

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID L. TURNER A/K/A DAVID LEE
TURNER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52315

FILED

MAY 15 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of possession of a firearm by an ex-felon. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge. On appeal, appellant David Turner challenges his conviction based on the denial of his request for a bifurcated proceeding on the elements of possession of a firearm by an ex-felon and his motion, in the alternative, to stipulate to his ex-felon status. We conclude that rejecting Turner's motion to stipulate was harmless error and therefore affirm the district court's judgment of conviction. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Alternative motion to stipulate

Citing Sanders v. State, 96 Nev. 341, 609 P.2d 324 (1980), which restricts the prosecution from exposing the jury to the nature of a prior conviction for purposes of proving a felon-in-possession charge under NRS 202.360, Turner asserts that he was entitled to a bifurcated proceeding or, in the alternative, should have been permitted to stipulate to his ex-felon status.

While we disagree that bifurcation was required under Sanders,¹ we agree that the district court abused its discretion in rejecting Turner's alternative motion to stipulate to his ex-felon status and thereafter admitting evidence of his prior felony convictions. Nevertheless, we conclude that doing so was harmless in light of overwhelming evidence that Turner constructively possessed the firearm for purposes of NRS 202.360.

In Sanders, this court held that "the prosecution should only be allowed to prove the fact, instead of the nature, of a prior conviction" due to the prejudice of exposing a jury to the nature of a prior felony to prove a felon-in-possession charge under NRS 202.360 in a multicount prosecution. 96 Nev. at 343, 609 P.2d at 326. Although Sanders was silent regarding whether it would be equally prejudicial, and therefore error, to admit evidence of the nature of a prior felony conviction in a

¹We disagree that Sanders necessarily requires bifurcating the elements of a felon-in-possession charge under NRS 202.360 for two reasons. First, even though the charge must be bifurcated in its entirety in a multicount prosecution to avoid prejudicing the jury regarding the remaining charges, see Morales v. State, 122 Nev. 966, 143 P.3d 463 (2006), no such prejudice exists in a prosecution in which felon-in-possession is the only charge at issue. Cf. U.S. v. Belk, 346 F.3d 305 (2d Cir. 2003) (holding that a district court does not err in refusing to bifurcate the elements of a felon-in-possession charge in a single-count trial). Second, any prejudice in trying these elements together in a single-count prosecution is cured by Sanders' mandate that the evidence of a prior conviction be narrowly restricted to the limited fact of the conviction itself. 96 Nev. at 343, 609 P.2d at 326; see also U.S. v. Amante, 418 F.3d 220, 224 (2d Cir. 2005) (when a jury is not exposed to the underlying facts of a felony conviction, "there can be no unfair prejudice justifying bifurcation").

single-count prosecution, in Edwards v. State, this court clarified that, in such a case, “the probative value of introducing a defendant’s prior judgment of conviction solely to prove his ex-felon status is likewise unduly prejudicial if the defendant offers to stipulate to that status.” 122 Nev. 378, 382, 132 P.3d 581, 584 (2006).

Notably, although he moved to stipulate to his ex-felon status under Sanders, consistent with Edwards, Turner argued that any probative value of admitting the records of his prior felony convictions would be outweighed by the danger of unfair prejudice. We agree. Because a defendant’s proffered stipulation to a prior felony conviction is equally probative and less prejudicial than the official record of that conviction, see Edwards, 122 Nev. at 383, 132 P.3d at 584 (quoting Old Chief v. United States, 519 U.S. 172, 191 (1997)), we conclude that Turner’s alternative motion to stipulate to his ex-felon status should have been granted in lieu of admitting the actual records of Turner’s prior convictions. See id. at 384, 132 P.3d at 585.

Nevertheless, in light of overwhelming evidence that Turner was in constructive possession of the firearm, we conclude that denying Turner’s alternative motion to stipulate was harmless. See Sanders, 96 Nev. at 344, 609 P.2d at 326.

Once police arrived in marked patrol cars to investigate why Turner and his passenger, Lester Toney, were parked in front of an unmarked police and government facility, the men exited the vehicle and walked into a secured building. Presumably discovering that public access was not permitted, the men promptly exited the building. However, instead of returning to the vehicle, Turner and Toney walked across the

street, appearing to the officer observing the men that “they were trying to avoid the vehicle for some reason.”

As a consequence, Turner and Toney were stopped by police. When asked about the vehicle, both men denied any knowledge of it. When asked to explain his presence in the area, Turner stated that he was simply walking on the sidewalk. With no one to claim the vehicle, and discovering that it was registered to a third party, the police impounded the vehicle and its contents were inventoried.

During the search, located on the passenger floorboard, police discovered a plastic bag containing two black curly-haired wigs, two stocking caps, and a loaded GP100 .357 revolver. Although Toney claimed that he owned the firearm, and that Turner lacked any knowledge of it, a latent fingerprint containing a unique “whorl” pattern was recovered from the firearm. While the whorl print was insufficient for identification purposes, the print pattern was consistent with thirty-five percent of the population, which notably included Turner, but not Toney.²

From this evidence, we conclude that the jury could have reasonably inferred that Turner was in constructive possession of the firearm for purposes of NRS 202.360. Despite his efforts to exonerate Turner at trial, Toney testified that he exited the vehicle and walked into the secured building to avoid the police because he knew he was in

²We disagree with Turner that the State’s fingerprint expert should not have been allowed to testify to the whorl print recovered from the firearm because the jury could have been confused about the print’s probative value. Although the print was less than sufficient to make a positive identification, this deficiency presents a question of weight for the jury rather than undermines its admissibility.

possession of a firearm, even though, like Turner, Toney initially denied any knowledge of the vehicle to police.

Consistent with this pattern of avoidance, which was prompted by Toney's guilty knowledge of the gun, Turner mirrored Toney's actions, first fleeing from the vehicle into the building, thereafter exiting the building, then walking away from the vehicle onto the sidewalk on the opposite side of the parking lot. Accordingly, given that his behavior mimicked the evasive behavior of his companion, the evidence suggests that Turner was knowingly in possession of the firearm.

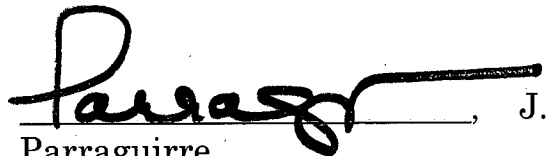
In addition to knowing of the firearm's presence, the evidence further suggests Turner shared control of the firearm. Not only was the bag containing the firearm in plain view, see Winters v. State, 719 N.E.2d 1279, 1281 (Ind. Ct. App. 1999), the whorl print recovered from the firearm indicated that Turner previously handled the firearm, and could reduce it to actual possession in the future. See State v. Murphy, 988 P.2d 1018, 1020 (Wash. Ct. App. 1999).

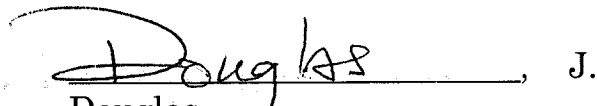
In our view, this evidence reasonably suggests that Turner possessed the requisite intent and power to exercise dominion and control over the firearm. See Woodall v. State, 97 Nev. 235, 236, 627 P.2d 402, 403 (1981) (discussing dominion and control as elements of constructive possession); U.S. v. Walls, 225 F.3d 858, 864 (7th Cir. 2000) (defining constructive possession as "knowingly ha[ving] the power and the intention . . . to exercise dominion and control over an object, either directly or through others." (internal quotation marks omitted)).

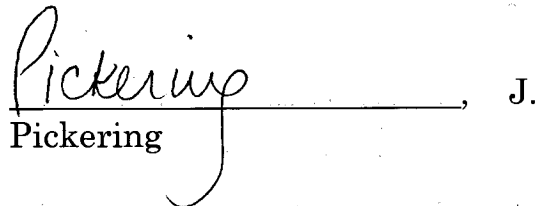
Conclusion

Given the overwhelming evidence of Turner's constructive possession of the firearm, we conclude that rejecting Turner's motion to stipulate to his ex-felon status was harmless. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


Parraguirre, J.


Douglas, J.


Pickering, J.

cc: Eighth Judicial District Court Dept. 15, District Judge
Christina A. DiEdoardo
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk