

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).

2013 IL App (4th) 110852-U
NO. 4-11-0852
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
February 8, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
REGINA THOMPSON,)	No. 10CF1112
Defendant-Appellant.)	
)	Honorable
)	Scott Drazewski,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justice Knecht concurred in the judgment.
Justice Pope specially concurred.

ORDER

¶ 1 *Held:* Assuming, for the sake of argument, that section 5-9-1.1(a) of the Unified Code of Corrections (730 ILCS 5/5-9-1.1(a) (West 2010)) violates the rule in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), as defendant contends, the error is harmless.

¶ 2 In this appeal, defendant, Regina Thompson, challenges the constitutionality of section 5-9-1.1(a) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-9-1.1(a) (West 2010)), arguing that it violates the rule in *Apprendi*. Assuming, for the sake of argument, that section 5-9-1.1(a) violates *Apprendi*, we find the error to be harmless in this case, and therefore we affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 In July 2011, a jury found defendant guilty of counts II and III of an indictment. (The jury also found her guilty of count IV, a count unimportant to this appeal.)

¶ 5 Count II alleged that on November 11, 2010, defendant committed the offense of unlawful delivery of a controlled substance while she was within 1,000 feet of a church (720 ILCS 570/401(c)(2), 407(b)(1) (West 2010)).

¶ 6 Count III alleged that on November 16, 2010, defendant committed the offense of unlawful delivery of a controlled substance while she was within 1,000 feet of a school (720 ILCS 570/401(c)(2), 407(b)(1) (West 2010)).

¶ 7 With respect to count II, evidence in the trial showed that on November 11, 2010, an informant, Gilbert Manley, telephoned defendant and they made arrangements for her to come to his apartment and sell him some cocaine. In his apartment, which was within 1,000 feet of a church, he paid her \$300 in bills prerecorded by the Bloomington police, and she handed him 2.2 grams of cocaine.

¶ 8 With respect to count III, the evidence showed that on November 16, 2010, Manley again telephoned defendant and this time they agreed to meet at a restaurant. At the restaurant, which was within 1,000 feet of a school, Manley paid defendant another \$300 in prerecorded bills, and she handed him 1.8 grams of cocaine.

¶ 9 In August 2011, the trial court sentenced defendant to six years' imprisonment for count II and to another concurrent term of six years' imprisonment for count III. Also, for counts II and III, the court imposed a street-value fine of \$600 pursuant to section 5-9-1.1(a) of the Unified Code (730 ILCS 5/5-9-1.1(a) (West 2010))—even though, by its verdicts, the jury had not determined the street value of the cocaine.

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12

A. Defendant's *Apprendi* Argument

¶ 13 In *Apprendi*, 530 U.S. at 490, the Supreme Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Decisions subsequent to *Apprendi* have amplified some of the terms in this holding. The "statutory maximum" is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" (Emphasis in original.) *Blakely v. Washington*, 542 U.S. 296, 303 (2004). The "penalty" includes not only imprisonment but also fines. *Southern Union Co. v. United States*, ___ U.S. ___, ___, 132 S. Ct. 2344, 2357 (2012); *Apprendi*, 530 U.S. at 501.

¶ 14 Section 5-9-1.1(a) of the Unified Code (730 ILCS 5/5-9-1.1(a) (West 2010)) provides that, in drug cases, the trial court must impose a fine in the amount of the street value of the drugs seized. The statute says:

"(a) 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 as defined in the Cannabis Control Act, [(720 ILCS 5/1 to 19 (West 2010))], the Illinois Controlled Substances Act [(720 ILCS 570/100 to 603 (West 2010))], or the Methamphetamine Control and Community Protection Act [(720 ILCS 646/1 to 9999 (West 2010))], 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 2010).

¶ 15 Defendant argues that this statute violates *Apprendi* because of the manner in which the street-value fine is determined. As defendant says, the statute "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." (Emphasis in original.) According to the jury instructions, the jury had to find only three elements to convict defendant of counts II and III: (1) she knowingly possessed, with the intent to deliver, a substance containing cocaine; (2) the weight of the substance was between 1 and 15 grams; and (3) she delivered this substance within 1,000 feet of a church or a school. Thus, by finding defendant guilty of counts II and III, the jury did not determine the street value of the controlled substances. Rather, the judge made that determination, as section 5-9-1.1(a) contemplated—and therein, according to defendant, lies the violation of *Apprendi*.

¶ 16 B. The Asserted Forfeiture of the *Apprendi* Argument

¶ 17 The State contends that defendant has forfeited her *Apprendi* argument because she never made that argument in the trial court. "[A]rguments made for the first time on appeal are waived" or, more precisely, forfeited. *People v. Magallanes*, 409 Ill. App. 3d 720, 725-26 (2011).

¶ 18 Defendant, on the other hand, cites *In re J.W.*, 204 Ill. 2d 50, 61 (2003), in which the supreme court stated: "[I]n general, a constitutional challenge to a criminal statute can be raised at any time." It is unclear what the supreme court means by the qualifier "in general." In the absence

of any guidance in that regard, we will take at face value the supreme court's statement that the unconstitutionality of a statute can be raised at any time. Defendant challenges the constitutionality of section 5-9-1.1(a), and contrary to the State's contention, she has not forfeited this challenge (see *id.*).

¶ 19 It follows that the plain-error doctrine is inapplicable. See *People v. Thompson*, 238 Ill. 2d 598, 611 (2010) ("When a defendant has forfeited appellate review of an issue, the reviewing court will consider only plain error. [Citation.] Harmless-error analysis is conducted when a defendant has preserved an issue for review. [Citation.] The application of plain-error or harmless-error review, therefore, depends on whether defendant has forfeited review of the issue.")

¶ 20 C. Harmless Error

¶ 21 The State points out that we need not consider the constitutionality of section 5-9-1.1(a) if we find the alleged *Apprendi* violation to be harmless beyond a reasonable doubt. The supreme court has exhorted Illinois courts to decide cases on nonconstitutional grounds whenever possible and to address constitutional issues "only as a last resort." *In re E.H.*, 224 Ill. 2d 172, 178 (2006). If we assume a violation of *Apprendi* only for the sake of argument and find the error to be harmless beyond a reasonable doubt, we can decide the case without actually reaching the constitutional issue. According to *People v. Thurow*, 203 Ill. 2d 352, 369 (2003), a violation of *Apprendi* is harmless error if it is clear, beyond a reasonable doubt, that a rational jury would have found the omitted element if the question had been submitted to the jury.

¶ 22 Because defendant charged Manley, and Manley paid, \$300 for the cocaine that was the subject of count II and because she charged him, and he paid, another \$300 for the cocaine that was the subject of count III, the State maintains that the evidence of the street value of these two

amounts of cocaine was "overwhelming" and any rational jury would have found the combined street value to be \$600 had the question been submitted to it. See *id.* The State cites *People v. Beavers*, 141 Ill. App. 3d 790, 796 (1986), in which the Third District held: "[S]treet value is the price in a sale between a willing seller and a willing buyer in the streets ***."

¶ 23 Defendant contends, on the other hand, that "[s]ale pricing, in and of itself, is not the end of the inquiry," and she further points out that the purity of the 2.2 grams and 1.8 grams is unknown. In this connection, she cites *People v. Morse*, 185 Ill. App. 3d 503, 509 (1989).

¶ 24 It is true that, in the circumstances of *Morse*, 185 Ill. App. 3d at 509, the price the buyer paid for the cocaine was not necessarily determinative of the street value of the cocaine. But, in *Morse*, 185 Ill. App. 3d at 510, the defendant sold a large quantity of cocaine, 56.1 grams—considerably more than the 8-gram quantities typically sold for personal consumption in Massac County (*id.* at 510); therefore, this sale evidently was wholesale, not retail (*id.* at 509-10). The Fifth District explained that buyers who bought cocaine wholesale turned around and sold it at a higher price to retail buyers and hence the street value was higher than the wholesale value: "Where a quantity of drugs larger than would be used for personal consumption is sold, the 'street value fine' can be higher than the price actually paid on the theory that the price paid is wholesale, but the value on the street is retail." *Id.* at 509. In the present case, though, defendant sold small quantities of cocaine to Manley in what were evidently retail transactions; therefore, by the logic of *Morse*, these sale prices were valid indicators of street value. See *Beavers*, 141 Ill. App. 3d at 796.

¶ 25 Granted, the Fifth District in *Morse* remarked that the cocaine the defendant sold was 68% pure, twice as pure as the cocaine typically on the market in Massac County (*Morse*, 185 Ill. App. 3d at 510), and, granted, the record in the present case does not reveal the purity of the cocaine

that defendant sold to Manley. Nevertheless, this discussion of purity in *Morse* is of no great help to defendant because the purity of the cocaine was one of the reasons the expert cited for his opinion of what the street value of the cocaine was and this expert opinion was needed only because the transaction had been wholesale.

¶ 26 In the present case, by contrast, the sale was retail, putting defendant in a weaker position than the losing defendant in *Morse*. Defendant in the present case contends that the street value of the cocaine might be *less* than what she charged the buyer whereas the defendant in *Morse* contended that the street value of the cocaine was precisely *what he had charged* the buyer, as opposed to the greater amount suggested in the expert opinion of a drug agent (*id.* at 509). By her own conduct, defendant has admitted that the cocaine she sold to Manley was of sufficient quality, of sufficient purity, to be worth \$300 and that the street value of 2 grams of such cocaine, give or take 0.2 grams, was \$300. See 18 Ill. Law and Prac. *Evidence* § 139 (admissions by conduct). It is clear, beyond a reasonable doubt, that any rational jury would regard the street value of the cocaine to be the amounts that defendant herself charged Manley when selling the cocaine to him. See *Thurow*, 203 Ill. 2d at 369; *Beavers*, 141 Ill. App. 3d at 796.

¶ 27 III. CONCLUSION

¶ 28 For the foregoing reasons, we affirm the trial court's judgment. We award the State \$50 in costs against defendant.

¶ 29 Affirmed.

¶ 30 JUSTICE POPE, specially concurring:

¶ 31 While I concur with the result, I write separately because I disagree with the majority's reasoning.

¶ 32 Defendant only argues section 5-9-1.1(a) of the Unified Code is facially unconstitutional. 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).

¶ 33 Defendant has failed to overcome the "strong presumption" of the constitutionality of section 5-9-1.1(a) because she 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 stipulated to the weight and street value of the drugs prior to trial, contesting only the issue of possession, the rule of *Apprendi* would again not be violated. Defendant does not address these two situations which support the facial validity of the statute. As a result, I would find defendant has failed to overcome the "strong presumption" section 5-9-1.1(a) is constitutionally viable. No further analysis is needed to dispose of this appeal.

¶ 34 The majority states, "[a]ssuming, for the sake of argument, that section 5-9-1.1(a) violates *Apprendi*, we find the error to be harmless in this case, and therefore we affirm the trial court's judgment." *Supra* ¶ 2. The majority's assumption section 5-9-1.1(a) violates *Apprendi* and is facially unconstitutional would result in the statute being void *ab initio*. See *Lucien v. Briley*, 213 Ill. 2d 340, 344, 821 N.E.2d 1148, 1150 (2004). If the statute was unconstitutional on its face, a fine imposed pursuant to a statute that is void *ab initio* could not be harmless error.

¶ 35 As stated earlier, defendant did not argue the statute was unconstitutional as applied in this case. However, even if defendant argued the application of this statute in this particular case violated *Apprendi*, harmless-error analysis is inapplicable here based on the facts of this case and my review of our supreme court's prior precedent. The defendant here did not object to the imposition of a street-value fine in the trial court and thus failed to preserve the issue for review. Our supreme court has only applied harmless-error analysis to *Apprendi* violations where a defendant preserved the error by objecting at trial. See *People v. Thurow*, 203 Ill. 2d 352, 363, 786 N.E.2d 1019, 1025 (2003).

¶ 36 However, where a defendant has failed to preserve the error, our supreme court has

made clear we are to apply plain-error analysis to determine whether to recognize the forfeited error. See *People v. Crespo*, 203 Ill. 2d 335, 347, 788 N.E.2d 1117, 1124 (2001) (supplemental opinion upon denial of rehearing filed March 31, 2003); *People v. Nitz*, 219 Ill. 2d 400, 411-12, 848 N.E.2d 982, 989-90 (2006). In *Crespo*, our supreme court relied on *United States v. Cotton*, 535 U.S. 625 (2002), where the United States Supreme Court applied plain-error analysis to an *Apprendi* violation because the defendant failed to object at trial, even though *Apprendi* had not been decided until after the defendant had been convicted. *Crespo*, 203 Ill. 2d at 347-48, 788 N.E.2d at 1124; see also *United States v. Booker*, 543 U.S. 220, 268 (2005) (doctrines of plain error and harmless error apply to sentences that violate *Apprendi*).

¶ 37 Our supreme court in *Crespo* went on to quote, with approval, the *Cotton* decision as follows:

" "[B]efore an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain', and (3) that 'affect[s] substantial rights.' " [Citation.] If all "three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." " *Crespo*, 203 Ill. 2d at 348, 788 N.E.2d at 1124 (quoting *Cotton*, 535 U.S. at 631-32, quoting *Johnson v. United States*, 520 U.S. 461, 467 (1997)); see also *People v. Kaczmarek*, 207 Ill. 2d 288, 798 N.E.2d 713 (2003).

We adopted this interpretation of plain error in *People v. Sharp*, 391 Ill. App. 3d 947, 957-58, 909 N.E.2d 971, 979-80 (2009), stating:

"This court will take our supreme court at its word and find plain error only in exceptional circumstances in which ' " 'the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.' " ' " *Sharp*, 391 Ill. App. 3d at 957-58, 909 N.E.2d at 979-80 (quoting *Crespo*, 203 Ill. 2d at 348, 788 N.E.2d at 1124, quoting *Cotton*, 535 U.S. at 631, quoting *Johnson*, 520 U.S. at 467).

¶ 38 Following *Thurow*, *Crespo*, and *Kaczmarek*, our supreme court decided the oft-cited case of *People v. Herron*, 215 Ill. 2d 167, 830 N.E.2d 467 (2005), with its two-pronged plain-error test. While the supreme court in *Nitz* later stated it declined in *Herron* to adopt the four-part federal test for plain error (see *Nitz*, 219 Ill. 2d at 415, 848 N.E.2d at 992), in *Herron*, the court compared the federal test prong for prong with Illinois's plain-error test and found the federal test "at its core" to be the same standard used in Illinois. *Herron*, 215 Ill. 2d at 186, 830 N.E.2d at 479.

¶ 39 That being said, had defendant argued on appeal the application of this statute violated *Apprendi*, I would still affirm her conviction. Applying plain-error analysis as outlined above, undisputed evidence at trial showed the sale of a total of four grams of cocaine for \$600. Defendant disputes neither the weight nor the amount paid for the drugs. She merely contends the jury should have made a finding of the weight and worth of the drugs. She did not object to the lack of an instruction requiring the jury to make those findings and thus failed to preserve any error for review. I would find any error here did not seriously affect the fairness, integrity, or public reputation of judicial proceedings and therefore should not be recognized.