2014 IL App (1st) 122928-U
Rule 23 Order filed October 21, 2014
Modified Upon Denial of Rehearing January 13, 2015

SECOND DIVISION

No. 1-12-2928

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. 12 CR 1772
	)	
TERRANCE WHITE,	)	Honorable
	)	Raymond Myles,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Simon and Justice Pierce concurred in the judgment.

O R D E R

¶ 1 *Held*: The State proved defendant guilty beyond a reasonable doubt of possession of narcotics where two officers' credible and reliable testimony established that defendant was seen engaging in a hand-to-hand transaction, fled, and prior to being captured by the police, threw a red container under a porch, and the police recovered the item, which contained heroin. Further, defendant is not entitled to the $5 per day presentence credit for the period where he was on electronic monitoring home confinement.

¶ 2 Following a bench trial, Terrance White, the defendant, was convicted of possession of a

controlled substance and sentenced to three years' imprisonment. He appeals his conviction, contending the State failed to prove him guilty beyond a reasonable doubt. Defendant also contends on appeal that he is entitled to presentence credit of $5 per day for each day that he was on home-confinement prior to sentencing.

¶ 3 Officer Reed testified that at about 11:43 a.m. on December 23, 2011, he and his partner, Officer Carter, were in an unmarked police vehicle in a "hot spot," a high narcotics area, on the 3600 block of West Lexington. Reed had made hundreds of narcotics arrests in seven and a half years as a police officer with the Chicago Police Department. He first observed defendant about 40 feet from him and Carter. Defendant was located at about 3620 West Lexington and Reed saw him accept cash from an unknown older Black male. As the officers approached in their vehicle, Reed observed defendant holding a red item "in between" his fingers and reaching out towards the older man, in the process of handing off the item.

¶ 4 As the officers approached, defendant looked in their direction, closed his right hand, and began to flee. He ran into an abandoned building at 3620 West Lexington and Reed followed him through the building. While inside of the building, Reed lost sight of defendant for one or two seconds, when Reed was running up the stairs to enter the building and when Reed reached the first floor unit. Reed and defendant ran through the building and onto the next block, going north. Reed lost sight of defendant for about 10 seconds when defendant changed direction and ran back towards Lexington. On Lexington, Reed spotted his partner, who was following defendant in the police vehicle through a vacant lot on Lexington. Officer Carter chased and detained defendant in front of 3638 West Lexington. Reed stayed with defendant while Carter

went to recover the red item that the officers observed defendant attempt to hand off to the unknown male and that Carter saw defendant throw away during the foot chase.

¶ 5 Officer Carter also made hundreds of narcotics-related arrests during his seven-year career as a Chicago Police officer. He testified that he observed defendant accept cash from an unknown Black male and then extend his right hand with a red item protruding from his fingertips towards the unknown man. As the officers approached, defendant closed his right hand and fled through an abandoned building at 3620 West Lexington. While Reed chased defendant on foot, Carter pursued him in the vehicle. Carter lost sight of defendant for about one minute and then observed defendant running southbound on Lexington through a vacant lot. During the pursuit, defendant slipped and fell, and as he got to his feet, defendant tossed from his right hand a red object that went into the rear yard of 3639 West Lexington, under the porch. Carter was about five feet from defendant when he observed defendant toss the object.

¶ 6 Defendant continued fleeing, running through an abandoned building at 3638 West Lexington, which is where Carter detained him. Reed arrived, and Carter went back and recovered the red item. Carter recovered the object approximately one foot from where defendant threw it. The red item was the only red item in the area, and Carter retrieved it from where it landed on a cement block under the porch.

¶ 7 The red item resembled the red item that Carter observed defendant throw under the porch and also resembled the red item defendant was holding out towards the unknown man during the hand-to-hand transaction. The State presented, unchallenged, chain-of-custody evidence and then the parties proceeded by stipulation. A forensic chemist tested the white

powdery substance found in the red item and concluded that it tested positive for the presence of heroin and weighed 0.3 grams.

¶ 8 In finding defendant guilty of possession of a controlled substance, the trial court found:

> "[B]oth officers were credible, especially Officer Carter ***, he's quite clear as to what he saw and what was carried out on the date and time in question. There's no question that he saw the defendant toss the object, the object was recovered, and the object was later tested, and the object tested by the crime lab indicated that it was indeed contraband. Therefore, the State has proved its case beyond a reasonable doubt[.]"

Defendant was sentenced to three years' imprisonment and awarded 273 days of presentence credit. In determining presentence credit, the trial court did not distinguish between the days defendant spent in custody at Cook County jail and the days he spent on electronic home monitoring. He was ordered to pay $1,190 in fines and fees, including a $500 controlled substance fine (720 ILCS 570/411.2(a) (West 2012) ($500 for a Class 3 or 4 felony)), and a mental health court fine of $10 (55 ILCS 5/5-1101(d-5) (West 2012)).

¶ 9 Defendant appeals, contending, first, that the State failed to prove him guilty beyond a reasonable doubt where the officers' identification of the man they saw engaging in the initial transaction was unreliable and because the evidence did not link the narcotics recovered from under the porch to defendant.

¶ 10 When a defendant challenges the sufficiency of the evidence, "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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Ross*, 229 Ill. 2d 255, 272 (2008). The reviewing court must also construe all reasonable inferences in favor of the prosecution. *People v. Bush*, 214 Ill. 2d 318, 326 (2005). The reviewing court does not retry the defendant. *Ross*, 229 Ill. 2d at 272. Rather, the trier of fact determines witness credibility, weighs testimony, and draws reasonable inferences from the evidence. *Id.* "A conviction will be reversed where the evidence is so unreasonable, improbable, or unsatisfactory that there remains a reasonable doubt of defendant's guilt." *Id.*; see also *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006).

¶ 11 To prove possession of a controlled substance, the State must prove beyond a reasonable doubt that the defendant had knowledge of the presence of a controlled substance and the substance was in the defendant's immediate and exclusive control. *People v. Carodine*, 374 Ill. App. 3d 16, 24-25 (2007). "Actual possession is the exercise by the defendant of present personal dominion over the illicit material [citation] and exists when an individual exercises immediate and exclusive dominion or control over the illicit material [citation]." *People v. Schmalz*, 194 Ill. 2d 75, 82 (2000). Dominion may be shown by the defendant having the contraband on his person, trying to conceal it, or being seen throwing it away. *People v. Ray*, 232 Ill. App. 3d 459, 461 (1992); see also *People v. Dismuke*, 2013 IL App (2d) 120925, ¶ 16.

¶ 12 The testimony showed that the officers saw defendant begin to hand off a red item to an unknown male, and when defendant saw the police, he ran, still holding the red item. While fleeing on foot, Carter saw defendant fall and as he got to his feet, defendant tossed from his right hand a red object that went into the rear yard of 3639 West Lexington, under the porch.

Carter was a mere five feet from defendant when he saw defendant toss the object and Carter recovered the item approximately one foot from where defendant threw it.

¶ 13 The parties argue at length whether the officers' identification of defendant was reliable. Defendant argues it is possible that during the chase the officers mistook him for the man who engaged in the transaction and arrested the wrong individual. We do not believe identity was a significant issue in this case. The officers lost sight of defendant for a couple of seconds but this does not rise to the level of an identification problem. Nothing in the record indicates that defendant was not the man engaging in the initial hand-to-hand transaction. The testimony is actually undisputed that the officers observed defendant, and then when the defendant looked in the officers' direction as they approached, defendant fled. Between the two officers, they only lost sight of defendant for seconds while pursuing defendant.

¶ 14 Even if there were some doubt as to the identification of defendant as the man who engaged in the transaction, there was clear evidence that defendant was the man who threw the red item under the porch. Carter testified that the red item he saw defendant handing off to the unknown male resembled the item he saw defendant toss under the porch, and the item Carter recovered moments later. No other items resembled the red item Carter saw defendant toss under the porch. The trier of fact is not required to disregard inferences that flow normally from the evidence nor is it required to seek all possible explanations consistent with innocence and elevate them to reasonable doubt. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009).

¶ 15 Defendant cites *People v. Jackson*, 23 Ill. 2d 360 (1961), to support his claim that the State failed to prove him guilty of constructive possession, arguing that the State did not link the narcotics recovered from under the porch to defendant. *Jackson* is inapposite because that case

involved constructive possession, whereas here, this is a case of actual possession where the undisputed testimony showed that defendant possessed the narcotics immediately prior to throwing the red item containing the narcotics under the porch. *Jackson* is also factually distinguishable because there, when the officers arrived at the defendant's apartment to execute a search warrant, the defendant ran into her bathroom and locked herself inside. *Id.* at 361-62. When she opened the door for the officer to enter, there were no narcotics in the bathroom or on her person. *Id.* at 362. It was not until the officers searched an airwell that the defendant had access to from her bathroom window did they find narcotics. *Id.* At no point did the officer executing the warrant see the defendant in actual possession of the narcotics that they recovered at the bottom of the airwell. Our supreme court found that the State failed to prove the defendant possessed narcotics because the narcotics were not found in an area that defendant exclusively possessed. *Id.* at 364. The defendant had access to the airwell, but also shared it with seven other tenants in the apartment building. *Id.*

¶ 16 Here, the officers observed defendant begin to hand off a red item to an unknown male, after having receiving cash from the man. The officers chased defendant after he fled upon looking in the officers' direction. Although the officers momentarily lost sight of defendant during certain limited moments during the chase, they nevertheless observed defendant with a red item in his hand while running, and observed him throw that red item away. The officers recovered the red item only a foot from where defendant threw it, and there were no other red items under the porch, where Officer Carter observed the red item land. The trial court found Carter's testimony to be credible and we will not disturb this finding or the guilty finding where

the evidence was not so improbable or unsatisfactory that it created a reasonable doubt of defendant's guilt.

¶ 17 Defendant next contends that because he was arrested on December 23, 2011 and remained in custody or on electronic monitoring until September 27, 2012, totaling 279 days in pretrial custody, he is entitled to receive $1,395 in credit towards his assessed fines. The State argues that defendant is not entitled to monetary credit for the 204 days he spent on electronic home monitoring prior to sentencing because he was not "incarcerated" as contemplated by section 110-14 of the Code of Criminal Procedure of 1963.

¶ 18 We recently decided this issue in *People v. Riley*, 2013 IL App (1st) 112472. The question presented is one of statutory interpretation, which we review *de novo*. *Riley*, 2013 IL App (1st) 112472, ¶ 7. When interpreting a statute, we begin with the language of the statute to ascertain and give effect to the intent of the legislature in enacting it. *Id.* We give the words their plain and ordinary meaning and consider them in the context provided. *Id.* Section 110-14 provides: "[a]ny person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated upon application of the defendant." 725 ILCS 5/110-14 (West 2012). We concluded in *Riley* that the defendant was "only entitled to a *per diem* monetary credit for days that he was actually physically incarcerated and not for those days that he was on home confinement." *Riley*, 2013 IL App (1st) 112472, ¶ 13.

¶ 19 In reaching this conclusion, we distinguished the majority opinion in *People v. Kuhns*, 372 Ill. App. 3d 829, 839 (2007), which defendant cites as analogous. In *Kuhns*, the majority awarded the $5 per day credit, holding that section 110-14 permitted the credit for every full or

partial day that the defendant was "in custody" after his arrest. *Kuhns*, 372 Ill. App. 3d at 838. Justice Gilleran Johnson's dissent in *Kuhns* analyzed the language of section 110-14 and concluded that it provided credit for days that a defendant is "incarcerated" and not merely "in custody." *Id*. at 839. This court found Justice Gilleran Johnson's dissent to be persuasive and concluded in *Riley* that section 110-14 only allows a *per diem* monetary credit for each day that a defendant is "physically incarcerated and not merely in custody." *Riley*, 2013 IL App (1st) 112472, at ¶ 11. "Custody" is a much broader term than "incarceration." *Kuhns*, 372 Ill. App. 3d at 839. Custody includes "actual imprisonment, as well as lesser restraints," whereas "incarceration" is limited to " '[i]mprisonment; confinement in a jail or penitentiary.' " *Id.*, quoting Black's Law Dictionary 760 (6th ed. 1990).

¶ 20 We also reviewed our supreme court's opinion in *People v. Beachem*, where the supreme court was asked to determine whether section 5-8-7 of the Code of Corrections (730 ILCS 5/5-8-7 (West 2008)), allowed a credit against a defendant's sentence for time spent in the sheriff's day reporting program which was an alternative to incarceration. The court in *Beachem* distinguished "in custody" and "incarceration," by explaining that "incarceration" refers only to actual, physical confinement and "in custody" includes a more expansive duty to submit to legal authority. *Beachem*, 229 Ill. 2d 237, 253 (2008).

¶ 21 We continue to follow the reasoning in *Riley*, and reject defendant's claim that *Riley* was wrongly decided, as well as his suggestion that we follow the majority in *Kuhns*. Accordingly, we find that defendant is not entitled to the $5 per day monetary credit for the days he spent on electronic home confinement. Defendant was incarcerated at Cook County jail from December 23, 2011, until March 7, 2012, when the trial court ordered defendant to home confinement, a

total of 74 days. Defendant remained on electronic monitoring until September 27, 2012. However, as concluded above, we will not include that time in our *per diem* presentence calculations. Therefore, we find that according to section 110-14, defendant is entitled to $370 in *per diem* credit. See *Riley*, 2013 IL App (1st) 112472, ¶ 13.

¶ 22 In a petition for rehearing, White argues that an amendment to section 5-1-10 of the Unified Code of Corrections (730 ILCS 5/5-1-10 (West 2014)) shows that this court misinterpreted section 110-14 of the Code of Criminal Procedure (725 ILCS 5/110-14 (West 2012)). Section 110-14 provides that "[a]ny person incarcerated on a bailable offense *** shall be allowed a credit of $5 for each day so incarcerated." 725 ILCS 5/110-14 (West 2012). The General Assembly amended the definition of "imprisonment," so that the amended statute, section 5-1-10, now provides, " 'Imprisonment' means incarceration in a correctional institution under a sentence of imprisonment and does not include 'periodic imprisonment' ***. 'Imprisonment' also includes electronic home detention." 730 ILCS 5/5-1-10 (West 2014). White claims that the amendment to section 5-1-10 clarifies the meaning of "incarcerated" in section 110-14. We do not see how the amendment to the definition of "imprisonment" affects the meaning or use of the distinct term "incarcerated" in any statute. If the new definition has any effect, it clarifies that "imprisonment" is a broader term that embraces not only "incarceration," as used in the definition's first sentence, but also "home detention," as distinguished from "incarceration," added in the new definition's second sentence. Accordingly, we deny the petition for rehearing.

¶ 23 Based on the foregoing, we affirm the judgment of the circuit court of Cook County finding defendant guilty of possession of narcotics and order the clerk of the circuit court of

Cook County to modify defendant's fines and fees order to reflect a $370 presentence monetary credit.

¶ 24 Affirmed; fines and fees order modified.