

No. 1-10-1661

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 16339 |
| |) | |
| JOSHUA JACKSON, |) | Honorable |
| |) | John Kirby, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held:* The evidence was sufficient to convict defendant of possession of a controlled substance with intent to deliver within 1,000 feet of a school, and the mittimus and fines and fees order must be modified; judgment affirmed as modified.

¶ 2 Following a jury trial, defendant, Joshua Jackson, was found guilty of possession of a controlled substance with intent to deliver within 1,000 feet of a school and sentenced to six years' imprisonment. On appeal, defendant contends his conviction should be reduced to simple possession of a controlled substance because the State failed to prove the requisite intent to deliver. Defendant also maintains he was improperly assessed a \$200 DNA analysis fee, and that his mittimus must be corrected to accurately reflect the number of days he spent in presentence custody credit and the proper charge of which he was found guilty. We affirm as modified.

¶ 3 At trial, Officer Anthony Bainsley testified that on August 12, 2009, he was working with his partner Officer Brian Ranieri patrolling the area near 605 North Ridgeway Avenue in Chicago

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in a helicopter, which was flying approximately 800 feet above the ground. At approximately 2:40 p.m., Officer Bainsley thought he saw someone who was later identified as defendant, in a red hat selling narcotics. Officer Bainsley specifically testified that defendant reached underneath a garbage can, retrieved an item, removed a second item from the first item, and put one of the items back underneath the garbage can. Defendant approached the driver side of a car stopped in an alley near the address in question, and gave an item to the driver. Officer Bainsley did not see the driver give defendant anything in return. Defendant repeated this process a second time with another driver, and walked over to where three other individuals were standing.

¶ 4 Officer Bainsley communicated with the officers on the ground via a radio and instructed them to investigate the suspicious narcotics activity. He told Officer Carlos Rojas that he witnessed two narcotics transactions and believed he knew where the items were located. Officer Bainsley instructed the officers to detain the four individuals in question, which they did, then told Officer Rojas to go into the alley and pick up the garbage can under which defendant retrieved the items. Officer Rojas complied with Officer Bainsley's instructions, recovered items from underneath the garbage can, and radioed to Officer Bainsley that he "got a positive." Officer Bainsley then told Officer Rojas that the person in the red hat was conducting the narcotics transactions, and defendant was arrested. Officer Ranieri, who piloted the helicopter, testified similarly to Officer Bainsley.

¶ 5 Officer Rojas testified similarly to Officer Bainsley and also testified that when he located the garbage can, he pushed it forward and observed a plastic bag. Inside of the plastic bag were 11 clear ziploc bags which contained suspect cannabis, 5 ziploc bags with "Superman" logos on them, also containing suspect cannabis, and 12 red-tinted ziploc bags containing suspect crack cocaine. Officer Rojas, a police officer for many years, had extensive experience in making narcotics arrests. Based on his experience, Officer Rojas indicated that because the items were concealed, they were for sale and not for defendant's personal use. According to Officer Rojas, an individual who uses narcotics for his personal use will generally have the narcotics on his person. Officer Rojas further

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testified that the police report he wrote indicated that on two separate occasions, defendant walked to the rear of the garbage can, picked up an unknown item, and returned that unknown item to the same place. Officer Jesus DeLarosa, who was one of Officer Rojas's partners, testified similarly to Officer Rojas.

¶ 6 Hasnain Hamayat, a forensic scientist, testified that he tested 5 of the 12 items found in the red-tinted bags. The five items weighed 1.1 grams and tested positive for cocaine. Mr. Hamayat then tested 7 of the 16 items containing the suspect cannabis. The seven items weighed 2.6 grams and tested positive for cannabis.

¶ 7 Investigator Robert Bresnahan testified that the distance between 605 North Ridgeway Avenue to 646 North Lawndale Avenue, where Ryerson Elementary School was located, was 215 feet.

¶ 8 Following argument, the jury found defendant guilty of possession of a controlled substance with intent to deliver within 1,000 feet of a school. The trial court sentenced defendant to six years' imprisonment, awarded him 279 days of presentence custody credit, and imposed \$2,185 in fines and fees, including a \$200 DNA analysis fee. The mittimus indicates that defendant was convicted of manufacture or delivery of a controlled substance.

¶ 9 On appeal, defendant contends his conviction should be reduced to simple possession, where there was insufficient proof that he intended to deliver the controlled substance. He specifically maintains Officer Bainsley did not testify positively or reliably that any narcotics transactions occurred and, there was no other indicia of his intent to deliver narcotics.

¶ 10 Where, as here, defendant challenges the sufficiency of the evidence to sustain his conviction, the question for the reviewing court is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Bush*, 214 Ill. 2d 318, 326 (2005). This standard recognizes the responsibility of the trier of fact to resolve conflicts in testimony, weigh the evidence, and draw

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reasonable inferences therefrom. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992). A reviewing court will not set aside a criminal conviction unless the evidence is so unreasonable or improbable as to raise a reasonable doubt of defendant's guilt. *People v. Hall*, 194 Ill. 2d 305, 330 (2000).

¶ 11 In order to prove defendant guilty of possession of a controlled substance with intent to deliver within 1,000 feet of a school, the State must prove: defendant had knowledge that the controlled substances were present; that the controlled substances were in defendant's immediate control or possession; that defendant intended to deliver the controlled substances; and the possession with intent to deliver occurred on a public way within 1,000 feet of a school. 720 ILCS 570/401(c)(2), 407(b)(1) (West 2008). Defendant contends the State failed to meet its burden to prove he intended to deliver the controlled substances.

¶ 12 In most cases, intent to deliver must be established by circumstantial evidence because direct evidence of intent to deliver is rare. *People v. Robinson*, 167 Ill. 2d 397, 408 (1995). In *Robinson*, the Illinois Supreme Court listed several factors as probative of a defendant's intent to deliver. *Id.* These factors include the quantity, purity, and packaging of the controlled substance, as well as the defendant's possession of weapons, police scanners, pagers, drug paraphernalia and large amounts of cash. *Id.* The *Robinson* factors are not exclusive. *Bush*, 214 Ill. 2d at 327. No one rule may be applied to each case because the number of potential fact scenarios in controlled substance cases are infinite. *Bush*, 214 Ill. 2d at 327. The trier of fact must determine, on a case-by-case basis, whether evidence of the defendant's intent to deliver is sufficient. *Robinson*, 167 Ill. 2d at 412-13.

¶ 13 Here, defendant possessed 16 packets of cannabis and 12 packets of cocaine. The seven tested packets of cannabis weighed 2.6 grams, and the five tested packets of cocaine weighed 1.1 grams. Officer Bainsley observed defendant engage in two transactions, then join a group of three other individuals. When Officer Bainsley relayed information regarding the transactions to the beat officers on the ground, Officer Rojas recovered narcotics underneath the garbage can which Officer Bainsley saw defendant reach under to obtain those items. Finding the State had proved defendant's

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intent to deliver beyond a reasonable doubt, the jury clearly relied on Officer Bainsley's observations. Viewing the entire record in the light most favorable to the State, we conclude a rational trier of fact could find the State proved defendant's intent to deliver beyond a reasonable doubt.

¶ 14 Defendant's argument, that the evidence is consistent with personal use rather than an intent to deliver, rests mainly on the small amount of the controlled substance, and his contention that most of the *Robinson* factors were not present here. This court has held that no matter how insignificant, the quantity of a controlled substance recovered is not dispositive of intent, but, rather, is one factor of many to consider in light of circumstances. *People v. Harris*, 352 Ill. App. 3d 63, 71 (2004). However, as the quantity of the substance decreases, the need for further circumstantial evidence of the defendant's intent to deliver increases. *Robinson*, 167 Ill. 2d at 413.

¶ 15 We agree that the weight of the recovered narcotics in this case and the lack of several of the *Robinson* factors could be viewed as consistent with personal use. However, despite defendant's contentions to the contrary, there was evidence that he intended to deliver the narcotics. The packaging of cocaine and cannabis into 28 small bags was indicative of defendant's intent to deliver. See *People v. Clark*, 406 Ill. App. 3d 622, 631 (2010) (stating that carrying 24 packets of heroin is an amount and packaging technique highly indicative of one's intent to deliver rather than to personally consume). Moreover, the testimony of Officers Bainsley and Rojas showed defendant intended to deliver the narcotics. Officer Bainsley testified that he witnessed two separate suspicious transactions that he believed to involve narcotics, and Officer Rojas testified that the way in which the drugs were concealed, *i.e.*, underneath a garbage can, was indicative of an intent to deliver, and not personal use. Examining the evidence as a whole, the jury obviously determined the two observed transactions, the way the narcotics were packaged, and the testimony of the police officers constituted strong circumstantial evidence of an intent to deliver. Despite the small quantity of the substances, and the fact that defendant did not possess weapons, police scanners, beepers, drug paraphernalia, or cash, the jury reasonably inferred defendant intended to deliver the controlled

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substance.

¶ 16 In reaching this conclusion, we reject defendant's argument that Officer Bainsley's testimony was impeached by the testimony of Officer Rojas. Defendant maintains that despite Officer Bainsley's testimony to the contrary, Officer Rojas testified that Officer Bainsley did not inform him that a person in a red hat engaged in two separate transactions with two individuals. Moreover, defendant contends Officer Rojas's police report regarding the incident made no mention of any alleged transactions or, that Officer Bainsley described any transactions over the radio. Although we acknowledge Officer Rojas testified on cross-examination that "play by play specifics were not discussed" during the radio transmission, on direct examination, Officer Rojas testified "[t]he radio transmission went on to state that [Officers Bainsley and Raniere] were conducting a narcotics investigation of an individual in which they had observed him go to a location two separate occasions." We also note Officer Rojas testified that although his police report did not use the word "transaction," it stated that on two separate occasions, defendant walked to the rear of the garbage can and picked up an unknown item. Moreover, the record clearly shows Officer Bainsley instructed Officer Rojas to arrest the man in the red hat, *i.e.*, defendant. We, thus, find Officer Bainsley's testimony, as to his observations of defendant's activities, was not impeached and, any inconsistencies in Officers Bainsley or Rojas's testimony were minor. *People v. Myles*, 257 Ill. App. 3d 872, 884 (1994).

¶ 17 Defendant next contends, and the State correctly agrees, that his mittimus should be corrected to reflect 286 days of presentence custody credit, and should indicate he was convicted of possession of a controlled substance with intent to deliver within 1,000 feet of a school. The record establishes that defendant was arrested on August 12, 2009, and sentenced on May 25, 2010. A defendant held in custody for any part of a day should be given credit against his sentence for that day (*People v. Smith*, 258 Ill. App. 3d 261, 267 (1994)), except that he is not entitled to presentence custody credit for the date he is sentenced (*People v. Williams*, 239 Ill. 2d 503, 510 (2011)). Accordingly, we order

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the clerk of the circuit court to correct the mittimus to reflect 286 days of presentence custody credit.

¶ 18 Furthermore, the report of proceedings shows defendant was convicted of possession of 1 to 15 grams of a controlled substance (cocaine) with intent to deliver within 1,000 feet of a school. The mittimus, however, misidentifies the offense as "MFG/DEL COCAINE/SCH/PUB H." It is well settled that where the common law record conflicts with the report of proceedings, the report of proceedings controls. *People v. Peeples*, 155 Ill. 2d 422, 496 (1993). Pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we correct the mittimus to accurately reflect defendant's conviction of possession of 1 to 15 grams of a controlled substance (cocaine) with intent to deliver within 1,000 feet of a school. 720 ILCS 570/401(c)(2), 407(b)(1) (West 2008); *People v. Blakney*, 375 Ill. App. 3d 554, 560 (2007).

¶ 19 Defendant also contends, and the State correctly agrees, that the \$200 DNA analysis fee cannot be imposed because he was assessed the fee upon a prior conviction. Pursuant to the supreme court's ruling in *People v. Marshall*, 242 Ill. 2d 285 (2011), the trial court was not authorized to assess defendant the \$200 DNA fee where he is currently registered in the DNA database. We, thus, vacate that fee.

¶ 20 Finally, defendant and the State agree that because he spent an additional seven days in presentence custody for which he was not credited, he is entitled to a \$35 credit to be applied against his fines. 725 ILCS 5/110-14(a) (West 2008). We, thus, modify the order assessing fines, fees, and costs against defendant and reduce the total amount assessed by \$35.

¶ 21 For the foregoing reasons, we order the clerk of the circuit court to correct the mittimus to reflect 286 days of presentence custody credit and that he was convicted of possession of 1 to 15 grams of a controlled substance (cocaine) with intent to deliver within 1,000 feet of a school; vacate the \$200 DNA analysis fee; find that defendant is entitled to an additional \$35 credit against his fines; and affirm the judgment in all other respects.

¶ 22 Affirmed as modified.

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