2015 IL App (1st) 122020-U

FIRST DIVISION
January 20, 2015

No. 1-12-2020

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 2982
	)	
DWIGHT WILLIAMS,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

O R D E R

¶ 1 *Held*: The surveillance officer's testimony established defendant's possession of cannabis recovered from an apartment building vestibule where officer observed defendant reaching into bag and handing an item to a person standing nearby.

¶ 2 Following a bench trial, defendant Dwight Williams was convicted of possessing between 30 and 500 grams of cannabis with intent to deliver (720 ILCS 550/5(d) (West 2012)) and was sentenced to four years in prison. On appeal, defendant contends the State failed to prove beyond a reasonable doubt that he had actual or constructive possession of approximately

31 grams of cannabis that police recovered from an apartment building vestibule. Defendant argues this court should reduce his conviction to the misdemeanor offense of the possession of the 2.5 grams of cannabis that was recovered from his person. Defendant also contends the mittimus should be amended to reflect the proper offense underlying his conviction. In addition, defendant challenges the total balance of fines and fees owed after the application of his sentencing credit. We affirm defendant's conviction but amend the mittimus and fines and fees order.

¶ 3 Defendant was charged with two counts of possession of cannabis with intent to deliver, with one count alleging his activities took place within 1,000 feet of "Rollins High School." At a hearing on defendant's motion to quash his arrest and suppress evidence, Chicago police officer David Appel testified that at about 11 p.m. on January 10, 2012, he was conducting narcotics surveillance near the intersection of Francisco Avenue and Roosevelt Road in Chicago with a partner, Officer Frank Sarabia, who was at a nearby location.

¶ 4 Appel observed defendant standing in an alley near 2858 West Roosevelt Road. As Appel watched, defendant had three separate, brief conversations with men and accepted unknown amounts of money. After each encounter, defendant walked away from the waiting individual and approached a vestibule door on the south side of a multi-unit building at 1141 South Francisco. Defendant's arrest report indicated he lived at that address.

¶ 5 The vestibule door was between 35 and 45 yards away from the site of the conversations. Appel could see the doorway from his vantage point. Appel testified that after the first conversation, he observed defendant bend down, "open the door slightly to the threshold," and

recover a small item from a clear plastic bag. Defendant then handed the item to the waiting individual.

¶ 6 Appel further testified as follows:

"Q. Where was the clear plastic baggie?

A. At 1141 South Francisco.

Q. Where at that address?

A. In the threshold at the base of the door that he would open.

Q. Was it on the floor of the vestibule?

A. It was on the ground. He would open the door, bend down and he picked up the baggie.

Q. From your surveillance point, could you see the plastic bag laying on the floor?

A. Not laying, no.

Q. Well, did you see Williams pick it up?

A. I did."

¶ 7 Defense counsel introduced Appel's testimony at a preliminary hearing that he could not see the bag on the floor but that defendant "appeared to manipulate items" while bending down. When asked at the earlier hearing if he could see what defendant was manipulating, Appel said he could see "just hand movement."

¶ 8 In his testimony at the suppression hearing, Appel asked to which transaction defense counsel was referring. The following exchange occurred:

"MR. KLOAK [defense counsel]: The time that Williams went to the door and opened the door and was manipulating something.

OFFICER APPEL: Okay. There were three separate transactions. Are you referring to one transaction? Because [in] the first transaction I did not see the plastic bag, the second transaction I did see the plastic bag, but not on the third one. And if I didn't understand the question then I thought you were referring to just one of the transactions, not which one specifically."

¶ 9 Defense counsel asked Appel to describe the plastic bag that he could see from his surveillance position. Appel testified it was "[j]ust a clear plastic bag and it had various small items in it from my vantage point, which I could see." No lights were on inside the vestibule but the area was illuminated by streetlights.

¶ 10 When asked if he could see inside the vestibule from his surveillance location, Appel testified as follows:

"I can't see – he only opened the door a few inches. All I could see was the door being opened approximately – on the first transaction I see the door opening a few inches and Mr. Williams reaching in, as the same with the third transaction [*sic*]. The door only opens a few inches.

MR. KLOAK: Could you see what Williams was removing from that area?

A. Only on the second transaction.

Q. Did you see it in Williams' hand?

A. See what? What are you referring to?

Q. Whatever he retrieved from the building, could you see what he was retrieving?

A. I could see him retrieve a small plastic bag, very quickly — rapidly put his hands into the small plastic bag and recover a small item.

Q. At the moment he would retrieve that plastic bag where was it?

A. It was in his left hand."

¶ 11 Appel testified he saw defendant "manipulate small items as I previously stated." Defense counsel asked how the officer could be sure defendant was not already holding the items in his hand when he went to the door and crouched down, and Appel responded he did not see any items in defendant's open hands as he approached the door.

¶ 12 In the second transaction, which Appel observed through binoculars, defendant retrieved an item from the plastic bag that was at "the threshold of the door when he opened it." Appel saw defendant pick up the plastic bag and replace it on the ground. Defendant closed the apartment vestibule door after retrieving an item for the third transaction. Appel testified that between three and five minutes elapsed between each transaction.

¶ 13 After witnessing the third transaction, Appel informed Sarabia over a radio that defendant should be detained. Appel testified that he lost sight of defendant during the 30 to 45 seconds that elapsed from when he left his surveillance location to when he approached defendant at the corner of Francisco and Roosevelt. The officers recovered the key that defendant had used, and Sarabia used the key to open the building door and retrieve a plastic bag from the vestibule. Defendant was arrested.

¶ 14 In a search at the police station, a plastic bag was recovered from the waistband of defendant's underwear that contained several zip-top bags of a substance suspected to be cannabis. Police also recovered $256 in cash from defendant's pants pocket and shoe. Appel

testified the suspect cannabis recovered from defendant's person was packaged in the same multi-colored plastic bags recovered from the vestibule. The trial court denied defendant's motion to suppress, finding Appel's testimony to be credible and that the officers had probable cause to arrest defendant.

¶ 15 At trial, defendant agreed to stipulate to Appel's testimony from the pretrial hearing. In addition, Appel further testified that when he interviewed defendant at the police station, defendant said he was "only selling weed, not the hard sh--." The parties stipulated Sarabia would testify that he was in constant radio communication with Appel and used the key from defendant to open the building's door. Sarabia also would testify that he recovered from the threshold one clear plastic bag containing 39 zip-top bags and one heat-sealed bag, and that no other bags were in the vestibule. The bag recovered from defendant at the police station contained eight zip-top bags.

¶ 16 The parties further stipulated that the package of 39 bags contained a total of 31.2 grams of cannabis. The bag recovered from defendant's clothing contained 2.6 grams of cannabis. The parties also stipulated the distance between 2858 West Roosevelt Road and Collins High School was 461 feet. The defense presented no evidence.

¶ 17 The trial court found defendant guilty on both counts, stating Appel was "very credible." The court stated that Appel satisfactorily explained the prior testimony that was the subject of defense counsel's attempted impeachment, and the court found no impeachment "at all." The court merged the two counts.

¶ 18 In a post-trial motion, defendant argued that the State failed to prove his crime took place within 1,000 feet of a school due to the misnaming of the school in the information. Defendant

also asserted the State failed to prove his guilt beyond a reasonable doubt. The trial court vacated defendant's conviction on the count involving the school and sentenced defendant to four years in prison on the remaining count.

¶ 19 On appeal, defendant contends the State failed to prove beyond a reasonable doubt that he had actual or constructive possession of the cannabis recovered from the building vestibule. He asserts that Appel's account of the transactions was not credible on several points, including the officer's description of the packaging of the cannabis and his testimony that he did not have defendant in his sight after he left the surveillance location. Defendant asserts that because the State only proved that he possessed the 2.6 grams of cannabis found in his clothing, his conviction should be reduced to reflect that lesser amount.

¶ 20 In reviewing a challenge to the sufficiency of the evidence, this court must determine whether, when viewing the evidence in the light most favorable to the prosecution, "any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime." *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). It is not the function of the reviewing court to retry the defendant. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). Determinations of witness credibility, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence are responsibilities of the trier of fact. *People v. Holman*, 2014 IL App (3d) 120905, ¶ 56. We will not substitute our judgment for that of the trier of fact on issues relating to the weight of the evidence or witness credibility, and we will reverse only "where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *Brown*, 2013 IL 114196, ¶ 48.

¶ 21 To sustain a conviction for possession with intent to deliver, the State must prove: (1) the defendant had knowledge of the presence of the controlled substance; (2) the controlled substance was in the immediate possession or control of the defendant; and (3) the defendant intended to deliver the controlled substance. *People v. Warren*, 2014 IL App (4th) 120721, ¶ 63, citing *People v. Robinson*, 167 Ill. 2d 397, 407 (1995). Here, defendant only challenges the State's proof as to the second element: his possession or control of the cannabis that was recovered from the building vestibule.

¶ 22 The possession of drugs may be actual or constructive. *People v. Givens*, 237 Ill. 2d 311, 335 (2010). Actual possession, or physical possession, exists when a defendant performs an act of physical dominion over the contraband. *People v. Schmalz*, 194 Ill. 2d 75, 82 (2000). Actual possession does not require personal touching of the illicit material but rather a present personal domain over it. *Id.*; see also *People v. Love*, 404 Ill. App. 3d 784, 788 (2010) (actual possession can be shown by testimony that the defendant tried to conceal or throw away the substance).

¶ 23 Viewing the evidence in a light most favorable to the State, as we must, we find the evidence sufficiently demonstrated actual possession of the contraband in the bag recovered in the vestibule. Officer Appel's testimony regarding the second transaction clearly established that he observed defendant retrieve an item from the plastic bag in the vestibule and pass it to the individual who had given defendant money. Although Appel testified he only viewed the second transaction in its entirety, from that observation of the second transaction, it is reasonable to infer that the first and third transactions occurred similarly. In addition, defendant admitted he was selling cannabis. The evidence showed that defendant was selling the cannabis from the bag in

the vestibule because after defendant was given money, he walked to the vestibule, which would be unnecessary if he was selling the drugs that were recovered from his clothing.

¶ 24 Although defendant challenges the State's comparison of this case to *People v. Carodine*, 374 Ill. App. 3d 16 (2007), we find its facts similar to those in the instant proceeding. In *Carodine*, a surveillance officer observed as the defendant removed a brown paper bag from a dryer vent extending from the outside of a building, took an item from the bag, and handed the item to a person who had given money to the defendant. *Id*. at 18-19. The officer left his surveillance position, and after two or three minutes, recovered a bag from the vent that contained 16 smaller bags containing what was later determined to be heroin and cocaine. *Id*. at 19-21. On appeal, this court affirmed the defendant's conviction for possession of a controlled substance, stating that a reasonable trier of fact could have found defendant guilty of constructive possession of the drugs in the dryer vent "because it is highly unlikely that anyone tampered with the contents of the brown paper bag in the two or three minutes that the officers lost sight of the dryer vent." *Id*. at 25. Moreover, the court in *Carodine* concluded that the trier of fact could have found the defendant guilty of actual possession of the drugs because the defendant exercised a present and personal dominion over those drugs by hiding them in a paper bag. *Id*. Under *Carodine*, defendant in the instant case had actual possession of the drugs in the plastic bag in the vestibule.

¶ 25 Even assuming *arguendo* that defendant did not have actual possession, a rational trier of fact could find he had constructive possession of the drugs found in the plastic bag in the vestibule. Constructive possession occurs when a defendant lacks a personal, present dominion over the contraband but has both the intent and the capability to maintain control and dominion

over the controlled substance. *People v. Frieberg*, 147 Ill. 2d 326, 361 (1992). Constructive possession is generally established when there is no actual control of the drugs but where the defendant knew the contraband was present and exercised control over it. *People v. Harden*, 2011 IL App (1st) 192309, ¶ 27. "Knowledge may be shown by evidence of conduct from which it may be inferred that the defendant knew the contraband existed in the place where it was found." *People v. Burks*, 343 Ill. App. 3d 765, 769 (2003).

¶ 26 Here, Appel saw defendant engage in three transactions in which he returned to the vestibule to obtain an item that he handed to the three individuals. Defendant opened the vestibule door with a key. More precisely, in describing the second transaction, Appel testified that defendant picked up a plastic bag containing several smaller items from the threshold of the vestibule door, removed an item, and handed the item to the person from whom he had accepted cash. A shorter period of time elapsed here between the time the surveillance officer left his location and the time the narcotics were recovered than occurred in *Carodine*. We also note that Appel did not testify that he saw anyone other than defendant enter or leave the vestibule during the described transactions. Thus, the evidence established defendant's constructive possession of the drugs in the vestibule.

¶ 27 Defendant contends that Appel was impeached with his testimony at the preliminary hearing that he did not see a bag on the ground while defendant was close to the building. He acknowledges, though, that Appel testified he observed the bag during the second of the three transactions.

¶ 28 Defendant also points out that Appel did not testify that the bag was returned to the vestibule after the third transaction. However, Appel stated that defendant closed the door after

retrieving an item for the third transaction, and a bag fitting the description provided by Appel was recovered from the vestibule within several minutes of that final transaction.

¶ 29 Defendant further asserts it is unreasonable to conclude that he would have placed a bag of narcotics in the vestibule when he was found to have cannabis hidden in his clothing. Defendant's challenges to Appel's testimony largely consist of attacks on the officer's credibility, which is the province of the fact finder, not the purview of a reviewing court. See *People v. Evans*, 209 Ill. 2d 194, 211 (2004). As we have noted, Appel did not testify that defendant reached into his clothing to obtain the items he handed to individuals in exchange for money; rather, he saw defendant take items out of the bag in the vestibule. Moreover, Appel testified the plastic bag recovered from the vestibule was similar in appearance to the bag recovered from defendant's underwear, in that both bags had multi-colored prints.

¶ 30 In conclusion on this point, Officer Appel's testimony was sufficient to establish defendant's possession of the cannabis in the plastic bag recovered from the vestibule. Combining the 31.2 grams of cannabis in that bag with the 2.6 grams of cannabis recovered from defendant's person, the State proved that defendant possessed between 30 and 500 grams of cannabis with intent to deliver.

¶ 31 Defendant next contends that the mittimus in this case should be amended to reflect his conviction of possession of cannabis with intent to deliver. The mittimus contained in the record states that defendant was convicted of "MFG/DEL CANNABIS/ 30-500G" pursuant to "720 ILCS 550-5(D)." The State responds that the mittimus need not be amended because it indicates the correct statutory section, which encompasses both the offense of the manufacture/delivery of cannabis and the offense of possession of cannabis with intent to deliver. However, instead of

resolving the issue, the common statutory citation for those two offenses instead creates ambiguity as to the basis of defendant's actual conviction. Because defendant was convicted of possession of cannabis with intent to deliver, and not of the manufacture or delivery of cannabis, we agree with defendant that the mittimus should be corrected to accurately reflect the judgment of the trial court. See *People v. Hill*, 408 Ill. App. 3d 23, 32 (2011); *People v. Blakney*, 375 Ill. App. 3d 554, 560 (2007). Therefore, we direct the clerk of the circuit court to amend the mittimus to reflect defendant's conviction for possession of cannabis with intent to deliver. See *People v. Cotton*, 393 Ill. App. 3d 237, 268 (2009) (remand not required for correction of the mittimus).

¶ 32 Defendant's remaining contention on appeal is that his fines and fees order should be revised to reflect the correct monetary amount due. He contends, the State agrees, and we concur that the order should be amended to state that defendant was assessed $1,335 in fines and fees and should receive $550 in credit for time spent in custody prior to his sentencing, thus leaving a total balance of $785 to be paid by defendant.

¶ 33 Affirmed; mittimus and fines and fees order amended.