

No. 1-10-1387

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 13577
)	
CHRISTOPHER DAVIS,)	Honorable
)	Maura Slattery-Boyle,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.
Justices Joseph Gordon and McBride concurred in the judgment.

ORDER

¶ 1 *Held:* The evidence was sufficient to convict defendant of possession of one or more grams of heroin with intent to deliver where there was evidence supporting a reasonable inference that the forensic chemist kept separate the contents of the five bags of powder used to establish the weight of the substance containing heroin, rather than combining them for testing. Defendant's three year term of mandatory supervised release was proper where he was convicted of a Class 1 felony but sentenced as a mandatory Class X offender. Defendant's \$200 DNA analysis fee must be vacated as he has been assessed this fee in an earlier case, and his \$5 court system fee must be vacated as it applies only to vehicular offenses. Defendant's mittimus shall be corrected to properly reflect his offense.

¶ 2 Following a jury trial, defendant Christopher Davis was convicted of possession of a controlled substance (1 or more grams, but less than 15 grams, of heroin) with intent to deliver and sentenced as a mandatory Class X offender to eight years' imprisonment with fines and fees. On appeal, defendant contends that there was insufficient evidence to convict him of possessing

one or more grams of heroin because the State failed to establish that the forensic chemist separately tested each of the five packets of powder used to establish the weight of the substance containing heroin. He also contends that his term of mandatory supervised release (MSR) should be the two years for his Class 1 felony offense rather than the three years for a Class X felony. The parties agree that defendant's \$200 DNA analysis fee must be vacated because he provided a DNA sample in an earlier felony case, his \$5 court system fee must be vacated because it applies only to vehicular offenses, and the mittimus should be corrected to properly reflect his offense.

¶ 3 The trial evidence showed that, in the mid-day on June 28, 2009, police observed defendant engage in three substantially identical transactions with three people: he accepted money as he stood near the mouth of an alley, went to a gate several feet down the alley where he removed a small bag from a clear plastic bag at the base of the gate, then returned to the person who had paid him and gave him the small bag. During the time that the police observed defendant, nobody but defendant approached the bag until officers arrived to arrest defendant and found that the clear plastic bag at the base of the gate contained 14 small bags of a white powder. The bag and its contents were sealed and sent to the State forensic crime laboratory ("crime lab").

¶ 4 A forensic chemist with the crime lab testified that she received the sealed bag and its contents. She weighed the 14 small bags together and found that they weighed 6.94 grams. She also chose five bags to test the contents and she "opened those five that are open and emptied at this point." After she "put the ones that were tested and the ones that were not tested minus the gross weight," she found that the substance in the five bags weighed 1.278 grams. She conducted a preliminary test against "that 1.278 grams" and found "the possibility of the presence of heroin" and then conducted a confirming test against "those five items" and found that "they were positive for heroin." By the time of trial, the evidence consisted of "the nine untested items and their packaging," the "empty plastic bags from the five tested items," "the five items that I tested in five individual bags," and "the outer plastic bag."

¶ 5 Following closing arguments, instructions, and deliberations, the jury found defendant guilty of possession with intent to deliver. The court denied defendant's post-trial motion challenging the sufficiency of the evidence. The court then sentenced him, as a mandatory Class X offender based on prior felony convictions, to eight years' imprisonment with three years' MSR and fines and fees, including the \$200 DNA analysis fee and \$5 court system fee. The mittimus shows defendant's offense as "MFG/DEL 1<15 GR HEROIN/ANALOG." Defendant's motion to reconsider his sentence was denied, and this appeal timely followed.

¶ 6 On appeal, defendant contends that there was insufficient evidence to convict him of possession of one gram or more of heroin with intent to deliver because the State failed to establish that the forensic chemist separately tested each of the five packets of powder used to establish the weight of the substance containing heroin.

¶ 7 When presented with a challenge to the sufficiency of the evidence, this court must determine whether, after taking 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. Beauchamp*, 241 Ill. 2d 1, 8 (2011). On review, we do not retry the defendant and we accept all reasonable inferences from the record in favor of the State. *Beauchamp*, 241 Ill. 2d at 8. The trier of fact is not required to disregard inferences that flow normally from the evidence nor to seek all possible explanations consistent with innocence and elevate them to reasonable doubt. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of the defendant's guilt remains. *Beauchamp*, 241 Ill. 2d at 8.

¶ 8 Here, defendant notes that the forensic chemist did not expressly testify that she separately tested the contents of each of the five bags of powder so that the evidence "left open the possibility that fewer than all five of these packages actually contained heroin." However, under these circumstances we need not elevate that possibility to reasonable doubt. The forensic

chemist testified that she selected and opened five of the small bags, found that their contents weighed 1.278 grams, and that she tested "that 1.278 grams" and "those five items." Thus, defendant does not challenge that the chemist indeed tested the contents of the five bags but raises the specter that she combined the contents and tested them as a single sample. However, at trial the contents of the five original bags were now in five new bags, from which a finder of fact could reasonably conclude that the chemist had taken care to keep the powder in the five bags separate and had not combined them. Taking the evidence in the light most favorable to the State, as we must, we find sufficient evidence to convict defendant of possession of one or more grams of heroin with intent to deliver.

¶ 9 Defendant also contends that he should receive the two year MSR term for his Class 1 felony offense rather than the three year term for a Class X felony.

¶ 10 Possession of 1 gram or more, but less than 15 grams, of heroin with intent to deliver is a Class 1 felony. 720 ILCS 570/401(c)(1) (West 2010). A defendant over 21 years old convicted of a Class 1 or Class 2 felony after two separate and sequential convictions for felonies of Class 2 or greater "shall be sentenced as a Class X offender." 730 ILCS 5/5-4.5-95(b) (West 2010).

"[E]very sentence includes a term [of MSR] in addition to the term of imprisonment;" 3 years for a Class X felony and 2 years for a Class 1 felony. 730 ILCS 5/5-4.5-15(c), -25(l), -30(l) (West 2010).

¶ 11 This court has repeatedly held that a defendant sentenced as a mandatory Class X offender receives the Class X MSR term of three years. *People v. Allen*, 409 Ill. App. 3d 1058, 1078 (2011); *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011); *People v. Lampley*, 405 Ill. App. 3d 1, 13-14 (2010); *People v. Holman*, 402 Ill. App. 3d 645, 652-53 (2010); *People v. McKinney*, 399 Ill. App. 3d 77 (2010); *People v. Lee*, 397 Ill. App. 3d 1067, 1072-73 (2010); *People v. Watkins*, 387 Ill. App. 3d 764, 766-67 (2009); *People v. Smart*, 311 Ill. App. 3d 415 (2000); *People v. Anderson*, 272 Ill. App. 3d 537, 541-42 (1995). Defendant argues that these cases are

cast into doubt by our supreme court's decision in *People v. Pullen*, 192 Ill. 2d 36 (2000), where a defendant convicted of multiple burglaries and sentenced as a Class X offender to consecutive prison terms totaling 30 years challenged his consecutive sentencing on the basis that the aggregate sentence exceeded the statutory maximum. The *Pullen* court found that the consecutive sentences exceeded the maximum for burglary on the basis that the Class X offender statute does not change the class of the felonies themselves, and defendant contends that this principle should apply to MSR as well. However, in *Rutledge, Lampley, Holman, McKinney, and Lee*, we expressly rejected the contention that *Pullen* applies to MSR. Adhering to these well-reasoned decisions, we find that defendant's three-year MSR term is not erroneous.

¶ 12 The parties correctly agree that two of defendant's fees must be vacated. The \$200 DNA analysis fee (730 ILCS 5/5-4-3(j) (West 2010)) is inapplicable because defendant provided a DNA sample upon a prior felony conviction and our supreme court recently held that the DNA analysis fee cannot be assessed under such circumstances. *People v. Marshall*, 242 Ill. 2d 285 (2011). The \$5 court system fee (55 ILCS 5/5-1101(a) (West 2010)) applies only to vehicular offenses, which defendant's offense is not. Lastly, the parties correctly agree that defendant was convicted of possession with intent to deliver rather than manufacture or delivery and the mittimus should thus indicate.

¶ 13 Accordingly, pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), the \$200 DNA analysis fee and the \$5 court system fee are vacated. The clerk of the circuit court is directed to correct the mittimus to reflect that defendant was convicted of possession of a controlled substance (1 or more grams, but less than 15 grams, of heroin) with intent to deliver. The judgment of the circuit court is affirmed in all other respects.

¶ 14 Affirmed in part, vacated in part, and mittimus corrected.