

No. 1-10-1381

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 3549
)	
CURTIS MATHEWS,)	Honorable
)	Kenneth J. Wades,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Epstein and Justice McBride concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant's challenge to the sufficiency of the State's evidence on the element of possession of a controlled substance rejected where there was joint possession; judgment entered on his conviction for delivery of a controlled substance affirmed; fines and fees order modified to reflect *per diem* credit; DNA analysis fee and court system fee found inapplicable and vacated; Class X MSR term affirmed.
- ¶ 2 Following a bench trial, defendant Curtis Matthews was found guilty of delivery of a controlled substance, then sentenced as a Class X offender to six years' imprisonment. He was also assessed fines and fees totaling \$2,620. On appeal, defendant contends that the State failed

to prove him guilty beyond a reasonable doubt where no witnesses saw him possess or deliver the narcotics, that he was entitled to *per diem* credit for time spent in pre-sentence custody, that the court improperly assessed certain fines and fees, and that his mandatory supervised release (MSR) term should be reduced from three years to two years.

¶ 3 The record shows that defendant was charged with delivery of a controlled substance in connection with a controlled drug purchase by Chicago police officers on January 8, 2009, at 7600 South Clyde Avenue, in Chicago. As pertinent to this appeal, the State presented the following testimony regarding that event at trial.

¶ 4 Chicago police officer Jennifer Przybylo testified that on January 8, 2009, she and Officer Kayla Shaar were working undercover with three surveillance officers (Officers Grubbs, Gavlin, and Thompson) and two enforcement officers (Officers Hughes and Hamada) on a controlled narcotics purchase. The operation was initiated by Officer Przybylo calling Trusavinia Boykin,¹ a person with whom she had previously engaged in narcotics transactions, to arrange another such transaction. Early that afternoon, the surveillance officers located to the area of 7600 South Clyde Avenue. When they were in place, Officers Przybylo and Shaar proceeded there in an undercover vehicle driven by Officer Shaar, and parked across the street.

¶ 5 Officer Przybylo then approached the residence, knocked on the door, and entered when Boykin answered. She told Boykin that she wanted to purchase \$100 worth of heroin and \$50 worth of crack-cocaine, and Boykin responded that "her guy with the heroin was on his way." In the meantime, defendant entered the front room where they were speaking and told Boykin, "he's here. Give me the money." Officer Przybylo handed Boykin \$100 in pre-recorded funds and told her it was for the heroin, then another \$50 in pre-recorded funds which she said was for the crack-cocaine. Boykin, in turn, handed the \$100 to defendant, who left the residence and

¹ Boykin's first name is alternately spelled in the record as Trusavinia and Trucenia.

returned about two minutes later. Defendant called Boykin into the next room, and Officer Przybylo heard him count to 10. Boykin then returned and handed her 10 black-tinted ziploc bags containing a white powder of suspect heroin. Officer Przybylo counted the bags herself, and Boykin obtained a clear plastic bag for her to put them in.

¶ 6 The conversation then turned to the subject of the crack-cocaine, and Boykin told Officer Przybylo "that it would be at least a half hour before her guy could come with it." Boykin said that would be too long and yelled out the same to defendant, who returned to the front room a few minutes later to inform them that he had called to cancel the crack-cocaine for that reason. Boykin then decided to go get the crack-cocaine herself. Officer Przybylo told her that she would wait outside in the car and returned to her undercover vehicle where she radioed the team that there had been a positive heroin buy. In the meantime, Boykin walked west down 76th Street and out of view, and returned about 15 minutes later with the crack-cocaine delivery, at which point Officer Przybylo radioed the team again and left the area.

¶ 7 On cross-examination, Officer Przybylo stated that no pre-recorded funds or drugs were recovered from defendant. She also stated that she did not see him leave the house, could not see into the other room from her location in the front room, and did not see what 10 items were handed to Boykin.

¶ 8 Chicago police officer Sharon Grubbs testified that on January 8, 2009, she was the primary surveillance officer during the controlled narcotics purchase at 7600 South Clyde Avenue, and that she had an unobstructed view of the location from her vehicle parked on the 7500 block of South Clyde Avenue. About two to three minutes after Officer Przybylo entered the house, Officer Grubbs observed a dark Chevy Malibu pull up in front of the undercover vehicle. Defendant exited the house a few minutes later, walked up to the driver's side of that car, leaned in as though he was talking, then reached into the car and walked back to the house

and went inside. A few minutes later, Officer Przybylo exited the house, got into the undercover vehicle, and radioed that there had been a positive heroin buy. On cross-examination, Officer Grubbs stated that she could not tell if defendant was carrying anything when he left the Chevy Malibu, nor did she know whether he had conversed with anyone.

¶ 9 The parties stipulated that Daniel M. Beerman, a forensic chemist at the Illinois State Police Crime Lab, would testify that 5 of the 10 bags of suspect heroin weighed 1.1 gram and tested positive for heroin, and that the total estimated weight of all 10 items would be 2.2 grams. Defendant rested without presenting any evidence, and the court found him guilty of delivery of a controlled substance, noting, *inter alia*, that "[t]he circumstantial evidence in the case is extremely strong."²

¶ 10 In this appeal from that judgment, defendant first contends that the State failed to prove him guilty of delivery of a controlled substance beyond a reasonable doubt. He maintains that the State failed to prove the element of possession where there was no fingerprint or physical evidence presented to show that he had handled the heroin, no witness testimony that he had been seen possessing the heroin, and no evidence that he resided at, or exercised control or dominion over, the residence at 7600 South Clyde Avenue.

¶ 11 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

² In announcing its ruling, the trial court noted the "dual identifications" of defendant made by the officers and stated, "I don't think they allow for any other hypothesis then [*sic*] that the defendant was accountable for the delivery of controlled substance." In this appeal, the parties do not address the issue of accountability, but rather, have confined their arguments to the issue of whether the State proved that defendant possessed the heroin.

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).

¶ 12 To sustain defendant's conviction of delivery of a controlled substance in this case, the State was required to prove that defendant knowingly delivered a controlled substance. 720 ILCS 570/401(c)(1) (West 2008). "Delivery" in this context refers to the actual, constructive, or attempted transfer of possession of a controlled substance with or without consideration. 720 ILCS 570/102(h) (West 2008). The element of possession may be actual or constructive (*People v. Givens*, 237 Ill. 2d 311, 335 (2010)); and since possession is an issue of fact that is rarely susceptible to direct proof, it may be proved by circumstantial evidence (*People v. Moore*, 365 Ill. App. 3d 53, 58 (2006)).

¶ 13 Actual possession is the exercise by defendant of present personal dominion over the narcotics, and will be found where he exercises immediate and exclusive dominion or control over them. *Givens*, 237 Ill. 2d at 335. Proof of actual possession does not, however, require defendant's present personal touching of the narcotics, only his present personal dominion over them. *People v. Schmalz*, 194 Ill. 2d 75, 82 (2000). Furthermore, the rule requiring that possession be exclusive does not preclude a finding of joint possession where two or more people share immediate and exclusive control, or the intention and power to exercise control, of the narcotics. *Schmalz*, 194 Ill. 2d at 82.

¶ 14 Viewed in the light most favorable to the prosecution, the evidence shows that Officer Przybylo entered the residence at 7600 South Clyde Avenue and requested \$100 worth of heroin from Boykin. After Boykin responded that the heroin supplier was on his way, defendant

entered the room, informed them that the supplier had arrived, and requested the money. Officer Przybylo handed Boykin \$100 which she, in turn, handed to defendant, who then exited the house, approached the dark Chevy Malibu which had been pulled up in front of the undercover vehicle, reached inside it, and returned to the house. Defendant then called Boykin into the next room where he counted out loud to 10, and Boykin returned with 10 black-tinted ziploc bags containing heroin which she handed to Officer Przybylo. This evidence was clearly sufficient to allow a reasonable trier of fact to find that defendant and Boykin jointly shared immediate and exclusive control of the heroin before ultimately transferring it to Officer Przybylo. *Schmalz*, 194 Ill. 2d at 82.

¶ 15 Defendant takes issue with that conclusion, claiming that no witness saw him possess the heroin, that there was no fingerprint or physical evidence showing that he handled it, and that there was no evidence that he resided at or exercised control over the residence at 7600 South Clyde Avenue. However, actual possession may be established despite the absence of direct proof and fingerprint or physical evidence showing that defendant handled the heroin. See *Schmalz*, 194 Ill. 2d at 82-83 (holding that there was sufficient evidence of actual possession where police officer found defendant and three others in a room clouded with marijuana smoke and containing marijuana and drug paraphernalia, and defendant, who was within reach of a "bong" and a plastic bag of marijuana, told the officer that they were having a party). It is also not required that the State prove that defendant had control over the premises where the drugs were found in order to obtain a conviction. *Givens*, 237 Ill. 2d at 335. We thus find defendant's claims without merit and affirm his conviction for delivery of a controlled substance.

¶ 16 Defendant next challenges the calculation and assessment of certain pecuniary penalties imposed by the court. Although defendant did not raise these claims in the circuit court, the supreme court has recognized that a sentence that does not conform to a statutory requirement is

void and may be attacked at any time. *People v. Jackson*, 2011 IL 110615, ¶ 10. 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).

¶ 17 Defendant first claims that he is entitled to a credit of \$2,280 for his time spent in pre-sentence custody which should be applied to offset his \$2,000 Controlled Substance Assessment. The State concedes that defendant is entitled to such credit, and that it should be applied as defendant has proposed. We agree. Defendant was entitled to a credit of \$5 for each of the 456 days that he served in pre-sentence custody, for a total credit of \$2,280 (725 ILCS 5/110-14 (West 2008)), and that credit offsets his \$2,000 Controlled Substance Assessment (*People v. Paige*, 378 Ill. App. 3d 95, 104 (2007)). Therefore, pursuant to our authority under Illinois Supreme Court Rule 615(b) (eff. Aug. 27, 1999)), we direct the clerk to modify defendant's fines and fees order to reflect a credit of \$2,000.

¶ 18 Defendant also claims that he was improperly assessed a \$200 DNA analysis fee (730 ILCS 5/5-4-3(j) (West 2008)) because his DNA profile is already registered in the Illinois State Police database in connection with a prior conviction. The State concedes that this fee was improperly assessed and should be vacated. Pursuant to the supreme court's ruling in *People v. Marshall*, 242 Ill. 2d 285, 303 (2011), we agree that the trial court was not authorized to assess defendant the \$200 DNA fee where he is currently registered in the DNA database, and, thus, vacate that fee.

¶ 19 Defendant further claims that he was improperly assessed a \$5 court system fee. The State concedes that the assessment was improper in this case, and we agree that the fee does not apply because defendant was convicted of delivery of a controlled substance, a violation of the Illinois Controlled Substances Act, and not a violation of the Illinois Vehicle Code or of a

similar municipal ordinance (55 ILCS 5/5-1101(a) (West 2008)), to which the fee is directed.

We therefore vacate the \$5 court system fee.

¶ 20 Defendant finally contends that his MSR term should be reduced from three years to the two-year term which attaches to the underlying conviction, in this case, a Class 1 felony. In this case, defendant was convicted of delivery of a controlled substance, a Class 1 felony (720 ILCS 570/401(c)(1) (West 2008)), and sentenced as a Class X offender based on his prior convictions (730 ILCS 5/5-5-3(c)(8) (West 2008)). This court has repeatedly held that where defendant is sentenced as a Class X offender, he must serve the Class X MSR term of three years, rather than the term of MSR applicable to the underlying felony. *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011), and cases cited therein. We find no reason to depart from that determination, and thus conclude that defendant, who was sentenced as a Class X offender, was subject to a three-year term of MSR.

¶ 21 For the reasons stated, we order the clerk to modify defendant's fines and fees order to reflect a credit of \$2,000, vacate the \$200 DNA fee and the \$5 court system fee, and affirm the judgment in all other respects.

¶ 22 Affirmed, as modified.