

NOTICE  
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2011 IL App (4th) 100262-U

Filed 10/25/11

NO. 4-10-0262

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
DEMARCUS D. TRIPLETT,	)	No. 08CF167
Defendant-Appellant.	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

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JUSTICE TURNER delivered the judgment of the court.  
Presiding Justice Knecht and Justice McCullough concurred in the judgment.

### ORDER

- ¶ 1 *Held:* (1) Where the State tried to obtain the return of a witness on overseas military duty throughout the entire speedy-trial period and got a return date a few days after the term's expiration, the trial court did not err by granting an extension of the speedy-trial term.
- ¶ 2 (2) Where the evidence showed defendant brought a pair of shoes in a shoe box into the car he was driving and later instructed his passenger to get the stuff out of the shoes and into the passenger's pocket because of police presence, the State's evidence was sufficient to prove defendant had possession of the cocaine the police found in the passenger's pockets.
- ¶ 3 (3) Where defendant had six prior felonies, three of which involved drugs, and was the "ring leader" in transporting a large amount of cocaine from Chicago to Peoria, the trial court did not abuse its discretion in sentencing defendant to 40 years' imprisonment.
- ¶ 4 In July 2008, the State charged defendant, Demarcus D. Triplett, with one count of unlawful possession with the intent to deliver a controlled substance (720 ILCS

570/401(a)(2)(B) (West 2008)). In March 2009, defendant made a speedy-trial demand. In July 2009, the State moved for a continuance beyond the statutory speedy-trial term, which the Livingston County circuit court granted over defendant's objection. After a fall 2009 bench trial, the court found defendant guilty of the charge. Defendant filed a motion for a new trial. At a joint January 2010 hearing, the court denied defendant's posttrial motion and sentenced defendant to 40 years' imprisonment. Defendant filed a motion to reconsider his sentence, which the court denied.

¶ 5 Defendant appeals, alleging (1) the trial court erred by granting the State's request for an extension of the speedy-trial term, (2) the State failed to prove beyond a reasonable doubt he possessed the cocaine, and (3) his sentence is excessive. We affirm.

¶ 6 I. BACKGROUND

¶ 7 The State's information alleged that on July 9, 2008, defendant knowingly possessed with the intent to deliver 100 grams or more but less than 400 grams of a substance containing cocaine. It further noted that, due to defendant's prior conviction for violating the Illinois Controlled Substances Act (720 ILCS 570/arts. I through VI (West 2008)) (People v. Triplett, No. 03-CF-233001 (Cir. Ct. DuPage Co.)), defendant could receive a sentence of up to 80 years' imprisonment. See 720 ILCS 570/408(a) (West 2008).

¶ 8 At the October 15, 2008, pretrial hearing, the State indicated it was not ready for trial due to the lack of a lab result and requested a continuance. Defense counsel did not object and noted the continuance would be by agreement. The trial court granted the continuance and put the case on the January 2009 jury trial calender. At the December 16, 2008, pretrial hearing, defendant waived his right to a jury trial, and the court scheduled a bench trial for March 3,

2009. The State did not mention the absence of a key witness at the pretrial hearing. On December 19, 2008, the State filed a motion for an evidence deposition of Deputy Jason Draper, the arresting officer that seized the alleged cocaine from codefendant, David Walker. The motion noted Deputy Draper would be unavailable to testify at the bench trial because he was leaving the state on December 28, 2008, for active military duty and was not expected to return for nine months to a year. A hearing on the motion was set for December 22, 2008. The docket sheet does not contain a hearing entry for December 22, 2008. On February 26, 2009, the State filed a motion to continue the March 2009 trial date based on Deputy Draper's absence.

¶ 9 On March 3, 2009, the trial court heard the State's motion to continue. The discussion between court and counsel indicated defense counsel could not make the December 22, 2008, hearing date. In Walker's case, the parties were able to get an evidence deposition, and the case proceeded to trial in January 2009. The court questioned the State on why Deputy Draper's absence was now being brought to its attention when the problem had been known in December 2008 and successfully addressed in another case. The prosecutor indicated he and another attorney discussed the possibility of proceeding without Deputy Draper. The court indicated its displeasure with the waste of court time. It fined the State \$500 and ordered the State to pay defense counsel \$300 but later vacated the taxation costs in its entirety. The court did grant the State's continuance. On March 5, 2009, defendant filed his demand for a speedy trial.

¶ 10 On July 23, 2009, the State filed a motion for a continuance beyond the statutory speedy-trial term. The motion noted defendant's term was set to expire on August 11, 2009 (a day short because the motion erroneously states the speedy-trial demand was made on March 4,

2009), and Deputy Draper was still unavailable due to his active military service overseas. The motion noted the State had exercised due diligence in attempting to obtain Deputy Draper's testimony. It listed the attempt to get an evidence deposition before his departure and its contacting military personnel to try and get Deputy Draper back for a trial. According to military personnel, Deputy Draper was set to return on or around August 14, 2009. The State attached copies of its e-mails to military personnel.

¶ 11 On July 28, 2009, the trial court held a hearing on the State's motion to continue. While the court noted its displeasure with the State in March 2009 for not doing more to get an evidence deposition in December 2008, it found the State had been diligent in trying to get Deputy Draper back for the trial. The court also noted the relatively short extension of the statutory period necessary to procure Deputy Draper's appearance. Thus, the court granted an extension of the speedy-trial period to August 28, 2009, and scheduled the bench trial for August 25, 2009. The court later reset the hearing for August 26, 2009. On August 26, 2009, defendant made a motion to continue the trial due to defense counsel's commitment in another case. The court then continued the case to October 2009.

¶ 12 On October 6, 2009, the trial court commenced defendant's bench trial. The evidence relevant to the issues on appeal is set forth below.

¶ 13 Walker testified he had been staying with defendant in Peoria the week before July 9, 2008, and defendant had been providing him with heroin for free that week. On the day in question, Walker came along for the ride on defendant's trip to Chicago. When they arrived in Chicago, Walker and defendant separated for around an hour. When Walker returned to the car, defendant was across the street talking to some guys, and Tavell Jackson, whom he had not met

before, was hanging out around the car. Defendant left the guys and returned to the car, carrying a pair of shoes in a shoe box. Defendant put the shoe box on the front-passenger floorboard near Walker's feet. Walker did not look at the shoes. He was high on heroin provided by defendant and went to sleep. On direct testimony, Walker testified the police had to wake him up. After the police had stopped them, defendant told him to reach down, pick up "the stuff" that was in the shoes, and put it in his pocket. Walker did so because he thought it was just a traffic stop. On cross-examination, Walker testified defendant had tapped him on the leg, woke him up when the police were behind them, and told him to put "the stuff" from the shoes into his pocket. "The stuff" was three bags containing a white powdery substance that looked like cocaine. While Walker admitted heroin could affect a person's ability to recall events, his ability was not affected because the heroin he took on the day in question was not strong or potent enough to affect his recall ability.

¶ 14 Deputy Draper testified that, at around 8:12 p.m. on July 9, 2008, he observed a car on southbound Interstate 55 without a front license plate. He was driving a police vehicle that, although unmarked, had characteristics making it easy to identify as a police vehicle. Officer Sam Fitzpatrick was in the front-passenger seat. Deputy Draper drove up next to the car without the front license plate to confirm it was in fact missing the license plate. As he drove along side the vehicle, he noticed the driver, later identified as defendant, was very nervous and had the steering wheel grabbed tightly. Deputy Draper also observed neither of the two passengers looked over at him. Deputy Draper then pulled in behind the vehicle. While they were behind the vehicle, Deputy Draper saw the front-seat passenger twice bend over and then reappear a couple of seconds later. Officer Fitzpatrick also testified he observed the front-seat

passenger twice duck down in the front seat like he was trying to grab something off the floor or put something underneath the seat.

¶ 15           Once they had the vehicle stopped, Deputy Draper approached the driver's side, and Officer Fitzpatrick approached the passenger side. Deputy Draper noticed defendant was very nervous and defendant's hands were visibly shaking. Defendant stated the car belonged to "Jennifer" and gave Deputy Draper his license, permit, and insurance. After Deputy Draper learned defendant's license was suspended and he had only a probationary permit, he re-approached the car. While talking to defendant, he observed what appeared to be cannabis shake or loose cannabis on the center console and driver's side floorboard. Deputy Draper asked defendant to exit the car and took a closer look inside the vehicle. In addition to the cannabis or cannabis shake, Deputy Draper observed two "cut baggie ends," which he explained are normally used to transport or sell drugs. When questioned about the cannabis and Baggies, defendant stated it was not his car.

¶ 16           After defendant was placed in the police vehicle, Deputy Draper asked Walker to step out of the car. While Deputy Draper talked to Walker, he noticed Walker was very nervous and very worried, and so Deputy Draper asked for permission to search him. Walker became very animated, and he lifted up his shirt and patted his pants. Deputy Draper again asked to search Walker, and Walker permitted the search. When Deputy Draper patted Walker's pocket, he felt a huge lump in the pocket, and Walker tensed up. In his front left pocket, Walker had one big Baggie with a large, white substance in it. In the front right pocket were two small Baggies containing a white substance. The parties stipulated to the admission of a lab report that showed (1) the substance in the large bag weighed 124 grams and contained cocaine, and (2) the

substance in the two smaller bags together weighed 129.7 grams and was not tested. When Deputy Draper questioned Walker about the cocaine in his pockets, Walker told him he needed to speak to the driver of the vehicle.

¶ 17 Deputy Draper also did a more thorough search of the car and observed a pair of shoes sitting in a shoe box on the front-passenger floorboard. Deputy Draper did not seize the shoes because he did not know the significance of them at that time. They released the vehicle before they were able to get the shoes.

¶ 18 Jackson testified defendant picked him up in Chicago to take him to buy a car in Peoria. Defendant had a front-seat passenger that Jackson did not know. The passenger asked defendant to make a stop. Defendant stopped, and the passenger went in. After being inside for six to seven minutes, the passenger returned to the car. Additionally, Jackson first testified he did not recall any mention of "bags" before the front-seat passenger was arrested. After being presented with his testimony from Walker's trial, Jackson testified he heard defendant tell the front-seat passenger "get the bag." Jackson stated it could have been "bags," which is what the transcript for Walker's trial states. Jackson thought defendant was referring to cannabis or some loose bags.

¶ 19 John Oliver testified that, in July 2008, he lived next door to defendant and had a car for sale. Defendant put his rims on Oliver's car to improve the chances of selling the car, and they agreed to split the profits of the car's sale. On July 8, 2008, Oliver knew defendant was going to Chicago to pick up a buyer for the car. He expected defendant to come over that day, but defendant never did.

¶ 20 After hearing all of the evidence and the parties' arguments, the trial court found

defendant guilty as charged. Defendant filed a motion for a new trial, arguing, *inter alia*, (1) the State failed to prove beyond a reasonable doubt defendant's possession of the cocaine, and (2) the court erred by extending the speedy-trial term. At a joint hearing in January 2010, the court denied defendant's posttrial motion and sentenced him to 40 years' imprisonment. Defendant had presented the testimony of his fiancée, Tamika Rainey, and his cousin, Simone Triplett. They described defendant as a family man and a person who was making improvements in his life. Defendant filed a motion to reconsider his sentence, asserting his sentence was excessive and the court improperly considered and weighed the factors in mitigation and aggravation. On April 7, 2010, the court denied defendant's motion.

¶ 21 Also, on April 7, 2010, defendant filed a notice of appeal in compliance with Illinois Supreme Court Rule 606 (eff. Mar. 20, 2009), and thus, this court has jurisdiction under Illinois Supreme Court Rule 603 (eff. July 1, 1971).

¶ 22 II. ANALYSIS

¶ 23 A. Speedy Trial

¶ 24 Defendant first argues the trial court erred by granting an extension of the speedy-trial term because the State failed to show sufficient evidence of due diligence in obtaining Deputy Draper's testimony. The State asserts defendant has forfeited this issue because defendant did not file a motion for discharge in the trial court. Defendant asserts his objection to the motion is sufficient to preserve the issue for review, and if not, the issue should be reviewed under the plain-error doctrine (see *People v. Gay*, 376 Ill. App. 3d 796, 799, 878 N.E.2d 805, 808 (2007)). Since defendant has asserted plain error, we need not initially address forfeiture because our first step is the same regardless, *i.e.*, determining whether any error occurred at all.

See *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1059 (2010) (noting the first step in conducting a plain-error analysis is whether any error occurred).

¶ 25 Under section 103-5(b) of the Code of Criminal Procedure of 1963 (725 ILCS 5/103-5(b) (West 2008)), a court must try a person on bail within 160 days from the date the defendant demanded trial. However, the court may grant a one time extension of up to 60 days where the State has been unable to obtain evidence despite its due diligence and has provided reasonable grounds for the court to believe that it will do so at a later date. 725 ILCS 5/103-5(c) (West 2008). The decision of whether to grant an extension lies within the trial court's discretion, and this court will not disturb its determination absent a clear abuse of discretion. *People v. Exxon*, 384 Ill. App. 3d 794, 798, 896 N.E.2d 844, 848 (2008). "A trial court abuses its discretion only when its decision is arbitrary, unreasonable, or fanciful or where no reasonable person would take the trial court's view." *People v. Pelo*, 404 Ill. App. 3d 839, 864, 942 N.E.2d 463, 485 (2010). Additionally, in reviewing the trial court's decision, this court examines the entire record as it existed at the time the trial court considered the motion for extension. *People v. Terry*, 312 Ill. App. 3d 984, 990, 728 N.E.2d 669, 675 (2000).

¶ 26 Defendant argues the State failed to show due diligence in obtaining Deputy Draper's testimony. As defendant notes, the State bore the burden of proof on the issue of due diligence. See *People v. Bonds*, 401 Ill. App. 3d 668, 674, 930 N.E.2d 437, 444 (2010). Whether the State exercised due diligence is determined on a case-by-case basis. *People v. Colson*, 339 Ill. App. 3d 1039, 1047, 791 N.E.2d 650, 656 (2003). "Black's Law Dictionary defines diligence as a continual effort to accomplish something, or care, caution; the attention required from a person in a given situation." (Internal quotation marks omitted.) *Exxon*, 384 Ill.

App. 3d at 800, 896 N.E.2d at 849 (quoting Black's Law Dictionary 468 (7th ed. 1999)). In *Exson*, 384 Ill. App. 3d at 799, 896 N.E.2d at 849, the reviewing court explained the test of due diligence was whether the State began efforts to locate its witness in sufficient time to secure the witness's presence before the speedy trial-term expired.

¶ 27 Here, the facts show the State learned of Deputy Draper's December 28, 2008, departure for active military service sometime after the December 16, 2008, hearing. Deputy Draper was to be gone 9 to 12 months. On December 19, 2008, the State sought an evidence deposition of Deputy Draper and gave notice of a hearing early on December 22, 2008. Defense counsel did not receive the notice in time to make the December 22, 2008, hearing on the evidence deposition before the scheduled hearing and did not appear. The record is devoid of any efforts on the part of the State to secure another hearing on the evidence deposition. The State had been successful in getting an evidence deposition in codefendant Walker's case. The State then waited until February 26, 2009, to file a motion to continue defendant's March 3, 2009, bench trial due to Deputy Draper's absence. At that hearing, the prosecutor indicated the last he heard was Deputy Draper was expected home in October 2009. While the trial court was frustrated more was not done earlier to obtain an evidence deposition, it granted the continuance. Two days after the hearing, defendant filed his speedy-trial demand under section 5-103(b). At an April 2009 status hearing, the prosecutor indicated four felony cases existed that required the testimony of Deputy Draper. He also explained that, after the March 3, 2009, hearing, his office began contacting military personnel to get Deputy Draper back and had started the procedure for Deputy Draper's return. The exhibit attached to the continuance motion contains e-mails from one of the prosecutor's to military personnel in April 2009. At a May 2009 status hearing, the

State explained it was waiting on word from a military official as to what dates Deputy Draper would be allowed to return for a trial. A June 22, 2009, e-mail from military personnel stated Deputy Draper was due to be home on August 14, 2009.

¶ 28 Defendant takes issue with the State's failure to try a second time to obtain an evidence deposition of Deputy Draper after defense counsel failed to make the December 22, 2008, hearing. However, a reviewing court is "not required to suspend common sense in evaluating the evidence in the record." *People v. Jimerson*, 166 Ill. 2d 211, 227, 652 N.E.2d 278, 286 (1995). After the failed hearing on December 22, 2008, only a few days remained before the deputy's departure, which included the Christmas holiday. Moreover, Deputy Draper was a witness in several other pending felony cases in Livingston County. While the State was able to secure an evidence deposition in codefendant Walker's case, it is both reasonable and realistic the State was unable to secure a deposition in all of the cases, including this one. Additionally, we note that, in March 2009, the trial court was clearly upset with the wasted court time when it voiced disapproval of the State's failure to obtain the evidence deposition. Accordingly, under the circumstances of this case, we disagree with defendant the State failed to exercise due diligence by failing to try a second time to obtain an evidence deposition of Deputy Draper before his military departure.

¶ 29 Defendant also contends the State should have tried to obtain Deputy Draper's return before defendant's March 2009 speedy-trial demand. Again, common sense comes into play. This situation involves a witness overseas for 9 to 12 months in the military while this country is at war. Defendant cites no authority that a 9 to 12 month delay in his trial would have violated his constitutional right to a speedy trial. When at war, our military should not be

disrupted about matters that are not absolutely critical.

¶ 30           Once defendant made his speedy-trial demand, the State began to obtain Deputy Draper's return. The e-mails show the prosecutor emphasized the 160-day speedy-trial period and the serious nature of the cases that needed Deputy Draper as a witness. The State was then able to obtain a return date for Deputy Draper that was a few days after the expiration of the speedy-trial term in this case.

¶ 31           The aforementioned facts are distinguishable from the cases cited by defendant that found the State did not exercise due diligence. In *People v. Shannon*, 34 Ill. App. 3d 185, 187, 340 N.E.2d 129, 131 (1975), the State waited until six days before trial to obtain one witness and four days before trial to obtain two other witnesses. In *People v. Durham*, 193 Ill. App. 3d 545, 546, 550 N.E.2d 259, 260 (1990), the record contained no evidence of any effort by the State to obtain the lab report within the speedy-trial period, and the reviewing court specifically noted the State did not emphasize and explain to the crime lab the report needed to be expedited. In *People v. Battles*, 311 Ill. App. 3d 991, 1004, 724 N.E.2d 997, 1006 (2000), the State did not decide to have deoxyribonucleic-acid testing done until the 103rd day of the 120-day period and then did not attempt to test in the remaining time available. In *Exson*, 384 Ill. App. 3d at 800, 896 N.E.2d at 849, the State did not attempt to contact its witness until the 119th day of the 120-day period. Unlike those cases, the prosecutor here (1) did not wait until the end of the speedy-trial term to try to obtain Deputy Draper's return, (2) emphasized the statutory speedy-trial deadline to the military, and (3) did what was necessary to obtain Deputy Draper's return, which just happened to be a few days beyond the 160-day period.

¶ 32           Accordingly, we find the trial court did not abuse its discretion by granting a 16-

day extension of the speedy-trial period to allow for Deputy Draper's return from military service. ¶ 33

#### B. Sufficiency of the Evidence

¶ 34 Defendant next argues the State failed to prove him guilty beyond a reasonable doubt because its evidence was insufficient to show defendant possessed the cocaine found in Walker's pocket. The State disagrees.

¶ 35 When presented with a challenge to the sufficiency of the evidence, a reviewing court's function is not to retry the defendant. *People v. Givens*, 237 Ill. 2d 311, 334, 934 N.E.2d 470, 484 (2010). Rather, we consider " '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.' " (Emphasis in original.) *People v. Davison*, 233 Ill. 2d 30, 43, 906 N.E.2d 545, 553 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Under that standard, a reviewing court must draw all reasonable inferences from the record in the prosecution's favor. *Davison*, 233 Ill. 2d at 43, 906 N.E.2d at 553. Additionally, we note a reviewing court will not overturn a criminal conviction "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *Givens*, 237 Ill. 2d at 334, 934 N.E.2d at 484.

¶ 36 For defendant to be convicted of possession of a controlled substance with intent to deliver, the State had to prove beyond a reasonable doubt "(1) defendant had knowledge of the presence of the controlled substance; (2) the controlled substance was in the immediate control or possession of defendant; and (3) defendant intended to deliver the controlled substance." *People v. Beasley*, 384 Ill. App. 3d 1039, 1046, 893 N.E.2d 1032, 1038 (2008). Defendant contends the State failed to prove beyond a reasonable doubt the possession element of the

crime.

¶ 37 Possession of a controlled substance may be actual or constructive. *People v. Turner*, 373 Ill. App. 3d 121, 135, 866 N.E.2d 1215, 1227 (2007). "Actual possession is the exercise of immediate and exclusive dominion or control. [Citation.] Constructive possession is the intent and capability to maintain control and dominion." (Internal quotation marks omitted.) *Turner*, 373 Ill. App. 3d at 135, 866 N.E.2d at 1227 (quoting *People v. Eghan*, 344 Ill. App. 3d 301, 306-07, 799 N.E.2d 1026, 1031 (2003)). Constructive possession is often established by circumstantial evidence. *Turner*, 373 Ill. App. 3d at 133, 866 N.E.2d at 1226. Additionally, possession may be joint. *Givens*, 237 Ill. 2d at 335, 934 N.E.2d at 484-85. For example, a defendant's conviction for unlawful possession of cannabis has been affirmed where the defendant was the driver of the car and his only front-seat passenger was the one found holding the cigarettes containing cannabis. *People v. Bowman*, 164 Ill. App. 3d 498, 502, 517 N.E.2d 771, 774 (1988).

¶ 38 In *Bowman*, 164 Ill. App. 3d at 502, 517 N.E.2d at 774, the record showed that, right after the car was stopped, the passenger took the cigarettes out of the glove compartment. The glove compartment was within the defendant's reach and was where the defendant kept his wallet. Moreover, the defendant had removed his wallet from the glove compartment just before the passenger removed the cigarettes and hid them in his hand. The reviewing court concluded the aforementioned facts supported an inference of the defendant's knowledge and control of the cannabis sufficient to sustain his conviction. *Bowman*, 164 Ill. App. 3d at 502, 517 N.E.2d at 774.

¶ 39 The facts of this case are similar to *Bowman*. According to Walker, defendant

brought a pair of tennis shoes in a shoe box into the car and placed them on the front-passenger floorboard. At some point after seeing the police (Walker's account varied), defendant told Walker to pick up the stuff that was in the shoes and put it in his pocket, which Walker did. Deputy Draper later found three bags containing cocaine in Walker's pockets.

¶ 40 Defendant takes issue with Walker's testimony because he is an accomplice, and such testimony has inherent weaknesses and should be viewed with caution and suspicion (see *People v. McLaurin*, 184 Ill. 2d 58, 79, 703 N.E.2d 11, 21 (1998)). However, "while subject to careful scrutiny, the testimony of an accomplice, whether it is corroborated or uncorroborated, is sufficient to sustain a criminal conviction if it convinces the jury of the defendant's guilt beyond a reasonable doubt." *McLaurin*, 184 Ill. 2d at 79, 703 N.E.2d at 21. This case was bench trial, and the trial court found Walker's testimony credible. Additionally, Walker's testimony is corroborated by Jackson's testimony defendant stated "get the bag" or "bags." While Jackson stated he thought defendant was referring to loose Baggies or a bag of cannabis, the trier of fact was not bound by Jackson's belief. In fact, the court noted how uncomfortable Jackson was on the stand, and it was easy to tell when he was telling the truth and when he was not. Moreover, Deputy Draper testified he found a pair of shoes in a shoe box on the left side of the front-passenger's floorboard. Officer Fitzpatrick and Deputy Draper both testified to seeing the front-seat passenger (Walker) twice duck down in the front seat and then reappear. Thus, Officer Fitzpatrick's and Deputy Draper's testimony also corroborate Walker's story.

¶ 41 Other circumstantial evidence demonstrates defendant's intent and control over the cocaine. Defendant was the vehicle's driver, and Baggies, which are used in the sale and transportation of drugs, were on the driver's floorboard. Moreover, defendant had been

supplying Walker with heroin for a week and was the one who arranged the Chicago trip.

Defendant provides benign reasons for the corroborating evidence. However, at the appellate level, we view the evidence in the light most favorable to the State. See *Davison*, 233 Ill. 2d at 43, 906 N.E.2d at 553.

¶ 42 Additionally, we note this case is distinguishable from *People v. Day*, 51 Ill. App. 3d 916, 366 N.E.2d 895 (1977), cited by defendant. There, the defendant was the driver of a vehicle that had two other front-seat passengers and four backseat passengers. *Day*, 51 Ill. App. 3d at 917, 366 N.E.2d at 896. The police discovered a large grocery bag containing cannabis on the floor beneath the legs of the passenger seated next to the defendant in the middle of the front seat. *Day*, 51 Ill. App. 3d at 917, 366 N.E.2d at 896. This court concluded the evidence was insufficient to establish the defendant had exercised any sort of control over the grocery sack of marijuana found on the floor since the sack could have belonged to someone other than the defendant. *Day*, 51 Ill. App. 3d at 917-18, 366 N.E.2d at 897. Moreover, his status as owner-driver of the vehicle did not mean he was in possession of everything within the passenger area when passengers were present who may have been the ones in possession of the contraband. *Day*, 51 Ill. App. 3d at 918, 366 N.E.2d at 897. In this case, the State presented evidence directly linking defendant to the cocaine and showing his control of it. Unlike *Day*, the State does not rely on defendant's status as the driver to establish his possession.

¶ 43 Accordingly, we find the State's evidence was sufficient for the trier of fact to find beyond a reasonable doubt defendant had constructive possession of the cocaine in Walker's pocket.

¶ 44 C. Sentence

¶ 45 Defendant last asserts his 40-year sentence is excessive because the sentence is disproportionate to his criminal history and involvement in this offense and he exhibited the potential for rehabilitation. The State argues defendant forfeited this argument by failing to state the specific reasons why his sentence was excessive in his motion to reconsider his sentence. The case the State cites in support of its argument, *People v. Smith*, 268 Ill. App. 3d 1008, 1012, 645 N.E.2d 384, 387 (1994), is distinguishable as that case addressed a blanket statement in a posttrial motion attempting to preserve all motions and objections. In his motion to reconsider, defendant argued his sentence was excessive and again argues that on appeal. Naturally, his brief on appeal is more in depth than his motion to reconsider in the trial court. Accordingly, we find defendant has not forfeited this issue on appeal.

¶ 46 This court has explained appellate review of a defendant's sentence as follows:

" A trial court's sentencing determination must be based on the particular circumstances of each case, including factors such as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. [Citations.] Generally, the trial court is in a better position than a court of review to determine an appropriate sentence based upon the particular facts and circumstances of each individual case. [Citation.] Thus, the trial court is the proper forum for the determination of a defendant's sentence, and the trial court's decisions in regard to sentencing are entitled to great deference and weight. [Citation.] Absent an abuse of discretion by the trial court, a sentence may not be

altered upon review. [Citation.] If the sentence imposed is within the statutory range, it will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense.' " *People v. Hensley*, 354 Ill. App. 3d 224, 234-35, 819 N.E.2d 1274, 1284 (2004) (quoting *People v. Kennedy*, 336 Ill. App. 3d 425, 433, 782 N.E.2d 864, 871 (2002)).

The sentencing range for possession with the intent to deliver a substance containing cocaine and weighing between 100 and 400 grams is 9 to 40 years' imprisonment. See 720 ILCS 570/401(a)(2)(B) (West 2008). Since defendant had a prior drug conviction, he could be sentenced to a prison term twice the maximum term otherwise authorized, extending his sentencing range to 80 years' imprisonment. See 720 ILCS 570/408(a) (West 2008). Thus, defendant's 40-year sentence falls in the middle of the sentencing range.

¶ 47 Defendant argues the 40-year sentence is disproportionate to his conduct in this case and emphasizes the fact that he was not in possession of the cocaine. While he was not in possession of the cocaine, the trial court found he was the "ring leader" and Walker was "an easy scapegoat." Those findings are supported by the record that shows it was defendant who arranged the trip from Chicago to Peoria, brought the cocaine into the car, and then ordered Walker to hide the cocaine on his person when the police entered the picture. Additionally, the crime involved 254 grams of cocaine, a large amount. Thus, we find defendant's sentence is not disproportionate to his actions in this crime.

¶ 48 Additionally, defendant's extensive criminal history includes six prior felonies,

three of which involved a controlled substance. While his longest sentence had only been 42 months, defendant had already served six prison terms and continued to break the law. Clearly, short prison terms were not deterring defendant from continuing to violate the law and being involved in the drug trade. A long sentence was needed to deter defendant and others from such conduct.

¶ 49 Last, defendant notes his rehabilitative potential. "A defendant's rehabilitative potential and other mitigating factors are not entitled to greater weight than the seriousness of the offense." *People v. Phippen*, 324 Ill. App. 3d 649, 652, 756 N.E.2d 474, 477 (2001). We presume the trial court considered the mitigating factors presented to it. *Phippen*, 324 Ill. App. 3d at 652, 756 N.E.2d at 477. Moreover, the trial court is not required to reduce a sentence from the maximum allowed due to the existence of mitigating factors. *Phippen*, 324 Ill. App. 3d at 652, 756 N.E.2d at 477. Here, defendant had numerous chances to rehabilitate himself after his previous trips to prison but chose instead to reoffend. The trial court recognized defendant's general education certificate and family and noted those mitigating factors did not come close to the aggravating factors. Our job is not to reweigh the factors involved in the trial court's sentencing decision. *Phippen*, 324 Ill. App. 3d at 653, 756 N.E.2d at 478.

¶ 50 Accordingly, we find the trial court did not abuse its discretion by sentencing defendant to 40 years' imprisonment.

¶ 51 III. CONCLUSION

¶ 52 For the reasons stated, we affirm the Livingston County circuit court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 53

Affirmed.