

2012 IL App (1st) 110745-U

SECOND DIVISION
November 13, 2012

No. 1-11-0745

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 13369
)	
KENNEL SUTTON,)	Honorable
)	Maura Slattery-Boyle,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Harris and Justice Quinn concurred in the judgment.

ORDER

- ¶ 1 *Held:* Evidence found sufficient to sustain defendant's conviction of distribution of a look-alike substance; fees and fines order modified; judgment affirmed in all other respects.
- ¶ 2 Following a bench trial, defendant Kennel Sutton was convicted of distribution of a look-alike substance and sentenced to 5 years' imprisonment. On appeal, he contends that the State failed to prove beyond a reasonable doubt that he delivered a look-alike substance, and further contests the propriety of certain fees and fines imposed against him.

¶ 3 At trial, 17-year veteran Chicago police officer David Torres testified that on July 8, 2010, he was assigned to conduct an undercover narcotics operation in the area of 4401 West 14th Street in Chicago. At 5:30 p.m., the officer arrived at that location in a covert vehicle and in plain clothes, and observed defendant driving a van. Defendant drove up to Officer Torres and asked him what he "was looking for." Based on the officer's five years' experience in the narcotics division, the officer knew that defendant's question meant was he looking for narcotics.

¶ 4 Officer Torres further testified that he told defendant he was "looking for four blows." The officer explained that blows is the "street terminology for heroin." Defendant then told the officer to wait there, and he would be right back. A few minutes later, defendant returned and pulled up next to the officer. Defendant then handed Officer Torres "a clear white plastic bag containing suspect narcotics." The officer explained that defendant handed to him what he "thought was suspect heroin." When Officer Torres was asked to describe the "packages that were handed to" him, he stated that "[i]t was a white clear plastic bag containing other smaller bags. Inside was suspect heroin." The officer testified that he was familiar with how heroin was packaged, and believed he was tendered suspect heroin.

¶ 5 Officer Torres further testified that after he received the suspect heroin, he paid defendant \$40 in prerecorded funds. The officer then asked defendant his name and number, and after defendant provided the officer with this information, he "sped away."

¶ 6 After defendant had left, the officer "examined closer the suspect narcotics, and it turned out that [defendant] had sold [him] white pieces of cut-up paper, so in fact there was not any narcotics in the bag." Officer Torres then radioed this information to his fellow officers who eventually stopped and detained defendant.

¶ 7 On cross-examination, Officer Torres further testified that he purchased four bags of heroin and "had received one bag containing four" bags of heroin. When asked if the inventory

sheet just said, "a white hand-knotted plastic bag containing tissue paper," the officer responded, that was "correct." When he was further asked about his description, the officer stated that it was "a clear bag, and inside being white paper, that is where the white -- that is where I am describing the white bag."

¶ 8 The following colloquy then took place between the court and Officer Torres:

"THE COURT: Was there paper around the four objects? You are saying a clear plastic bag with white paper and these four little packets with more tissue paper in it.

[OFFICER TORRES]: I recall a white clear knotted bag.

THE COURT: Here is the thing. Either it is clear or it is white. I am having trouble.

[OFFICER TORRES]: I believe I described it white only because what was inside was white."

The officer then stated that it was a clear bag and he observed white tissue paper in the bag. When Officer Torres was further asked, "[a]nd the tissue paper, when you saw that there was white tissue paper inside the bag, you thought that was just part of the packaging of the heroin, correct," he responded, "[c]orrect."

¶ 9 At the close of evidence, the court found defendant guilty of distribution of a look-alike substance. In doing so, the court noted that defendant had asked the officer what he needed, and he said, "[f]our blows," and defendant then told him to wait for him. When defendant returned he had a "clear bag with four smaller items, white, what he believes to be white rock substance, heroin." The officer then gave defendant money for the items.

¶ 10 Defendant filed a motion for a new trial. At the proceeding on the motion, defendant argued that the plastic bag delivered to the officer did not contain any substance, but, rather, was

merely packaging. The court denied the motion, noting that although there was no narcotics, there was a look-alike substance, that it found that it was the intent of defendant to deliver anything other than narcotics, and defendant was proven guilty beyond a reasonable doubt.

¶ 11 On appeal, defendant maintains that the State failed to prove beyond a reasonable doubt that he delivered a look-alike substance. He asserts that our standard of review is *de novo* because the issue is a purely legal one, namely, whether the materials he delivered to the officer fit within the legal definition of a look-alike substance. We disagree. Defendant is challenging the sufficiency of the evidence (*People v. Anderson*, 364 Ill. App. 3d 528, 534-35 (2006); *People v. Pulley*, 345 Ill. App. 3d 916, 920 (2004)); and, in such a case, the standard of review is whether, after reviewing 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. Williams*, 193 Ill. 2d 306, 338 (2000)). A criminal conviction will be reversed only if the evidence is so unsatisfactory as to raise a reasonable doubt. *People v. Campbell*, 146 Ill 2d. 363, 375 (1992). For the reasons that follow, we do not find this to be such a case.

¶ 12 To sustain a conviction for distribution of a look-alike substance, the State was required to prove beyond a reasonable doubt that defendant knowingly distributed a look-alike substance. 720 ILCS 570/404 (West 2010). Here, defendant does not dispute that there was sufficient evidence to prove his intent. Instead, he maintains that the State failed to prove beyond a reasonable doubt that he delivered a look-alike substance where the undercover officer allegedly testified that he received packaging but no substance.

¶ 13 A look-alike substance is defined in more than one way in the Illinois Controlled Substances Act (Act) (720 ILCS 570/102(y) (West 2010)). Section 102(y) of the Act specifically provides that a look-alike substance means a substance, other than a controlled substance, which (1) by overall dosage unit appearance, including shape, color, size, markings, taste, consistency

or any other identifying physical characteristic would leave a reasonable person to believe that the substance is a controlled substance, *or* (2) is expressly or impliedly represented to be a controlled substance *or* is distributed under circumstances which would lead a reasonable person to believe that the substance is a controlled substance. (Emphasis added.) 720 ILCS 570/102(y) (West 2010). This section further provides that for purposes of determining whether the representations made or the circumstances of the distribution would lead a reasonable person to believe that the substance is a controlled substance, the court may consider the following factors in addition to any other factors that may be relevant: 1) statements made by the owner or person in control of the substance concerning its nature, use, or effect; 2) statements made to the buyer or recipient that the substance may be resold for profit; and 3) whether the distribution included an exchange of or demand for money and whether the amount of consideration was substantially greater than the reasonable retail market value of the substance. 720 ILCS 570/102(y)(2)(1) (West 2010).

¶ 14 Here, defendant contends that all that was inventoried and thus exchanged was a large plastic bag with tissue paper, and that no reasonable person could misconstrue the large plastic bag with tissue as a controlled substance. In support, he maintains that Officer Torres recanted his testimony on cross-examination that there were four small plastic bags in one large bag, and cites to Officer Torres' testimony that the item tendered was a "white hand-knotted plastic bag containing tissue paper," and that the white tissue paper was just part of the packaging. We disagree with defendant's interpretation of Officer Torres' testimony. We observe that Officer Torres had explained on cross examination that he "had received one bag containing four," and that with regards to the inventory sheet he described it "white only because what was inside was white." The officer explained that when he examined the item delivered, he discovered that it was a bag containing white tissue paper. Specifically, on direct examination, the officer had

stated that he believed that, when the transaction occurred, he was tendered a controlled substance, and that only after defendant had left and upon closer examination of "the suspect narcotics, [] it turned out that [defendant] had sold [him] white pieces of cut-up paper, so in fact there was not any narcotics in the bag." The officer's initial impression, that he was tendered suspect heroin, undergirds the finding that what he was delivered was indeed a look-alike substance under the Illinois Controlled Substances Act (Act) (720 ILCS 570/102(y) (West 2010)). *Anderson*, 364 Ill. App. 3d at 537. The State was not required to prove, as defendant maintains, that at the time of the trial, or after the delivery, police believed that the materials received by Officer Torres looked like heroin as it was the officer's initial impression at the time of delivery that mattered. *Anderson*, 364 Ill. App. 3d at 537.

¶ 15 Furthermore, and as explained above, the Act defines a look-alike substance as a substance, other than a controlled substance, which is impliedly represented to be a controlled substance *or* is distributed under circumstances which would lead a reasonable person to believe the substance to be a controlled substance. (Emphasis added.) 720 ILCS 570/102(y)(2) (West 2010). Both of these scenarios were met here. The record shows that defendant drove up to Officer Torres, and asked him what he was looking for, which the officer, based on his five years of experience in the narcotics division, knew to mean was he looking for narcotics. Officer Torres then asked defendant for "four blows" which is the street terminology for heroin. Defendant told the officer that he would be right back, and when he returned, he handed the officer a package in exchange for money. This evidence clearly shows a mutual understanding between defendant and the undercover officer that the item being sold was a controlled substance where the officer requested blows, the street term for heroin, and defendant gave him an item in exchange for money. *People v. O'Connol*, 98 Ill. App. 3d 625, 629-30 (1981). Defendant thus

impliedly represented the item delivered to be a controlled substance, which falls within the definition of a look-alike substance. 720 ILCS 570/102(y)(2) (West 2010).

¶ 16 In addition, the officer's five years in the narcotics division is exactly the kind of experience called for to determine what a reasonable person in the context of a drug transaction would be led to believe regarding the substance. *People v. Cochran*, 323 Ill. App. 3d 669, 679 (2001). Thus, contrary to defendant's contention, based on the surrounding circumstances of the transaction, and the officer's five years of narcotics experience, which included familiarity with heroin packaging, a reasonable person would have believed that what the officer was delivered was narcotics. *Cochran*, 323 Ill. App. 3d at 679. Thus, the item delivered fell within the definition of a look-alike substance, namely, it was distributed under circumstances which would lead a reasonable person to believe that the substance is a controlled substance. 720 ILCS 570/102(y)(2) (West 2010).

¶ 17 Defendant, nonetheless, maintains that his claim that there was no look-alike substance tendered is supported by the fact that the State did not send anything to the crime lab for analysis. Contrary to defendant's contention, the fact that the item delivered did not have to be sent to the crime lab does not lead to the conclusion that it was not a look-alike substance. There is no requirement that police send a look-alike substance to the crime lab for analysis for defendant to be found guilty of distribution of a look-alike substance. 720 ILCS 570/102(y) (West 2010) (defining look-alike substance). Accordingly, we find that there was sufficient evidence for the trial court to conclude that defendant was guilty of distribution of a look-alike substance beyond a reasonable doubt. *Anderson*, 364 Ill. App. 3d at 534-35.

¶ 18 In the alternative, defendant requests this court to reduce his conviction to attempted delivery of a controlled substance and to remand for a new sentencing hearing. Defendant's single sentence without any supporting authority is not argument in violation of Supreme Court

Rule 341(h)(7) (eff. July 1, 2008). *People v. Phillips*, 215 Ill. 2d 554, 565 (2005). The appellate court is not a repository into which an appellant may foist the burden of argument and research; it is neither the function nor the obligation of this court to act as an advocate or search the record for error. *People v. Universal Public Transp., Inc.*, 2012 IL App (1st) 073303-B, ¶50.

Accordingly, defendant has waived this issue for review. *Phillips*, 215 Ill. 2d at 565; *People v. Campbell*, 2012 IL App (1st) 101249, ¶54.

¶ 19 Next, defendant contends, the State concedes, and we agree that the trial court erred in imposing the \$500 controlled substance fine, the \$5 court system fee, and the \$100 drug analysis fee. The controlled substance fine was imposed pursuant to section 401 or 402 of the Act, (720 ILCS 570/401, 402 (West 2010)), but defendant was sentenced under section 404. Thus, the controlled substance fine does not apply. The court system fee only applies to vehicle offenses, and because this case did not involve a vehicle offense, the fee was improperly assessed against defendant. 55 ILCS 5/5-1101(a) (West 2010); 625 ILCS 5/1-100 (West 2010). The drug analysis fee only applies where an analysis has been conducted, and none was done in this case. *People v. Diaz*, 377 Ill. App. 3d 339, 351 (2007) (DNA analysis fee could not be assessed against defendant where no analysis was conducted). Accordingly, pursuant to our authority under Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), we vacate the \$500 fine, the \$5 fee, and the \$100 fee, and direct that the trial court's order be modified to that effect.

¶ 20 In light of the foregoing, we vacate the fines and fees as noted and direct that the trial court's order be modified to that effect, and affirm the judgment of the circuit court of Cook County in all other respects.

¶ 21 Affirmed as modified.