SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3498-09T3

STATE OF NEW JERSEY
IN THE INTEREST OF M.R.

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Submitted April 4, 2011 – Decided September 27, 2011

Before Judges A. A. Rodríguez and C. L. Miniman.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Middlesex County, Docket No. FJ-12-1279-10.

Evan F. Nappen, attorney for appellant M.R. (Louis P. Nappen, on the brief).

Bruce J. Kaplan, Middlesex County Prosecutor, attorney for respondent State of New Jersey (Simon Louis Rosenbach, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

M.R. appeals from the March 5, 2010 dispositional order that adjudicated him a juvenile offender for conduct, which if committed by an adult, would constitute fourth degree unlawful possession of a firearm, N.J.S.A. 2C:58-6.1b. The judge imposed a one-year probationary term, with a special condition of sixty days in custody. The custodial term was suspended. We reverse the dispositional order.

At the time of the offense, M.R. was fourteen years old and resided with his mother and maternal grandparents. M.R. did not own a car at that time. However, he borrowed his grandfather's car that day.

At the dispositional hearing, two witnesses testified for the State, Milltown Patrolmen Christopher Johnson and James Miodvszewski. Johnson testified that at 4:30 p.m. on Tuesday, October 27, 2009, a rainy day, Johnson was sent to the intersection of South Main Street and Lakewood Avenue. As Johnson reached the corner, he saw a car, later determined to be M.R.'s grandfather's vehicle, with one flat tire and a "doughnut" spare tire, coming from a side street. M.R. was driving and his passenger, C.R., was trying to stop traffic in order to allow the vehicle to enter onto Main Street. Johnson activated his overhead lights, exited his patrol car, and told M.R. to pull to the side of the road. Johnson knew both M.R. and C.R. Johnson pulled his patrol car directly behind the stopped car. He asked M.R. what happened. M.R. replied that he had been in an accident. Johnson requested M.R.'s credentials. M.R. presented his driver's license only. He said that the registration and insurance card were "in the back of the car."

By this time, Miodvszewski and other officers had arrived. Miodvszewski testified that, while he was standing by the

passenger's window, he heard M.R. say "please don't tell me I put the f—g registration under the platform. He's going to see the bullets." Miodvszewski told Johnson. Johnson decided to find the registration and insurance card. First, Johnson asked M.R. whether there were bullets in the car. C.R. said that there were. Then Johnson asked C.R. whether there was a gun in the car. C.R. said that he did not know.

Johnson opened the trunk, which contained two compartments. One was a tray. Underneath the tray were the registration, insurance card, and about 600 rounds of ammunition, and a gun. The gun was in a soft bag with six more bullets.

The sole witness for the defense was M.R. He testified that he was driving his grandfather's car to take his friend C.R. home. The car slid and hit a curb. Two tires deflated. M.R. got a spare "donut" tire and lug nut wrench from the trunk, which is set up so that the "floor" can be lifted and divided into two sections. On the driver's side compartment was a spare tire and a wrench.

According to M.R., the previous Sunday he had gone target shooting with his grandfather at the Shore Shot Pistol Range in Lakewood. When they returned home after shooting, M.R. took a three-foot leather cube box, which held the gun, out of the car and put it in the basement. He was unaware that there were

bullets in the trunk of the car. The bullets were not with the gun.

M.R. did not see the gun again until the police officer held it up for him to see at the scene. In fact, he had never seen the gun case that was moved into evidence at the hearing. That case, which was a telescope case, had never been used to hold the gun. M.R. admitted seeing the bullets in one of the trunk compartments when he retrieved the spare tire. However, he denied seeing the gun in the trunk.

The judge denied M.R.'s motion to suppress evidence. Later, the judge found M.R. guilty of constructively possessing the gun seized from the trunk. The judge based her decision in part on the fact that M.R. should have called his grandfather to corroborate his testimony.

On appeal, M.R. contends:

> THE COURT BELOW ERRED IN FINDING UNLAWFUL POSSESSION SINCE [M.R.] WAS NOT AWARE OF HIS CONTROL FOR A SUFFICIENT PERIOD TO TERMINATE HIS POSSESSION.

We agree.

As a matter of law, and applying the facts as found by the judge, we conclude that the element of possession was not established by the evidence. N.J.S.A. 2C:2-1 provides in pertinent part:

> **2C:2-1 Requirement of a Voluntary Act. . .**

> a. A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable. A bodily movement that is not a product of the effort or determination of the actor, either conscious or habitual, is not a voluntary act within the meaning of this section.
>
> . . .
>
> c. Possession is an act, within the meaning of this section, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.
>
> [N.J.S.A. 2C:2-1.]

Here, there is no proof to establish beyond a reasonable doubt that M.R. knew that there was a gun or even bullets in the trunk of the car until he opened its trunk after the accident. He admitted seeing the bullets, but not the gun, only then. Nothing in evidence gives rise to an inference that M.R. knew about the gun being in the car before he opened the trunk. The police arrived at the scene shortly thereafter. Even if he learned of its presence when he saw the bullets, he had no opportunity to terminate possession with a disabled car and no cell phone. The car was not M.R.'s. Others had access to the vehicle.

Thus, M.R. did not have a sufficient period of time in which to have terminated his possession of the gun. The element of knowing possession by M.R. was not proven. The finding of guilt cannot stand.

M.R. also contends:

> THE COURT BELOW ERRED BECAUSE ITS APPLICATION OF HEARSAY EXCEPTIONS WERE SELECTIVELY ENFORCED AND INTERNALLY INCONSISTENT.

We disagree.

M.R.'s grandfather was in court and available to testify at the hearing. Therefore, his hearsay statement to a police officer was not inadmissible.

M.R. also argues:

> PRIOR COUNSEL'S CONDUCT IN NOT PRESENTING THE GRANDFATHER'S TESTIMONY AT TRIAL CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.
>
> THE COURT BELOW ERRED IN FINDING GUILT BECAUSE "[M.R.] SHOULD HAVE CALLED HIS MOTHER OR HIS GRANDFATHER."

We need not reach these issues because we are reversing the finding of guilt. However, even if the guilty finding was affirmed, the resolution of this specific issue, involving facts outside the record, cannot be accomplished on direct appeal. There must be a post-conviction relief fact finding hearing. State v. Preciose, 129 N.J. 451, 460 (1992). The record does

not indicate whether the grandfather was willing to testify or would have asserted his privilege against self-incrimination. That fact must first be determined before scrutinizing counsel's failure to call the grandfather under the Strickland/Fritz[1] standard for ineffective assistance of counsel.

Nonetheless, we agree with M.R. that the failure to call M.R.'s mother or grandfather to testify cannot be considered by the trier of fact as evidence of guilt. It is the State not the juvenile that has the burden of proof. Moreover as stated above, the grandfather may not have been willing to testify.

The remaining contentions are:

> THE COURT BELOW COMMITTED HARMFUL ERROR BY NOT GRANTING DEFENSE COUNSEL'S MOTION FOR A NEW TRIAL.
>
> THE COURT BELOW ERRED BY NOT GRANTING THE MOTION TO SUPPRESS.
>
> THE COURT BELOW'S DECISION RUNS CONTRARY TO INHERENT JUSTICE AND PUBLIC POLICY.

After a careful review, we conclude that these arguments are without sufficient merit and do not warrant discussion in a written opinion. R. 2:11-3(e)(2).

Reversed.



[1] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). State v. Fritz, 105 N.J. 42, 58 (1987).