2011 IL App (1st) 101256-U

FIFTH DIVISION
March 2, 2012

No. 1-10-1256

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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 13741
	)	
FRANCISCO ECHENIQUE,	)	Honorable
	)	William T. O'Brien,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Epstein and Justice Joseph Gordon concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial testimony of a police officer, though contradicted by defense witnesses, was sufficient to sustain defendant's conviction for possession of a controlled substance with intent to deliver where 49 small baggies of cocaine weighing over 18 grams were found in his sock.

¶ 2 Following a bench trial, defendant Francisco Echenique was convicted of possession of a controlled substance (cocaine) with intent to deliver and was sentenced to six years in prison. On appeal, defendant contends he was not proven guilty beyond a reasonable doubt where the testimony of the State's sole witness was incredible. Defendant asserts in the alternative that his

conviction should be reduced to simple possession because there was insufficient evidence of intent to deliver the cocaine. We affirm.

¶ 3 Defendant was charged with possession of 15 or more grams but less than 100 grams of cocaine with intent to deliver. At trial, Officer Junkovic testified that on the evening of June 24, 2008, he and his partner, Officer Macniff, were on duty in an unmarked police vehicle. At about 9:50 p.m. they were heading northbound on Kedzie when Junkovic observed a white Cadillac in front of them make a right turn from Kedzie onto Cortland without utilizing its turn signal. Junkovic also turned onto Cortland, activated his emergency equipment, and curbed the Cadillac. Defendant was in the driver's seat of the Cadillac, another man was in the passenger seat. Junkovic approached the driver's side of the vehicle. Junkovic testified at trial that when he observed a green baggie on the driver's lap, he asked defendant to exit the vehicle and then recovered the baggie. A blue Ziploc baggie containing suspect cannabis was received in evidence at trial. Junkovic corrected his testimony, stating the bag he retrieved was blue, not green, and that his belief the baggie was green "was an honest mistake."

¶ 4 Junkovic placed defendant in custody and conducted a custodial search by patting defendant's outer garments. inside pockets, and up and down his legs. Defendant was wearing a shirt, blue jeans that covered his high-top gym shoes, and white socks. Defendant's passenger, Jose Virola, was not searched. Junkovic and his partner were the only police officers involved in the initial traffic stop. Junkovic had never before seen defendant. During the stop, two other officers arrived, determined everything was all right, and left. No one else was present on the sidewalk or in the street. About 15 minutes passed from the time Junkovic activated his lights until they left the scene at about 10:05 p.m.

¶ 5 Defendant was transported to the police station and placed in a holding cell. Junkovic asked defendant to remove his shoes and socks. As defendant did so, Junkovic observed a clear

plastic bag in defendant's sock beneath the tongue of his shoe. At the site of the arrest, Junkovic had not noticed defendant's shoes because his jeans trousers came down over them. The plastic bag was slightly smaller than a golf ball and contained 49 smaller bags. Junkovic recalled that at the preliminary hearing, he testified the bag was "[a] little larger than a golf ball." Junkovic did not submit the bag for fingerprint testing.

¶ 6 During cross-examination of Junkovic, defense counsel opened the inventory envelope, removed what he described as the "little packet" that had contained the 49 smaller bags, and asked Junkovic to place the contraband in the bag "and show me how it was a little smaller than a golf ball." The State's objection, that the cocaine was now in "lab bags" after being tested and would have to be put back in "the original small knotted bags and then put in there," was sustained.

¶ 7 The parties stipulated to the chain of custody and chemical composition of the recovered substances. Of the 49 small bags recovered, 36 were tested; their contents were positive for cocaine and weighed 15.3 grams. The total of the 49 bags weighed 18.4 grams. The State rested.

¶ 8 Kevin Peters testified for the defense that he was an attorney and represented defendant in a federal court civil suit alleging false arrest in 2007 against Chicago police officers Vasquez and Jaurique. The suit was settled, and on June 24, 2008, Peters tendered to defendant a settlement check in the amount of about $16,000. The total settlement was $25,000 and Peters' fee was one-third of that amount. Peters subsequently learned that defendant was arrested later that same day. Peters has sued the Chicago Police Department hundreds of times and well over 95 % of the cases have settled. He has had other clients whom police have retaliated against. After defendant's case settled, defendant asked Peters whether he should be concerned about the officers that he had sued, and Peters told him that "the odds are that nothing's going to happen,

but I can't guarantee anything." In the majority of Peters' cases, there has been no retaliation against his clients, "but there have been a few times."

¶ 9 Jose Virola testified he is a friend of defendant and has known him for 15 years. Defendant's nickname is Cisco. Virola was present when defendant was arrested on June 24, 2008. On October 26, 2007, Virola came to court and witnessed a hearing on a motion in a case in which Officer Jaurique testified and defendant was the accused. Virola was aware that defendant subsequently filed a lawsuit against Jaurique and other police officers regarding defendant's arrest in that case.

¶ 10 Virola testified that on June 23, the day before defendant's arrest, both attorney Peters and defendant's trial attorney warned defendant of the possibility that he may have a problem with Officer Jaurique and instructed him not to travel alone. Both attorneys had also advised Virola by phone that day to be with defendant, to help him out. Consequently, Virola and his friends had a policy that defendant always be with someone when he traveled.

¶ 11 On June 24, 2008, Virola and defendant met in the late afternoon. It was a sunny summer day and defendant was dressed in a white tee shirt, dark blue jeans shorts, and sandals; he was not wearing socks or gym shoes. The two men ate at a restaurant and went to a bank where defendant deposited a check. When asked whether defendant received any cash from the deposit, Virola testified, "No, he didn't. He was depositing a check. That's all he was doing." The two men then went to Humboldt Park to watch a softball game. At about 8:45 p.m. they left the park and drove north on Kedzie in defendant's Cadillac. They were near Hirsch when Virola noticed an unmarked police car with two officers in it and saw that Officer Jaurique was driving the police vehicle. Jaurique was not in uniform but he wore a vest and badge. Virola recognized Jaurique from the 2007 court case and jokingly said to defendant, "There goes your buddy the cop." Then defendant and Virola noticed that Jaurique made a U-turn and began to follow

defendant's car. Virola told defendant that they should start making phone calls to mutual friends. Virola took out his cell phone and made calls to two friends, a man named Sanchez and a woman named McDavia. He told them to meet him and defendant at Kedzie and Cortland. He also told them to phone other people. Defendant also made calls on his cell phone. When defendant made a right turn onto Cortland, Jaurique stayed right behind them and activated the lights of his police car after turning onto Cortland. Defendant stopped his car at Cortland and Albany. The police car pulled up behind and "just stood there" with its lights flashing. Jaurique and the other officer did not exit their vehicle.

¶ 12 A second unmarked police car came to the scene and stopped at the side of the first police car. Two male police officers from the second car, Junkovic and Macniff, approached defendant's car. The officers told defendant and Virola to get out and took them to the rear of the Cadillac. The two officers handcuffed defendant and Virola together and then thoroughly searched defendant's car. Neither officer said that he found cannabis in the car. At trial, Virola was shown the blue bag and stated he had never seen the bag before. The officers searched defendant and Virola but recovered nothing. Virola was allowed to leave when Macniff determined there were no warrants out for him. By then, close to an hour had passed. There were "quite a few" people on the street by then, "anywhere between 30 to 40 people there." One of the persons there was Sanchez, one of the two persons Virola had called on his cell phone.

¶ 13 On the next day, defendant's wife told Virola that defendant had been arrested for having drugs in his car. Virola knew that no drugs were found in the car. However, Virola did not go to the police station to report that defendant was falsely arrested. He did not report that Officer Jaurique had followed them and did not file a complaint with the police department.

¶ 14 Alexander Martinez, a close friend of defendant, testified that he saw defendant arrested at Cortland and Albany on June 24, 2008, after Virola phoned Martinez to go to Cortland and

Albany. Martinez was in a car with his girlfriend and his sister. When he arrived at about 9 p.m., there were about 10 people there, but later about 20 or 30 people were present. Martinez saw defendant's car, two unmarked police cars side by side, and four officers. Defendant and Virola were handcuffed in back of defendant's car. Then one of the unmarked police cars left. Martinez saw police officers search defendant and his car. He did not see whether they found anything. About an hour passed before the police left with defendant. Defendant was wearing jeans shorts, a white shirt, and black sandals that evening. He was not wearing gym shoes, socks, or long pants. Defendant's lawyer contacted Martinez two or three days later and told him to remember what defendant was wearing.

¶ 15 Carlos Sanchez testified he was a friend of defendant, whom he knew as Cisco. On June 24, 2008, he was going to the store at Albany and Cortland at about 8:45 p.m. when he saw defendant's white Cadillac pulled over by an unmarked police car containing two male officers in plain clothes. About six to eight people were in the area. The officers handcuffed defendant and Virola, searched them, and searched defendant's car. Another unmarked police car came, the first police car left, and officers in the second car searched defendant's car again. They were there for about an hour until they left with defendant.

¶ 16 Maria Felix, a friend of defendant for more than 20 years, testified that on June 25, 2008, defendant telephoned her and asked her to bring his citizenship papers to the Dirksen Federal Building. On the following day, June 26, Felix went downtown to the federal building and brought defendant's immigration papers to the Immigration Department. About one-half hour later, defendant was released to her. Defendant was wearing dark blue jeans shorts, black sandals, and a white shirt. The white tee shirt did not have any printing on it. A couple of days after that, at a meeting where several people were present, defendant's attorney told Felix to remember what defendant had been wearing.

¶ 17 The parties stipulated that when defendant was booked into Division 11 of Cook County Jail on June 25, 2008, an inventory slip of his clothing was prepared. Subsequently, a subpoena was served on the jail for production of the inventory slip. Jesse Anderson, the superintendent of Division 11, would testify that in response to the subpoena, he made a thorough search for the clothing inventory slip but was unable to find it. The defense rested.

¶ 18 In rebuttal, the State introduced a prior 2001 conviction of Alexander Martinez for aggravated unlawful use of a weapon, a 2007 felony conviction of Carlos Sanchez for delivery of cannabis, and a 2006 conviction of Maria Felix for possession of a controlled substance. The State also presented defendant's booking photograph showing that at the time of his arrest, he was wearing a white tee shirt with writing on it.

¶ 19 The trial court found defendant guilty as charged. Stating that the determining factor was credibility, the court concluded that the officer's version was more credible than that of the defense witnesses whom the court described as "altogether terrible" and "highly incredible." The court also concluded there was an intent to deliver, based on the amount of narcotics and the number of bags in which it was packaged. In denying defendant's posttrial motion, the court found that inconsistencies in the officer's testimony were not material, while the defense witnesses were consistent only on one point but were inconsistent on other points and that their testimony was incredible. Defendant was sentenced to six years in prison.

¶ 20 On appeal, defendant contends that he was not proven guilty beyond a reasonable doubt of possession of cocaine with intent to deliver, and his argument is in two parts. Defendant first argues that the evidence did not establish beyond a reasonable doubt that the cocaine was found on his person where the testimony of the State's lone witness was self-contradictory and incredible and the defense witnesses presented evidence of a pretextual traffic stop and the planting of evidence by police in retaliation against defendant for his prior successful lawsuit for

false arrest. Alternatively, defendant contends that, assuming *arguendo* he did possess the cocaine, the evidence failed to establish that he had the requisite intent to deliver the cocaine.

¶ 21 When reviewing a challenge to the sufficiency of the evidence in a prosecution for possession of a controlled substance with intent to deliver, the reviewing court must determine 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. *People v. Butler*, 304 Ill. App. 3d 750, 755 (1999). This means that the reviewing court must allow all reasonable inferences from the record in favor of the prosecution. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). In a bench trial, the trial court observes the witnesses and is responsible for judging their credibility, resolving any inconsistencies, determining the weight to give to their testimony, and drawing reasonable inferences from all the evidence presented. *People v. Irvine*, 379 Ill. App. 3d 116, 132 (2008). "Because the trial judge is in a superior position to weigh the evidence and decide on the credibility of the witnesses, we may not reverse the judgment merely because we might have reached a different conclusion." *People v. Love*, 404 Ill. App. 3d 784, 787 (2010).

¶ 22 Allowing for all reasonable inferences in favor of the prosecution, we find no basis on which to reverse the judgment of the trial court. The evidence against defendant consisted primarily of the testimony of Officer Junkovic, who testified in detail about stopping defendant's vehicle for a traffic violation and seeing in plain view on defendant's lap a bag containing what Junkovic believed was a contraband narcotic substance. After patting defendant down at the scene of arrest, Junkovic conducted a more thorough search of defendant at the police station and discovered a bag containing a number of smaller bags of suspected cocaine. Junkovic stated he did not discover the cocaine during his cursory search of defendant at the scene of arrest because defendant's jeans covered his shoes. Junkovic's testimony, combined with the stipulation

regarding the composition and amount of the substance retrieved from defendant's shoe, was sufficient to establish defendant's guilt beyond a reasonable doubt.

¶ 23 Labeling Junkovic's testimony "fantastic," defendant contends it was incredible that he would have allowed himself to be found with a bag of marijuana in plain view on his lap when stopped by police and that Junkovic would fail to discover the cocaine in defendant's sock during the on-street pat-down search. We will not reverse a conviction simply because the defendant claims that a witness was not credible. *People v Bannister*, 378 Ill. App. 3d 19, 40 (2007).

¶ 24 Defendant asserts that Junkovic's credibility was impeached by his testimony that the marijuana found on defendant's lap was enclosed in a green bag, when in fact the bag was blue. Junkovic's testimony concerning the color of the bag was a minor flaw and did not create a reasonable doubt of defendant's guilt. See *People v. Lee*, 376 Ill. App. 3d 951, 956 (2007). A specific flaw in a police officer's testimony does not necessarily destroy the officer’s credibility as a whole. *Cunningham*, 212 Ill. 2d at 285.

¶ 25 The court was well aware that the determining factor in the prosecution was the credibility of the witnesses. The court found that Junkovic was more credible than the defense witnesses whose testimony the court found to be "altogether terrible" and "highly incredible." As the finder of fact, the trial court was entitled to credit Junkovic's testimony and to disregard that of the defense witnesses. See *Bannister*, 378 Ill. App. 3d at 41. We note that there were major inconsistencies in the testimony of the defense witnesses concerning whom Virola phoned from defendant's car, where Virola and defendant's friends were told to meet defendant, whether two officers or four officers left their police cars at the arrest scene, and whether the police searched defendant's car once or twice.

¶ 26 Defendant also contends that this court "should presume" that the contents of the missing jail inventory slip would have refuted Junkovic's testimony that defendant was wearing gym

shoes and socks, not sandals as the defense witnesses claimed. The inventory slip was described as a Corrections Department form listing defendant's personal clothing and effects worn when he was received at Division 11 of Cook County Jail on the day after his arrest. In support of his contention, defendant refers us to *People v. Danielly*, 274 Ill. App. 3d 358 (1995). There, after we reversed an aggravated criminal sexual assault conviction on other grounds, we recommended in *dictum* that defendant was entitled to a particular jury instruction on remand where the police returned the complainant's underwear to her and it was later destroyed. The suggested instruction stated: "If you find that the State has allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State's interest." We do not find *Danielly* controlling in the present case. In *Danielly*, the item in question was evidence of the crime that could have been submitted to testing, and there was testimony that it was lost because the police returned it to the victim and it was later destroyed.

¶ 27 In the instant case, although defense counsel asserted in the trial court that the disappearance of the inventory slip was a suspicious "coincidence," on appeal defendant does not claim bad faith on the part of the State in the disappearance of the slip. He asserts only that the document was "evidence" that was in the State's control, and that its disappearance raises the inference that its contents would have been favorable to the defense and unfavorable to the State.

¶ 28 A number of Illinois decisions have affirmed criminal convictions notwithstanding the loss or destruction of evidence which defendants believed would have been helpful to their defense. See, e.g., *People v. Nunn*, 184 Ill. App. 3d 253 (1989) (audio tape recording); *People v. Luallen*, 188 Ill. App. 3d 862 (1989) (video tape of defendant); *People v. Hall*, 235 Ill. App. 3d 418 (1992) (tape recording of witness's interview); *People v. Vargas*, 116 Ill. App. 3d 787 (1983) (tape recordings of police conversations). Here, we conclude that the unavailability of the Cook County Jail inventory slip was insufficient to overturn defendant's conviction.

¶ 29 Alternatively, defendant contends that the evidence was insufficient to support an inference of intent to deliver the cocaine beyond a reasonable doubt. Defendant was charged by information with a Class X felony, possession with intent to deliver 15 or more grams but less than 100 grams of cocaine, in violation of section 401(a)(2)(A) of the Illinois Controlled Substances Act (Act) (720 ILCS 570/401(a)(2)(A) (West 2008)). It was unrebutted that the suspected cocaine found in defendant's sock was wrapped in 49 small bags which in turn were in one larger bag. The parties stipulated that 36 of the 49 small bags were tested and their contents tested positive for cocaine. The 36 tested bags weighed 15.3 grams, and the aggregate weight of the 49 bags was 18.4 grams.

¶ 30 To sustain a charge of possession of a controlled substance with intent to deliver, the State must prove: (1) 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. Sanchez*, 388 Ill. App. 3d 467, 473 (2009), citing *People v. Robinson*, 167 Ill. 2d 397, 407 (1995). Whether the evidence is sufficient to prove intent to deliver must be determined on a case-by-case basis. *Id*. at 412-13.

¶ 31 Here, the trial court relied on *Robinson* in arriving at its conclusion that the element of intent to deliver was established beyond a reasonable doubt. In *Robinson*, the defendant was arrested in an apartment after he was observed throwing a plastic bag or packet out of a window. Inside the bag were four tinfoil packets, later determined to contain phencyclidine (PCP), and 36 clear plastic bags containing a white powdery substance. A forensic chemist tested the white powdery substance in 15 of the 36 bags and determined that it was cocaine and weighed a total of 1.47 grams; the aggregate weight of the 36 bags of cocaine was 2.8 grams. A jury convicted defendant on two counts of possession of a controlled substance with intent to deliver. The appellate court reversed defendant's convictions after concluding that the State had failed to

prove the element of intent to deliver beyond a reasonable doubt. The appellate court ruled that the amount of narcotics was insufficient to support an inference that the narcotics could not have been intended for personal consumption and that the fact the narcotics were packaged in 40 individual packets, without more, was insufficient to establish intent to deliver beyond a reasonable doubt. *People v. Robinson*, 252 Ill. App. 3d 1023, 1036-37 (1993).

¶ 32 In reversing the appellate court and affirming the judgment of the trial court, the supreme court observed that direct evidence of intent to deliver is rare and "such intent must usually be proven by circumstantial evidence." *Robinson*, 167 Ill. 2d at 408. The court observed that in considering circumstantial evidence necessary to support an inference of intent to deliver, Illinois courts have considered many different factors as probative of intent to deliver, such as whether the amount of drugs is too large to be viewed as being for personal consumption, the purity of the confiscated drug, the possession of drug paraphernalia, weapons, large amounts of cash, police scanners, beepers or cell phones, and the manner in which the substance is packaged. *Id*.

¶ 33 Defendant asserts that none of the factors enumerated in *Robinson* was present here. He contends there was no evidence that Junkovic viewed defendant engaging in a narcotics transaction; no money, weapons, scanners, or paraphernalia were found; and no evidence was introduced concerning the purity of the cocaine. We note that defendant was in possession of a cell phone, one of the factors listed in *Robinson*. Since that 1995 decision, cell phone use has become prevalent and we believe should be discounted as probative of an intent to deliver a controlled substance. However, two other factors listed in *Robinson* as probative of intent to deliver were present here, namely, the amount of the substance being too large to be for personal consumption and the manner in which the substance was packaged. The supreme court noted "that the quantity of controlled substance alone can be sufficient evidence to prove an intent to

deliver beyond a reasonable doubt *** where the amount of controlled substance could not reasonably be viewed as designed for personal consumption." *Id*. at 410-11.

¶ 34 The trial court received no testimony as to what quantity of cocaine could be considered inconsistent with personal use. However, we agree with the State that the amount of cocaine recovered from defendant's person, more than 18 grams, was simply too large to be considered for personal consumption. Section 402(a)(2)(A) of the Act makes possession of 15 or more grams of cocaine a Class 1 felony. 720 ILCS 570/402(a)(2)(A) (West 2008). Section 401(a)(2)(A) of the Act makes possession of that amount with intent to deliver a Class X felony. The amount of cocaine recovered here was well over six times the amount recovered in *Robinson*. Defendant has cited no authority where cocaine in excess of 15 grams has been held to be an amount consistent with personal consumption.

¶ 35 The State also contends that the packaging of the large amount of cocaine into 49 separate small baggies indicated an intent to deliver the cocaine. In *Robinson*, the court noted that, "generally, when a defendant is charged with possession of a controlled substance, in appropriate circumstances, packaging alone might be sufficient evidence of intent to deliver." *Id*. at 413. In *Robinson*, the 40 individual parcels, when combined with other appropriate circumstances, namely, anonymous tips of drug dealing and the amount of late-night traffic at the apartment, were sufficient to support the guilty verdict. *Id*. at 413. In *People v. Clark*, 406 Ill. App. 3d 622, 631 (2010), this court refused to reduce defendant's conviction for possession of heroin with intent to deliver to simple possession, finding that his possession of 24 packets of heroin was "highly indicative of one's intent to deliver rather than to personally consume." In *People v. Tolliver*, 347 Ill. App. 3d 203, 220 (2004), we affirmed defendant's conviction for possession with intent to deliver based upon the separate packaging of 30 bags and a quantity of 7.6 grams of cocaine. Cases cited by defendant involved far fewer individual packages of a controlled

substance than the 49 baggies here and with an aggregate weight less than that comprising a Class 1 felony amount and considerably less than the quantity of cocaine recovered here.

¶ 36 It was not unreasonable for the trier of fact in this case to conclude that the cocaine found on defendant's person and packaged into 49 individual baggies, when combined with the fact the quantity exceeded 18 grams, evinced an intent by defendant to deliver the cocaine. Moreover, when stopped by police, defendant was in his car, not in a stationary location such as his residence where one might stash a large quantity of cocaine for his own personal consumption. A trial court reasonably could conclude that when defendant placed 18 grams of cocaine, divided into 49 separate bags, inside his sock that day, he did not intend that the cocaine was solely for his own personal use.

¶ 37 Defendant argues that the smaller individual bags would have been consistent with the form in which he would have purchased the cocaine for his own individual use. He contends he had received a $16,000 check that day and thus had no need to sell drugs, but he had sufficient money to buy drugs and may have done so "in celebration of his windfall." This speculative argument fails because Virola testified that at the bank defendant merely deposited his $16,000 check and received no cash back. Thus, there was no testimony that defendant would have had the funds that day to purchase a large supply of cocaine.

¶ 38 We have no basis to overturn the trial court's finding that the evidence was sufficient to support the inference of an intent to deliver cocaine beyond a reasonable doubt. We conclude that, when all of the evidence is viewed as a whole and in the light most favorable to the State, a rational trier of fact could have found beyond a reasonable doubt that the State proved defendant guilty of possession of cocaine with intent to deliver. For the reasons stated, we affirm the judgment of the trial court.

¶ 39 Affirmed.