

NOTICE  
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2013 IL App (4th) 110504-U

NO. 4-11-0504

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED  
February 7, 2013  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
DAVID WALKER,	)	No. 08CF166
Defendant-Appellant.	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.  
Presiding Justice Steigmann and Justice Appleton concurred in the judgment.

**ORDER**

¶ 1 *Held:* (1) The trial court did not abuse its discretion in sentencing defendant to 20 years' imprisonment.

(2) Defendant failed to establish section 5-9-1.1(a) of the Unified Code of Corrections (730 ILCS 5/5-9-1.1(a) (West 2008)) is unconstitutional on its face.

¶ 2 In January 2009, a jury found defendant, David Walker, guilty of possession of cocaine with the intent to deliver 100 grams or more but less than 400 grams of a substance containing cocaine (720 ILCS 570/401(a)(2)(B) (West 2008)), a Class X felony. In March 2009, the trial court sentenced defendant to 35 years in the Illinois Department of Corrections (DOC) and imposed various fines and fees, including a \$25,400 street-value fine. Defendant appealed.

¶ 3 In an unpublished order, this court found (1) the State presented sufficient evidence for a rational trier of fact to convict defendant and (2) the trial court had a concrete,

evidentiary basis for the street-value fine it imposed. *People v. Walker*, No. 4-09-0333, slip order at 1 (January 18, 2011) (unpublished order under Supreme Court Rule 23). However, this court remanded the case for the trial court to reconsider defendant's sentence because the trial court relied on the State's mistaken belief defendant was eligible for day-for-day credit when it sentenced defendant. *Walker*, No. 4-09-0333, slip order at 13. On remand, the trial court granted defendant's motion to reconsider his sentence and modified his sentence to 20 years in DOC.

¶ 4 Defendant appeals, arguing (1) the trial court abused its discretion in sentencing him to 20 years in prison and (2) his \$25,400 street-value fine must be vacated because section 5-9-1.1(a) of the Unified Code of Corrections (Unified Code) violates the sentencing rules set forth in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). We affirm.

¶ 5 I. BACKGROUND

¶ 6 As this is the second time this court is hearing an appeal from defendant in this case, we only include the information relevant to our disposition of this appeal. (See *Walker*, 4-09-0333, slip order at 2-5.)

¶ 7 In January 2009, during defendant's trial, Denise Hanley, a forensic scientist with the Illinois State Police who works at the Morton Forensic Science Laboratory, testified she received and weighed the contents of three bags of suspected cocaine seized from defendant. According to Hanley, the laboratory's policy is for the scientists to "work cases to a weight limit." Once that limit is reached and the remaining items are "not going to go up to the next weight limit," the lab employees do not analyze the remaining sample. According to Hanley's testimony, the bag she tested contained cocaine and had a net weight of 124 grams. Hanley testified she weighed the other two bags without testing them. The gross weight of the other two bags of

suspected cocaine was 129.7 grams.

¶ 8 In an evidence deposition of Deputy Jason E. Draper of the Livingston County Sheriff's Department, which was read to the jury at defendant's trial as if he were testifying, Deputy Draper testified "we field tested" and weighed the suspected cocaine at the Livingston County jail. The substance in question field tested positive for cocaine and "weighed up to 250 grams." Draper did not specify whether he field tested the substance in each bag. Inspector Mike Willis of the Pontiac police department, who was assigned to the Livingston County Proactive Unit at the time of trial, testified the cocaine seized had a local street value of \$100 per gram. On cross-examination, Willis testified an ounce is equal to 28.6 grams. According to Willis, a dealer could buy an ounce of cocaine in Chicago for between \$600 to \$1,000.

¶ 9 The jury found defendant guilty of unlawful possession with intent to deliver a controlled substance, more than 100 grams but less than 400 grams of a substance containing cocaine.

¶ 10 At defendant's March 2009 sentencing hearing, Inspector Willis again testified the street value of a gram of cocaine is \$100 and 254 grams of cocaine were seized from defendant. Willis testified the total street value of the cocaine seized would be \$25,400. On cross-examination, Willis testified the bulk price for all the cocaine recovered would be approximately \$13,500. Defendant argued the State only presented evidence 124 grams of the substance defendant possessed was cocaine. Defendant argued the fact the State only established he had 124 grams of cocaine was relevant both toward his fines and his sentence.

¶ 11 The trial court found for purposes of the sentencing hearing defendant had possession of 254 grams of cocaine. The court also found the street value of the cocaine was

\$100 per gram. The court sentenced defendant to a term of 35 years in DOC and imposed a \$25,400 street-value fine as well as other fines and costs. The court stated defendant "will serve 50 percent of his time so that is approximately 17 years if he receives any good time credits."

¶ 12 In May 2009, the trial court denied defendant's motion to reconsider sentence.

¶ 13 Defendant appealed. In an unpublished order, this court held (1) the State presented sufficient evidence for a rational trier of fact to convict defendant and (2) the trial court had a concrete, evidentiary basis for the street-value fine it imposed. *Walker*, No. 4-09-0333, slip order at 1. However, this court remanded the case for the trial court to reconsider defendant's sentence because the trial court relied on the State's mistaken belief defendant was eligible for day-for-day credit when it sentenced defendant. *Walker*, No. 4-09-0333, slip order at 13.

¶ 14 On remand, in April 2011, the trial court granted defendant's motion to reconsider sentence. The court stated its intention in imposing the 35-year sentence on defendant was for him to serve a 17-year term in DOC. As a result, the trial court modified his sentence to 20 years, which the court said amounted to a 17-year term of incarceration after application of good-time credit if defendant served 85% of his sentence.

¶ 15 In June 2011, the trial court heard arguments on defendant's motion to reconsider his sentence once again. At that hearing, the court noted defendant was eligible for 75% good-time credit and amended defendant's sentence to so reflect the court's determination.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 A. Defendant's Sentence

¶ 19 Defendant argues the trial court abused its discretion in sentencing him to 20 years

in prison for unlawful possession with intent to deliver a controlled substance, 100 grams or more but less than 400 grams of a substance containing cocaine (720 ILCS 570/401(a)(2)(B) (West 2008)), a Class X felony. According to defendant, a 20-year prison sentence is disproportionate to and bears no relationship to the seriousness of the crime he committed. Defendant argues he only possessed the drugs for 15 minutes and the cost to incarcerate him at a time when Illinois is facing unprecedented financial hardship merits a lesser sentence.

¶ 20 The State points out the punishment for this offense is a prison term of not less than 9 years and not more than 40 years. See 720 ILCS 570/401(a)(7.5)(B) (West 2008). However, the State argues the trial court could have sentenced defendant to a term of 80 years in prison pursuant to the repeat-offender statute. See 720 ILCS 570/408 (West 2008).

¶ 21 Trial courts are given wide discretion in sentencing defendants for criminal offenses under the Illinois Controlled Substances Act (Act) (720 ILCS 570/100 to 603 (West 2008)). "A sentence within the statutory limits will not be disturbed absent an abuse of discretion." *People v. Coleman*, 166 Ill. 2d 247, 258, 652 N.E.2d 322, 327 (1995). Section 100 of the Act states in part:

"It is not the intent of the General Assembly to treat the unlawful user or occasional petty distributor of controlled substances with the same severity as the large-scale, unlawful purveyors and traffickers of controlled substances. However, it is recognized that persons who violate this Act with respect to the manufacture, delivery, possession with intent to deliver, or possession of more than one type of controlled substance listed

herein may accordingly receive multiple convictions and sentences under each Section of this Act. To this end, guidelines have been provided, along with a wide latitude in sentencing discretion, to enable the sentencing court to order penalties in each case which are appropriate for the purposes of this Act." 720 ILCS 570/100 (West 2008).

The trial court did not abuse its discretion in sentencing defendant. Defendant had possession of three bags of suspected cocaine. The State tested one of the bags, which weighed 124 grams, and detected the presence of cocaine. The gross weight of the other two bags was 129.7 grams. In addition, as the trial court noted at the initial sentencing hearing, defendant was extended-term eligible because of his "prior record which includes prior deliveries of a controlled substance with the intent to deliver, robbery[,] and aggravated battery of a person over 60 years of age."

¶ 22 Defendant received a 20-year sentence. This was in the lower end of the sentencing range. We find no merit in defendant's argument his sentence was excessive because of the amount of time he supposedly was in possession of the drugs. As for the cost of defendant's confinement, this is a policy matter better left to the General Assembly.

¶ 23 B. Constitutionality of Street-Value Fine

¶ 24 Defendant next argues the \$25,400 street-value fine assessed against defendant pursuant to section 5-9-1.1(a) of the Unified Code (730 ILCS 5/5-9-1.1(a) (West 2008)) must be vacated because this subsection of the Corrections Code violates the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Section 5-9-1.1(a) states:

“When a person has been adjudged guilty of a drug related

offense involving possession or delivery of cannabis or possession or delivery of a controlled substance, other than methamphetamine, as defined in the Cannabis Control Act, the Illinois Controlled Substances Act, or the Methamphetamine Control and Community Protection Act in addition to any other penalty imposed, a fine shall be levied by the court at not less than the full street value of the cannabis or controlled substances seized.

‘Street value’ shall be determined by the court on the basis of testimony of law enforcement personnel and the defendant as to the amount seized and such testimony as may be required by the court as to the current street value of the cannabis or controlled substance seized.” 730 ILCS 5/5-9-1.1(a) (West 2008).

¶ 25 Defendant bases his argument on the United States Supreme Court’s recent decision in *Southern Union Co. v. United States*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2344 (2012). In *Southern Union*, the Supreme Court decided its holdings in *Apprendi* and *Blakely v. Washington*, 542 U.S. 296 (2004), applied to “sentences of criminal fines.” *Southern Union Co.*, \_\_\_ U.S. \_\_\_, 132 S. Ct. at 2348-49. Thus, *Apprendi* prohibits a defendant's maximum fine to be enhanced beyond what is allowed pursuant to the factual findings of the trier of fact or the admissions of the defendant. *Southern Union Co.*, \_\_\_ U.S. \_\_\_, 132 S. Ct. at 2352.

¶ 26 Pursuant to *Southern Union*, defendant argues he should not have to pay the street-value fine assessed against him because section 5-9-1.1(a) violates *Apprendi* and is, therefore, unconstitutional. According to defendant:

"[T]he provision of subsection 5/5-9-1.1(a) [*sic*] \*\*\* requiring the *court* to determine the street value of a controlled substance stands in contravention of the rules established in *Apprendi* \*\*\* and, as a result, is not constitutionally viable. Thus, [defendant's] \$25,400 street-value fine must be vacated."

\* \* \*

The constitutional infirmity with subsection 5/5-9-1.1(a) [*sic*], resides in the manner that the street value fine is determined. That subsection requires the *court* to determine the value of the controlled substance at issue, not based upon the jury's findings, but upon its individual review of the evidence presented before, during, or after trial. 730 ILCS 5/5-9-1.1(a) (West 2010); *Apprendi*, 530 U.S. at 483, 120 S. Ct. at 2359, n. 10. ('[T]he judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury.')

In other words, a sentencing court, in setting a street-value fine, must make factual determinations about the weight and value of the substances seized. In doing so, in defendant's view, a judge usurps the role of the jury.

¶ 27 The State contends defendant forfeited this argument because he did not raise the issue in the trial court. The Illinois Supreme Court has stated an *Apprendi* violation "does not necessarily invalidate a defendant's sentence." *People v. Nitz*, 219 Ill. 2d 400, 409, 848 N.E.2d 982, 989 (2006). According to our supreme court, "when a defendant has failed to object to an

error, plain-error analysis applies.” *Nitz*, 219 Ill. 2d at 410, 848 N.E.2d at 989. In *People v. Herron*, our supreme court summarized the plain-error analysis as follows:

“[T]he plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. In the first instance, the defendant must prove ‘prejudicial error.’ That is, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. The State, of course, can respond by arguing that the evidence was not closely balanced, but rather strongly weighted against the defendant. In the second instance, the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant’s trial and challenged the integrity of the judicial process. [Citation.] Prejudice to the defendant is presumed because of the importance of the right involved, ‘regardless of the strength of the evidence.’ (Emphasis in original.) [Citation.] In both instances, the burden of persuasion remains with the defendant.” *People v. Herron*, 215 Ill. 2d 167, 186-87, 830 N.E.2d 467, 479-80 (2005).

¶ 28 However, defendant argues we should not apply the plain-error analysis because

he is making a facial challenge to the constitutionality of section 5-9-1.1(a). Our supreme court has stated, in general, a constitutional challenge to a criminal statute can be raised at any time. *In re J.W.*, 204 Ill. 2d 50, 61, 787 N.E.2d 747, 754 (2003). According to defendant, section 5-9-1.1(a) is unconstitutional because it requires a trial court to determine the value of the controlled substances at issue based upon its individual review, and not a jury's findings, of evidence presented before, during, or after trial.

¶ 29 With regard to challenges to the constitutionality of statutes, our supreme court has stated:

"there is a 'strong presumption' that a legislative enactment passes constitutional muster, and a party challenging the constitutionality of a statute bears the burden of clearly establishing its invalidity. *People v. Thurow*, 203 Ill. 2d 352, 367, [786 N.E.2d 1019, 1027] (2003). A statute is unconstitutional on its face only if no set of circumstances exists under which it would be valid. *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, [305-06, 891 N.E.2d 839, 845] (2008). 'Thus, so long as there exists a situation in which a statute could be validly applied, a facial challenge must fail.' *Hill v. Cowan*, 202 Ill. 2d 151, 157, [781 N.E.2d 1065, 1069] (2002). Whether a statute is constitutional is a question of law, which we review *de novo*. *People v. McCarty*, 223 Ill. 2d 109, 135, [858 N.E.2d 15, 32] (2006)." *People v. Kitch*, 239 Ill. 2d 452, 466, 942 N.E.2d 1235, 1243 (2011).

¶ 30 Defendant has failed to overcome the "strong presumption" of the constitutionality of section 5-9-1.1(a) because he has failed to establish this statute could never be valid under any set of circumstances. For example, if a defendant chose to have a bench trial and the trial judge made factual findings regarding the street value and weight of the drugs during defendant's trial, the rule of *Apprendi* would not be violated. Further, if a defendant were to stipulate to the weight and street value of the drugs prior to trial, contesting only the issue of possession, it would appear the rule of *Apprendi* would again not be violated. Defendant does not address these two situations which would appear to support the facial validity of the statute. As a result, we find defendant has failed to overcome the "strong presumption" section 5-9-1.1(a) is constitutionally viable.

¶ 31 In his reply brief, while continuing to argue section 5-9-1.1(a) is unconstitutional on its face, defendant also argues for the first time on appeal the *application* of section 5-9-1.1(a) violates *Apprendi*. Pursuant to Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008)), we find defendant forfeited this argument by failing to raise it in his initial brief to this court. "While \*\*\* the constitutionality of a statute may generally be raised at any time [citation], issues raised for the first time in a reply brief, even when they deal with the constitutionality of a statute, may not be considered." *People v. Brooks*, 377 Ill. App. 3d 836, 841, 885 N.E.2d 320, 324 (2007). As a result, we make no ruling whether the statute was unconstitutional as applied in this case.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we affirm the trial court's judgment. Because the State successfully defended a portion of the criminal judgment, we grant the State its \$50 statutory

assessment against defendant as costs of this appeal. See *People v. Smith*, 133 Ill. App. 3d 613, 620, 479 N.E.2d 328, 333 (1985) (citing *People v. Nicholls*, 71 Ill. 2d 166, 178, 374 N.E.2d 194, 199 (1978)).

¶ 34            Affirmed.