

Rule 23 order filed  
May 24, 2013;  
Modified upon Granting of  
Rehearing September 11, 2013.

2013 IL App (5th) 110019-U

NO. 5-11-0019

IN THE  
APPELLATE COURT OF ILLINOIS  
FIFTH DISTRICT

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).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Clay County.
	)	
v.	)	No. 10-CF-48
	)	
EDUARDO VELA,	)	Honorable
	)	Wm. Robin Todd,
Defendant-Appellant.	)	Judge, presiding.

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PRESIDING JUSTICE SPOMER delivered the judgment of the court.  
Justices Welch and Goldenhersh concurred in the judgment.

**ORDER**

¶ 1 *Held:* The defendant's convictions for unlawful delivery of cannabis (720 ILCS 550/5(d) (West 2008)) are affirmed where the defense theory was that the defendant never possessed the cannabis that was sent through the mail but the jury heard evidence from which it could have inferred that the defendant possessed and transferred possession of the cannabis, including evidence that a confidential informant recognized the defendant's handwriting on the packages. The circuit court did not err in failing to instruct the jury on the definition of possession where the Illinois Pattern Jury Instructions, Criminal, No. 17.05A (4th ed. 2000), which defines delivery, adequately explained the concept of constructive transfer of possession to the jury. The defendant was not deprived of a fair trial where the jury sent out a note toward the beginning of deliberations that one juror had not heard portions of the evidence and the circuit court instructed the jury to continue deliberating, as the circuit court had made inquiries of the jury throughout the trial to ensure that the jury could hear all of the evidence and could have reasonably believed that the statement in the note was untrue. The circuit court did not err in refusing to suppress recordings obtained pursuant to an eavesdropping warrant where allegations of the confidential informant were substantiated, at least in part, by the officer who made the application, and thus contained some corroboration. The defendant was entitled to be admonished that it was his right to elect to be sentenced under the law in effect at the time of his offense in order to receive credit for time served in the penitentiary for revocation of parole while still being held on the current offenses, and so the judgment will be modified so

that he will receive such a credit.

¶ 2 The defendant, Eduardo Vela, appeals from the amended judgment entered in the circuit court of Clay County on December 20, 2010, which sentenced him to the Illinois Department of Corrections (IDOC) for a period of nine years after he was found guilty of four counts of unlawful delivery of cannabis, in violation of section 5(d) of the Illinois Cannabis Control Act (720 ILCS 550/5(d) (West 2008)). On appeal, the defendant contends that the circuit court made the following errors: (1) failed to enter a judgment notwithstanding the verdict because the State failed to prove that the defendant ever possessed or had control over the cannabis at issue; (2) refused to submit Illinois Pattern Jury Instructions, Criminal, No. 4.16 (4th ed. 2000), which defined possession, to the jury; (3) failed to take remedial action to avoid prejudice to the defendant where the jury sent out a note indicating that one juror had not heard portions of the trial and failed to pay attention to testimony; (4) failed to suppress recordings obtained pursuant to an eavesdropping warrant which the defendant contends was based on unadulterated hearsay without corroboration; and (5) failed to award the defendant credit for time served from August 26, 2009, until January 4, 2010, while he was also serving time in the IDOC for a parole violation. This order was originally filed on May 24, 2013. On June 14, 2013, the defendant filed a petition for rehearing. We grant rehearing and, after considering the State's answer and the defendant's reply, issue this modified order. For the following reasons, we affirm the defendant's convictions, but modify the defendant's sentence to reflect that he will receive additional credit for time served from August 26, 2009 to January 4, 2010.

¶ 3

#### FACTS

¶ 4 On February 9, 2009, Inspector Brian Davis of the Southeastern Illinois Drug Task Force filed an application in the circuit court of Clay County for an order authorizing the use of an eavesdropping or recording device, pursuant to section 108A-3(a)(1) of the Illinois

Code of Criminal Procedure of 1963 (Code of Criminal Procedure) (725 ILCS 5/108A-3(a)(1) (West 2008)). In the application, Inspector Davis stated that he had conducted an interview with confidential source "Lester Jones," later identified as Angela Sweetin, who informed him that in the summer of 2005, the defendant lived in Flora and had family members who resided in Alamo, Texas, ship cannabis through the U.S. mail to the defendant's girlfriend at the time. Sweetin informed Davis that she was present when the marijuana packages were opened. Sweetin further explained that in the fall of 2007, while the defendant was in prison, the defendant arranged for Sweetin to receive quarter-pound packages of marijuana through the mail from Alamo, Texas. Sweetin would sell the cannabis, and the proceeds from the transaction would be wired to Texas and money orders would be purchased to send to the defendant in prison. Sweetin stated that she had stopped selling cannabis for the defendant in November 2007, but she knew of others who continued receiving and selling cannabis sent through the mail from south Texas as arranged by the defendant.

¶ 5 Davis further stated that, according to Sweetin, the defendant contacted her on February 6, 2009, and asked her to sell cannabis for him. The defendant was then residing in south Texas and informed Sweetin that there was cannabis located in a mailbox located at an address in Flora, the residence of Scott Robinson, and that Sweetin should remove a manila envelope from the mailbox and sell the cannabis inside. Sweetin went to the Robinson residence and made contact with Robinson, who removed the envelope from the mailbox and handed it to Sweetin. Inspector Davis indicated that he had witnessed this transaction take place. In the presence of Inspector Davis, Sweetin opened the envelope and he observed approximately six ounces of a green leafy substance that field-tested positive for cannabis. On February 8, 2009, the defendant telephoned Sweetin wanting to know how much cannabis she received and informing her that he wanted her to send him \$700 from the

proceeds of the sale of the cannabis. Inspector Davis requested an order authorizing the use of an eavesdropping device to monitor in-person and telephonic communications between Sweetin, who consented to the use of the device, and the defendant and/or other coconspirators between February 9, 2009, and March 10, 2009. On February 9, 2009, an order was entered allowing the use of an eavesdropping device as requested by Inspector Davis. Another eavesdropping order was entered on May 4, 2009.

¶ 6 On July 20, 2010, the defendant was charged by information with four counts of unlawful delivery of 30 to 500 grams of cannabis in violation of section 5(d) of the Cannabis Control Act (720 ILCS 550/5(d) (West 2008)).<sup>1</sup> A jury trial commenced on August 16, 2010. At the beginning of the trial, the defendant stipulated to the foundation of all of the recordings obtained by Inspector Davis under the eavesdropping orders. The evidence relating to the issues on appeal consisted of the testimony of Inspector Davis, Angela Sweetin, and Scott Robinson, as well as the overhear recordings and a recorded interview that Inspector Davis conducted with the defendant. Before the first recorded conversation was played for the jury, and several times thereafter, the circuit court admonished the jurors to listen carefully to the recordings and to raise their hands if they could not hear.

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<sup>1</sup>We note that, on May 19, 2009, the defendant was originally charged, by indictment in a separate case, with unlawful delivery of cannabis as well as unlawful calculated criminal cannabis conspiracy, based on the same facts. He was held in a jail in Alamo, Texas, awaiting extradition from May 21, 2009, until August 11, 2009, when he was extradited to Clay County. In that case, the defendant filed a motion to quash the eavesdropping order, quash the arrest and indictment, and suppress the evidence obtained. That motion was denied on June 16, 2009. An order was entered on November 1, 2009, stating that the charges in that case were nol-prossed due to a plea entered in the present case. However, no plea is of record.

¶ 7 According to Inspector Davis's testimony, Sweetin, at the defendant's behest, picked up the first package of marijuana from the mailbox at the Robinson residence on February 7, 2009. The package was addressed to "Mark Carpenter or current resident," and the return address was a post office box in Alamo, Texas. Sweetin gave the package to Inspector Davis, and it tested positive for 167 grams of marijuana. Two days later, Sweetin placed a call to the defendant in Inspector Davis's presence, which was recorded pursuant to the eavesdropping order. During the discussion, Sweetin told the defendant that she had sold "a quarter" of the marijuana, and the defendant requested that she give \$75 toward the \$700 she owed the defendant to Scott Robinson so that Robinson could wire the money to the defendant. A recording of Sweetin traveling to Robinson's residence and giving him the money was also played for the jury.

¶ 8 A February 11, 2009, recording of a phone call between Sweetin and the defendant was then played for the jury. During that call, Sweetin told the defendant she would be taking \$100 to Scott toward the \$625 she still owed on the marijuana. Sweetin also told the defendant that she knew someone who wanted "a large amount," to which the defendant responded, "I am trying to get it now because other people want some." When Sweetin asked the defendant whether he would try to mail a large amount or whether he would bring it next time he came up to Illinois, the defendant stated that his aunt worked at the post office and "she takes it in for me." The remaining testimony and recordings followed this same pattern, whereby marijuana would arrive in the mail after a conversation with the defendant, and Sweetin would give Robinson money to be sent to the defendant. According to the testimony, one other package arrived at Robinson's address in addition to the February 7, 2009, package. The second package arrived on February 19, 2009, and contained 212 grams of marijuana.

¶ 9 According to the testimony, Inspector Davis made contact with Robinson on March

4, 2009, requesting his cooperation in the investigation. Robinson became a cooperating witness at that time. Inspector Davis instructed Robinson not to accept any more packages and instructed Sweetin to call the defendant and tell him the last package of marijuana had been stolen along with the money, and this phone call was recorded on March 5, 2009. Upon hearing this, the defendant stated "my cousin is going to be mad." At that time Inspector Davis established a post office box for the purpose of accepting packages. Because the original overhear order had expired, Inspector Davis instructed Sweetin and Robinson to keep him apprised on any conversations they had with the defendant. Thereafter, two packages arrived at the post office box Inspector Davis had established. These packages were received on March 30, 2009, and May 1, 2009, and weighed 230 grams and 156.5 grams, respectively. After the fourth package was received, Inspector Davis applied for and was granted the second eavesdropping order. Thereafter, three other conversations between Sweetin and the defendant were recorded, wherein the two discussed how much money Sweetin had collected and how to send the money to the defendant.

¶ 10 During cross-examination of Inspector Davis, the defense confirmed that no fingerprints were taken from the packages and no handwriting analysis was performed. The defense also pointed out that the defendant had said on the tapes that his aunt placed the packages in the mail, and also that during one conversation, the defendant said thank you to Sweetin and stated "that's coming from way down the line."

¶ 11 Angela Sweetin's testimony corroborated that of Inspector Davis. Sweetin also testified that she recognized the defendant's handwriting on the packages because she and the defendant exchanged letters during the defendant's time in prison, and also that he abbreviated "Street" as "STR," which matched the abbreviations on the packages. On cross-examination Sweetin conceded that the defendant asked her how much marijuana was in the packages. Scott Robinson's testimony corroborated that of Inspector Davis as well.

¶ 12 Inspector Davis's August 24, 2009, interview with the defendant was played for the jury. During the interview, the defendant stated that he did not do the actual sending of the packages, but rather "made arrangements" to have the packages sent. He also stated that his aunt put the packages in the mail.

¶ 13 The defendant did not introduce any evidence at trial. During the jury instruction conference, the defendant tendered Illinois Pattern Jury Instructions, Criminal, No. 4.16 (4th ed. 2000), which defines possession. The circuit court refused the instruction, stating that possession was not at issue in this case. The jury was given Illinois Pattern Jury Instructions, Criminal, No. 17.05A (4th ed. 2000), containing the following definition of deliver:

**"17.05A Definition Of Deliver**

[1] The word 'deliver' means to transfer possession or to attempt to transfer possession.

[2] The word 'deliver' includes a constructive transfer of possession which occurs without an actual physical transfer. When the conduct or declarations of the person who has the right to exercise control over a thing is such as to effectively relinquish the right of control to another person, so that the other person is then in constructive possession, there has been a delivery.

[3] A delivery may occur with or without the transfer or exchange of money, or with or without the transfer or exchange of other consideration."

¶ 14 Twenty-two minutes after the jury began deliberating, the circuit court received a note from the jury stating, "We, the jury, all agree on the verdict except for one \*\*\* who missed parts of the trial because he couldn't hear and his concentration wasn't good." The note was signed by the jury foreman. Thereafter, the following colloquy between the court and counsel occurred:

"STATE: So is the note indicating that the juror who is not sure of a verdict is

not sure because that juror was not able to completely hear the evidence and process it?

COURT: That appears to be the statement. However, the jury was informed fully and completely to raise their hand if they couldn't hear something, they needed anything repeated, if they needed anything done whatsoever. None of that occurred or happened during the trial. I mean this isn't like they've been talking for 17 hours. It's been 25 minutes. \*\*\*

DEFENSE: Well, Your Honor, I would like a hung jury so...

COURT: We're many many hours from that point. I'm not blowing four days of my life when the jury has spent less than 20 minutes working on this.

DEFENSE: I would certainly understand, Your Honor, if you, what you said that you send that back, that they just now started and keep deliberating. I would understand that."

¶ 15 The circuit court sent the following note to the jury: "I have your note. You have received the evidence in this case and been instructed as to the law. All 12 of you need to continue to deliberate." Before this note was delivered to the jury, the jury sent a second note requesting to hear the interview between Inspector Davis and the defendant again. The defense objected, stating that to allow the jury to hear the interview again would place emphasis on a particular piece of evidence. After a recess the length of which cannot be determined from the record, the jury returned a verdict of guilty on all four counts of unlawful delivery of cannabis. The circuit court polled the jury, who all indicated that this was, indeed, their verdict.

¶ 16 On September 16, 2010, the defendant filed a motion for judgment notwithstanding the verdict and a motion for a new trial, raising, *inter alia*, all the issues he raises on appeal with the exception of the sentencing credit issue. On October 25, 2010, the circuit court held

a hearing on the posttrial motions and denied them from the bench. The circuit court then proceeded to a sentencing hearing. The presentence investigation report, filed by the chief managing probation officer of the Clay County probation office, listed the defendant's time served in custody on the subject charges as follows:

"According to the Clay County Sheriff's Office, Defendant began receiving credit for time served following the issuance of a governor's [extradition] warrant on 8/11/09. He then went back to prison on a parole violation on 8/26/09. Defendant was released from prison on 1/4/10 and has been in custody since his release date:

8/11/09 – 8/26/09:	16 days
1/4/10 – 10/25/010:	295 days
<b>GRAND TOTAL:</b>	<b>311 DAYS</b>

\*If the court would choose to give Defendant credit for time served while in DOC from 8/26/09 – 1/4/10, he would receive an additional 130 days which would bring his grand total to 441 days of credit for time served."

¶ 17 During its argument regarding sentencing, the State argued as follows:

"730 ILCS 5/5-8-7 Subparagraph E indicates that an offender charged with the commission of an offense committed while on parole, mandatory supervised release, or probation shall not be given for time spent in custody \*\*\* so we believe he should not be given credit for that time, 130 days \*\*\*."<sup>2</sup>

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<sup>2</sup>We note that the State incorrectly cited to section 5-8-7 of the Unified Code of Corrections (730 ILCS 5/5-8-7 (West 2008)), which had been repealed at the time of sentencing and did not contain a subparagraph E or an exclusion for time spent in custody on a violation of parole. At the time of sentencing, the Unified Code of Corrections had been renumbered and the correct cite was to section 5-4.5-100(e). 730 ILCS 5/5-4.5-100(e) (West 2010).

¶ 18 The defendant did not refute the State's position that he was not entitled to receive the 130 days credit for time served in the IDOC for a revocation of his parole. The circuit court sentenced the defendant to nine years in the IDOC for each of the four counts of unlawful delivery of cannabis, to be served concurrently. Regarding presentencing credit, the circuit court found the defendant to be eligible for 311 days, but did not award him credit for the 130 days he was held in the IDOC for revocation of parole. On November 22, 2010, the defendant filed a motion to reduce sentence, arguing that he was entitled to presentencing credit for 82 days he served in Texas while awaiting extradition on the current charges. The circuit court amended the mittimus to award this credit. The defendant never argued that he was entitled to the 130 days while in the IDOC for parole revocation in his motion to reduce sentence. This appeal followed.

¶ 19

## ANALYSIS

¶ 20

### 1. *Sufficiency of the Evidence*

¶ 21 The defendant first argues that the circuit court erred in denying his motion for a judgment notwithstanding the verdict because possession is required for delivery and the evidence was insufficient to prove that he ever possessed the marijuana at issue. We begin our analysis with the following statement of the standard of review:

"A criminal conviction will not be set aside on grounds of insufficient evidence unless the proof is so improbable or unsatisfactory that there exists a reasonable doubt of the defendant's guilt. [Citation.] The standard for reviewing a challenge to the sufficiency of the evidence is well settled. When reviewing the sufficiency of the evidence to sustain a verdict on appeal, the relevant inquiry is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' (Emphasis omitted.) [Citations.] The same standard of review applies when

reviewing the sufficiency of evidence in all criminal cases, regardless of whether the evidence is direct or circumstantial. [Citations.] Circumstantial evidence alone is sufficient to sustain a conviction where it satisfies proof beyond a reasonable doubt of the elements of the crime charged. [Citation.]" *People v. Pollock*, 202 Ill. 2d 189, 217 (2002).

¶ 22 Here, the defendant was charged with four counts of unlawful delivery of cannabis pursuant to section 5 of the Cannabis Control Act (720 ILCS 550/5(d) (West 2008)), and the Cannabis Control Act defines "delivery" in section 3(d) as "the actual, constructive or attempted transfer of possession of cannabis, with or without consideration, whether or not there is an agency relationship." 720 ILCS 550/3(d) (West 2008). The defendant argues that the evidence was insufficient to prove that the defendant ever possessed the cannabis that arrived in the four packages, but was sufficient to prove, at most, that he served as a "broker," arranging such deliveries, and therefore he cannot be found guilty of delivery.

¶ 23 "Because possession is often difficult to prove directly, proving possession frequently rests upon circumstantial evidence." *People v. Love*, 404 Ill. App. 3d 784, 788 (2010). In a case based on circumstantial evidence, each chain in the link of circumstances does not have to be proven if all the evidence considered collectively satisfied the trier of fact that the defendant is guilty. *Id.* at 788. Moreover, "[p]roof beyond a reasonable doubt does not require the exclusion of every possible doubt, and a conviction may be sustained upon wholly circumstantial evidence if it leads to a reasonable certainty that the defendant committed the crime." *People v. Shevock*, 335 Ill. App. 3d 1031, 1037 (2003).

¶ 24 After carefully reviewing the entire record, we find that a reasonable trier of fact could have found, with reasonable certainty, that the defendant committed the deliveries for which he was charged. First, the jury could have found, based on Angela Sweetin's testimony, that she recognized the defendant's handwriting on the packages, that the defendant actually

possessed the cannabis, and that he transferred the packages to his aunt to be placed in the mail. Furthermore, the jury could have understood the defendant's statements in his interview with Inspector Davis that he "made arrangements" to have the packages sent to mean that he transferred possession of the cannabis to his aunt, as his agent, to be placed in the mail and delivered to Clay County. Finally, the jury could have found the phone calls wherein the defendant reported that a delivery was imminent, followed by the arrival of the package in the mail, and the subsequent request by the defendant for money, were circumstantial evidence of the delivery. It is within the province of the jury to determine the weight of the evidence and the credibility of witnesses. *People v. Kotlarz*, 193 Ill. 2d 272, 298 (2000). Accordingly, regardless of any evidence in the record that may or may not contradict the above evidence, such as the fact that the defendant purportedly did not know the weight of the packages, we find sufficient evidence for the jury to have found that the defendant transferred actual possession of the cannabis. Therefore, we need not address the defendant's arguments regarding constructive possession.

¶ 25

## 2. Jury Instructions

¶ 26 The defendant next argues that the circuit court erred in refusing to submit Illinois Pattern Jury Instructions, Criminal, No. 4.16 (4th ed. 2000), which defines "possession," to the jury. "Generally, a reviewing court will review jury instructions only for an abuse of discretion." *People v. Hammonds*, 409 Ill. App. 3d 838, 849 (2011) (citing *People v. Mohr*, 228 Ill. 2d 53, 66 (2008)). However, our standard of review is *de novo* when the question is whether the applicable law was accurately conveyed. *Id.* (citing *Barth v. State Farm Fire & Casualty Co.*, 228 Ill. 2d 163, 170 (2008)). In such a case, "[o]ur task is to determine whether the instructions given to the jury \*\*\*, ' "considered as a whole, fully and fairly announce the law applicable to the respective theories of the People and the defense." ' " *Pollock*, 202 Ill. 2d at 210 (quoting *People v. Terry*, 99 Ill. 2d 508, 516 (1984) (quoting

*People v. Kolep*, 29 Ill. 2d 116, 125 (1963))).

¶ 27 Here, Illinois Pattern Jury Instructions, Criminal, No. 4.16 (4th ed. 2000), which was refused, defines the term possession and explains that possession may be actual or constructive. It then explains that "[a] person has constructive possession when he lacks actual possession of a thing but he has both the power and the intention to exercise control over a thing [either directly or through another person]." Illinois Pattern Jury Instructions, Criminal, No. 4.16 (4th ed. 2000). The defendant argues that this definition was required because his theory was that he never actually possessed the cannabis at issue. We find that this definition of constructive possession would not aid the defendant in explaining his theory to the jury, as a definition of constructive possession would actually give the jury an alternative means by which to find that the State had adequately proven that the defendant had possession of the cannabis by exercising control over it through another person. Moreover, in Illinois Pattern Jury Instructions, Criminal, No. 17.05A (4th ed. 2000), which was given, the jury was instructed that the word "deliver" encompasses a constructive transfer, whereby "the conduct or declarations of the person who has the right to exercise control over a thing is such as to effectively relinquish the right of control to another person." We find that this aspect of the definition given to the jury adequately instructed the jury as to the theory advanced by the defendant. Accordingly, we find no error.

¶ 28

### 3. *Juror Inattention*

¶ 29 We next consider whether the circuit court erred in instructing the jury to continue to deliberate after the jury sent a note out stating that one juror could not hear portions of the trial and failed to pay attention to some of the testimony. The standard of review for whether the circuit court failed to remedy juror misconduct is abuse of discretion. *People v. Runge*, 234 Ill. 2d 68, 105 (2009). We begin our review by noting that the defendant, after moving for a hung jury, which the circuit court denied, acquiesced in the judge's instructions, by

stating, as quoted above, that he would certainly understand if the judge wanted to instruct the jury to continue to deliberate. The defendant did not request that the circuit court reopen *voir dire* or replace the allegedly inattentive juror with an alternate. Accordingly, we find this issue waived. See *People v. Gonzalez*, 388 Ill. App. 3d 566, 573 (2008) (citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)).

¶ 30 Having found that the defendant waived this issue on appeal, we proceed to review this issue under the plain error doctrine. See *id.* at 574 ("The plain error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error where either the evidence is close, or the error affects substantial rights."). After carefully reviewing the record, we find that the circuit court did not err. The circuit court was careful to ensure that the jurors heard all of the evidence by repeatedly admonishing them to raise their hands if they could not hear. When the juror sent the note out after 20 minutes, it was within the province of the court to disbelieve that a juror had not heard testimony despite the circuit court's efforts to ensure attentiveness, and to instruct them to deliberate further.

¶ 31 We find *People v. Jones*, 369 Ill. App. 3d 452 (2006), upon which the defendant relies to argue that the circuit court should have taken corrective measures *sua sponte*, to be distinguishable. The court's holding in *Jones* that the trial judge was required to make further inquiry of the juror on his own motion was expressly limited to the circumstances in that case, where the trial judge, without a prompt from the prosecution or defense, stated on the record that he personally witnessed a juror who was "half asleep through most of the trial." 369 Ill. App. 3d at 456. The court specifically emphasized that the trial judge witnessed the inattentiveness throughout almost the entire proceeding. *Id.* Here, the juror subjectively reported that he "missed parts of the trial because he could not hear and his concentration wasn't good." There was no observation, by the judge, of juror inattentiveness. We decline to follow *Jones* under the circumstances of this case.

¶ 32

#### 4. *Eavesdropping Warrant*

¶ 33 We turn now to the propriety of the orders allowing for the use of an eavesdropping device to record conversations between Sweetin and the defendant pursuant to section 108A-3 of the Code of Criminal Procedure (725 ILCS 5/108A-3 (West 2008)). Under that section, an application for use of an eavesdropping device, where one party consents to the use of the device, must contain, *inter alia*, a statement of the facts and circumstances relied upon by the applicant to justify his belief that an order should be issued. 725 ILCS 5/108A-3(a)(2) (West 2008). Because section 108A-4(b) of the Code of Criminal Procedure (725 ILCS 5/108A-4(b) (West 2008)) requires the circuit court, in order to authorize use of an eavesdropping device, to find reasonable cause to believe that an individual is committing, has committed, or is about to commit a felony under Illinois law, if hearsay appears in the application, the circuit court must have some basis for crediting the hearsay. *People v. Wassell*, 119 Ill. App. 3d 15, 20 (1983). However, the reliability of the informant is not required to be shown if the informant is a witness and an ordinary citizen. *People v. Sylvester*, 86 Ill. App. 3d 186, 195-96 (1980).

¶ 34 Despite the defendant's arguments to the contrary, we find a plethora of corroboration of the hearsay of Sweetin as set forth in the application for use of an eavesdropping device. Inspector Davis personally observed Sweetin remove an unopened package from the residence of Robinson, it had a return address of Alamo, Texas, and it contained cannabis. These observations alone were sufficient for the circuit court to find that an individual had committed a felony under Illinois law. Accordingly, we find that the circuit court did not err in failing to suppress the recordings.

¶ 35

#### 5. *Credit for Time Served*

¶ 36 Finally, the defendant contends that he is entitled to credit for time served from August 26, 2009, to January 4, 2010, in the IDOC for revocation of parole because he had

not posted bond for the current charges. As the defendant aptly points out, at the time of the defendant's offenses, the applicable law regarding sentencing credit did not contain an exclusion for time served for a revocation of parole. 730 ILCS 5/5-8-7 (West 2008) (repealed by Pub. Act 95-1052, § 95 (eff. July 1, 2009)). However, at the time the defendant was sentenced, the law was clear that such time was excluded. 730 ILCS 5/5-4.5-100 (West 2010). The circuit court sentenced the defendant according to the new law, denying him credit for time served in the IDOC for revocation of parole while he was still being held on the current charges.

¶ 37 The State argues that at the time of the offenses, although time served in the IDOC for revocation of parole was not specifically excluded by section 5-8-7 of the Unified Code of Corrections (730 ILCS 5/5-8-7 (West 2008) (repealed by Pub. Act 95-1052, § 95 (eff. July 1, 2009))), the defendant nevertheless would not be entitled to the credit under then-existing law. According to the State, although the defendant was on parole at the time of the commission of his offenses, he was still considered to be "committed to the Department of Corrections" within the meaning of section 5-8-4 of the Unified Code of Corrections (730 ILCS 5/5-8-4 (West 2008)) and thus was required to serve his sentence for the current offenses consecutive to his sentence for revocation of parole. The State then points to case law that, at the time of the offenses, denied credit for time served for simultaneous pretrial incarceration on offenses that require consecutive sentencing. See *People v. Plair*, 292 Ill. App. 3d 396, 401 (1997); see also *People v. Latona*, 184 Ill. 2d 260, 265 (1998). We are unpersuaded.

¶ 38 As the defendant points out, our supreme court has specifically held that section 5-8-4 of the Unified Code of Corrections (730 ILCS 5/5-8-4 (West 2008)) does not apply to persons on parole. *People ex rel. Gibson v. Cannon*, 65 Ill. 2d 366, 373 (1976). Accordingly, case law prohibiting credit for time served for simultaneous pretrial

incarceration for offenses requiring consecutive sentencing is inapplicable to the case at bar. At the time of the defendant's offenses, section 5-8-7 of the Unified Code of Corrections provided that offenders receive credit against their terms of imprisonment when they are "in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5-8-7(b) (West 2008) (repealed by Pub. Act 95-1052, § 95 (eff. July 1, 2009)); see also *People v. Robinson*, 172 Ill. 2d 452, 462 (1996). Accordingly, because the defendant had not posted bond on the current charges at the time he was transferred to the IDOC for a revocation of parole, he was in simultaneous custody on both charges and entitled to pretrial credit. See *Robinson*, 172 Ill. 2d at 463. This interpretation of section 5-8-7 of the Unified Code of Corrections is supported by the fact that the Unified Code of Corrections was later amended to exclude credit for time served while on revocation of parole. 730 ILCS 5/5-4.5-100 (West 2010). Where a statute is amended, it will be presumed that the legislature intended to effect change in the law as it existed. *Gibson*, 65 Ill. 2d at 373. For these reasons, we find that, under the law as it existed at the time of the offenses, the defendant was entitled to credit for time served while in simultaneous custody on the current offenses and revocation of parole.

¶ 39 The defendant was entitled to elect whether he wanted to be sentenced under the law in effect at the time of the offense or the one in effect at the time of sentencing. *People v. Varghese*, 391 Ill. App. 3d 866, 878 (2009). In addition, our supreme court has held that, in the absence of a showing that he was advised of his right to elect under which statute he should be sentenced, and an express waiver of that right, the defendant is denied due process of law. *People v. Strebin*, 209 Ill. App. 3d 1078, 1081 (1991) (citing *People v. Hollins*, 51 Ill. 2d 68, 71 (1972)). On appeal, the defendant has effectively made an election to be sentenced under the law as it existed at the time of his offenses. Accordingly, pursuant to Illinois Supreme Court Rule 366(a)(1) (eff. Feb. 1, 1994), we modify the defendant's sentence to reflect additional credit for time served from August 26, 2009, to January 4,

2010.

¶ 40

## CONCLUSION

¶ 41 For the foregoing reasons, the defendant's convictions are affirmed, but the sentence is modified to reflect additional credit for time served from August 26, 2009, to January 4, 2010.

¶ 42 Affirmed as modified.