

THIRD DIVISION
December 14, 2011

No. 1-10-1841

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 9668
)	
OTILIO HERNANDEZ,)	The Honorable
)	Larry G. Axelrod,
Defendant-Appellant.)	Judge Presiding.

JUSTICE SALONE delivered the judgment of the court.
Presiding Justice Steele and Justice Murphy concurred in the judgment.

ORDER

Held: Where the evidence showed that defendant possessed an amount of heroin too small to establish an intent to deliver it, his conviction would be reduced to simple possession of a controlled substance and the cause remanded for resentencing and for amendment of the fines and fees order.

¶ 1 Following a stipulated bench trial, defendant Otilio Hernandez was convicted of possession of a controlled substance (heroin) with intent to deliver. He was sentenced as a Class X offender to six years in prison and assessed various fines and fees. On appeal, defendant contends that his conviction should be reduced to simple possession because there was insufficient evidence of intent to deliver the small amount of heroin in his possession. Defendant

also challenges the imposition of a \$200 DNA analysis fee and a \$5 court system fee, and he asserts that he is entitled to a presentence incarceration credit toward imposed fines. We reverse defendant's conviction for possession of a controlled substance with intent to deliver and remand with directions to impose sentence on the lesser included offense of possession of a controlled substance and to amend the fines and fees order.

¶ 2 Defendant and co-defendant Geovani Noa were charged by indictment with possession with intent to deliver "less than 10 [grams]" of a substance containing heroin. At their arraignment, the State was permitted without defense objection to amend the indictment "to conform to the Grand Jury transcript" to charge the offense of possession with intent to deliver more than 1 but less than 15 grams of heroin.

¶ 3 Defendant filed a pretrial motion to quash arrest and suppress evidence, and two police officers testified at the hearing on his motion. Officer Matthew Bowler of the Des Plaines Police Department testified that on April 22, 2009, the police, working with a confidential informant, set up a purchase of narcotics by having the informant place a phone call to defendant and arrange for the purchase from him of \$300 worth of heroin. The transaction was to take place at the Comfort Inn Hotel at Touhy and River Road in Des Plaines. Bowler, his two partners, and the confidential informant went to the Inn where the informant placed a phone call to defendant at about 4 p.m. Defendant called the informant back and told her he wanted to meet her at a gas station parking lot across the street from the inn. Bowler, who had been given a description of defendant by the informant, observed two men at the gas station. Bowler and his partners, Officers Lave and Bueno, approached defendant, who matched the description of the man who "was supposed to deliver \$300 worth of heroin." Lave conducted a pat-down search of

defendant and retrieved from defendant's pocket a small clear plastic bag containing a "brownish powderlike substance, suspect heroin." Defendant was placed under arrest. At the police station, two additional baggies of suspected narcotics were recovered from defendant's person.

¶ 4 Officer Lave testified that at the gas station he conducted a "crunch and feel" search through defendant's pants pockets and jacket pockets. Lave felt a small, round, hard object in defendant's right jacket pocket which Lave recovered.

¶ 5 At the conclusion of the hearing, the court denied defendant's motion to quash arrest and suppress evidence.

¶ 6 Defendant, whose case was severed from that of his co-defendant, proceeded by way of a bench trial at which the parties stipulated to the evidence, including the testimony given by the police officers at the hearing on the motion to quash and suppress. It was further stipulated that three packets of a brown substance recovered from defendant were submitted for analysis; that the forensic scientist tested one of the three packets; that she determined the substance therein contained heroin and weighed 0.2 gram. She did not analyze the substance in the remaining two packets but determined that they contained a total of 0.4 gram of a brown powdered substance.

¶ 7 The parties also stipulated that after defendant's arrest, he was advised of his *Miranda* rights and gave Officer Bueno a signed statement. Defendant told Bueno that he had received a phone call that afternoon from a girl known to him as Dee who told defendant she wanted to score some heroin. In the past six months defendant had done heroin with her three times. Dee said she wanted to purchase \$300 worth of heroin. Defendant told her he did not have it but that he would get it and meet her with his friend "who was going to score it." Defendant and his friend Geo drove to the gas station in Des Plaines and got out of the car, and the police came up

to him. The police found a packet of heroin in defendant's jacket pocket and placed him under arrest. At the police station, the police found more heroin in his shoe and in his pants pocket. Defendant further related in his statement to Bueno that he was a heroin addict and agreed to get some heroin for Dee "because she's my friend, but Geo was the guy who was actually going to get heroin and deliver it to Dee." Defendant stated the heroin found on him was his because he needed "at least three or four bumps a day" and "[t]he heroin that Dee ordered up belongs to Geo because he said he would take care of it."

¶ 8 Following the stipulations, both sides rested. The court found defendant guilty. At the subsequent sentencing hearing, defendant stated: "I was just a drug user. I don't selling [*sic*] no drugs, you know." The court replied, "Do you understand it's not selling drugs but it's called delivery? When you *** help one person bring drugs to someone else, that's the crime." Because of defendant's criminal history and his conviction for a Class 2 felony, the court sentenced him as a Class X offender to the minimum of six years in jail. The court also credited defendant with 443 days spent in presentence custody and imposed fines and fees totaling \$1,720, including a \$200 DNA analysis fee and a \$5 court system fee. This appeal follows.

¶ 9 On appeal, defendant, an admitted heroin addict, contends that the evidence proved only that he possessed a small amount of heroin consistent with his personal use and did not establish beyond a reasonable doubt that he intended to deliver the heroin in his possession.

¶ 10 When presented with a claim of insufficiency of the evidence, we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt. *People v. Leonard*, 377 Ill. App. 3d 399, 403 (2007). This means that we must allow all reasonable inferences from the

record in favor of the prosecution. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004).

However, we will reverse a conviction where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *People v. Herman*, 407 Ill. App. 3d 688, 704 (2011).

¶ 11 To sustain a charge of possession of a controlled substance with intent to deliver, the State must prove: (1) the defendant had knowledge of the presence of the narcotics; (2) the narcotics were in the immediate possession or control of the defendant; and (3) the defendant intended to deliver the narcotics. *People v. Sherrod*, 394 Ill. App. 3d 863, 865 (2009). Whether the evidence is sufficient to prove intent to deliver must be determined on a case-by-case basis. *People v. Robinson*, 167 Ill. 2d 397, 412-13 (1995).

¶ 12 Allowing for all reasonable inferences from the record in favor of the prosecution, we find that the evidence failed to establish that defendant intended to deliver the heroin in his possession. Defendant was charged with a Class 1 felony, possession with intent to deliver 1 or more grams but less than 15 grams of heroin in violation of section 401(c)(1) of the Illinois Controlled Substances Act (Act) (720 ILCS 570/401(c)(1) (West 2008)).¹ The parties stipulated that suspected heroin was found in three separate small packets, one of which was recovered from his jacket pocket, a second from his pants pocket and a third from his shoe. The parties further stipulated that one of the three packets was tested and that its contents tested positive for

¹ The mittimus accurately stated that defendant was found guilty of possession with intent to deliver a lesser amount of the narcotic drug in violation of section 401(d)(i) of the Act, a Class 2 felony.

heroin and weighed 0.2 gram. The remaining packets were not analyzed. The aggregate weight of the three packets was 0.6 gram.

¶ 13 The parties agree the stipulated facts established the first two elements of the offense, namely, that defendant had knowledge of the presence of heroin and that heroin was found in the immediate possession or control of the defendant. We agree with the State that the evidence to which the parties stipulated, including the testimony of Officer Bowler and defendant's statement to police, also established that defendant had the requisite intent to deliver \$300 worth of heroin to the informant. However, the State was also required to prove that defendant intended to deliver the heroin in his immediate possession or control. While defendant was arrested with a second individual who was also charged with possession of heroin with intent to deliver, no evidence was introduced at defendant's trial that his co-defendant was found to possess heroin of which defendant could be charged as having constructive possession. The authorities cited by both parties deal with the common situation on appeal where defendant was in possession of a controlled substance and the issue was whether or not he evinced an intent to deliver that controlled substance. Here, we have evidence of intent to deliver a controlled substance, but the issue is whether defendant was in possession of the substance that was intended to be delivered. We conclude that where defendant was in possession of what analysis proved to be only 0.2 gram of a substance containing heroin, we agree with defendant that the State failed to prove that he intended to deliver that small amount of heroin to the confidential informant for the agreed purchase price of \$300.

¶ 14 The State cites *People v. Berry*, 198 Ill. App. 3d 24 (1990), in support of its contention

that even the small amount of narcotics actually found on defendant's person was sufficient to establish his intent to deliver those narcotics. We find *Berry* inapposite where defendant there was found to be in possession of \$3,100 and 3.9 grams of cocaine, an amount considerably larger than the heroin defendant possessed in the instant case. The State also relies on *People v. LeCour*, 172 Ill. App. 3d 878 (1988), which is similar to the instant case in that both involved a police-arranged controlled buy. However, in *LeCour* defendant was found in possession of 3.3 grams of cocaine which was the agreed amount of cocaine to be purchased.

¶ 15 Here, the police recovered "three brown packets" of powder from three separate items of defendant's clothing. There was no testimony that the three packets were packaged in a manner consistent with the sale of narcotics. Only 0.2 gram was found by analysis to contain heroin, but even the combined weight of the three packets, 0.6 gram, could reasonably be viewed as designed only for personal consumption. See *People v. Sherrod*, 394 Ill. App. 3d 863, 866 (2009). There was no testimony as to the street value of heroin or the amount that Dee, the confidential informant, could have expected to receive for her \$300. Defendant and Geovani Noa were arrested together and were charged with possession with intent to deliver one or more grams but less than 15 grams of heroin. The parties stipulated that defendant told police that his friend Geo "was the guy who was actually going to get heroin and deliver it to Dee." Defendant never told police, however, that Geo was actually in possession of heroin. Defendant was tried separately, and, critically, no evidence was introduced at defendant's trial as to whether or not any heroin was found on Geo. We conclude the State failed to prove that defendant intended to deliver the small amount of heroin found in his possession. Consequently, we vacate defendant's conviction for possession of a controlled substance with intent to deliver, affirm the lesser-

included conviction for possession of a controlled substance, and remand for resentencing.

¶ 16 Next, defendant contests the imposition of certain fees. Defendant asserts, and the State agrees, that the imposition of a \$200 DNA analysis fee pursuant to section 5-4-3 of the Unified Code of Corrections (730 ILCS 5/5-4-3) (West 2009)) must be vacated. The record reveals defendant had already submitted a blood sample after a prior conviction and his DNA was registered in CODIS (Combined DNA Index System). Consequently, he was not required to submit another sample or pay another fee. *People v. Marshall*, 242 Ill. 2d 285, 302 (2011). The imposition of a \$5 court system fee pursuant to section 5-1101(a) of the Illinois Vehicle Code (55 ILCS 5/5-1101(a) (West 2009)) must also be vacated, as defendant was not convicted of any offense under the Code. *People v. Brown*, 388 Ill. App. 3d 104, 112 (2009).

¶ 17 Defendant also asserts that because he was entitled to 443 days of presentence custody credit, he should have received a \$5-per-day credit against the fines imposed against him. The State agrees that defendant is entitled to credit for 443 days in custody. Defendant's credit against fines would amount to \$2,215, an amount greater than the fines imposed.

¶ 18 Finally, defendant contends that in the event his Class 2 felony conviction for possession with intent to deliver were to be upheld, his mandatory supervised release (MSR) term must be reduced from three years, the MSR term for a Class X felony, to two years, the MSR term for the Class 2 felony. Defendant was sentenced as a Class X offender pursuant to section 5-5-3(c)(8) of the Unified Code of Corrections, which requires the imposition of a Class X sentence upon conviction for a Class 1 or Class 2 felony after two previous convictions for a Class 2 or greater class felony. 730 ILCS 5/5-5-3(c)(8) (West 2008). Because we have reduced defendant's conviction to simple possession, a Class 4 felony in violation of section 402(c) of the Act, and

the trial court will not be required upon remand to impose a Class X sentence, defendant's claim is moot.

¶ 19 Pursuant to Supreme Court Rule 615(b)(3), we reduce defendant's conviction to unlawful possession of less than one gram of a substance containing heroin, vacate his sentence, and remand the cause to the trial court for a new sentencing hearing. Pursuant to Supreme Court Rule 615(b)(1), we also direct the trial court upon remand to amend its fines and fees order to (1) vacate the \$200 DNA analysis fee and the \$5 court system fee, leaving a balance of \$485 in fees, and (2) credit defendant with \$5 per day for each of the 443 days of presentence credit, or \$2,215, an amount more than sufficient to offset the \$1,030 in imposed fines.

¶ 20 Vacated in part; affirmed in part; and remanded with directions.