2013 IL App (1st) 113017-U

FOURTH DIVISION
August 1, 2013

No. 1-11-3017

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 2551
	)	
ANTHONY LEGGINS,	)	Honorable
	)	John T. Doody,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held*: Judgment on defendant's jury conviction of possession of a controlled substance with intent to deliver affirmed where no complete breakdown in the chain of custody occurred warranting plain error review; defendant subject to a three-year term of MSR as a Class X offender.

¶ 2 Following a jury trial, defendant Anthony Leggins was found guilty of possession of a controlled substance with intent to deliver, then sentenced as a Class X offender to eight years' imprisonment, and a three-year term of mandatory supervised release (MSR). On appeal, defendant contends that there was a "complete breakdown" in the chain of custody of the narcotics presented at trial, casting reasonable doubt on his conviction. He also contends that the three-year term of MSR that attached to his Class X sentence is void and should be reduced to two years because he was convicted of a Class 1 offense. He thus requests that we reverse his conviction or, in the alternative, correct his mittimus to reflect a two-year term of MSR.

¶ 3 Defendant was charged with this offense after police observed him and co-defendant Ronnie Simmons, who is not a party to this appeal, engaging in several narcotics transactions. As pertinent to this appeal, the following evidence was presented at trial. Chicago police officer John Wrigley testified that about 8:45 p.m. on November 14, 2009, he was conducting a surveillance from the roof top of an apartment building on the corner of Central Park and West Douglas Boulevard in Chicago. There were multiple lights illuminating the area at that time, and he was using binoculars.

¶ 4 Officer Wrigley further testified that as soon as he began his surveillance, he saw defendant and Simmons engaged in conversation approximately 40 feet away from him. Less than five minutes later, Officer Wrigley heard an approaching individual whistle or yodel at

defendant and Simmons, prior to engaging in conversation with them. He then saw defendant walk to a nearby bench, retrieve an item from the ground below it, and walk back to Simmons, who then accepted money from the unknown individual. Upon his return, defendant gave that person a small item.

¶ 5 A short time later, Officer Wrigley observed the same series of events involving a second person who approached defendant and Simmons. After that interaction, officer Wrigley heard defendant shout "blows, blows," a street term for heroin, to oncoming pedestrians. Shortly thereafter, Officer Wrigley observed defendant and Simmons engage in a transaction with a third unknown individual. This transaction was similar to the other two, but on this occasion, defendant personally accepted the money from the unknown individual. Officer Wrigley then contacted his enforcement officers via radio and asked them to detain defendant and Simmons.

¶ 6 Chicago police officer Frank Sarabia testified that he assisted Officer Wrigley on the night of the incident. He recovered a clear plastic bag containing nine tinfoil packets wrapped in clear red tape from underneath a park bench. He kept those items on his person, where they remained in his constant custody, care and control, until he arrived at the police station. He then placed them in a narcotics envelope, which he handed to Officer Jason Acevedo. Officer Sarabia identified State's exhibits 2A, 2B and 2C through 2K as the evidence bag, clear plastic bag, and nine tinfoil packets, respectively, and stated that they were all in substantially the same condition as when he last saw them. On cross-examination, Officer Sarabia testified that when he

recovered the items, he merely looked inside the clear plastic bag, saw different packets, and placed them on his person without counting them.

¶ 7 Officer Acevedo testified that he received a clear plastic bag and nine tinfoil packets wrapped in red tape from Officer Sarabia at the police station. He inventoried those items under number 11848600, and sealed them in an evidence bag, after which he placed them in a secure vault, keeping the items under his constant care and control throughout the entire process. He identified State's exhibits 2A, 2B and 2C through 2K as the evidence bag, clear plastic bag, and nine tinfoil packets, respectively, and stated that they were in substantially the same condition as the last time he saw them, aside from some additional markings made by the crime lab and the addition of individual plastic bags.

¶ 8 Officer Acevedo further testified that a discrepancy existed between the evidence presented at trial, and what he listed in the inventory report, in that one of the tinfoil packets was not wrapped in red tape when presented at trial. In all other respects, that packet was in the same condition as on the night he inventoried it. On cross-examination, Officer Acevedo was asked why he had not documented the items as eight packets with red tape, and one packet without tape. He responded that at the time he inventoried the items, what stood out most to him was the red tape.

¶ 9 Thomas Halloran, a forensic chemist, identified State's exhibits 2A, 2B and 2C through 2K as the evidence bag, the clear plastic bag, and the nine tinfoil packets, respectively, which he received in a properly sealed condition from the chemistry vault at the Illinois Forensic Science

Center, and which were handed to him by evidence technician Allen Caliendo. The tinfoil packets consisted of eight foil packets wrapped in red tape and one foil packet that was not. This evidence, as presented at trial, was in substantially the same condition as when he last saw it. Halloran further testified that he analyzed seven of the nine packets. The contents of those seven packets collectively weighed 1.1 grams. He did not weigh the contents of the other two packets, but estimated that they weighed .3 gram. After performing various tests, he concluded that the contents of the seven packets tested positive for the presence of heroin.

¶ 10 The jury found defendant guilty of possession of between 1 and 15 grams of heroin with intent to deliver. In this appeal from that judgment, defendant contends that his conviction should be reversed because, due to a "complete breakdown" in the chain of custody, the State failed to provide a sufficient evidentiary link between the packets recovered at the scene and the packets that were analyzed by Halloran and submitted into evidence. Defendant acknowledges that he forfeited this issue by failing to object at trial, but argues that his claim may be reviewed under the plain error doctrine.

¶ 11 A contention that the chain of custody for evidence is deficient is a claim that the State failed to establish an adequate foundation for admitting that evidence. *People v. Woods*, 214 Ill. 2d 455, 471 (2005). Such an attack goes to the admissibility of the evidence, as opposed to proof of the existence of an element of the crime, and, as such, it is subject to the ordinary rules of forfeiture. *People v. Alsup*, 241 Ill. 2d 266, 275 (2011), citing *Woods*, 214 Ill. 2d at 473; see also *People v. Muhammad*, 398 Ill. App. 3d 1013, 1016-17 (2010).

¶ 12 The plain error doctrine is a narrow exception to the waiver rule which allows a reviewing court to consider unpreserved claims of error where defendant shows that the evidence is closely balanced, or the error is so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). However, before invoking the plain error doctrine, we must first determine whether any error occurred at all. *In re Samantha V.*, 234 Ill. 2d 359, 368 (2009).

¶ 13 In a case involving controlled substances, the physical evidence is often not readily identifiable, and thus may be susceptible to tampering, contamination or exchange. *Woods*, 214 Ill. 2d at 466-67. In such cases, the State bears the burden of establishing a chain of custody as a foundation for the admission of that evidence, whereby the State must establish that the police took reasonable protective measures to ensure that the substance recovered from the defendant was the same substance tested by the forensic chemist, and that it is improbable that the evidence was subject to tampering or accidental substitution. *Woods*, 214 Ill. 2d at 466-67; see also *Alsup*, 241 Ill. 2d at 274.

¶ 14 Unless defendant produces evidence of actual tampering, the State need not present testimony from every person in the chain to satisfy its burden, nor must it exclude every possibility of tampering or contamination. *Woods*, 214 Ill. 2d at 467. Additionally, evidence is admissible even where there is a missing link in the chain of custody, so long as testimony was presented which sufficiently described the condition of the evidence when delivered which matched the description of the evidence upon examination. *Alsup*, 241 Ill. 2d at 274. At that

point, any deficiencies in the chain of custody go to the weight, not the admissibility, of the evidence. *Alsup*, 241 Ill. 2d at 275.

¶ 15 Here, defendant maintains that because of the "complete breakdown" in the chain of custody, the State failed to link the recovered evidence with the evidence that was tested and presented at trial. In support, defendant points to discrepancies in packaging and weight between the recovered and tested narcotics, as well as the lack of testimony accounting for those discrepancies, or explanation as to how the evidence was maintained or transferred to Halloran after being placed in the secured vault. The State responds that these discrepancies do not constitute a "complete breakdown" in the chain of custody, and, as such, defendant has failed to establish an error warranting plain error review. We agree.

¶ 16 The record shows that Officers Sarabia and Acevedo identified the State's Exhibits 2B and 2C through 2K as the clear plastic bag, and nine tinfoil packets that were recovered from underneath the park bench, and Exhibit 2A as the evidence bag in which those items were placed then properly sealed. Both officers testified that those items remained in their constant custody, care and control throughout recovery, transport to the police station, and inventory process. Further, Officer Acevedo testified that he assigned those items the unique inventory number 11848600 and placed them in a secure vault. Halloran in turn, also identified People's exhibits 2A, 2B and 2C through 2K as the evidence he received in a properly sealed condition in this case.

¶ 17 This court has found that testimony regarding the receipt of evidence in a sealed condition with a matching inventory number is sufficient to establish that the integrity of the evidence had

not been compromised, even when the description of the contents of the evidence bag did not match the substance tested. *People v. Paige*, 378 Ill. App. 3d 95, 99 (2007). Here, pursuant to Officer Sarabia, Officer Acevedo, and Halloran, the evidence at issue was handled with reasonable protective measures so as to make it improbable that the evidence was subject to tampering. *Woods*, 214 Ill. 2d at 466-67. Although Halloran did not pronounce the inventory number on the bag, the fact remains that Officer Sarabia, Officer Acevedo and Halloran each identified People's Exhibit 2 in its entirety as the evidence that they, collectively, recovered, transported, inventoried, received and analyzed in relation to this case; exhibits which Officer Acevedo testified had received a unique identifying inventory number.

¶ 18 Based on the foregoing, we find that the State made a *prima facie* showing of a sufficient chain of custody of the evidence at issue, in spite of the single packet disparity in relation to the presence of red tape. *Britton*, 2012 IL App (1st) 102322, ¶¶ 19-20. We note that the same number of tinfoil packets were recovered by Officer Sarabia, inventoried by Officer Acevedo, and analyzed by Halloran. Further, Officer Sarabia testified that when he recovered the narcotics, he simply looked inside the bag, and did not separate the packets or count them individually, and thus did not testify that he confirmed that each individual package was wrapped in red tape at that time. Moreover, Officer Acevedo testified that when he was conducting the inventory, the red tape was what most stood out to him. Given this evidence of the protective measures that were taken in this case, we do not find the lack of red tape on a single packet to be fatal to the State's *prima facie* case. *Alsup*, 241 Ill. 2d at 278-79.

¶ 19 In reaching that conclusion, we find defendant's reliance on the disparity in weight between the narcotics recovered and the narcotics that were tested misplaced. Defendant correctly points out that the initial police report reflected the approximate weight of the recovered narcotics as .9 gram, which is a .5 gram difference from the weight of the narcotics as calculated by Halloran at the time of testing. However, Officer Sarabia did not testify that he weighed the narcotics when he recovered them, nor does the police report so reflect. Halloran, on the other hand, weighed seven of the nine packets, then estimated the weight of the remaining two packets in arriving at the collective 1.4 gram estimate of the nine packets. Under these circumstances, we do not find a .5 gram difference to be significant, or reflective of a complete breakdown in the chain of custody. *Britton*, 2012 IL App (1st) 102322, ¶¶ 15, 19-20.

¶ 20 Defendant also points to the lack of testimony establishing how the narcotics were maintained and transported to Halloran after being placed in the secure vault. However, under the circumstances of this case, the State was not required to present testimony from every person in the chain. *Woods*, 214 Ill. 2d at 467. We find that the lack of such testimony does not destroy the chain of custody. *People v. Irpino*, 122 Ill. App. 3d 767, 775 (1984); *People v. Johnson*, 361 Ill. App. 3d 430, 441-42 (2005).

¶ 21 Based on the foregoing, we conclude that the State met its burden in producing a *prima facie* case of the chain of custody of the entirety of the State's exhibit 2. Because no error occurred in the admission of that evidence, there can be no plain error (*People v. Bair*, 379 Ill.

App. 3d 51, 60 (2008) (and cases cited therein)), and we honor his procedural default of the issue (*Woods*, 214 Ill. 2d at 473).

¶ 22 In reaching this conclusion, we have considered *People v. Gibson*, 287 Ill. App. 3d 878 (1997), and *People v. Terry*, 211 Ill. App. 3d 968 (1991), upon which defendant relies, and find both cases distinguishable from the case at bar.

¶ 23 In *Gibson*, the officer who inventoried 19 packets of suspected cocaine used a scale to estimate a collective weight of 2.0 grams. *Gibson*, 287 Ill. App. 3d at 879. At trial, the parties stipulated that the forensic chemist received 20 packets, with a total estimated weight of 9.3 grams. *Gibson*, 287 Ill. App. 3d at 879. In finding that the State had failed to demonstrate a reasonable probability that the drug evidence had not been altered or substituted, this court found the almost fivefold weight increase to be a "substantial" discrepancy, and noted that no testimony was presented specifying the procedures the inventory officer employed in safekeeping the evidence. *Gibson*, 287 Ill. App. 3d at 279, 882-83. Here, in contrast, there is no discrepancy in the number of packets, the initial estimated weight of the packets was not calculated with a scale, there was not such an extreme disparity between that weight and the weight as calculated by the forensic chemist, and the State presented testimony regarding the procedures employed to safeguard the evidence. Thus, *Gibson* is factually distinguishable from the case at bar.

¶ 24 In *Terry*, although police inventoried 32 packets of suspect narcotics with a collective estimated weight of 8.0 grams, the forensic scientist analyzed 42 packets with a weight of 12.0 grams, and which was covered in a yellow substance. *Terry*, 211 Ill. App. 3d at 971. In finding

that the evidence was erroneously admitted at trial, this court relied heavily on the 10-packet discrepancy, as well as the 4.0 gram difference in weight. *Terry*, 211 Ill. App. 3d at 974. Here, there was no discrepancy as to the number of packets, nor was there such a significant difference in weight. Thus *Terry* is also distinguishable from the case at bar.

¶ 25 Defendant next maintains that the three-year term of MSR that attached to his Class X sentence is void and should be reduced to two years because he was convicted of a Class 1felony offense. Although a void sentence can be challenged at any time, we review the sentence to determine whether it is actually void. *People v. Balle*, 379 Ill. App. 3d 146, 151 (2008). For the following reasons, we find that it is not.

¶ 26 Section 5-8-1(d) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-1(d) (West 2008)), provides that the MSR term for a Class X felony and for a Class 1 felony is three years and two years, respectively. Because defendant was convicted of a Class 1 felony, he maintains that he is only subject to a two-year term of MSR, relying on *People v. Pullen*, 192 Ill. 2d 36 (2000).

¶ 27 Defendant's reliance on *Pullen* is misplaced. This court has repeatedly addressed *Pullen* and found that it does not change the conclusion that a defendant sentenced as a Class X offender shall receive the same three-year MSR term imposed on defendants convicted of Class X felonies. See *People v. Brisco*, 2012 IL App (1st) 101612, ¶ 62; *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011); *People v. Lee*, 397 Ill. App. 3d 1067, 1073 (2010); and *People v. McKinney*,

399 Ill. App. 3d 77, 83 (2010). We agree with these decisions and likewise conclude that the three-year MSR term was correctly applied in this case.

¶ 28 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.