

No. 1-11-0840

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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. 10C6 60408
)	
DAVID DARTY,)	Honorable
)	Luciano Panici,
Defendant-Appellant.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Epstein concurred in the judgment.

ORDER

¶ 1 *Held:* The evidence was sufficient to convict defendant of possession of a controlled substance with intent to deliver; defendant forfeited his argument that the trial court failed to advise him of the TASC probation alternative; and we correct defendant's mittimus to accurately reflect that he was convicted of possession with intent to deliver 1 gram or more but less than 15 grams of heroin.

¶ 2 Following a bench trial, defendant David Darty was convicted of possession of a controlled substance (heroin) with intent to deliver and sentenced to five years' imprisonment.

On appeal, defendant contests the sufficiency of the evidence supporting his conviction, arguing that the evidence failed to show he delivered or intended to deliver drugs. He also contends that

the trial court erred when it failed to admonish him as to his eligibility for the drug abuse treatment program (TASC). Defendant finally contends that the mittimus must be corrected to reflect the proper conviction. We affirm as modified.

¶ 3 At trial, Detective Elzia testified that on February 26, 2010, he was performing a surveillance of a drug house located at 14010 Grace Avenue in Robbins, Illinois, which was adjacent to 3203 McBreen Avenue. At about 10:20 a.m., Elzia saw a Ford Explorer pull up to a stop sign near 3203 McBreen Avenue. Defendant walked across the street to the driver's side door and engaged in a hand-to-hand transaction with the driver of the Ford. When the driver tendered money to defendant, Elzia, who was about five to eight feet away from the scene, proceeded towards the Ford and announced that he was a police officer. At that time, defendant placed silver tinfoil packets into his mouth, and Elzia grabbed him. Elzia told defendant to spit out the packets, defendant complied, and he was taken into custody. Elzia recovered seven packets from defendant, and when he asked defendant what was inside the packets, defendant responded, "heroin."

¶ 4 On cross-examination, Elzia admitted that he did not know what was exchanged between defendant and the driver of the Ford, and there was no mention of money recovered from defendant on the inventory sheet that police provided to the assistant State's Attorney. After Detective Elzia testified, the parties stipulated that the substance recovered was heroin, and that it weighed one gram.

¶ 5 Following closing arguments, the trial court found defendant guilty of possession of heroin with intent to deliver. In so finding, the court stated that Detective Elzia testified credibly, and noted that the transaction was terminated when Elzia announced his office and defendant put the packets of contraband into his mouth.

¶ 6 Defendant subsequently motioned the court for a new trial. In rejecting defendant's contention that he was just a buyer, the trial court denied the motion stating,

"it's a guy coming up in a SUV, coming up, giving something to him. We don't know what it was, but, obviously, then the defendant is stopped, and he has seven different packets of heroin. And that shows an intent to sell or deliver. I don't think that the reasonable inferences based on all the evidence that was presented during the trial would indicate that, in fact, the defendant is the buyer. In fact, he is the seller."

¶ 7 At sentencing, defense counsel argued for the minimum sentence, stating that defendant has a drug problem and a non-violent history. The State referred to defendant's prior history of drug related offenses and requested that he be sentenced to seven years' imprisonment. In allocution, defendant referred to his drug problem and requested the minimum sentence. The presentence investigation report (PSI) also described defendant's history of drug abuse, non-violent drug related offenses, and his desire to participate in drug treatment. After hearing arguments in aggravation and mitigation, the court sentenced defendant to five years' imprisonment.

¶ 8 On appeal, defendant contends that his conviction for possession of a controlled substance with intent to deliver should be reduced to simple possession where there was insufficient proof that he had the intent to deliver. Defendant maintains that when he was arrested he was in possession of seven packets of heroin, but no money, supporting an inference that he was the buyer, not the seller, of the drugs.

¶ 9 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 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).

¶ 10 In order to prove defendant guilty of possession of a controlled substance with intent to deliver, the State must prove that the defendant had knowledge that the controlled substance was present, the controlled substance was in the defendant's immediate control or possession, and the defendant intended to deliver the controlled substance. *People v. Robinson*, 167 Ill. 2d 397, 407 (1995); 720 ILCS 570/401(c)(1) (West 2010). Defendant contends that the State failed to meet its burden to prove that he intended to deliver the controlled substance.

¶ 11 Intent to deliver must usually be established by circumstantial evidence because direct evidence of intent to deliver is rare. *Robinson*, 167 Ill. 2d at 408. In *Robinson*, the Illinois Supreme Court listed several factors as probative of a defendant's intent to deliver. These factors include the quantity, purity, and packaging of the controlled substance, as well as the defendant's possession of weapons, police scanners, beepers, drug paraphernalia and large amounts of cash. *Robinson*, 167 Ill. 2d at 408. 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 court 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.

¶ 12 Here, while Detective Elzia was performing a surveillance of a drug house, he observed a Ford Explorer pull up to a stop sign and saw defendant walk across the street to the driver's side of the Ford. He then witnessed defendant engage in a hand-to-hand transaction with the driver. During the exchange, Elzia approached the men and announced that he was a police officer. Defendant then placed silver tinfoil packets into his mouth and Elzia grabbed him. When defendant spit out the seven packets, Elzia took him into custody. Finding that the State proved defendant's intent to deliver beyond a reasonable doubt, the trial court held that the police testimony was credible and that the transaction was interrupted when Elzia announced his office. Moreover, in denying defendant's motion for a new trial, the trial court indicated that the fact that defendant possessed seven packets of heroin showed an intent to sell. Viewing the record in the light most favorable to the State, we conclude that a rational trier of fact could find the State proved defendant's intent to deliver beyond a reasonable doubt.

¶ 13 Defendant's argument that the evidence was consistent with personal use rather than an intent to deliver rests largely on the small weight of the controlled substance, that most of the *Robinson* factors were not present, and that defendant was the buyer, not the seller. This court has held that no matter how insignificant, the small quantity of a controlled substance recovered is not dispositive of intent, but rather is one factor of many to consider in light of the 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.

¶ 14 We agree that the weight of the recovered heroin 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. Under the appropriate circumstances, the packaging of a controlled substance, alone, may be sufficient

evidence of intent to deliver. *Robinson*, 167 Ill. 2d at 414; see *e.g.*, *People v. Williams*, 358 Ill. App. 3d 1098, 1102 (2005) (where the defendant possessed 1.6 grams of 12 individually packaged rocks of crack cocaine). In this case, the packaging of heroin into seven tinfoil packets was conducive of defendant's intent to deliver. Moreover, the testimony of Detective Elzia showed that defendant intended to deliver the narcotics. Elzia testified that he witnessed defendant approach the driver of a Ford Explorer and engage in a hand-to-hand transaction with him in a high narcotics area. When Elzia announced his office, defendant immediately tried to swallow the packets of heroin. Therefore, the evidence as a whole, including the observed transaction, the way the narcotics were packaged, and the testimony of Elzia, constituted strong circumstantial evidence of an intent to deliver. Despite the small quantity of the substance, and the fact that defendant did not possess weapons, police scanners, beepers, drug paraphernalia, or cash, the trial court could reasonably infer defendant intended to deliver the heroin.

¶ 15 In reaching this conclusion, we reject defendant's argument that the evidence showed that he was the buyer, not the seller, during the transaction. As stated above, Detective Elzia's testimony clearly established that defendant approached the driver of the Ford, engaged in a hand-to-hand transaction with him, and was caught with seven packets of heroin. The fact that no money was recovered on defendant does not change this result, particularly where Elzia disrupted the transaction when he announced that he was a police officer. In addition, the trial court explicitly rejected defendant's theory that he was the buyer when it stated, "I don't think that the reasonable inferences based on all the evidence that was presented during the trial would indicate that, in fact, the defendant is the buyer. In fact, he is the seller."

¶ 16 Defendant next contends that the trial court erred by failing to admonish him of his eligibility for TASC where it had reason to believe he was a drug addict and was statutorily eligible for treatment. Defendant concedes that he failed to raise this issue in a post-sentencing

motion, but asserts that the trial court's failure to comply with the admonishment requirement of the Alcoholism and Other Drug Abuse and Dependency Act (Act) (20 ILCS 301/40-10(a) (West 2010)), constituted plain error that must be addressed despite forfeiture. *People v. Wallace*, 331 Ill. App. 3d 822, 835 (2002). The State responds that defendant has forfeited review of this issue by failing to raise it at the sentencing hearing or in a post-sentencing motion, and, furthermore, that it is not reviewable under the plain error doctrine. *People v. McNulty*, 383 Ill. App. 3d 553, 556-58 (2008). We agree with the State.

¶ 17 In *McNulty*, 383 Ill. App. 3d at 556, this court rejected defendant's reliance on *Wallace* to support his claim for plain error review, and concluded that defendant had forfeited the issue. In doing so, this court found persuasive the reasoning in the dissent in *Wallace* who observed that the cases relied upon by the majority predated the statutory authority making the post-sentencing motion mandatory, and that the facts showed that appellate counsel was the only person who wanted defendant evaluated for TASC. *McNulty*, 383 Ill. App. 3d at 557, citing *Wallace*, 331 Ill. App. 3d at 841 (Quinn, J., dissenting). Applying that reasoning to the facts in *McNulty*, where the issue was not raised in the circuit court, defendant had previously failed to complete drug treatment, and, with counsel, asked the court to impose the minimum sentence and provide him with substance abuse treatment while he was incarcerated, this court found that the plain error doctrine did not apply and that he had forfeited the issues. *McNulty*, 383 Ill. App. 3d at 557-58. We continue to find *McNulty* the better reasoned decision, and likewise conclude that defendant in this case forfeited the TASC admonishment issue when he failed to object during the sentencing hearing and raise the issue in his post-sentencing motion. *McNulty*, 383 Ill. App. 3d at 558.

¶ 18 Forfeiture aside, this issue is moot. When the issue involved in the trial court no longer exists due to intervening events that have rendered it impossible for the appellate court to grant

relief to the defendant, the case is moot. *People v. Roberson*, 212 Ill. 2d 430, 435 (2004). A sentencing challenge is moot where defendant has completed serving his sentence. *People v. Campbell*, 224 Ill. 2d 80, 83 (2006).

¶ 19 Here, defendant completed serving his term of imprisonment and was released from prison on May 25, 2012. We acknowledge that defendant's term of mandatory supervised release (MSR) is part of his sentence (*People v. Whitney*, 368 Ill. App. 3d 678, 681 (2006)), that his MSR term does not end until May 26, 2014, and that his sentence will thus not be fully discharged until that date. However, the only relief available for us to grant, and the relief requested by appellate counsel, is to vacate and remand this cause to the trial court for further proceedings. These proceedings would consist of a resentencing hearing at which time the trial court would consider whether a TASC evaluation should be ordered and whether defendant should be sentenced to probation instead of a prison term. It is impossible to sentence defendant to probation with drug treatment in lieu of imprisonment where he already completed his term of incarceration. Accordingly, because it is impossible for this court to grant defendant relief, the case is moot. See *McNulty*, 383 Ill. App. 3d at 558 (where defendant had discharged his prison term and only MSR remained, it was impossible to sentence him to probation with drug treatment thus rendering the issue moot).

¶ 20 Defendant finally contends, and the State agrees, that defendant's mittimus should be corrected to reflect the actual offense of which he was convicted with the correct statutory citation. The record shows that although defendant was initially charged with possession of cocaine with intent to deliver, during arraignment, the controlled substance was amended to heroin. According to the report of proceedings, defendant was convicted of possession with intent to deliver 1 to 15 grams of heroin in violation section 401(c)(1) of the Illinois Controlled Substances Act (720 ILCS 570/401(c)(1) (West 2010)). The mittimus, however, incorrectly cites

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section 401(c)(2) of the Illinois Controlled Substances Act and misidentifies the offense as "MFG/DEL 1<15 GR COCAINE/A."

¶ 21 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 heroin with intent to deliver (720 ILCS 570/401(c)(1) (West 2010). *People v. Blackney*, 375 Ill. App. 3d 554, 560 (2007).

¶ 22 For the foregoing reasons, we correct defendant's mittimus to accurately reflect that he was convicted of possession of heroin with intent to deliver, and affirm the judgment of the circuit court in all other respects.

¶ 23 Affirmed; mittimus corrected.