

No. 1-12-0700

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)	Appeal from the
ILLINOIS,)	Circuit Court of
)	Cook County.
Plaintiff-Appellee,)	
)	
v.)	No.11 CR 504
)	
LAWRENCE CLINTON,)	Honorable
)	William H. Hooks,
Defendant-Appellant.)	Judge Presiding.

JUSTICE Hoffman delivered the judgment of the court.
Presiding Justice Connors and Justice Cunningham concurred in the judgment.

ORDER

- ¶ 1 *Held:* Affirmed in part as modified, and vacated in part. The mittimus was corrected to reflect the charge in the indictment and the DNA fee was vacated; judgment of the Circuit Court was affirmed in all other respects as admission of prior conviction was not error.
- ¶ 2 Following a jury trial, the defendant, Lawrence Clinton, was found guilty of possession of a controlled substance with intent to deliver under section 401(c)(2) of the Criminal Code of 1961 (Code) (720 ILCS 570/401(c)(2) (West 2010)). He was subsequently sentenced to 10 years' imprisonment. He now appeals, contending that he was denied a fair trial by the introduction of

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a certified copy of his prior narcotics conviction as rebuttal evidence. Alternatively, he asks this court to amend the mittimus to reflect a conviction of possession of a controlled substance with intent to deliver, rather than manufacture or delivery of cocaine or an analog thereof. Finally, the defendant seeks a vacatur of a \$200 DNA fee imposed by the trial court, asserting that his DNA had previously been collected and catalogued by the State police. We affirm in part and vacate in part.

¶ 3 The defendant was charged by information with possession of between one and 15 grams of cocaine under section 401(c)(2) of the Code. 720 ILCS 570/401(c)(2) (West 2010). Prior to trial, the State filed a motion *in limine* seeking, in relevant part, to introduce the defendant's two prior convictions for possession of a controlled substance, one in 1999 and another in 2007, as rebuttal evidence in the event he elected to testify. When the court inquired as to objections, defense counsel requested exclusion of the 1999 conviction but expressly declined any objection to the 2007 conviction. Accordingly, the court allowed the introduction of a certified copy of the 2007 conviction.

¶ 4 The following evidence was presented at trial. Police Officer Fred Caruso testified that on the night of December 5, 2010, he was on narcotics surveillance along with five other officers at the 3900 block of West Grenshaw in Chicago. Caruso testified that the area was known for high narcotics trafficking and gang activity. Around 10:50 that night, Caruso was in civilian clothing and had positioned himself in a covert location on the block. He testified that, although it was dark, the block was lit with streetlights and lighting from buildings.

¶ 5 Caruso testified that he observed the defendant from a distance of about 130 feet, pacing

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back and forth on Grenshaw. After about five or ten minutes Caruso saw three individuals approach the defendant and hand him money. Caruso testified that the defendant appeared to count the money and then place it in his pocket. The defendant subsequently reached into his other pocket and handed all three individuals a small item. The three individuals then walked away from the defendant. Caruso believed that he had just observed a narcotics transaction.

¶ 6 Caruso then radioed his partner, Officer Arletta Kubik, who picked him up in an unmarked police car. They drove around the block, returned to where the defendant was standing and exited the vehicle, approaching the defendant. Caruso testified that the defendant looked in their direction and then fled. Caruso and Kubik proceeded to pursue the defendant on foot along with enforcement Officers Michael Suing and Miranda. The defendant was then apprehended by Miranda and placed under arrest.

¶ 7 Officer Suing testified that he was part of the surveillance team the night of the offense. According to Suing, although it was dark at the time, the block had good artificial lighting. Suing testified that when Caruso and Kubik initially began running after the defendant, the defendant ran right past the squad car in which Suing was stationed. Suing testified that he also began running after the defendant. When Suing reached a distance of about 10 to 15 feet away from the defendant, he saw him extend his right arm and drop something to the ground as he rounded a corner.

¶ 8 At that point, Suing and Kubik stopped chasing the defendant and picked up the plastic bag. Suing testified that the bag contained ten smaller zip-lock bags which appeared to hold crack cocaine. Miranda and Caruso continued pursuing the defendant, ultimately catching him

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and taking him into custody. Suing testified that the bags dropped by the defendant tested positive for crack cocaine. On cross-examination, Suing acknowledged that the bags were never tested for fingerprints or DNA.

¶ 9 Officer Kubik testified that she was conducting surveillance with Caruso and the other officers that night. She was waiting in an unmarked car when she received the radio transmission from Caruso that he had witnessed a suspected narcotics transaction. Kubik testified that she then drove to the location on Grenshaw where the alleged transaction had taken place. She stopped her car and saw the defendant on the sidewalk from a distance of about 15 feet away. Kubik stepped out of her car, made eye contact with the defendant, and announced her office. The defendant immediately began running and Kubik chased him. Kubik stated that as the defendant made a turn into an alley she saw him toss an item to the ground with his right hand. She and Suing stopped to retrieve the item, which she described as a plastic bag containing smaller bags of what she believed to be crack cocaine.

¶ 10 Officer Stephen Hefel testified that he was part of the surveillance team that night. He was present when the defendant was taken to the police station and when Miranda performed a standard custodial search upon him. Hefel stated that the search of the defendant produced a piece of jewelry and \$112 in cash. They did not take an oral statement from him.

¶ 11 The parties stipulated, if called to testify, Rosa Lopez, a forensic chemist, would testify that the substance in the bags recovered from the defendant tested positive for 1.2 grams of cocaine.

¶ 12 At the close of the State's case defense counsel made a general motion for a directed

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verdict which was denied.

¶ 13 In his own defense, the defendant testified that he was 48 years old and that his highest level of education was a GED he obtained while incarcerated. He testified as follows:

"Defense Counsel: You have a GED?

A: Yeah

Q: And where did you receive a GED?

A: Department of Corrections, Jacksonville Correctional center.

Q: You have a certificate?

A: Yes.

Q: Did you go to high school at all in Chicago?

A: Off and on.

Q: Where was that?

A: Farragut High School.

Q: When did you receive your GED?

A: I think it was May 9.

Q: When you say 9 you mean 2009?

A: Yes, sir.

Q: In this period of incarceration where you worked on your high school equivalency, when did you begin that time?

A: I think it was 2007.

Q: 2007?

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A: 2007.

Q: And when did that end?

A: 10.

Q: 2010?

A: Yes.

Q: Would it be fair to say June of 2010?

A: Exactly.

Q: Was that for a narcotics case?

A: Yes, it was."

¶ 14 The defendant testified that, upon his release in June 2010, the first thing he did was go to a residential treatment home called Hope House. The defendant stated that he has had a problem with narcotics all of his life and that he continues to work on the recovery steps he learned at Hope House. The defendant testified that, although he formerly used narcotics every day, he was currently clean and sober and had been so ever since he went to Jacksonville in 2007.

¶ 15 The defendant stated that on the night of the offense he had been released from Hope House on a two-day pass. He was going to visit a friend near Grenshaw, but when he arrived, he found the building closed and boarded up, so he proceeded to walk down an alley. The defendant admitted that he was standing near a "lot" on Grenshaw when he saw the police. According to the defendant, the police were in the process of arresting another individual, but when they saw him, they released that individual and yelled for the defendant to "come here." The defendant testified that he immediately began running away because he was on parole. The

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defendant believed that because he was on parole, if he did not run, he would be in danger of being arrested for "the littlest thing." The police eventually caught him, handcuffed him and brought him to a squad car. The defendant testified that the police told him to provide them with "a gun or somebody big and you can go home tonight." The defendant stated that when he responded that he could not do this, one of the officers retrieved crack cocaine from his own pocket and said "well we got something for you."

¶ 16 The defendant testified on cross-examination that, since his release on parole, he had not been employed but had done "little neighborhood jobs." He made no money from these jobs because Hope House did not permit him to charge people. The defendant admitted that he had \$112 in his pocket the night of the offense, but stated that he had been given this money earlier in the evening by a friend who owned a club. On re-direct the defendant denied that he had any narcotics in his pocket.

¶ 17 At the close of the defendant's case, the State offered into evidence a certified copy of the defendant's 2007 felony conviction for possession of a controlled substance. Defense counsel again stated he had no objection to this evidence. The conviction was marked as People's Exhibit No. 6.

¶ 18 Following arguments, the jury found the defendant guilty of possession with intent to deliver. The defendant was sentenced to 10 years imprisonment, and this appeal followed.

¶ 19 On appeal, the defendant first argues that he was denied a fair trial by the admission of a certified copy of his 2007 narcotics conviction (the conviction) in the rebuttal portion of the State's case. He believes that the evidence was "unnecessary" and unduly prejudicial in light of

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the fact that he had already admitted to the conviction in his testimony on direct examination.*

This argument is without merit.

¶ 20 Initially, as the defendant concedes, this issue was waived because defense counsel declined to object to the admission of the conviction in the trial court and failed to specifically preserve the issue in his post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E. 2d 1124 (1988). Furthermore, the issue should be deemed invited error. The doctrine of invited error holds that an accused may not elect to proceed in one manner at trial and then contend on appeal that the course of action was in error. *People v. Villarreal*, 198 Ill.2d 209, 227-28, 260 Ill.Dec. 619, 761 N.E.2d 1175 (2001). When a defendant procures, invites, or acquiesces in the admission of evidence, he cannot contest the admission on appeal. *People v. Caffey*, 205 Ill.2d 52, 114, 792 N.E.2d 1163 (2001); *People v. Stewart*, 105 Ill.2d 22, 473 N.E.2d 840 (1984); *People v. Pegram*, 152 Ill.App.3d 656, 504 N.E.2d 958 (1987).

¶ 21 In this case, the defendant elected to testify fully aware that the State would properly seek introduce the conviction to impeach his testimony. The court asked on two occasions if the defendant wished to object to the evidence, once during the State's motion *in limine*, and again during rebuttal when the State proffered the certified copy. On both occasions counsel expressly

*The defendant also argues that this error was compounded by the fact that the certified copy was sent back to the jury containing superfluous, inflammatory information, namely, the amount of his bail in the case, his sentence duration, and the fact that the case was reversed on appeal. However, the defendant withdraws this part of the argument in his reply brief, because the record shows that the certified copy of the conviction was never actually seen by the jury. The record does in fact demonstrate that People's Exhibits 1 - 5 were tendered to the jury but that the conviction, Exhibit 6, was not. Thus, this component of the defendant's argument need not be addressed.

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waived any objection. In his own testimony, the defendant used the conviction to establish his case; specifically, that he became clean and sober in prison after years of daily drug use; that he obtained his GED while in prison; and that he felt the need to spontaneously run from the police because he was on parole from that offense and feared that it could lead to another arrest. Thus, it was in his own interest to "front" his conviction to prove his version of events. Even assuming, but not deciding, that the allowance of the evidence could be considered error, it was invited error.

¶ 22 The defendant claims that the admission of the conviction amounted to plain error. This is without merit.

¶ 23 This court may reach the merits of a waived issue under the plain error doctrine of Illinois Supreme Court Rule 615(a) (Ill. S. Ct. R. 615(a) (*eff. May 1, 2007*)), where the evidence is closely balanced or the error is of such magnitude that the accused is denied a fair trial. *People v. Friesland*, 109 Ill.2d 369, 375, 488 N.E.2d 261 (1985); *People v. Lucas*, 88 Ill. 2d 245, 250, 430 N.E.2d 1091 (1981).

¶ 24 The defendant here has failed to meet either prong of this test. First, there was no error in the admission of the certified copy. A trial court's decision to admit evidence of a prior offense is entitled to great deference and will not be reversed on appeal absent an abuse of discretion. *People v. Barner*, 374 Ill. App. 3d 963, 871 N.E.2d 849 (2007). It is beyond question that the State was entitled introduce the conviction when the defendant placed his credibility in issue (see *People v. Montgomery*, 47 Ill. 2d 510, 268 N.E.2d 695 (1971); *Barner*, 374 Ill. App. 3d at 969-70). The proper way to do this is by offering a certified copy of the conviction. *People v. Bey*,

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42 Ill. 2d 136, 246 N.E.2d 287 (1969); *People v. Medley*, 111 Ill. App. 3d 444, 450-51, 444 N.E.2d 269 (1983). Further, the jury in this case was not exposed to unnecessary inflammatory evidence about the conviction. Rather, the only evidence they heard, set forth in the defendant's testimony, was the location of his incarceration, the date of his release, and the fact that he was imprisoned on a narcotics offense. The remaining contents of the certified copy of his conviction, namely, the amount of his bail, the fact of the reversal, and the length of his sentence, were never seen or heard by the jury. Thus, his argument here fails.

¶ 25 Nor do we believe the evidence in this case was closely balanced. It was undisputed that the defendant was at the scene of the offense at the time in question. Officer Caruso testified to seeing the defendant pace back and forth, converse briefly with three individuals, and then conduct what appeared to be a narcotics sale to these individuals in plain view. Several officers and also the defendant testified that he subsequently ran from the scene upon seeing the police. The officers also testified that he discarded what proved to be crack cocaine from his pocket.

¶ 26 Next, the defendant seeks reversal on the basis that his counsel was ineffective for failing to object to the introduction of the conviction. See *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). However, it is well-established that a review of defense counsel's competency under *Strickland* does not extend to matters involving the exercise of judgment, discretion, or trial strategy. *People v. Witherspoon*, 55 Ill. 2d 18, 22, 302 N.E.2d 3 (1973); *People v. Manley*, 163 Ill. App. 3d 950, 954-55, 516 N.E.2d 1343 (1987). As indicated above, the defendant relied upon the conviction to help establish his defense. Although others may have employed a different strategy, we find no evidence in the record that he was deprived of the

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effective assistance of counsel in this case. See *Manley*, 163 Ill. App. 3d at 954.

¶ 27 Alternatively, the defendant requests that this court amend the *mittimus* to reflect a conviction for "possession of a controlled substance with intent to deliver" as stated in the indictment rather than manufacturing or delivery of cocaine or an analog thereof as it now states. Both places state that the offense was under section 401(c)(2) of the Code. 720 ILCS 570/401(c)(2) (West 2010). The State raises no objection to this request.

¶ 28 This court has authority to correct a *mittimus* it finds to be incorrect (see *People v. Moore*, 365 Ill. App. 3d 53, 67, 847 N.E.2d 829 (2006); *People v. Whitfield*, 366 Ill. App. 3d 448, 451, N.E.2d (2006) (defective *mittimus* may be corrected at any time), without remanding the case. See Ill. S. Ct. R. 615(b)(1) (*eff. May 1, 2007*). Thus, this court should amend the *mittimus* to reflect a conviction for possession of a controlled substance.

¶ 29 Finally, the defendant seeks a vacatur of a fee for DNA testing imposed by the trial court. The State concurs in this request.

¶ 30 At the completion of sentencing, the court entered an order assessing fees and fines which the defendant owed, including a \$200 fee for DNA testing. However, the parties agree that the defendant had already submitted a DNA sample in his prior case and had paid the fee. Accordingly, there is no need for an additional charge here. See *People v. Marshall*, 242 Ill. 2d 285, 950 N.E.2d 668 (2011).

¶ 31 For the foregoing reasons, we affirm, as modified, the judgment of the circuit court of Cook County and vacate the DNA testing fee.

Affirmed as modified and vacated in part.

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