2024 IL App (1st) 23-2165-U
Order filed: February 15, 2024

FIRST DISTRICT
FOURTH DIVISION

No. 1-23-2165B

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MALIK SHORTERS, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. No. 236002807 Honorable Charles Beach, Judge, presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Ocasio concurred in the judgment.

ORDER

¶ 1 *Held*: We affirmed the pretrial detention order where the court's findings were not against the manifest weight of the evidence and the decision to detain was neither an abuse of discretion nor against the manifest weight of the evidence.

¶ 2 Defendant-appellant, Malik Shorters, appeals under Illinois Supreme Court Rule 604(h) (eff. Sept. 18, 2023) from an order which directed that he remain in pre-trial detention pursuant to a verified petition brought by the State of Illinois, plaintiff-appellee, under article 110 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/110-1 *et seq.* (West 2022)), as amended by

Public Act 101-652 (eff. Jan. 1, 2023), commonly known as the Pretrial Fairness Act (Act).[1] For the following reasons, we affirm.

¶ 3 On October 29, 2023, the State charged defendant with armed habitual criminal (AHC), a Class X felony, and aggravated unlawful use of a weapon (AUUW), a Class 4 felony. More specifically, the State alleged that on October 28, 2023, defendant possessed an uncased firearm, a Glock 30, 45 caliber loaded with one round in the chambers.

¶ 4 Additionally, the State filed a verified petition for a pretrial detention hearing under section 110-6.1 of the Code (725 ILCS 5/110-6.1 (West 2022)). The State alleged that the proof was evident or the presumption was great that defendant committed AHC, a detainable offense, and posed a real and present threat to the safety of any person or persons or the community and that no condition or combination of conditions set forth in section 110-10(b) of the Code (*Id.* § 110-10(b)) would mitigate that risk.

¶ 5 On that same day, the court held a hearing on the petition. At the outset, pretrial services reported that defendant was assessed for new criminal activity at level four and failure to appear at level two with a recommended pretrial supervision of level one.

¶ 6 An assistant state's attorney (ASA) on behalf of the State proffered that, on October 28, 2023, officers from the Village of Lansing police department were dispatched to a Walmart store to investigate a retail theft. At the store, a loss prevention employee informed police that three

[1] While commonly known by these names, neither the Illinois Compiled Statutes nor the forgoing public act refer to the Act as the "Safety, Accountability, Fairness and Equity-Today" Act, *i.e.*, SAFE-T Act, or the "Pretrial Fairness Act." See *Rowe v. Raoul*, 2023 IL 129248, ¶ 4 n. 1. Certain provisions of the legislation in question were amended by Pub. Act 102-1104 (eff. Jan. 1, 2023). See *Rowe*, 2023 IL 129248, ¶ 4. The supreme court initially stayed the implementation of this legislation but vacated that stay effective September 18, 2023. *Id.* ¶ 52.

male subjects were seen concealing merchandise. Defendant was identified as one of the offenders. A loss prevention employee detained defendant who was carrying a bag.

¶ 7 The officers asked defendant if they could search the bag. Defendant "immediately stuck his hand inside the bag and advised he would search the bag himself." Police directed defendant to take his hand out of the bag and took it from him. Police looked inside the bag to search for non-purchased merchandise and observed a black firearm. The firearm was a Glock 30 with a bullet in the chambers, a magazine with eight bullets, and a switch to make it automatic.

¶ 8 The ASA provided the court with defendant's history of criminal convictions: a 2014 aggravated discharge of a firearm where he received 30 months of probation and a 2017 unlawful use of a weapon as a felon (UUWF) where he was sentenced to 3 years' imprisonment.

¶ 9 In response, defense counsel offered that defendant was 27 years old, a high school graduate, and unemployed but looking for work. Defendant is not married and has two children. He is a lifelong resident of Cook County and currently lives with his mother at a place which is eligible for electronic home monitoring. In mitigation, defense counsel maintained the State had not asserted that defendant had "brandished" the firearm. Defense further argued that, based on the recommendation of level one pretrial supervision, "conditions of release would be sufficient."

¶ 10 Before ruling on the petition, the court asked the ASA whether the bag was in the defendant's hands when police asked to search it; the ASA responded: "Correct."

¶ 11 The court, in granting the State's petition, stated:

> "Okay. Now, so the first question regarding is the proof evident, the presumption great that you were in possession of this weapon, this [AHC] charge, I do believe the answer is yes. Okay? That's why I asked the question. I want to be absolutely sure that you were in possession of that weapon. The weapon was inside a bag. That bag was in your

possession in your hands. That puts that weapon in your control. As such I do believe the State has met their burden that the proof is evident or the presumption is great.

The second point then becomes do you pose a real and present threat to an individual or the community. And I know you're shaking your head no and I want to believe that's the answer as well, [defendant]. My problem, however, is this, is that in looking at your background, you have an aggravated discharge of a firearm. You also have a prior firearm charge. That tells me this is the third time that you have been in possession of a weapon. And in one of those times you used the weapon discharging that weapon. That tells me you are a danger to the community. And I would love to believe that you're not. But anytime someone possesses a weapon when they are not allowed to use it or have it and then discharges it tells me that they're a danger to somebody, and that somebody is the community in general.

The reality is this. You cannot possess a weapon in any way, shape or form. You certainly can't discharge one. Yet your background tells me that you have a tendency to possess them and you have a tendency to discharge them. So I do believe you are a real and present threat to the community.

Then the question is are there any conditions or combination of conditions that can reasonably mitigate that threat. All right? The fact that you have these two prior offenses and now we stand here today with a new offense for a gun charge, a third gun charge, that perpetual violation of the laws tells me that there are no conditions that I can put together that you would honor, okay, that you would honor like a law and follow that would mitigate that threat.

Accordingly, sir, I do believe that you should be detained on this matter."

¶ 12 The court entered a written order memorializing its oral determinations that the State had shown by clear and convincing evidence that the defendant had committed AHC, a detainable offense, poses a real and present danger, and that no condition or combination of conditions can mitigate that threat. The order also included additional reasons for the court's findings. In relation to the proof that defendant committed AHC, the order provided that "[d]uring a Retail theft investigation, bag held by D[efendant] was searched and had a handgun. D[efendant] in exclusive control." As to defendant's threat to safety, the court expressed that "D[efendant] has a prior Agg Discharge of a firearm. Third Firearm case for D[efendant]. Gun in this case modified to be fully automatic." As to the finding that no conditions of bond would mitigate the dangers posed by defendant, the court in its order reasoned that "D[efendant] has 2 prior felonies, both gun related and all within the past 10 years. D[efendant] has no regard for following conditions and such will not follow EM or curfer [*sic*]."

¶ 13 Defendant has appealed.

¶ 14 In his notice of appeal, defendant contends that the State had not met its burden of proof as to whether he had committed the charged offense and poses a real and present threat and that there are no conditions which mitigate the threat, ensure his appearance at later court dates, or prevent him from being charged with a subsequent offense.

¶ 15 Before addressing defendant's contentions of error, we set forth the applicable framework.

¶ 16 Pursuant to article 110 of the Code, as amended, "[a]ll defendants shall be presumed eligible for pretrial release," and pretrial release may only be denied in certain specific situations. 725 ILCS 5/110-6.1 (West 2022). The State has the burden to prove by clear and convincing evidence that: (1) the proof is evident or the presumption great that the defendant has committed a qualifying offense, (2) the defendant's pretrial release poses a real and present threat to the safety

of any person or the community, and (3) less restrictive conditions would not avoid a real and present threat to the safety of any person or the community and/or prevent the defendant's willful flight from prosecution. 725 ILCS 5/110-2(a), 110-6.1 (West 2022). The Code provides a nonexclusive list of factors that the circuit court may consider when making a determination that the defendant poses a real and present threat to any person or the community, which include: (1) the nature and circumstances of any offense charged, including whether the offense is a crime of violence involving a weapon; (2) the history and characteristics of the defendant; (3) the identity of any person to whom the defendant is believed to pose a threat and the nature of the threat; (4) any statements made by or attributed to the defendant, together with the circumstances surrounding the statements; (5) the age and physical condition of the defendant; (6) the age and physical condition of the victim or complaining witness; (7) whether the defendant is known to possess or have access to a weapon; (8) whether at the time of the current offense or any other offense, the defendant was on probation, parole, or supervised release from custody; and (9) any other factors including those listed in section 110-5 of the Code. *Id.* § 110-6.1(g).

¶ 17 Appeals of bail orders under Illinois Supreme Court Rule 604(c)(1) (eff. Sept. 18, 2023) have historically been reviewed using an abuse of discretion standard. *People v. Inman,* 2023 IL App (4th) 230864, ¶ 10 (citing *People v. Simmons*, 2019 IL App (1st) 191253, ¶ 9). While Illinois Supreme Court Rule 604(h) (eff. Sept. 18, 2023) provides a new procedure for appeals under the Act, even considering the changes made to the Code by the Act, "the Act neither mandates nor suggests a different standard of review." *Inman,* 2023 IL App (4th) 230864, ¶ 11. There is some debate among and within the appellate districts concerning the appropriate standard of review with respect to appeals under Rule 604(h). See *People v. Herrera*, 2023 IL App (1st) 231801, ¶¶ 22-24 (observing split between districts regarding abuse of discretion and manifest weight of the

evidence standard under the Act). While we would affirm the detention order under either standard, we conclude that a circuit court's ultimate decision to detain or not is subject to review for an abuse of discretion (*Inman*, 2023 IL App (4th) 230864, ¶ 10 (citing *People v. Simmons*, 2019 IL App (1st) 191253, ¶ 9)), while a circuit court's factual determinations are reviewed under the manifest weight standard (*People v. Rodriquez*, 2023 IL App (3d) 230450, ¶ 8; *People v. Stock*, 2023 IL App (1st) 231753, ¶ 12).

¶ 18 An abuse of discretion occurs where the court's judgment is fanciful, arbitrary, or unreasonable, or where no reasonable person would agree with the court's position. *Simmons*, 2019 IL App (1st) 191253, ¶ 9. In conducting this review, we will not substitute the circuit court's factual and credibility findings with our own. *Inman*, 2023 IL App (4th) 230864, ¶ 11. "A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented." *People v. Deleon*, 227 Ill. 2d 322, 332 (2008).

¶ 19 Defendant first argues that the trial court erred in finding that the State met its burden of proving by clear and convincing evidence that the proof is evident or the presumption is great that defendant committed the offense charged, AHC.

¶ 20 An individual commits the offense of AHC by possessing a firearm after having been convicted a total of 2 or more times of certain qualifying offenses, including UUWF and aggravated discharge of a firearm. 720 ILCS 5/24-1.7 (West 2018). The possession element can be met by a defendant's actual or constructive possession of a firearm. *People v Bogan*, 2017 IL App (3d) 150156, ¶ 27. Constructive possession is demonstrated by the defendant's immediate and exclusive control of the area where the firearm was found and knowledge of the firearm. *Id.* Constructive possession of a firearm is often proved with circumstantial evidence. *Id.*

¶ 21 The State proffered that when police arrived at the Walmart store, they were informed that defendant had been detained in the store with a bag. When police asked defendant if they could search this bag, defendant exerted further control over the bag by putting his hand inside and stating that he would do the search. Police observed the firearm in this bag. The State also proffered that defendant had two prior qualifying convictions, UUWF and aggravated discharge of a firearm. We conclude that the finding that State showed by clear and convincing evidence that the proof is evident or the presumption great that defendant committed the charge of AHC is not against the manifest weight of the evidence.

¶ 22 On appeal, defendant asserts that the State did not meet its burden of proof that he committed AHC for two reasons. Specifically, the State failed to provide evidence that defendant owned the gun, and the bag was "unlawfully searched." We reject both arguments.

¶ 23 As to the first contention, as discussed, a defendant violates the AHC statute by either actually or constructively possessing a firearm and possession may be established without proof of ownership of the firearm.

¶ 24 As to defendant's second point, the Act "dictates that normal rules of admissibility do not apply to detention proceedings, that suppression orders may not be entered, and that whether evidence has been obtained as a result of unlawful searches or seizures or both are only 'relevant' in assessing its weight." *People v Parker*, 2024 IL App (1st) 232164, ¶ 60. A defendant may not move to suppress evidence at the detention hearing but may argue that "proof of the charged crime may have been the result of an unlawful search or seizure." 725 ILCS 5/110-6.1(f)(6) (West 2022).

¶ 25 Defendant did not argue at the detention hearing that the proof of the charged offense, AHC, was the result of an unlawful search of the bag. On appeal, defendant has not presented any

grounds or arguments in support of his conclusory and bare assertion that the search was illegal. Defendant has forfeited this issue.

¶ 26 About the search, according to the proffer, police were informed by store personnel that defendant was observed with two other individuals concealing merchandise and that defendant was holding a bag. With this knowledge, police searched the bag for non-purchased store items. At this stage only and without deciding or making any indication as to the merits of any motion to suppress we do not believe that there is anything about the search of the bag which should impact the weight of the proffered evidence about the recovered firearm at the detention hearing. See generally, *People v. Talach*, 114 Ill. App. 3d 813 (1983) (police had probable cause to arrest defendants based on radio communication about retail theft and search shopping bags where stolen items were visible).

¶ 27 Next defendant argues that the trial court erred when it found that the State established by clear and convincing evidence that the proof is evident or the presumption great that defendant poses a real and present threat to the safety of the community.

¶ 28 According to the proffer, defendant was caught in a public Walmart store in the Lansing community with two other individuals engaging in retail theft. While doing so, defendant possessed an uncased Glock 30 firearm which had been made automatic, with a bullet in the chambers, and a magazine loaded with eight more bullets. Defendant had two prior felony convictions which were related to firearms including an aggravated discharge of a firearm. The finding that the proof is evident or the presumption great that defendant posed a real and present threat to the safety of the community is not against the manifest weight of the evidence.

¶ 29 Defendant contends that he cannot be considered a threat to safety because he was not "brandishing" or using the firearm during the incident. Defendant did not actually brandish the

firearm but he did illegally possess the weapon. And he carried the uncased loaded Glock while part of group, which was observed committing retail theft at a Walmart store which was open to the public for business.

¶ 30 Defendant also challenges the finding that there are no conditions which would mitigate the threat to safety. The court found that defendant had three gun charges in a ten-year period, including a conviction for aggravated discharge of a weapon. The proffer showed that during the latter part of this time period he was sentenced to a three-year prison sentence on UUWF and then went on to again possess a firearm here. The court observed that because of his first gun conviction he was not allowed to possess a firearm and had shown a propensity to violate laws relating to firearms. As a result, the court believed that defendant was not likely to comply with any conditions of release. The finding that there were no conditions which would militate against the present and real threat to the safety of the community posed by defendant was not against the manifest weight of the evidence.

¶ 31 Defendant argues that electronic home monitoring would serve to mitigate the threat to the safety of the community and this condition of release was supported by the report of pretrial services. The circuit court considered and rejected this suggestion. On review, we do not reweigh the relevant factors and substitute our own judgment for that of the circuit court. *People v. Whitmore*, 2023 IL App (1st) 231807, ¶ 24. Further, electronic home monitoring is not an infallible method of preventing harm to public safety. See *People v Whitaker*, 2024 IL App (1st) 232009 (where defendant was charged with offenses while on pretrial condition of electronic home monitoring).

¶ 32 Finally, defendant argues that his detention is improper because the State failed to meet its burden of proving by clear and convincing evidence that defendant poses a serious risk to not

appear in court and there are no potential mitigating conditions that could be applied to prevent his willful flight.

¶ 33 However , the State in its petition for a detention hearing did not seek defendant's detention on the basis that he posed a risk of not appearing in court and no conditions would prevent his willful flight to avoid prosecution and did not offer evidence or argument as to these issues at the detention hearing. Further, the trial court did not base its detention order on these grounds. We need not address this argument where the decision to detain defendant may be affirmed solely on the risk to a person or persons or a community basis as discussed above. See 725 ILCS 5/110-2(a), 110-6.1 (West 2022).

¶ 34 For these reasons, we conclude that the circuit court's findings that the State proved by clear and convincing evidence that the proof is evident or the presumption is great that defendant committed AHC, a detainable offense, poses a real and present threat to the safety of the community, and there are no conditions which would militate against the threat. We affirm the order of pretrial detention as it was neither an abuse of the circuit court's discretion nor against the manifest weight of the evidence.

¶ 35 Affirmed.