

No. 1-09-3278

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 CR 281
)	
EDWARD AIKENS,)	Honorable
)	John Kirby,
Defendant-Appellant.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Joseph Gordon and Howse concurred in the judgment.

ORDER

- ¶ 1 *Held:* Judgment entered on defendant's conviction for possession of a controlled substance affirmed over his challenges to the sufficiency of the evidence; \$200 DNA fee vacated; fines and fees order modified to correct clerical error.
- ¶ 2 Following a bench trial, defendant Edward Aikens was found guilty of possession of a controlled substance (heroin) and sentenced to 18 months' imprisonment. He was also assessed fines and fees of \$1,125. On appeal, defendant challenges the sufficiency of the evidence to

prove him guilty beyond a reasonable doubt, and the propriety of the pecuniary penalties imposed by the court.

¶ 3 We initially affirmed defendant's conviction on May 13, 2011, and found the assessment of a \$200 DNA fee proper notwithstanding that the Illinois State Police already had his DNA profile from a prior felony conviction. *People v. Aikens*, No. 1-09-3278 (2011) (unpublished order under Supreme Court Rule 23). Thereafter, the supreme court entered a supervisory order directing this court to vacate that order and reconsider the matter in light of *People v. Marshall*, 242 Ill. 2d 285 (2011). *People v. Aikens*, No. 112416 (Ill. Sept. 28, 2011). We have done so, and, as will be explained below, we conclude that defendant's \$200 DNA fee must be vacated.

¶ 4 The record shows that defendant was charged with possession of a controlled substance with intent to deliver in connection with an incident that occurred on November 17, 2008. At trial, Chicago police officer Heidewald, an 18-year veteran of the Chicago Police Department, testified that about 4:25 p.m., that day, he was in plainclothes and conducting a narcotics surveillance at 4000 West Congress Parkway, in Chicago. He was positioned at the top of the ramp which led from the street to the "L" platform at that location. From there, and with the use of binoculars, he had an unobstructed view of defendant about 100 feet away, except when buses passed by.

¶ 5 Over the course of about 20 minutes, Officer Heidewald observed defendant engage in two transactions. In the first, a black female approached defendant and passed him an unknown object, and defendant, in return, took an object from his right-front pants pocket and tendered it to her. A few minutes later, two black males approached defendant and one of them handed him an unknown object. Defendant again reached into his pocket and gave that individual an unknown object in return.

¶ 6 Following this second transaction, Officer Heidewald made radio contact with his partner, Officer Lipka, and provided him with a physical description of defendant and his location. When Officer Heidewald arrived at the designated spot, Officer Lipka had defendant handcuffed and in custody. Officer Heidewald then held defendant while Officer Lipka recovered several tinfoil packets from the ground. At the police station, Officer Lipka handed him the 13 recovered packets, and he put them into an inventory bag and inventoried them under number 11503340. Officer Lipka also recovered money from defendant.

¶ 7 On cross-examination, Officer Heidewald stated that he could not see the objects tendered in the two transactions that he observed. He also testified that he did not see Officer Lipka recover the foil packets, but did see him bend over, and that he did not personally recover any money from defendant or stop the other parties involved in either transaction.

¶ 8 Chicago police officer John Lipka testified that he has worked for the Chicago Police Department for over 18 years. About 4:25 p.m., on November 17, 2008, he and his partner, Officer Heidewald, were conducting a surveillance in the 4000 block of West Congress Parkway. Officer Heidewald contacted him by radio and directed him to the northwest corner of West Congress Parkway and Pulaski Road where he had seen a black male in tan overalls engage in what he thought were two drug transactions. Officer Lipka drove to that location in an unmarked car, and saw defendant, who matched the suspect's description, standing on the corner. He then turned his car in front of defendant and stepped out. When he was about five to six feet away from defendant, defendant looked in his direction and "discarded" to the curb several tinfoil packets that were in his right hand. At that point, Officer Lipka took him into custody.

¶ 9 As Officer Lipka waited for Officer Heidewald to arrive, he kept sight of the discarded items, which were a few feet away and undisturbed. Less than a minute later, Officer Heidewald came upon the scene and took control of defendant. Officer Lipka then recovered 13 tinfoil

packets from the curb, each of which contained a white powder of suspect heroin. He kept the tinfoil packets in his continuous care, custody, and control until he arrived at the police station, where he gave them to Officer Heidewald, who placed them in a plastic, heat-sealed bag and inventoried them under number 11503340. Officer Lipka also performed a custodial search of defendant and recovered a counterfeit \$20 bill, which he inventoried as well.

¶ 10 On cross-examination, Officer Lipka testified that he did not find any additional money either on the ground or on defendant. He never questioned Officer Heidewald about his having witnessed two drug transactions when only one counterfeit \$20 bill had been recovered.

¶ 11 The parties stipulated, in relevant part, that the forensic chemist for the Illinois State Police Lab would testify that she received inventory number 11503340, that 8 of the 13 items tested positive for heroin and weighed 1.2 grams, and that the total estimated weight of the five remaining items was .7 gram. The parties also stipulated to a proper chain of custody of the recovered items.

¶ 12 After closing arguments, the trial court found that Officer Heidewald testified credibly regarding his observations, and did not attempt to bolster his testimony in that he admitted that he did not see the objects that were transacted. The court noted that only one \$20 bill was recovered, which it found to be a "sufficient [d]efense argument," but under the totality of the circumstances, determined that Officer Heidewald "was credible and established that he saw what he believed to be two transactions." The court then found defendant guilty of the lesser offense of possession of a controlled substance (720 ILCS 570/402(c) (West 2008)).

¶ 13 In this appeal, defendant first contends that the State did not prove him guilty of that offense beyond a reasonable doubt. He maintains that the officers' testimony was incredible, contradictory, and contrary to human nature.

¶ 14 Where, as here, defendant challenges the sufficiency of the evidence to sustain his conviction, the question for the reviewing court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Jordan*, 218 Ill. 2d 255, 269 (2006). It is the responsibility of the trier of fact to determine the credibility of the witnesses and the weight to be given their testimony, to resolve any inconsistencies and conflicts in the evidence, and to draw reasonable inferences therefrom. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). A reviewing court will not overturn the decision of the trier of fact unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *People v. Smith*, 185 Ill. 2d 532, 542 (1999).

¶ 15 In this case, defendant was convicted of possession of a controlled substance in that he knowingly possessed heroin. 720 ILCS 570/402(c) (West 2008). Viewed in the light most favorable to the prosecution, the evidence shows that defendant was standing on the corner of West Congress Parkway and Pulaski Road while holding in his right hand 13 tinfoil packets of white powder, at least 8 of which contained heroin. Although defendant attempted to abandon these packets by discarding them into the street, Officer Lipka observed him do so and ultimately recovered them. This evidence was thus sufficient to allow the trial court to find him guilty of possession of a controlled substance.

¶ 16 Notwithstanding, defendant takes issue with the testimonies of officers Heidewald and Lipka. He first contends that Officer Heidewald's testimony must be "discounted in its entirety" where the trial court found him credible, but mistaken in his observations. This claim is not borne out by the record which contains no finding by the trial court that Officer Heidewald was "mistaken" in his observations. In fact, the very suggestion that Officer Heidewald was mistaken

is at odds with the court's express finding that his testimony was credible. We thus find defendant's contention to be without merit.

¶ 17 Defendant also contends that the testimony of Officer Lipka was improbable, incredible, and unsatisfactory. He first calls our attention to the fact that at the time of the incident, it was dusk and snowing outside, which, he maintains, would have so affected Officer Lipka's ability to see defendant discard the tinfoil packets as to render his testimony on that matter implausible.

¶ 18 We note that the record contains no evidence of the weather conditions or visibility at the time in question. To overcome this deficiency, defendant has attached to his brief a printout from the Internet which contains the historical data of those conditions, and, citing *People v. Cain*, 14 Ill. App. 3d 1003, 1006 (1973), claims that we may take judicial notice of the facts contained therein. We disagree. In that case, this court found that the trial court properly took judicial notice of the fact that it would have been light outside at 4:40 p.m., on July 30, due to daylight savings time. *Cain*, 14 Ill. App. 3d at 1006. Here, however, and unlike *Cain*, the information that defendant asks us to take notice of was never before the trial court, and, thus, our consideration of it here would amount to a trial *de novo* on the element of possession. See *People v. Williams*, 200 Ill. App. 3d 503, 513 (1990) (granting State's motion to strike supplemental record where police laboratory report would be considered for first time on appeal). That is not our function, and we will therefore not consider this evidence presented for the first time on appeal.

¶ 19 Defendant also maintains that Officer Lipka's testimony that he held 13 packets of heroin in his hand and dropped them when the officer was five feet away is incredible, as doing so would be "contrary to human nature." We disagree, as it is not uncommon for suspects to attempt to distance themselves from incriminating evidence as police arrive on the scene.

¶ 20 Defendant further claims that Officer Lipka's testimony contradicted that of Officer Heidewald, who testified that the packets were in defendant's pocket. This contention fails to take into account the fact that the officers' testimonies corresponded to different points in time. Officer Heidewald's report was based on his observation of defendant as he engaged in the transactions on the street, while Officer Lipka's observation was made after his arrival at the designated location where, upon seeing the officer, defendant discarded the packets that were in his right hand. In that interim period, there was sufficient opportunity for defendant to take hold of the packets from his pocket. The trial court clearly found Officer Lipka's testimony credible on this matter and resolved any existing conflicts in his favor. *Sutherland*, 223 Ill. 2d at 242. We do not find that determination so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt (*Smith*, 185 Ill. 2d at 542), and therefore affirm his conviction for possession of a controlled substance.

¶ 21 Defendant next challenges the calculation and assessment of certain of the pecuniary penalties imposed by the court. The State responds that defendant has forfeited these claims by failing to raise them in the circuit court. This court has recognized, however, that a sentencing error may affect defendant's substantial rights, and thus can be reviewed for plain error. *People v. Black*, 394 Ill. App. 3d 935, 939 (2009) (citing *People v. Hicks*, 181 Ill. 2d 541, 544-45 (1998)). The propriety of court-ordered fines and fees raises a question of statutory interpretation, which we review *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 22 We initially note that the parties have acknowledged a clerical error in the fines and fees order entered by the trial court. They agree that a \$100 assessment was improperly entered on the line titled "Assessment Cannabis," and that it should have been entered on the line below for "Crime Lab Drug Analysis" (730 ILCS 5/5-9-1.4 (West 2008)). We agree, and pursuant to our

authority under Illinois Supreme Court Rule 615(b) (eff. Aug. 27, 1999)), direct the clerk to modify the fines and fees order to reflect the proper assessment.

¶ 23 Defendant further claims that the trial court failed to properly offset his fines with the \$5 per day credit for time he spent in presentence custody. He claims that he is entitled to an additional \$100 credit for this time to be applied to the Crime Lab Drug Analysis fine. However, in his reply brief, defendant concedes that the Crime Lab Drug Analysis is a fee. Since section 110-14 of the Code of Criminal Procedure (Code) (725 ILCS 5/110-14(a) (West 2008)) only authorizes a credit to offset *fines* assessed by the trial court (*People v. Jones*, 375 Ill. App. 3d 289, 293 (2007)), defendant has effectively conceded that the trial court acted properly in not crediting him for the Crime Lab Drug Analysis. Accordingly, we find that the issue is effectively waived. Ill. S. Ct. R. 341(h)(7) (eff. Jul. 1, 2008).

¶ 24 Defendant next claims that he was improperly assessed a \$200 DNA analysis fee because the Illinois State Police already had his DNA profile from a prior felony conviction. We agree. Pursuant to the supreme court's ruling in *Marshall*, 242 Ill. 2d at 303, the trial court was not authorized to assess defendant the \$200 DNA fee where he is currently registered in the DNA database. We therefore vacate that fee.

¶ 25 Defendant also contends that he was improperly assessed a \$25 court services fee, claiming that the statute only authorizes assessment of the fee under certain criminal statutes, none of which include the offense of possession of a controlled substance. The State responds that the statute authorizes assessment of the fee in all criminal cases resulting in a judgment of conviction.

¶ 26 Under the Counties Code, the court may assess a \$25 court services fee against a defendant upon a finding of guilty resulting in a judgment of conviction, or for an order of supervision or probation without entry of judgment made under specific enumerated criminal

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provisions. 55 ILCS 5/5-1103 (West 2008); *People v. Williams*, 405 Ill. App. 3d 958, 965 (2010). In this case, a judgment of conviction was entered against defendant, which, alone, made him eligible for the court services fee. *Williams*, 405 Ill. App. 3d at 965. We thus find that the trial court did not err in assessing him a \$25 court services fee.

¶ 27 Accordingly, we order the clerk to modify defendant's fines and fees order as indicated, vacate his \$200 DNA fee, and affirm the judgment in all other respects.

¶ 28 Affirmed, as modified.