

No. 1-12-0934

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 ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 CR 19888
)	
DION BUTLER,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

JUSTICE Palmer delivered the judgment of the court.
Presiding Justice Gordon and Justice Taylor concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's conviction for Class 1 possession of more than 1 gram of heroin with intent to deliver was affirmed where the State proved beyond a reasonable doubt that the weight of heroin exceeded one gram after a State chemist found a total of 1.3 grams of heroin in five individually wrapped baggies of white powder.

¶ 2 Following a bench trial, defendant Dion Butler was convicted of Class 1 possession of a controlled substance (more than 1 one gram but less than 15 grams of heroin) with intent to deliver and was sentenced to six years in prison. On appeal, defendant contends that his

conviction must be reduced to Class 2 possession with intent to deliver because the State failed to prove that the amount of heroin in his possession exceeded one gram. Defendant also asserts the trial court's order imposing a \$200 DNA analysis fee should be vacated. We affirm defendant's conviction and vacate the portion of the trial court's sentencing order that imposed a \$200 DNA fee.

¶ 3 Defendant and three codefendants (Devon Butler, Alvin Hawkins and Tony Givan) were charged by information with possession of more than 1 gram but less than 15 grams of heroin with intent to deliver. Defendant, Hawkins, and Devon Butler were tried simultaneously in a bench trial, while Givan pleaded guilty to a lesser narcotics charge and a weapons charge. The following testimony relevant to this appeal was adduced at trial.

¶ 4 On the afternoon of October 9, 2010, Chicago Police Officers Marion Swiatkowski and Matthew Lopez were notified by police radio that individuals were manufacturing narcotics at 6136 South Justine in Chicago. The officers went to the house at that location and obtained the signature of Charlene Bergen on a written consent-to-search form. Officer Lopez and a police lieutenant entered the residence and went to the basement. In one room of the basement they encountered four black males. One of them (Devon Butler) was seated at a glass table, spooning a white powder into small plastic bags. The second man (Hawkins), also seated at the table, was using a CTA transit bus card and a razor blade to mix small piles of white powder to be placed into plastic bags and distributed for sale. Lopez believed the white powder was suspect heroin. The third man (Givan) was weighing little green plastic bags on a digital scale; some of the green bags were open, some were closed. The fourth man, identified at trial as defendant, was disassembling gel tab pills and pouring the white substance inside them out onto the table.

¶ 5 After Lopez placed the men in custody and removed them from the room, he seized the items found in the room. With respect to the piles of white powder on the glass table, Lopez testified: "Because they were all opened *** I compiled them all into one larger pile and put them in a plastic bag and had them inventoried that way." The powder Lopez placed into one bag included "the little green bags [the men] were putting the narcotics into, some were opened and some were closed." Lopez also found in the room an additional 11 "pre-sealed bags" of suspect heroin that were "individually bagged." Lopez testified: "They were already prepackaged for street sale. We recovered them and they were inventoried separately from the larger bag of heroin and they were given their own individual inventory number." "The little bags are sealed." Lopez did not specify where in the room he found the 11 little bags of suspect heroin. Lopez gave the suspect heroin and the other evidence he recovered to his partner, Officer Swiatkowski.

¶ 6 Swiatkowski testified she received from Lopez the clear bag containing a white powder; 11 zip lock baggies containing suspect heroin; red gel tablets; a CTA bus card, razor blade, two spoons and a strainer, all containing a white powder residue; a coffee grinder; a digital scale; empty zip lock bags; proof-of-residence documents; \$200 in U.S. currency; and miscellaneous narcotics equipment. Each item was inventoried by giving it a unique inventory number and placing it in a bag which was heat-sealed and sent to the Illinois State Police Crime Lab. Among the items she inventoried were the clear bag containing a white powder substance which was inventoried under number 12147544, and the 11 zip lock baggies inventoried under number 12147545. All of the items were in Swiatkowski's care, custody and control from the time she received them from Lopez until she sent them to the crime lab.

¶ 7 The parties stipulated that if Debora L. Bracey were called to testify, she would testify she is a forensic chemist employed at the Illinois State Police Crime Lab. She is qualified to testify as an expert in the area of forensic chemistry and all the equipment she used was tested, calibrated, and functioning properly when the items were tested. She received the various inventoried items in a heat-sealed condition that Swiatkowski sent to her, including items with inventory numbers 12147544 and 12147545. When she opened the envelope numbered 12147545, she found 11 zip lock baggies containing a white powdery substance. Using tests commonly accepted for ascertaining the presence of a controlled substance, Bracey tested 5 of the 11 zip lock bags. Those five items tested positive for heroin in the amount of 1.3 grams. Bracey also tested the white powdery substance contained in 12147544 and it tested positive in the amount of 10.7 grams of heroin. It was her expert opinion within a reasonable degree of scientific certainty that the items tested positive in the total amount of 12 grams of heroin. In addition, residue found on the bus card and the two spoons tested positive for the presence of heroin. A proper chain of custody with respect to handling the items within the laboratory was maintained.

¶ 8 After additional evidence was heard and the parties rested, defendant's counsel argued in closing argument: "If all of these items were grouped in a single bag and not segregated at the time of the actual seizure, you have the risk of contamination. *** [T]he result could be a multiplication of the quantities that are found to obtain a proscribed substance."

¶ 9 The trial court found defendant and his two codefendants guilty as charged. Defendant's post-trial motion reprised his argument of possible cross-contamination between tested substances. The court sentenced defendant to six years in prison.

¶ 10 Defendant asserts on appeal that the State failed to establish beyond a reasonable doubt that the weight of heroin in defendant's possession exceeded one gram because the police mixed and commingled the samples of white powder before they were sent to the crime lab for analysis. He asks that this court reduce his conviction from Class 1 possession with intent to deliver more than 1 gram but less than 15 grams of heroin, to Class 2 possession of a controlled substance with intent to deliver.

¶ 11 In a controlled substance case, it is the State's burden to prove beyond a reasonable doubt that the substance at issue is a controlled substance. *People v. Hagberg*, 192 Ill.2d 29, 34 (2000). "The punishment for possession of a controlled substance with the intent to deliver it depends on how much of it the defendant possessed—or more precisely, how much of *a substance containing a controlled substance* he possessed." (Emphasis in original.) *People v. Coleman*, 391 Ill. App. 3d 963, 971 (2009). When a defendant is charged with the possession of a specific amount of an illegal drug with the intent to deliver and there is a lesser included offense of possession of a smaller amount, the weight of the seized drug is an essential element of the crime which must be proven beyond a reasonable doubt. *People v. Jones*, 174 Ill. 2d 427, 428-29 (1996).

¶ 12 Defendant claims that Lopez mixed together the white powder from the piles on the glass table in a single bag, "and commingled the baggies of powder, some of which were open, in a single evidence bag." As a result, defendant maintains, the substance tested by the State's chemist was not sufficiently homogenous to determine how many of the samples actually contained heroin. Defendant is correct in challenging the crime lab chemist's testing of the contents of the evidence bag that contained the green bags of powder (some of which were open)

and the commingled piles of white powder from the table, and her conclusion that the substance tested positive for 10.7 grams of heroin. When a seized sample is not sufficiently homogenous, a portion from each sample must be tested to determine the identity of the substance in each sample. *Jones*, 174 Ill. 2d at 429. When Lopez mixed together all of the piles of powder from the table and the green bags of powder by placing all of them in an evidence bag, it would have been impossible for the chemist to determine whether the heroin she found in the evidence bag came from each of the piles and the green bags or from just one. The single sampling method used by the chemist did not support an evidentiary finding beyond a reasonable doubt that the white powder in each of the piles and each of the green bags that were mixed together in one evidence bag contained heroin. See *People v. Adair*, 406 Ill. App. 3d 133, 142 (2010).

¶ 13 We reach a different conclusion, however, with respect to the 11 prepackaged, sealed baggies that Lopez also found in the apartment and which he placed in a separate evidence bag. The chemist did not rely on random sampling to test for the presence of a controlled substance in those 11 baggies. She analyzed the contents of 5 of the 11 baggies and found heroin in each baggie. The total weight of the five baggies alone was 1.3 grams; the chemist did not add the weight of the untested six baggies. Therefore, the State sustained its burden of proving that the substance in defendant's possession exceeded one gram of heroin.

¶ 14 Defendant also contends and the State agrees that the imposition of the \$200 DNA analysis fee, pursuant to section 5-4-3 of the Unified Code of Corrections (730 ILCS 5/5-4-3) (West 2012)) must be vacated. An Illinois State Police report in the appendix of defendant's opening brief establishes that at the time of his conviction in the instant case, defendant's DNA was registered in CODIS (Combined DNA Index System). Consequently, defendant was not

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required to submit another sample or pay another DNA analysis fee. *People v. Marshall*, 242 Ill. 2d 285, 302 (2011).

¶ 15 Under our authority pursuant to Illinois Supreme Court Rule 615(b) (August 27, 1999), we vacate the portion of the trial court's sentencing order that imposed a \$200 DNA sentencing fee. We affirm defendant's conviction in all other respects.

¶ 16 Affirmed in part; vacated in part.