

No. 1-10-2946

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 8824
)	
JOSEPH WRIGHT,)	Honorable
)	John Kirby,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Robert E. Gordon and Justice Palmer concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's possession of 5.4 grams of cocaine and \$1,132 as he fled from a fortified drug house was sufficient to sustain his conviction for possession of a controlled substance with intent to deliver.

¶ 2 Following a bench trial, defendant Joseph Wright was convicted of possession of a controlled substance with intent to deliver and sentenced as a Class X offender to eight years in prison and a two-year term of mandatory supervised release (MSR). On appeal, defendant asserts that his conviction should be reduced to simple possession, as there was insufficient evidence of intent to deliver the cocaine in his possession. Defendant also: (1) requests

presentence incarceration credit to offset for fines imposed; (2) challenges the imposition of another fine and a \$200 DNA analysis fee; (3) objects to the increase in his MSR term from two to three years by the Department of Corrections (DOC); and (4) requests correction of the mittimus to accurately reflect the offense of which he was convicted. We affirm defendant's conviction, grant a custody credit offset for his fines, vacate another fine and the DNA analysis fee, and order correction of the mittimus to reflect the appropriate offense and an MSR term of three years.

¶ 3 At trial, Officer Delpilar testified that at about 10 a.m. on April 17, 2009, he and seven other police officers executed a search warrant on a residence at 1401 West 61st Street in Chicago. The residence was a corner house at 61st and Loomis. Delpilar was the designated evidence officer, whose duty it was to photograph the residence and any recovered items. Delpilar and five of his team members approached the rear entrance of the house, knocked on the back door, and announced their office. Monitoring the police radio, Delpilar heard an officer yell, "Go to the front." Delpilar and another officer ran to the front of the house. Delpilar saw defendant on the front porch, which the officer described as "[j]ust a small couple of stairs and a landing." He saw defendant run from the front door of the house and flee northbound on Loomis. The officers apprehended defendant about 200 feet north of the house, where Delpilar handcuffed him and patted him down. From defendant's front pants pocket Delpilar recovered two plastic bags of suspect cocaine and a large wad of cash later determined to total \$1,132. Delpilar testified that in his 13 years as a police officer, he had made hundreds of narcotics-related arrests and was familiar with how narcotics were packaged for sale and distribution. Based on his training and experience, and on the amount of the money and suspect cocaine recovered, Delpilar was of the opinion that the amount of cocaine was for sale, not for personal use.

¶ 4 Delpilar took defendant back to the house at 61st and Loomis where police officers and three individuals who were not officers were present. Delpilar placed the items recovered from defendant into evidence envelopes. He photographed the inside of the house and items found therein, including: the fortified rear door of the house that had brackets and floor posts to prevent entry; a table on which Delpilar observed cannabis, small packaging, and two piles of money; a chair on which he observed two bags of suspect cocaine; a number of empty Zip-Loc bags suitable for packaging narcotics that were found in a bedroom; and items found on the kitchen counter, including a scale, chunks of crack cocaine on a mirror, and baking soda used to mix crack cocaine. At the police station, Delpilar inventoried the narcotics recovered from defendant and from the house. He also counted and inventoried the money recovered from defendant, which amounted to \$1,132, as well as \$257 recovered from the house.

¶ 5 A forensic scientist employed by the State Police testified that she received the two bags that had been recovered from defendant's pants pocket and tested the chunky substances which weighed 5.4 grams and which in her opinion contained cocaine. The chunks on the mirror on the kitchen counter contained 28.9 grams of cocaine. The substance recovered from a chair in the house contained 3.3 grams of cocaine.

¶ 6 The defense rested without presenting testimony.

¶ 7 The court ruled that because defendant was seen on the front porch and not seen actually coming out of the house, he could not be tied to the narcotics found inside the house. However, the court found defendant guilty of possession with intent to deliver the 5.4 grams of cocaine found in his pocket.

¶ 8 At the sentencing hearing, the court stated it would sentence defendant as a Class X offender and imposed a prison term of eight years. The court also ordered defendant to serve an MSR term of two years. The mittimus does not reflect the MSR term imposed by the court, but

it does reflect that defendant was sentenced as a Class X offender. The records of the DOC reflect that defendant is to serve a three-year MSR term.

¶ 9 On appeal, defendant does not contest the possession of the 5.4 grams of cocaine recovered from his pants pocket, and there is no question but that the State established possession. Defendant contends, however, that his conviction for possession of a controlled substance with intent to deliver must be reduced to simple possession because the State failed to prove beyond a reasonable doubt the element of intent by defendant to deliver the cocaine. Defendant also contends that the facts are not in dispute and, consequently, *de novo* review is appropriate.

¶ 10 We reject the applicability of *de novo* review. We are presented with a claim of insufficiency of the evidence and, consequently, we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt. *People v. Leonard*, 377 Ill. App. 3d 399, 403 (2007). This means that we must allow all reasonable inferences from the record in favor of the prosecution. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). On appeal, a conviction will not be set aside on grounds of insufficient evidence unless the proof is so improbable or unsatisfactory that there remains a reasonable doubt as to the defendant's guilt. *People v. Clark*, 349 Ill. App. 3d 701, 704 (2004).

¶ 11 To sustain a charge of possession of a controlled substance with intent to deliver, the State must prove that: (1) the 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. Sherrod*, 394 Ill. App. 3d 863, 865 (2009). Whether the evidence is sufficient to prove intent to deliver must be determined on a case-by-case basis. *People v. Robinson*, 167 Ill. 2d 397, 412-13 (1995); *Clark*, 349 Ill. App. 3d at 704. Intent to

deliver a controlled substance is seldom amenable to direct proof, and such intent usually must be proven by circumstantial evidence. *People v. Reynolds*, 358 Ill. App. 3d 286, 298 (2005).

¶ 12 In considering circumstantial evidence necessary to support an inference of intent to deliver, many different factors are probative of intent to deliver. In *Robinson*, our supreme court noted several of those factors: 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. *Robinson*, 167 Ill. 2d at 408. However, the list of sample factors in *Robinson* is neither exhaustive nor inflexible. *People v. Bush*, 214 Ill. 2d 318, 327 (2005).

¶ 13 Defendant contends that the small amount of cocaine found in defendant's possession, 5.4 grams, was consistent with personal use and not consistent with sale of the drug. Defendant also contends that the cocaine was not packaged for sale in small baggies, that Delpilar testified he did not observe defendant engage in any narcotics transaction, and that the trial court specifically found there was nothing to link defendant with the drugs found inside the house.

¶ 14 We find that two of the factors listed in *Robinson* as probative of intent to deliver were present here, namely, the large amount of cash found on defendant and the amount of the narcotics being too large for personal consumption. Intent to deliver can be inferred where the amount of the controlled substance cannot reasonably be viewed as designed solely for personal consumption. *People v. Marshall*, 165 Ill. App. 3d 968, 976 (1988). Delpilar testified that, based on his experience involving hundreds of narcotics arrests, it was his opinion that the 5.4 grams of cocaine found in defendant's possession represented an amount for sale, not for personal use. In addition, defendant was in possession of a large amount of cash, \$1,132. See *People v. Berry*, 198 Ill. App. 3d 24, 28-29 (1990) (intent to deliver was established where defendant was

in possession of 3.9 grams of cocaine and \$3,100 and possessed no drug-user paraphernalia). Defendant cites cases where the accused was found in possession of a greater amount of a controlled substance than the 5.4 grams of cocaine found here, but the appellate court ruled that sufficient evidence of intent to deliver was lacking. *People v. Rivera*, 293 Ill. App. 3d 574 (1997); *People v. Nixon*, 278 Ill. App. 3d 453; *People v. Crenshaw*, 202 Ill. App. 3d 432 (1990). However, those cases did not involve additional *Robinson* factors, such as the possession of a large amount of cash as in this case.

¶ 15 The trial testimony also established that defendant attempted to flee from the police as they were executing a search warrant for what was undoubtedly a drug house. We have defined a drug house as a dwelling not used primarily as a residence but instead as a center for the packaging and distribution of drugs. *In re K.A.*, 291 Ill. App. 3d 1, 6 (1997); *People v. Bond*, 205 Ill. App. 3d 515, 517 (1990). Here, the rear entry of the house was barricaded with two-by-four posts and the police were required to force their way in. Cocaine and cannabis were found in several locations in the house, along with \$257 in cash and a number of baggies suitable for packaging narcotics. From the kitchen counter, police recovered 28.9 grams of cocaine, a scale, and baking soda used to mix crack cocaine. Without question, the dwelling was a fortified drug house. The trial court noted there was no evidence that defendant was actually inside the drug house and could not be linked to the contraband found inside the house. However, defendant was seen on the porch of the house by the front door, and it is a reasonable conclusion that at that time he was either exiting or entering the drug house. The trial court was not required to disregard inferences flowing from the evidence. *People v. Wheeler*, 226 Ill. 2d 92, 117 (2007).

¶ 16 Defendant's nexus with the drug house, when combined with the amount of cocaine and the large amount of cash on defendant's person, was sufficient to establish his intent to deliver the cocaine. Mindful that we are charged with viewing the evidence in the light most favorable

to the State and determining whether any rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt, we conclude that the evidence is not so improbable or unsatisfactory that there remains a reasonable doubt as to the defendant's guilt of possession of the cocaine with intent to deliver. We conclude that the evidence seen in a light most favorable to the prosecution was sufficient to establish that defendant knew of the presence of the narcotics, that the narcotics were in his immediate and exclusive control, and that defendant intended to deliver the narcotics.

¶ 17 Next, defendant asserts, and the State agrees, that the imposition of a \$200 DNA analysis fee pursuant to section 5-4-3(j) of the Unified Code of Corrections (730 ILCS 5/5-4-3(j) (West 2010)) must be vacated. Defendant previously had been convicted of felonies and we may presume that he was required in the past to submit a DNA sample and pay an analysis fee of \$200. *People v. Leach*, 2011 IL App (1st) 090339, ¶ 37. Consequently, defendant was not required to submit another sample or pay another fee. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011).

¶ 18 The parties also agree that the \$100 Methamphetamine Law Enforcement Fund fine should be vacated, as the fine may be imposed only where the defendant has been convicted of a methamphetamine-related offense. 730 ILCS 5/5-9-1.1-5(a) (West 2010).

¶ 19 Under our authority pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the circuit court to vacate that portion of its monetary assessment order requiring defendant to pay the \$200 DNA analysis fee and the \$100 methamphetamine fine. The total amount assessed in the order is thereby reduced from \$2,630 to \$2,330.

¶ 20 Defendant also contends, and the State agrees, that he was charged with two alleged fees that were actually fines which should have been offset by his \$5-per-day presentence credit.

¶ 21 The \$30 Children's Advocacy Center assessment is a fine that should be subject to offset for presentence incarceration credit. *People v. Williams*, 2011 IL App (1st) 09-1667-B, ¶ 19. The \$2,000 Controlled Substance Assessment commonly referred to as a "drug assessment," imposed pursuant to section 411.2(a) of the Illinois Controlled Substances Act (720 ILCS 570/411.2(a)) (West 2010)), is also a fine, subject to offset by presentencing incarceration credit. *People v. Jones*, 223 Ill. 2d 569, 588 (2006). Those two fines totaled \$2,030. The court credited defendant with 523 days in presentence custody. The State maintains, and we agree, that the credit should have been only 522 days, as the mittimus issued to the DOC on the date defendant was sentenced and that day should not have been included in the calculation of presentence credit. *People v. Williams*, 239 Ill. 2d 503, 508-09 (2011). At \$5 per day, the credit for 522 days more than offsets the \$2,030 for those two fines. The only remaining assessments for which defendant is liable are the \$300 in fees not subject to the \$5-per-day credit. Consequently, the order assessing monetary penalties should be corrected to show that the total defendant is required to pay is \$300.

¶ 22 Defendant also assigns error to the increase of his MSR term from two to three years. He asserts that the trial court correctly imposed a two-year term and contends that the DOC lacked the authority to increase the MSR term to three years because the imposition of sentence is exclusively a function of the judiciary.

¶ 23 Defendant was convicted of possession of cocaine with intent to deliver, a Class 1 felony. 720 ILCS 570/401(c)(2) (West 2008). Because of his criminal history, defendant was required to be sentenced as a Class X offender. 730 ILCS 5/5-5-3(c)(8) (West 2008), now codified at 730 ILCS 5/5-4.5-95(b) (West 2010). When a defendant is sentenced as a Class X offender because of his criminal background, the MSR term applicable to the Class X sentence is automatically imposed. *People v. Watkins*, 387 Ill. App. 3d 764, 766-67 (2009); *People v. Smart*, 311 Ill. App. 3d 415, 417-18 (2000); *People v. Anderson*, 272 Ill. App. 3d 537, 541-42 (1995). The MSR term

mandated for a Class X sentence by section 5-8-1(d)(1) of the Unified Code of Corrections is three years. 730 ILCS 5/5-8-1(d)(1) (West 2010). Defendant argues that these cases are unpersuasive based on the supreme court's decision in *People v. Pullen*, 192 Ill. 2d 36 (2000). However, this court has expressly rejected the argument that *Pullen* applies to MSR. *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011); *People v. Holman*, 402 Ill. App. 3d 645, 653 (2010); *People v. McKinney*, 399 Ill. App. 3d 77, 81-83 (2010); *People v. Lee*, 397 Ill. App. 3d 1067, 1072-73 (2010).

¶ 24 We note that the appropriate three-year MSR term is accurately entered in the DOC records. Defendant is correct in asserting that it is the duty of the trial court, not the DOC, to sentence a defendant to a term of MSR within the statutory guidelines. See 730 ILCS 5/5-1-19 (West 2010). However, while the mittimus does accurately specify that defendant, having been convicted of a Class 1 offense, was sentenced as a Class X offender, it does not state the MSR term imposed by the court. It is a reasonable conclusion that the DOC, rather than increasing the MSR period from two to three years as defendant contends, merely entered the MSR term of three years mandated by statute for the Class X sentence as referenced in the mittimus. The trial court's imposition of a two-year MSR term did not conform to section 5-8-1(d)(1) and thus was void. Pursuant to *People v. Arna*, 168 Ill. 2d 107, 113 (1995), we exercise our authority, *sua sponte*, to correct the MSR portion of the sentence, as a void order can be corrected at any time. This court has the authority to directly order the clerk of the circuit court to make the necessary corrections to the mittimus pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999); see also *People v. Williams*, 368 Ill. App. 3d 616, 626 (2006) (a mittimus may be amended at any time to correct the record). This court directs the circuit court clerk to amend the mittimus by adding that a three-year MSR term was imposed.

¶ 25 Finally, both defendant and the State agree the mittimus incorrectly reflects his conviction for manufacture or delivery of a controlled substance when, in fact, he was convicted of possession of a controlled substance with intent to deliver. While section 401 of the Illinois Controlled Substances Act (720 ILCS 570/401) (West 2008)), under which defendant was convicted, covers manufacture or delivery as well as possession with intent to manufacture or deliver, the mittimus did not comport with the oral pronouncement of the court which found defendant guilty of possession with intent to deliver. See *People v. Jones*, 376 Ill. App. 3d 372, 395 (2007). Accordingly, this court directs the circuit court clerk to amend the mittimus to reflect that defendant was convicted on Count 1 of possession with intent to deliver 1-15 grams of cocaine.

¶ 26 For the reasons stated above, we affirm defendant's conviction for possession of a controlled substance with intent to deliver. We vacate the portion of the circuit court's sentencing order that imposed a \$200 DNA fee and a \$100 methamphetamine fine, reducing the total of fines and fees assessed to \$2,330. We order the fines and fees order to be corrected to reduce defendant's total payable assessments to \$300, reflecting that defendant's \$5-per-day offset for the 522 days of presentence custody credit more than offsets the \$2,030 for the \$30 Children's Advocacy Center fine and the \$2,000 drug assessment fine. Finally, we order correction of the mittimus to reflect that a three-year MSR term was imposed as part of defendant's Class X sentence and that defendant's conviction on Count 1 was for possession with intent to deliver 1-15 grams of cocaine.

¶ 27 Affirmed in part, vacated in part; mittimus corrected.