

SECOND DIVISION
MAY 22, 2012

No. 1-10-0319

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. 08 CR 8901
)	
ROBERT JONES,)	Honorable
)	John J. Fleming,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

- ¶ 1 *Held:* The defendant could not be convicted of both the inchoate offense of criminal drug conspiracy and the principal offenses of delivery of a controlled substance. Accordingly, his conspiracy conviction was vacated and his sufficiency of the evidence challenge to that conviction became moot. The mittimus was corrected to reflect the proper statutory citations for the offenses for which the defendant was found guilty and the proper amount of presentence incarceration credit.
- ¶ 2 Following a bench trial, defendant Robert Jones was found guilty of criminal drug conspiracy, and three counts of delivery of a controlled substance. The defendant was originally charged with committing the offenses within 1,000 feet of a church, however, the trial court found that there was insufficient evidence to support the charges that the deliveries were made within the requisite distance from a church, and convicted the defendant only of the lesser included offenses. On appeal, the defendant contends that the trial court erred when it convicted him of both the

inchoate offense of conspiracy and the principal offenses of delivery of a controlled substance. The defendant argues that the delivery convictions should be vacated. The State agrees that the defendant cannot be convicted of both offenses, but argues, instead, that the conspiracy conviction should be vacated. The defendant also contends that his mittimus must be amended to reflect the proper statutory subsections under which he was convicted and to reflect the proper presentence custody credit. We affirm in part, vacate in part, and order the clerk of the circuit court to correct the mittimus.

¶ 3 According to the State's theory of the case, the defendant conspired with drug sellers to lead an undercover police officer posing as a buyer to them. The undercover officer made three "controlled buys," and used an audio recording device to document the drug sales. On appeal, the defendant does not challenge his convictions for delivery of a controlled substance. Instead, the defendant contends that the State presented insufficient evidence of a conspiracy with the sellers, arguing that he was acting as a "buyer's agent" in the transactions.

¶ 4 At trial, Chicago police officer Michael Clemmons testified that, during January through March of 2008, he was involved in an undercover investigation of drug sales in the area of 63rd Street and Cottage Grove.

¶ 5 On January 4, 2008, he encountered the defendant on 63rd Street and asked about buying "butter" or crack cocaine. The defendant led Clemmons to an apartment at 6116 South Cottage Grove and knocked on the window. The defendant told a man inside that he needed three, the man handed the defendant three bags of suspected crack cocaine, and the defendant handed the bags to Clemmons. In exchange Clemmons handed the defendant \$30 in prerecorded funds, and the defendant handed the money to the man in the apartment.

¶ 6 On February 12, 2008, Clemmons again encountered the defendant on 63rd Street. Clemmons told the defendant that he wanted four "dimes." The defendant led Clemmons to an apartment at 6439 South Cottage Grove. The defendant knocked on the door and was greeted by a

different individual. The individual handed the defendant four "rocks" of suspected crack cocaine, and the defendant handed Clemmons the rocks. In exchange, Clemmons gave the defendant \$40 of prerecorded funds, and the defendant gave the money to the individual in the apartment. As they were walking away from the apartment, the defendant gave Clemmons his phone number and told him to call if he was interested in purchasing more cocaine.

¶ 7 On February 15, 2008, Clemmons called the defendant, and asked to purchase six rocks. The defendant and Clemmons met near 63rd Street and Cottage Grove. The defendant led Clemmons to an apartment located at 6133 Cottage Grove. There they met a third individual. Clemmons and the defendant had a brief conversation with the individual, he left, and when he returned he spat six bags of cocaine out of his mouth. He handed the cocaine to Clemmons, and Clemmons handed him \$60 of prerecorded funds in exchange. The defendant asked Clemmons for one of the rocks of cocaine, but Clemmons told him that he needed to take all six with him.

¶ 8 On cross-examination, Clemmons admitted that, after each transaction, the defendant asked Clemmons to "help him out," and Clemmons gave him a small amount of money.

¶ 9 Chicago police officer Ricky Hughes testified that, after the undercover investigation was concluded, he used a counting wheel to measure the distance from the location of the drug sales to local churches. He testified that the distance was less than 1,000 feet. He also testified that he knew the buildings were churches because he read the signs in front of the buildings.

¶ 10 The parties stipulated that the items recovered by Clemmons all tested positive for the presence of cocaine.

¶ 11 Following argument by the parties, the trial court found that the State had presented insufficient evidence that the churches identified by the police officer were in fact used as places of worship. The court found the defendant guilty of three counts of delivery of a controlled substance and one count of criminal drug conspiracy. The trial court further held that the convictions would "merge" because the defendant could not be convicted of both the inchoate and principal offenses.

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However, the trial court subsequently sentenced the defendant to concurrent terms of six years' incarceration on "each count." The mittimus reflects convictions on both the conspiracy count and the delivery counts.

¶ 12 The defendant first contends that he cannot properly be convicted of both the inchoate and principal offenses of criminal drug conspiracy and delivery of a controlled substance. The State concedes this point, however, the parties disagree about which offenses should be vacated. The defendant argues that the delivery convictions should be vacated, and the State argues that the conspiracy conviction should be vacated.

¶ 13 The relevant provision in section 8-5 of the Criminal Code of 1961 (the Code) (720 ILCS 5/8-5 (West 2008)) is simple and straightforward: "No person shall be convicted of both the inchoate and the principal offense." In cases such as the one before us, a defendant cannot be convicted of both criminal drug conspiracy and delivery of a controlled substance with respect to the same drugs. See *People v. Coleman*, 391 Ill. App. 3d 963, 976 (2009). The State concedes this point, and thus it is clear that we must vacate either the conspiracy conviction or the delivery convictions.

¶ 14 The defendant argues that the trial court intended to merge the delivery convictions into the conspiracy conviction and that we should find the trial court's oral pronouncement controlling. However, society has an interest in seeing convictions entered for offenders whose guilt has been proven beyond a reasonable doubt, and on appeal a reviewing court may correct an erroneous trial court ruling that merges one conviction with another. *People v. Yaworski*, 2011 IL App (2d) 090785,

¶ 10.

¶ 15 When faced with excess convictions, this court must vacate the conviction for the less-serious offense. See *People v. Alvarado*, 2011 IL App (1st) 082957, ¶ 23 (addressing a one-act, one-crime rule violation). Under section 405.1(c) of the Illinois Controlled Substances Act (720 ILCS 570/405.1(c) (West 2008)), the sentence for a criminal drug conspiracy is the same as that for the

offense which is the object of the conspiracy. However, although often silent on their reasoning, reviewing courts have consistently treated the principal offense as more serious than the inchoate offense and have vacated the conspiracy conviction in similar circumstances. See, e.g., *People v. Coleman*, 391 Ill. App. 3d 963, 976 (2009); *People v. Lewis*, 361 Ill. App. 3d 1006, 1019 (2005); *People v. Castaneda*, 299 Ill. App. 3d 779, 781 (1998); *People v. Sonntag*, 238 Ill. App. 3d 854, 857 (1992). The sole case the defendant cites in support of allowing the conspiracy count to stand involves a conspiracy to commit theft case, where the State *nol-prossed* the underlying theft charges. See *People v. Brouillette*, 92 Ill. App. 2d 168, 173 (1968). Accordingly, in this case we vacate the defendant's criminal drug conspiracy conviction.

¶ 16 The defendant next contends that he was not proven guilty beyond a reasonable doubt of criminal drug conspiracy. However, because we have vacated that conviction as violative of section 8-5 of the Code, this contention is now moot. See *People v. Hill*, 2011 IL 110928, ¶ 6. Therefore, we need not address the sufficiency of the evidence supporting the defendant's conspiracy conviction.

¶ 17 The defendant next contends, and the State concedes, that his mittimus must be corrected to reflect that he was convicted only of delivery of a controlled substance, not delivery within 1,000 feet of a church. We agree with the parties and order the clerk of the circuit court to correct the mittimus to reflect two counts of the Class 2 felony of delivery of a controlled substance under section 401(d) of Illinois Controlled Substances Act (720 ILCS 570/401(d) (West 2008)), and one count of the Class 1 felony of delivery of a controlled substance under section 401(c)(2) of the Illinois Controlled Substances Act (720 ILCS 570/401(c)(2) (West 2008)).

¶ 18 Finally, the defendant contends, and the State concedes, that his mittimus must be corrected to reflect presentence custody credit of 638 days. We agree with the parties and order the clerk of the circuit court to amend the mittimus accordingly.

¶ 19 For the foregoing reasons, we vacate the defendant's criminal drug conspiracy conviction, and direct the clerk of the circuit court to correct the mittimus to reflect the proper statutory citations

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for the defendant's remaining convictions and the proper calculation of the defendant's presentence credit. We affirm the judgment of the circuit court of Cook County in all other aspects.

¶ 20 Affirmed in part and vacated in part; mittimus corrected.