

No. 1-11-0821

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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. 09 CR 20678
	)	
LLOYD WESLEY,	)	Honorable
	)	John T. Doody, Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.  
Presiding Justice Lampkin and Justice Hall concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where the Illinois recidivism statute mandates that a defendant sentenced as a Class X offender must receive the entire Class X sentence, this includes the statutorily prescribed MSR term.

¶ 2 Following a jury trial, defendant Lloyd Wesley was convicted of possession of 1 to 15 grams of cocaine with intent to deliver. After hearing factors in aggravation and mitigation, the trial court sentenced defendant to eight years and six months in the Cook County Department of Corrections, with a three-year term of mandatory supervised release (MSR). On this direct appeal, defendant claims that the trial court erred when it imposed a three-year term of

mandatory supervised release on defendant's conviction of a Class 1 felony. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 The appellate record shows that, on October 11, 2009, Chicago Police Officer Tod Olsen observed defendant retrieve drugs from a parked vehicle and sell them to several pedestrians on the street. Olsen and Officer Frank Sarabia arrested defendant and searched the vehicle, from which they recovered 21 small bags containing crack cocaine, 90 small bags containing heroin, and \$235 in cash. Sarabia transported the evidence to the Tenth District police station, where he inventoried the drugs and placed them into a vault. The property inventory form listed the evidence inventoried under the number 11814596 as a medium-sized plastic bag containing: (1) seven small plastic baggies containing 90 Ziploc bags of various designs all filled with heroin, and (2) a clear plastic bag containing 21 orange-tinted Ziploc bags each containing crack cocaine.

¶ 5 The State filed a felony complaint, alleging that defendant violated the Illinois Controlled Substances Act (720 ILCS 570 (West 2008)) when he was found in possession of 9 grams of heroin<sup>1</sup> and 2.1 grams of cocaine. The appellate record reveals that, at some point, these numbers were crossed out and rewritten in pen to indicate different weight totals: "15.1 g tested / 27.2 g total" for the heroin and "1.2 g tested / 3.6 g total" for the cocaine. We have no way of knowing who wrote in pen or when. The State also filed an information charging defendant with one count of possession of 1 to 15 grams of cocaine with intent to deliver, and one count of possession of

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<sup>1</sup> The State later decided not to prosecute defendant for possession of heroin.

cocaine with intent to deliver within 1,000 feet of a church. 720 ILCS 570/401(c)(2) (West 2008); 720 ILCS 570/407(b)(1) (West 2008). The State later decided not to prosecute the latter charge.

¶ 6 I. Evidence at Trial

¶ 7 At trial, the State presented three witnesses: Chicago Police Officer Tod Olsen, who witnessed the drug sale; Officer Frank Sarabia, who recovered and inventoried the drugs; and Lenetta Watson, a forensic scientist who tested the drugs. Defendant called one witness, Sergeant Ignacio Hernandez, who had conducted roll call at the Tenth District police station on the morning of the incident; defendant called Hernandez in an attempt to impeach a portion of Olsen's testimony.

¶ 8 A. Officer Tod Olsen's Testimony

¶ 9 At trial, Officer Tod Olsen testified that he is a police officer with the Chicago Police Department. In his 15 years as an officer, he has made nearly 2,000 drug arrests, and has conducted surveillance hundreds of times. At 8:40 a.m. on October 11, 2009, he was driving his motor vehicle to work when he observed several people gathered on the 2200 block of South Springfield Avenue, in Chicago. Olsen became suspicious, so he parked his vehicle on an access road nearby. As he sat in his vehicle, he observed defendant standing in a vacant lot near a white Chevy Corsica that was parked on Springfield Avenue. Olsen observed another individual, whom he recognized as Nakia Smith, walking down the street. Olsen testified that Smith was a man whom Olsen had observed 50 to 60 times before; however Olsen did not specify what he had previously observed Smith doing. Smith approached defendant and handed him a white object

the size of a fist. Defendant received the object, walked over to the Chevy Corsica, and placed the object in the vehicle's glove compartment.

¶ 10 Olsen testified that three individuals then approached defendant. Each of the three individuals handed defendant currency, which he then walked back to the parked Chevy. Defendant again reached into the glove compartment and removed several items, which he then dispensed to the three individuals. At that time, based on his prior experience, Olsen believed that he had just witnessed a drug sale. Because he was alone and did not have a police radio, Olsen decided not to arrest defendant at that time, and instead drove to the Tenth District police station.

¶ 11 Olsen testified that, when he arrived at the police station, he told Officer Frank Sarabia that he had observed a drug sale. Olsen and Sarabia then drove a police vehicle back to the area where Olsen had observed defendant. This time, Olsen exited the vehicle out of the sight of defendant, and walked through a nearby gangway. From there, Olsen observed defendant in the same vacant lot near the parked Chevy, this time handing an item to another individual on a bicycle. Olsen did not observe defendant receive anything from the individual.

¶ 12 Olsen testified that he then returned to the police vehicle and drove along Springfield Avenue towards defendant. As the officers approached, their vehicle hit a pothole and made a scraping noise. Defendant glanced at the officer's vehicle and then walked towards the passenger side of a white Lincoln Town Car that was idling on the side of the road. Smith was still nearby, and he also approached the driver's side of the Lincoln, and both men appeared to be talking to the occupants of the vehicle.

¶ 13 Olsen testified that he and Sarabia then drove up to defendant and Smith, and detained them. The Lincoln drove off on the officers' orders. Olsen remained with the suspects while Sarabia attempted to search the Chevy. Sarabia found that the vehicle was locked, so he radioed Officer Sergio Escobedo to bring a tool kit and open the vehicle's doors. Once Escobedo unlocked the vehicle, Sarabia retrieved "a clear white plastic bag" the size of a fist, which contained inside numerous smaller bags the size of a postage stamp. Some of the smaller bags were filled with a white powder, while others contained a substance that looked like rock cocaine. Some of the bags had numerous designs printed on the outside. At that point, the officers arrested defendant and transported him to the Tenth District. Olsen testified that he conducted a custodial search and recovered \$91 in cash on defendant's person.

¶ 14 During the defense's cross-examination of Officer Olsen, defense counsel introduced for the first time State's Exhibit 2, which Olsen identified as "some of the drugs that were found" that day. Olsen testified that some of the drugs were in bags that had a red and black design with some writing on one side, and the remainder were contained in orange-tinted bags. The bags inside the evidence bag were the approximate size of the item that Smith had handed to defendant. At no point during cross-examination or at any other point during the trial did either party object to the foundation for this exhibit, which was later offered and received in evidence.

¶ 15 B. Officer Frank Sarabia's Testimony

¶ 16 Officer Frank Sarabia testified that he is a Chicago Police Officer, and that he has conducted thousands of drug investigations during his 11-year career. While defendant and Smith were detained, he approached the Chevy Corsica and observed through the window that the glove

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compartment was open. Inside the compartment he observed a plastic bag that contained numerous smaller plastic bags that, in turn, contained either a white chunky substance or a fine powder. Based on his experience, he believed the substances to be crack cocaine and heroin. He also observed a stack of cash next to the plastic bags. At that point, defendant and Smith were placed under arrest, and Sarabia attempted to search the Chevy. Once the vehicle was unlocked, he removed the bags and the money that he had observed through the window.

¶ 17 At trial, the State presented Sarabia with State's Exhibit 2, which he described as a "Chicago Police evidence narcotics envelope." Sarabia testified that inside the envelope was a heat-sealed State Police Crime Lab bag that contained the drugs that he had recovered from the Chevy Corsica. Sarabia then explained the typical inventory process for recovered drugs. He would first keep the money and the drugs on his person until he arrived at the Tenth District police station. From there, he would count and recount the items, enter information into a computer, and then assign the evidence a unique eight-digit number. He would then fill out the front portion of the evidence bag. At that point, he would take the evidence to a sergeant who would then double-check the information to make sure it was accurate. The evidence bag would then be heat-sealed and placed into a vault. Sarabia testified that all of these procedures were followed with the evidence in the instant case, and that the items were kept in Sarabia's constant care, custody, and control until placed into the vault.

¶ 18 Sarabia testified that the inventory number 11814596 was assigned to the evidence bag. The State then asked Sarabia to remove the items from the evidence bag, and he recognized the same bags of suspected heroin and crack cocaine that he had recovered from the Chevy. He

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recalled that there were 90 bags of heroin and 21 bags of crack cocaine. With State's Exhibit 2 in front of him, he described it as follows:

“ASSISTANT STATE’S ATTORNEY (ASA): Did

any of the bags that you recovered have signifying marks?

SARABIA: Yes.

ASA: What were those marks?

SARABIA: The marks on the heroin were one-half of it was white clear, the other half -- the front portion was red with a bomb print design. I can't see offhand unless I would be able to see my report what the print was on the crack cocaine.

ASA: Regarding the items that you can see inside the bag without opening it, does it have any text on there, any writing on there?

SARABIA: Yes.

ASA: What does that say?

SARABIA: One of the bags has 1-B. Another one has 1-A. Then on the outside it is the -- the number on the top says 10128109, it looks like initials, JW possibly, and then C09-39722 underneath that.

ASA: Now, regarding specifically these red bags, can you read what that writing says right there?

SARABIA: It says, ‘Stay High.’ ”

Sarabia testified that, other than the bags being opened, the items were in the same or substantially the same condition as when he found them.

¶ 19 Although Sarabia recognized his writing on the outside of the heat-sealed bag, he offered no explanation of how he recognized this evidence as that seized from this defendant. Although Sarabia read number 10128109 off the exhibit, he did not testify that he recognized this number in any way.

¶ 20 Sarabia testified that he also recovered \$235 in cash from the vehicle. He kept the money on his person and transported it to the police station, where he then inventoried the money using the same procedures that he followed with the drugs. The cash was assigned a unique inventory number of 11814602, sealed in a separate evidence bag, and placed into a different vault.

¶ 21 C. Lenetta Watson’s Testimony

¶ 22 Lenetta Watson testified that she is a forensic scientist employed by the Illinois State Police, and that she has tested evidence for controlled substances thousands of times over the past 11 years. The State presented her with State’s Exhibit 2, which she identified as the same evidence bag that she placed into her custody on October 20, 2009. Watson testified that she recognized the exhibit by the markings she wrote on the envelope, however, she did not testify concerning the inventory number on the evidence bag. Watson testified that, except from being opened in court, the evidence was in the same or substantially the same condition as the last time she observed it.

¶ 23 Watson testified that the Chicago Police Department delivers evidence to the Forensic Science Center, and the evidence technician, Allen Caliendo, receives the evidence and places it into a vault. On October 20, 2009, Watson retrieved the evidence bag from the vault, placed her initials on the outside of the bag, and received “electronic custody” - a way of tracking who has the evidence at a given time. She opened the evidence bag and removed several bags, including 90 small bags of white powder and 21 small bags of a rocky substance. There were several bags present that were empty, though she did not specify which ones. At this point, the trial court allowed Watson to use her notes to refresh her recollection because she could not remember the weight totals. She testified that she had separated the 90 bags containing powder and determined they weighed 41.047 grams, including the weight of the bags. She then tested the powder and found that heroin was present in the samples. She estimated that the powder from 50 of the 90 bags contained 15.1 grams of heroin. Watson also emptied the contents of 7 of the 21 bags containing the rocky substance, and determined they weighed 1.231 grams. She tested the substance and found that the samples contained cocaine. She then estimated that the 21 bags contained a total of 3.6 grams of crack cocaine.

¶ 24 Watson testified that she placed the samples into new bags at the conclusion of her tests. She marked those bags and sealed them into another envelope. She then wrote her initials and the date on the seal of the bag and placed it back into the original evidence bag.

¶ 25 After Watson’s testimony, the State moved to admit State’s Exhibit 2 into evidence. Defendant did not object, and the trial court admitted the exhibit into evidence. The State then

rested and the defense moved for a directed verdict without argument, which the trial court denied.

¶ 26 D. Ignacio Hernandez's Testimony

¶ 27 After the State rested, the defense called one witness, Sergeant Ignacio Hernandez, who testified that he conducted roll call at the Tenth District at 8:50 a.m. on October 11, 2009. Officer Olsen was not present for roll call, and Officer Sarabia told Hernandez that Olsen was running late for personal reasons. Olsen arrived at 8:50 a.m. and told Hernandez that he was late because he had set up surveillance and observed a drug sale. In light of this, Hernandez marked Olsen as "present" at the 8 a.m. roll call. Also, the parties stipulated that Theresa Nelson, an attorney, would testify that she was present for an earlier conversation between Hernandez and defense counsel in which Hernandez stated that an officer would have had to submit a due slip for compensatory time if he or she was more than 15 minutes late.

¶ 28 E. Closing, Conviction and Sentencing

¶ 29 During closing argument, the defense argued that Olsen's testimony was an incredible and false version of the events. After listening to closing argument and jury instructions, the jury found defendant guilty of possession of 1 to 15 grams of cocaine with intent to deliver. After hearing factors in aggravation and mitigation, the trial court sentenced defendant to eight years and six months in the Cook County Department of Corrections, with a three-year term of mandatory supervised release.

¶ 30

## II. Proceedings on Appeal

¶ 31 Defendant appeals his conviction, claiming that the trial court erred when it imposed a three-year term of mandatory supervised release on defendant's conviction of a Class 1 felony. After both parties submitted their briefs on this appeal, the State filed, and this court granted, a motion to supplement the appellate record with seven photocopies of State's Exhibit 2. The photocopies show that the date "10/28/09" is written in pen on the seal of the evidence bag, which Officer Sarabia incorrectly read as one single number: 10128109. Written next to the date are the initials "LW." This is consistent with Watson's testimony that she placed her initials, which Sarabia misread as "JW," and the date on the seal of the evidence bag at the conclusion of her tests. The photocopies also show that the evidence envelope is labeled under inventory number 11814596, which, according to the inventory form and Sarabia's testimony, is the same number that was originally assigned to the evidence. Defendant then filed a motion which asked to withdraw the argument on appeal, in which he "challenged the State's evidence and chain of custody at trial." His motion stated that this argument was "predicated on testimony showing that State Exhibit 2 – the controlled substance tested by the chemist and allegedly to have been possessed by defendant – displayed an eight-digit number that did not match the inventory number." This court granted defendant's motion.

¶ 32

## ANALYSIS

¶ 33 On this appeal, defendant's only argument now is that he should have received a two-year MSR term, rather than a three-year term, because the length of the MSR term is based upon the

class of the felony of which the defendant was convicted. For the following reasons, we affirm defendant's sentence.

¶ 34

#### I. Standard of Review

¶ 35 Whether defendant should have received a two-year or three-year MSR term is a question of statutory interpretation that we review *de novo*. *People v. Robinson*, 172 Ill. 2d 452, 457 (1996). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). The primary purpose of statutory interpretation is to “ascertain and give effect to the intent of the legislature.” *Robinson*, 172 Ill. 2d at 457. “The most reliable indicator of legislative intent is the language of the statute itself.” *Robinson*, 172 Ill. 2d at 457. “The statutory language must be given its plain and ordinary meaning \* \* \* and where that language is clear and unambiguous, we must apply the statute without further aids of statutory construction.” *Robinson*, 172 Ill. 2d at 457. In general, ambiguities in a criminal statute must be resolved in favor of the defendant. *Robinson*, 172 Ill. 2d at 457.

¶ 36

#### II. Mandatory Supervised Release

¶ 37 Defendant next argues that, even though he was properly sentenced as a Class X offender, MSR terms are not part of a sentence, and he should have received the two-year Class 1 MSR term rather than the three-year Class X MSR term. Defendant argues that because MSR terms are mandated by statute, the incorrect MSR term renders his sentence void. *Jackson*, 2011 IL App (1st) 110615, ¶ 10. For the following reasons, we affirm.

¶ 38 The Unified Code of Corrections (the Code) states that “[w]hen a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, after having twice been convicted in any state or federal court of an offense that contains the same elements as an offense now \*\*\* classified in Illinois as a Class 2 or greater Class felony \*\*\*, that defendant shall be sentenced as a Class X offender.” 730 ILCS 5/5-4.5-95(b) (West 2008). Furthermore, the Code states that the MSR term “shall be written as part of the sentencing order.” 730 ILCS 5/5-8-1(d) (West 2008). The MSR term for Class X offenders shall be three years. 730 ILCS 5/5-8-1(d)(1) (West 2008). The parties do not dispute that defendant has previously been convicted of at least two Class 2 or greater felonies and was properly sentenced as a Class X offender.

¶ 39 The Illinois Appellate Court has, on multiple occasions, interpreted the Code to require that defendants sentenced as Class X offenders must receive the entire sentence that an offender convicted of a Class X offense would receive. *People v. McKinney*, 399 Ill. App. 3d 77, 80-81 (2010); *People v. Lee*, 397 Ill. App. 3d 1067, 1073 (2010); *People v. Watkins*, 387 Ill. App. 3d 764, 766-777 (2009); *People v. Smart*, 311 Ill. App. 3d 415, 417-418 (2000); *People v. Anderson*, 272 Ill. App. 3d 537, 541 (1995). The MSR term is treated as part of an offender's sentence. *McKinney*, 399 Ill. App. 3d at 81; *Lee*, 397 Ill. App. 3d at 1073. Therefore, when an offender is convicted of a Class 1 or Class 2 felony, if the offender is to be sentenced as a Class X offender pursuant to section 5-4.5-95(b), the offender receives the Class X MSR term. *McKinney*, 399 Ill.App.3d at 81.

¶ 40 Although the Code mandates that Class X offenders receive a three-year MSR term, defendant argues that he should receive the two-year MSR term because possession of 1 to 15

grams of cocaine is a Class 1 offense (720 ILCS 570/401(c)(2) (West 2008)), and the sentencing statute imposed a two-year MSR term to offenders sentenced as Class 1 or Class 2 offenders (730 ILCS 5/5-8-1(d)(2) (West 2008)). Although defendant acknowledges that his argument has been rejected many times by the Illinois Appellate Court, he argues that these cases were wrongly decided. In support of his argument, defendant points to the Illinois Supreme Court's decision in *People v. Pullen*, 192 Ill. 2d 36 (2000). Many of the decisions adverse to defendant's position have been decided subsequent to *Pullen*, which was decided in 2000. For example, *McKinney* and *Lee* were each decided 10 years after *Pullen*. *McKinney*, 399 Ill. App. 3d 77; *Lee*, 397 Ill. App. 3d 1067.

¶ 41 In *Pullen*, our supreme court was asked to analyze a sentencing statute that applied to offenders serving consecutive sentences. *Pullen*, 192 Ill. 2d at 40. The defendant in *Pullen* entered a negotiated guilty plea to five counts of burglary. *Pullen*, 192 Ill.2d at 38. The defendant had an extensive criminal record, and was sentenced as a Class X offender, even though burglary is a Class 2 felony. *Pullen*, 192 Ill. 2d at 38-39. The defendant was sentenced to 15 years on each count of burglary; the sentences for counts I and II ran concurrently with each other, the sentences for counts III, IV, and V ran concurrently with each other, and those two terms were to be served consecutively, resulting in a total of 30 years' incarceration. *Pullen*, 192 Ill. 2d at 39.

¶ 42 On a motion to withdraw his guilty plea, the defendant argued that the 30-year sentence was void because it violated a statute limiting the aggregate length of consecutive prison terms to the sum of the maximum extended terms for the two most serious felonies. *Pullen*, 192 Ill. 2d at 39. During the relevant time period, the statutory limit for extended sentences for Class 2

felonies, such as burglary, was 14 years. *Pullen*, 192 Ill. 2d at 40-41 (citing 730 ILCS 5/5-8-2 (West 1994)). The defendant in *Pullen* argued that, because his sentence was comprised of two separate terms to be served consecutively, his total sentence could not exceed 28 years, or 14 years for each consecutive term. *Pullen*, 192 Ill. 2d at 40.

¶ 43 The Illinois Supreme Court held that the defendant was required to be sentenced as a Class X offender because of his prior criminal history. *Pullen*, 192 Ill. 2d at 41. However, the court concluded that, under the terms of section 5-8-4(c)(2) of the Unified Code of Corrections (730 ILCS 5/5-8-4(c)(2) (West 1994)), the defendant's aggregate sentence could not exceed 28 years' imprisonment. *Pullen*, 192 Ill. 2d at 43-44. The court found that the terms of the statute explicitly stated that the maximum sentence for consecutive terms could not exceed the sum of the maximum terms authorized for the two most serious felonies. *Pullen*, 192 Ill. 2d at 42. The two most serious felonies involved were burglaries, a Class 2 offense, and therefore, the maximum terms for Class 2 offenses applied. *Pullen*, 192 Ill. 2d at 42-43.

¶ 44 Defendant argues that the reasoning in *Pullen* should apply here, but his arguments are not persuasive. As the Second District held in *McKinney*, the sentencing statute at issue here differs from the statute at issue in *Pullen* because the sentencing statute at issue “specifie[d] part of the sentence for a defendant's offense,” whereas the statute at issue in *Pullen* “delineate[d] how separate sentences for separate crimes are served .” *McKinney*, 399 Ill. App. 3d at 83.

¶ 45 The Illinois Supreme Court noted in *Pullen* that, had the defendant been sentenced to a single term, he would have been eligible for a longer sentence because he was sentenced as a

Class X offender and would not have been subject to the maximum consecutive sentences statute. *Pullen*, 192 Ill. 2d at 45.

¶ 46 *Pullen* is distinguishable from the case at bar. Our supreme court indicated that, had the defendant not been sentenced to consecutive sentences, he would have received the sentence mandated by statute to Class X offenders. *Pullen*, 192 Ill. 2d at 45. Defendant is not subject to consecutive sentences, and the sentencing statutes indicate that offenders with criminal histories similar to defendant's shall be sentenced as Class X offenders, regardless of the classification of the underlying offense. 730 ILCS 5/5-4.5-95(b) (West 2008). Illinois courts have consistently held that MSR terms are inseparable parts of sentences. *McKinney*, 399 Ill. App. 3d at 81; *Lee*, 397 Ill. App. 3d at 1073. The statute in the case at bar does not delineate between the prison sentence and the MSR term; rather, it states that convicted defendants “shall be sentenced as a Class X offender.” 730 ILCS 5/5-4.5-95(b) (West 2008). As a result, offenders who commit Class 1 or Class 2 offenses, but are to be sentenced as Class X offenders, are to be subject to Class X sentencing guidelines for every part of the sentence, including the MSR term.

¶ 47 **CONCLUSION**

¶ 48 For the aforementioned reasons, we affirm defendant’s sentence. We find that the Illinois recidivism statute mandates that defendants sentenced as Class X offenders must receive the entire Class X sentence, including the statutorily prescribed MSR term. Therefore, the trial court properly sentenced defendant to a three-year MSR term pursuant to the Code's recidivism statute requiring defendant to be sentenced as a Class X offender.

¶ 49 Affirmed.