

No. 1-10-0188

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 15326
	)	
JIMMIE MONTGOMERY,	)	Honorable
	)	John P. Kirby,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE LAMPKIN delivered the judgment of the court.  
Justices Cahill and Garcia concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Defense counsel's determination to stipulate to the chain of custody despite discrepancy in police report concerning inventory number of substances recovered from defendant did not prejudice defendant's case. Conviction affirmed; mittimus corrected to credit defendant with \$5 per day for the 125 days he spent in pre-trial custody.
- ¶ 2 Following a bench trial, defendant Jimmie Montgomery was convicted of possession of a controlled substance (cocaine) with intent to deliver and sentenced to seven years in prison. On appeal, defendant contends that he was denied the effective assistance of counsel when his trial counsel agreed to stipulate that a proper chain of custody was maintained over the cocaine

despite a discrepancy in the inventory number of the drugs contained in a police report.

Defendant also challenges the amount of the fine imposed upon him.

¶ 3 At trial, the State's evidence established the following. On July 31, 2009, Chicago police officer Marquis Cooper was working as an undercover surveillance officer in the area of 3455 South Prairie Avenue in Chicago, along with about nine other officers. At about 2:20 p.m. he observed defendant, from a distance of about 15 feet, engage in what appeared to be four drug transactions, each separated in time by several minutes. On each occasion a black male individual would approach defendant on foot, engage in a brief conversation, and then hand money to defendant. Defendant would walk to a black garbage cart at the beginning of an alley, reach under the cart to retrieve a plastic bag, remove an item from the bag, replace the bag under the cart, and then return to the person who was waiting and give that person the item. The person would then walk away. After viewing the fourth such transaction. Cooper radioed his fellow officers and Officers Patterson and O'Connor approached. Defendant was detained, as Cooper and Patterson walked to the garbage cart, where Patterson retrieved a plastic bag containing nine green-tinted small zip-lock bags.

¶ 4 Officer Michael O'Connor testified that he was also part of the surveillance team that day. When Cooper alerted them to what he had seen, O'Connor, Cooper and Patterson all approached the scene. Defendant was detained, and Patterson recovered, from under the garbage cart, one clear bag containing nine green-tinted zip-lock baggies which each contained a white chalk-like substance suspected to be crack cocaine. Patterson then handed the bag to O'Connor, who testified that he kept it in his possession until they reached the police station. A bundle of currency in the amount of \$588, in numerous denominations, was recovered from defendant. O'Connor testified that he inventoried the suspected narcotics in the following manner. He placed the plastic bag with the nine green-tinted bags into an inventory bag, which was assigned

inventory number 11744221.<sup>1</sup> Descriptions about the defendant and items in the bag were written on the outside of the bag and it was heat sealed after it was "signed off" by O'Connor's sergeant. The item was then placed into an evidence vault. From there, according to O'Connor, the suspected drugs would go to the Illinois State forensics department and then to the Illinois State Police crime lab for testing. On cross-examination defense counsel asked no questions about the chain of custody of the drugs. Instead the parties proceeded by stipulation.

¶ 5 The parties stipulated that:

"Nancy McDonagh, forensic chemist at the Illinois State Police crime lab, forensic chemistry, would testify she received inventory 11744221 in a heat sealed condition from the Chicago Police Department. That the inventory envelope was opened and found to contain nine items of chunky substance.

That forensic chemist is employed by the Illinois State Police crime lab and qualified to testify as an expert in the area of forensic chemistry and all equipment used was tested, calibrated and functioning properly when the items were tested.

That the chemist performed tests commonly accept [*sic*] in the area of forensic chemistry for ascertaining the presence of controlled substance. After performing tests on nine of the items recovered, it's [*sic*] chemists opinion within a reasonable degree of scientific certainty that the contents were positive for the presence of cocaine and actual weight was 1.1 grams. The chemist would

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<sup>1</sup> In questioning O'Connor about the inventory number, the prosecutor initially misspoke and referred to inventory number 1174421, but she then corrected herself in subsequent questioning and used the number 11744221.

further testify that the total estimated weight of the nine items would be 1.1 grams.

After the testing and analysis of inventory 11744221 was complete, she would further testify that it was again sealed and she would be able to identify it in open court as the same items that were tested and that they were still in a sealed condition. That a proper chain of custody was maintained at all times."

¶ 6 Defendant presented the testimony of Ladevt Taylor, who said he had been friends with defendant for about five years. On the day in question he and defendant walked over to 35<sup>th</sup> and Prairie at about noon and bought several food items at a local store. They then waited for some friends to join them so they could go to a park to play basketball. Taylor went into a cell phone store to look at merchandise while defendant waited across the street. Taylor saw defendant at least once through the window of the store. When Taylor came out of the store he claimed he saw two uniformed police officers arrive in a squad car and detain defendant, placing him in the car. Before that, Taylor saw nobody else approach defendant, nor did he see him deliver any items to anyone, accept money from anyone, or go into an alley.

¶ 7 The trial court found defendant guilty of possession of 1 gram or more but less than 15 grams of a controlled substance, cocaine, with intent to deliver. Because of prior convictions he was sentenced as a class X offender to seven years in prison, with credit for 125 days served in pre-sentence custody. He now appeals.

¶ 8 Defendant's central contention on appeal is based upon an arrest report, part of which is contained in the record on appeal, but which was never introduced or used at trial. In the incident narrative section of that report it is stated that Officer Patterson recovered "a clear plastic bag with [*sic*] contained nine small green tinted ziplock bags filled with white rock-like

substance (suspected crack-cocaine), inventory #11744233." This inventory number differs from that described at trial by Officer O'Connor and in the stipulation, which was #11744221.

¶ 9 Ordinarily, defendant's stipulation to the chain of custody would bar his challenge to that chain for the first time on appeal. *Carodine*, 374 Ill. App. 3d at 26-27. In an attempt to circumvent this rule of waiver, defendant contends that he was denied the effective assistance of counsel by counsel's decision to engage in a stipulation concerning the chemist's safekeeping of the drug evidence and the chain of custody. But the evidence of the inventory number for these drugs was consistent throughout the trial itself, save for the one instance which we have noted when the prosecutor misspoke and then corrected himself. The number described by Officer O'Connor was the same number utilized by the parties in their stipulation to the chain of custody. Even where there is a discrepancy between the inventory numbers for drugs used at trial, no insufficiency of the evidence has been found where there is proof that the police took protective measures which reasonably established that the drugs recovered from defendant were the same as those tested by the forensic chemist. *People v. Carodine*, 374 Ill. App. 3d 16, 27 (2007). The testimony of Officer O'Connor together with the stipulation concerning the chemist's testimony provided this proof of safeguards here. O'Connor testified that the drugs remained in his possession from the time he saw Officer Patterson recover them and give them to him until they were placed in a heat-sealed envelope and placed in the police evidence safe. The envelope containing these drugs and bearing the same inventory number was received in a heat-sealed condition by the police chemist who actually tested them and then placed them back in a sealed envelope which it was stipulated she would be able to identify. All of this evidence established careful procedures by the police and the chemist to establish a correct chain of custody in the drug evidence.

¶ 10 It is clear, then, that an attempt to center a defense on a single discrepancy contained in a police report would have been a slim reed for defense counsel to rely upon. Such reports are hearsay, inadmissible as substantive evidence at trial, and can only be used for impeachment or to refresh the recollection of a witness. *People v. Williams*, 240 Ill. App. 3d 505, 506 (1992); see *People v. Velez*, 388 Ill. App. 3d 493, 502 (2009). Even had counsel attempted to impeach Officer O'Connor with the statement in the police report, the State would have had the opportunity to offer an explanation of the discrepancy, undoubtedly as a typographical error, and would still have been able to rely upon the strong testimony of Officer O'Connor about his efforts to safeguard the evidence as well as the in-court testimony of the police chemist concerning her safeguarding efforts at her end of the chain of custody of the drugs. The evidence from this trial establishes that Officer O'Connor and the chemist, according to the stipulation, agreed on the inventory number of the drug evidence. There is no reason to think that the actual testimony of the chemist would have differed in this respect, had counsel not agreed to stipulate to this testimony. Based upon this evidence the burden would have shifted to the defendant to show actual tampering with the evidence, something that one differing inventory number in an impeaching police report would not have shown. See *Carodine*, 374 Ill. App. 3d at 26-27. Because defendant has failed to show any prejudice arising from his counsel's determination to proceed by way of stipulation concerning the chain of custody, we need not analyze whether defense counsel's performance in this regard was deficient. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). We find no basis for reversal on this ground.

¶ 11 Defendant also contends that he was not awarded the proper monetary credit of \$5 per day for the time he spent in custody awaiting trial. The State concedes error on this point and accordingly we order that the mittimus be corrected to show that defendant is entitled to a credit of \$625 for the 125 days he spent in pre-trial custody.

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¶ 12 Judgment affirmed; mittimus corrected.