

No. 1-10-2548

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. 10 CR 3993
)	
AVERIELL McDONALD,)	Honorable
)	Maura Slattery-Boyle,
Defendant-Appellant.)	Judge Presiding.

JUSTICE JOSEPH GORDON delivered the judgment of the court.
Justices Epstein and Howse concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where testimony showed defendant dropped a tin that contained suspect heroin in front of police and the trial court found the testifying officer to be credible, there was sufficient evidence to prove defendant guilty of possession of a controlled substance beyond a reasonable doubt.
- ¶ 2 After a bench trial, defendant Averiell McDonald was convicted of possession of a controlled substance (heroin) and sentenced to five years in prison. On appeal, defendant contends that: (1) the State failed to prove him guilty of possession of heroin beyond a reasonable doubt, specifically arguing the testimony of the sole State witness was uncorroborated and not

credible; and (2) the \$200 DNA analysis fee was improperly assessed. We affirm defendant's conviction and vacate the contested fee.

¶ 3 At trial, Officer David Zelig testified that around 1:10 p.m. on January 21, 2010, he and his partner, Officer Freeman, were patrolling in a vehicle when Zelig, who was the passenger, saw an unknown man talking with the occupant of a vehicle near the southeast corner of Lavergne Avenue and Cortez Street. The unknown man gestured with two fingers in an easterly direction. When Zelig looked east, he saw defendant bending down near a fence about 15 feet away from the unknown man, seemingly to retrieve something from underneath a fence line. Defendant then stood up, looked in the officers' direction, and dropped a brown object onto the ground. No one else was near defendant when he dropped the object. The officers pulled up alongside defendant and Zelig recovered the object, an Altoids tin, from the snow-covered ground. Only a couple of minutes passed from the time Zelig saw defendant drop the tin to the time he recovered it, he never lost sight of the tin, and no other brown items were on the ground near the tin, which contained eight capsules of suspect heroin. Defendant was arrested and a custodial patdown revealed \$38 on his person. Although Zelig believed the unknown man standing by the vehicle was working with defendant, Zelig did not approach him and could not remember any specifics about him or the vehicle by which he was standing.

¶ 4 At a preliminary hearing on February 18, 2010, Zelig said that he first saw defendant when defendant was coming out of an alleyway. At trial, he testified that he was about 40 feet north of the intersection when he first saw defendant bending down near the fence, which was at the end of a brownish-red building on the corner of Lavergne and Cortez, "almost like a gate to go to the back of that location." The defense showed Zelig two photos of the subject intersection, the first one taken from a distance and the second taken closer to the intersection. Zelig testified that he was unable to see a building to the east of the corner building in the first

photo, but that the trees in the photo were in full bloom. In the wintertime, Zelig said he was probably able to see the building to the east from that distance. Zelig was also unable to see a building to the east of the corner building in the second photo, but said that at the time of defendant's arrest he could see one from the corner.

¶ 5 Officer Daniel Freeman testified that the proper inventory techniques were used and a proper chain of custody was maintained with respect to the Altoids tin and eight capsules of suspect heroin.

¶ 6 The parties then stipulated that, if called, Pat Junious-Hawkins, a forensic chemist, would testify that the contents of the capsules were positive for 1.3 grams of heroin.

¶ 7 In finding defendant guilty of possession of a controlled substance, the trial court stated that it did "not find the pictures to be dispositive or that the officer testified untruthfully." The court again stated that "the officer testified credibly" at the hearing on defendant's motion for new trial, which was denied. Defendant was sentenced to five years in prison.

¶ 8 On appeal, defendant first contends that the evidence was insufficient to prove him guilty of possession beyond a reasonable doubt. Specifically, defendant primarily argues that Zelig's testimony was "dropsy" testimony and, therefore, contrary to human experience and unworthy of belief.

¶ 9 The standard of review on a challenge to the sufficiency of the evidence is 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. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). When considering a challenge to the sufficiency of the evidence, it is not the function of the reviewing court to retry the defendant; it is for the trier of fact to determine the credibility of witnesses, weigh the evidence, draw reasonable inferences, and resolve any conflicts in the evidence. *Siguenza-Brito*, 235 Ill. 2d at 228. A reviewing court

will not reverse a conviction unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009).

¶ 10 To sustain a conviction for possession of a controlled substance, the State must prove that the defendant had knowledge and possession of the drugs. *People v. Givens*, 237 Ill. 2d 311, 334-335 (2010). Possession may be actual or constructive. *Givens*, 237 Ill. 2d at 335.. To prove constructive possession, the State must show that in addition to knowledge, defendant had the "intent and capability to maintain control" over the drugs. *People v. Carodine*, 374 Ill. App. 3d 16, 25 (2007) (quoting *People v. Frieberg*, 147 Ill. 2d 326, 361 (1992)). Knowledge and possession are both questions of fact and the findings of the trier of fact will not be disturbed unless the evidence is so unbelievable and improbable that it creates a reasonable doubt of the defendant's guilt. *Carodine*, 374 Ill. App. 3d at 25.

¶ 11 Defendant describes Zelig's testimony as "dropsy" testimony and therefore inherently incredible. In a dropsy case, a police officer falsely testifies that the defendant dropped narcotics in plain view, as opposed to the narcotics being recovered from an illegal search, in order to avoid the exclusion of evidence on fourth amendment grounds. See *People v. Ash*, 346 Ill. App. 3d 809, 816 (2004) (citing G. Chin & S. Wells, The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury, 59 U. Pitt. L. Rev. 233, 248-49 (1998)). Defendant cites to numerous cases as examples of cases based on dropsy testimony. However, none of the cited cases resulted in a reversal of the conviction based on a lack of sufficient evidence. See, e.g., *People v. Bonslater*, 261 Ill. App. 3d 432, 434 (1994) (evidence was sufficient to prove the defendant guilty beyond a reasonable doubt; conviction reversed on other grounds); see also *People v. Gustowski*, 102 Ill. App. 3d 750, 754 (1981) and; *People v. Warren*, 43 Ill. App. 3d 1064, 1068 (1976), *aff'd*, 69 Ill. 2d 620 (1977) (evidence was sufficient to prove

the defendants guilty beyond a reasonable doubt; judgments affirmed). Notably, defendant fails to cite to any case that directly supports his conclusion that " '[d]ropsy' testimony is contrary to human experience and unworthy of belief."

¶ 12 Here, we find that Zelig's testimony was sufficient to prove defendant had knowledge of and intended to maintain control over the recovered heroin. Zelig testified that, when he first saw defendant, defendant was bending over, seemingly to retrieve something. Then defendant stood up, saw the officers' car, and dropped an Altoids tin. No one else was near defendant at the time, nothing else was on the snow-covered ground where defendant dropped the tin, and Zelig never lost sight of the tin until he retrieved it. Defendant argues that "it is highly unlikely that any person in his or her right mind would spontaneously present incriminating evidence to the police." However, it is not inherently unbelievable that, upon seeing police, defendant would attempt to rid himself of incriminating evidence. Moreover, the trial court heard Zelig's testimony and found him to be credible. As the trial court was in a better position to make credibility determinations, we see no reason to substitute our judgment for that of the trial court.

¶ 13 The testimony of Officer Zelig was sufficient to support defendant's conviction, even without corroboration by Officer Freeman, because it is well-established that the testimony of a single, credible eyewitness is sufficient to uphold a conviction. *Siguenza-Brito*, 235 Ill. 2d at 228; see also *People v. Rincon*, 387 Ill. App. 3d 708, 722-24 (the court found the evidence was sufficient to convict the defendant of attempted arson beyond a reasonable doubt even where the State presented one eyewitness and no physical evidence, and the defendant presented two alibi witnesses and testified himself); *Bonslater*, 261 Ill. App. 3d at 434-35, 437 (the testimony of one police officer, which included testimony that the defendant looked in the officer's direction and dropped a bag containing suspect drugs, plus the stipulated testimony that the recovered bag contained cocaine, was sufficient to prove defendant guilty beyond a reasonable doubt). At trial,

Zelig, the passenger in the police car, testified about his observations of defendant. Freeman, the driver of the car, testified regarding the chain of custody of the recovered heroin. Notably, defendant never questioned Freeman to contest Zelig's observations and the State was not required, as a matter of law, to corroborate Zelig's credible testimony. *Ash*, 346 Ill. App. 3d at 818.

¶ 14 Furthermore, the trial court determined that the two photo exhibits of the intersection near which defendant was arrested were not dispositive. Defendant argues, nonetheless, that Zelig was not credible because he testified to seeing defendant near a fence and the photos do not show a fence. The photos in question are contained in the record on appeal. In one photo, taken farther from the intersection, the east side of the corner building is behind a tree lush with leaves and there is no snow on the ground. In contrast, defendant was arrested in the wintertime and Zelig testified that the ground was covered in snow. Zelig explained at trial that the fence was at the end of the corner building and that in the wintertime he was probably able to see east of the corner building because the trees were not in bloom as they were in the photo. In light of the apparent difference in seasons between the date of arrest and when the photo was taken, Zelig's explanation is not unreasonable. Moreover, the photo taken closer to the intersection is cropped so the east end of the corner building is not depicted at all. Zelig maintained that he was able to see east of the corner building even though it was not in the photo and his testimony is not inconsistent with the photo. Though no fence is depicted, the photos fail to directly contradict Zelig's testimony and it is reasonable to infer that the photos do not depict the entire scene or the conditions as they were on the date of arrest.

¶ 15 Defendant next contends, and the State correctly agrees, that the \$200 DNA analysis fee was improperly assessed because he previously submitted a DNA sample. A trial court only has the authority to order a defendant to submit a DNA sample and pay the DNA analysis fee once,

when the defendant is not currently in the DNA database. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). The record here shows that defendant was convicted of a felony, possession of a controlled substance, on June 24, 2004. Defendant also points to a State Police DNA Indexing Laboratory Report, of which we may take judicial notice (*People v. Jimerson*, 404 Ill. App. 3d 621, 634 (2010)), that shows, based on the 2004 conviction, defendant submitted a DNA sample for analysis and a profile was subsequently obtained. Under these circumstances, the trial court was not authorized to impose the \$200 DNA analysis fee. *Marshall*, 242 Ill. 2d at 302; see also *People v. Leach*, 2011 IL App. (1st) 090339, ¶ 38 (finding that in order to vacate a DNA charge under *Marshall*, a defendant need only show that he was convicted of a felony after the DNA requirement went into effect on January 1, 1998). We therefore vacate the \$200 DNA analysis fee pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 1, 1987).

¶ 16 For the foregoing reasons, we vacate the \$200 DNA analysis fee and affirm the judgment of the trial court in all other respects.

¶ 17 Affirmed in part; vacated in part.