

No. 1-11-3781

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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|--------------------------------------|---|--------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the    |
|                                      | ) | Circuit Court of   |
| Plaintiff-Appellee,                  | ) | Cook County.       |
|                                      | ) |                    |
| v.                                   | ) | No. 10 CR 4458     |
|                                      | ) |                    |
| BRIAN ELMORE,                        | ) | Honorable          |
|                                      | ) | Jorge Luis Alonso, |
| Defendant-Appellant.                 | ) | Judge Presiding.   |

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JUSTICE HALL delivered the judgment of the court.  
Presiding Justice ROCHFORD and Justice REYES concurred in the judgment.

**ORDER**

¶ 1 *Held:* The evidence was sufficient to support defendant's conviction for possession of a controlled substance. His six-year sentence is not excessive.

¶ 2 After a bench trial, defendant Brian Elmore was convicted of unlawful possession of a controlled substance (heroin) under section 402(c) of the Illinois Controlled Substances Act (720 ILCS 570/402(c) (West 2010)) and sentenced to an extended term of six years. On appeal, defendant asserts the State failed to prove him guilty beyond a reasonable doubt. He also contends that his six-year sentence is excessive. We affirm.

¶ 3 Defendant was charged by information with "possession of a controlled substance with intent to deliver in that he knowingly and unlawfully possessed with intent to deliver \*\*\* more than 5 grams of heroin."

¶ 4 At trial, Officer Matthew McGrory testified that he conducted a narcotics surveillance on the second floor of an abandoned two-flat building at 4720 West Huron on February 3, 2010. McGrory positioned himself in a room, with one window facing east and the other facing south, where he could see the entire block of 4700 West Huron. McGrory was assisted by enforcement officers Matthew Bouch and Brian McHale, who were located on the 4700 block of Ohio, approximately a block away from the surveillance location. McGrory testified that around 11:50 a.m. he looked out the window and observed an unknown individual approach defendant and give him an unknown amount of money. Defendant then walked across the street to 4723 West Huron, retrieved a bag, and removed an item from the bag. He then returned to 4720 West Huron, and gave the item to the individual. McGrory believed that he was observing an illegal narcotics transaction. Defendant participated in a total of three separate similar transactions.

¶ 5 Shortly thereafter, McGrory observed co-defendant James Armstrong<sup>1</sup> and co-arrestee Antonie Patrick walk toward 4720 West Huron. Armstrong was carrying a black and blue fabric bag. He walked to 4709 West Huron, and hid the fabric bag between the front porch and a garbage can. He then removed a black plastic bag from the same area and placed this bag on the east side of the porch, concealing it in the snow. Armstrong then returned to 4720 West Huron. On two separate occasions, an unknown person approached him and gave him an unknown amount of money. Armstrong would then walk to 4709 West Huron, retrieve an item from the plastic bag, and return to 4720 West Huron to deliver the item to the person who paid him.

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<sup>1</sup> Armstrong was convicted following a simultaneous but severed bench trial and currently has an appeal pending before this court in case number 1-12-0218.

McGrory believed that Armstrong was conducting illegal narcotics transactions. McGrory observed the men for approximately 25 minutes, and used binoculars to view each transaction. McGrory then radioed Bouch and McHale and gave them physical descriptions of defendant, Armstrong, and Patrick. Bouch and McHale immediately drove to 4720 West Huron and detained the three men. McGrory directed Bouch to the side of the front porch at 4709 West Huron, and directed McHale to keep an eye at 4723 West Huron. He then broke surveillance and went to 4723 West Huron, where he had observed defendant retrieving objects, and recovered 23 Ziploc bags of heroin enclosed in one large Ziploc bag.

¶ 6 Officer Matthew Bouch testified that after he detained the three men, McGrory positively identified them as the individuals engaged in the suspect drug transactions.

¶ 7 Officer Brain McHale testified that after arresting the three men, they were transported to the 11<sup>th</sup> district. McHale performed a custodial search and recovered \$76 from defendant, \$355 from Armstrong, and \$79 from Patrick. He also inventoried the 39 tinfoil packets of PCP, and a loaded gun which were recovered near 4709 W. Huron, and the 23 Ziploc bags of heroin.

¶ 8 Martinique Rutherford, a forensic scientist with the Illinois State Police, testified that the 23 clear Ziploc bags that McGrory found tested positive for 5.5 grams of heroin. The trial court found defendant guilty of the lesser included offense of possession of a controlled substance, stating that he would give defendant "the benefit of the doubt on intent."

¶ 9 During a sentencing hearing, the State urged the court to sentence defendant to the maximum extended term of six years based on defendant's seven prior felonies. Defendant urged the court to sentence him to one to three years, stating that his "biggest problem is being addicted to illegal substances and alcohol." His history of drug and alcohol abuse was detailed in the pre-sentence investigation (PSI) report. Defendant stated that he was employed prior to his arrest, and produced four letters written on his behalf attesting to his character in recent times.

He also gave a statement asking the court for leniency and expressing his intentions to seek "aftercare" services upon his release.

¶ 10 During its pronouncement, the court stated that it had "reviewed the PSI [presentence investigation report] and considered the arguments of the attorneys, the nature and circumstances of the offense, the factors in aggravation and mitigation, including his criminal history and the financial impact of incarceration." The court concluded that the 43-year-old defendant's 20-year criminal history of drug related felony convictions showed he had been a drug dealer since the 80s, and stated "that an extended term is appropriate based upon the criminal history and the facts and circumstances of the case." Defendant was sentenced to the maximum extended term sentence for a Class 4 felony, six years in prison.

¶ 11 On appeal, defendant contends the State failed to introduce sufficient evidence to connect him to the plastic bag containing the 23 Ziploc bags of heroin found near 4723 West Huron.

¶ 12 When a defendant challenges the sufficiency of the evidence, the relevant question on review is whether, after considering the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). The trier of fact determines the credibility of witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). A conviction will only be overturned where the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt. *Beauchamp*, 241 Ill. 2d at 8.

¶ 13 Section 402(c) of the Illinois Controlled Substances Act (Act) makes it unlawful for "any person knowingly to possess a \*\*\* controlled substance." 720 ILCS 570/402(c)(West 2010). To convict a defendant of the offense of possession of a controlled substance, "the State must prove

that the defendant had knowledge of the presence of an illicit substance and that the substance was in his immediate and exclusive control." *People v. Young*, 2013 IL App. (2d) 120167 ¶ 30.

¶ 14 "Possession may be established by evidence of actual physical possession or constructive possession." *People v. Scott*, 152 Ill. App. 3d 868, 871 (1987). "Actual possession is proved by testimony which shows [the] defendant exercised some form of dominion over the unlawful substance, such as trying to conceal it or throwing it away." *Id.* Constructive possession can exist without actual personal present dominion over the controlled substance but requires a showing that the defendant had the intent and capability to maintain immediate and exclusive control over it. *People v. Schmalz*, 194 Ill. 2d 75, 81 (2000). The evidence establishing constructive possession is often entirely circumstantial. *People v. Besz*, 345 Ill. App. 3d 50, 59 (2003). "Constructive possession may exist even where an individual is no longer in physical control of the drugs, provided that he once had physical control of the drugs with intent to exercise control in his own behalf, and he has not abandoned them and no other person has obtained possession." *People v. Adams*, 161 Ill. 2d 333, 345 (1994).

¶ 15 Here, the evidence shows that defendant was in constructive possession of the heroin. First, the evidence established that defendant had knowledge of the contents of the bag recovered near 4723 West Huron. Officer McGrory testified that on three different occasions, he observed an individual approach defendant and give him an unidentified sum of money. Defendant would then walk to 4723 West Huron, retrieve an item from a bag, return to 4720 West Huron, and give it to the person that paid him. When McGrory searched the place where he saw defendant retrieving items, he found a bag full of 23 Ziploc bags of heroin. Because defendant accessed the bag on three different occasions before it was retrieved by Officer McGrory, it is reasonable to infer that defendant had knowledge of its contents.

¶ 16 Defendant argues that because the court acquitted defendant of "possession of a controlled substance with intent to deliver" it is logical to infer that defendant was unaware of the bag's contents. However, the intent to deliver is an independent element of a distinct crime and we decline defendant's invitation to draw any conclusion about the element of possession from the trial court's ruling on intent to deliver.

¶ 17 Second, it is clear that defendant maintained immediate and exclusive control of the bag of heroin. There is no evidence showing that another person obtained possession of the bag prior to their seizure by police, and no serious claim can be made that the bag was ever abandoned since defendant repeatedly returned to the bag on three separate occasions within a 25 minute period to retrieve an unknown object from the bag. This is enough evidence to find that defendant maintained control for purposes of constructive possession since "the State need only show that [the] defendant has not abandoned the drugs and that no other person has obtained possession of the drugs." *People v. Jones*, 295 Ill. App. 3d 444, 453 (1998).

¶ 18 Defendant argues that circumstantial evidence cannot adequately connect him to the bag because there was no evidence that defendant put the heroin near 4723, the heroin was accessible to any number of people, and McGrory lost sight of the area where the bag was located. However, these factors do not preclude defendant from being in constructive possession as the State only needed to prove knowledge of the presence of the drugs and that the defendant had immediate and exclusive possession or control of the drugs. *Schmalz*, 194 Ill. 2d at 81. Regardless of how the heroin got there, the evidence shows that defendant knew the contents of the bag and intended to maintain control and ownership over the bag of heroin. Furthermore, defendant's assertion that others may have had access to drugs and that McGrory lost sight of the area where the drugs were located for a period of time fails because mere access by other

individuals is insufficient to defeat a charge of constructive possession. *Scott*, 152 Ill. App. 3d at 871.

¶ 19 Defendant also contends that his six-year extended-term sentence is excessive in light of the nature of the offense, his history of drug addiction, and the mitigating evidence.

¶ 20 In reviewing a claim that a sentence within statutory limits is excessive, an abuse of discretion occurs when the sentence is "greatly at variance with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense." *People v. Fern*, 189 Ill. 2d 48, 54 (1999). When mitigating factors are presented to the trial court, there is a presumption that the court considered them, absent some contrary evidence from the record. *People v. Payne*, 294 Ill. App. 3d 254, 260 (1998). A reviewing court may not substitute its judgment for that of a sentencing court merely because it would have weighed the factors in aggravation and mitigation differently. *People v. Alexander*, 239 Ill. 2d 205, 213 (2010).

¶ 21 A violation of section 402(c) is a Class 4 felony, which is punishable by a prison term of not less than one year and not more than 3 years under section 5-5-8-1(a)(7) of the Unified Code of Corrections. 730 ILCS 5/5-8-1(a)(7) (West 2010). However, for a Class 4 felony, the extended-term provision of section 5-5-3.2(b)(1) exposes defendant to a possible extended term sentence of up to six years "[w]hen a defendant is convicted of any felony, after having been previously convicted \*\*\* of the same or similar class felony or greater class felony, when such conviction has occurred within 10 years after the previous conviction." 730 ILCS 5/5-3.2(b)(1) (West 2010). Here, defendant was eligible for the maximum extended term sentence based on his 2006 and 2007 felony drug convictions.

¶ 22 The record shows that the court considered all relevant factors in sentencing defendant. The court emphasized defendant's seven prior drug related felonies and his 20 years spent in prison since 1990 in fashioning an appropriate sentence. Defendant asserts that the court failed

to consider how his substance abuse problems related to his criminal record; however, the court reviewed defendant's PSI, which detailed defendant's struggles with alcohol and drug addiction, and nonetheless still decided to impose the statutory maximum. Defendant asks us to discount the consideration and weighing conducted by the trial court and substitute our own, giving more weight to defendant's substance abuse problems. However, as a reviewing court, we simply are not permitted to do this. *Alexander*, 239 Ill. 2d 205, 213 (2010). Instead, we defer to the judgment of the trial court. Defendant's PSI shows that not only has he amassed seven felony convictions in 20 years, but he has also never successfully completed a sentence of probation. Because defendant is a repeat offender with a history of violating his probation, we find that defendant's sentence is not at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense.

¶ 23 For the foregoing reasons, we affirm the judgment of the Circuit court of Cook County.

¶ 24 Affirmed.