

No. 1-13-3700

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. 12 CR 11286
)	
TRADAMUS LANIGAN,)	Honorable
)	Paula M. Daleo,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Gordon and Palmer concurred in the judgment.

O R D E R

¶ 1 *Held:* Judgment entered on defendant's conviction for possession of a controlled substance with intent to deliver affirmed over his claim that the trial court erroneously believed that it lacked discretion to consider his posttrial motions; cause remanded for a hearing on defendant's ability to pay public defender fee.

¶ 2 Following a jury trial, defendant Tradamus Lanigan was convicted of possession of a controlled substance with intent to deliver, then sentenced to eight years' imprisonment. On appeal, defendant contends that the trial court erred by believing it lacked discretion to set aside the jury's verdict and enter a judgment for simple possession of a controlled substance requiring

remand for new posttrial motions and sentencing. He also contends that the trial court improperly assessed a Public Defender Fee against him without a hearing on his ability to pay, and, therefore, requests that the fee be vacated, or in the alternative, that his cause be remanded for the appropriate statutory hearing.

¶ 3 The record shows that on May 18, 2012, a team of police officers executed a search warrant at defendant's residence. After knocking and announcing their presence and receiving no response, the officers forcibly entered the second-floor apartment at 2014 South Fifth Avenue in Chicago, Illinois. Inside, the officers forced open a closet door and discovered defendant standing there with a female. After a further search of the apartment, the officers found two other males, one in a bedroom, and the other in the living room closet.

¶ 4 Chicago police sergeant Dennis Diaz, one of the officers executing the warrant, observed four clear plastic bags containing a white powdery substance, suspect heroin, on a table approximately two feet from the closet where defendant was discovered. Under that table, Sergeant Diaz also recovered a brown paper bag containing letters addressed to defendant at the warrant address, including a gas bill. Sergeant Diaz then searched the kitchen where he discovered rolls of sandwich bags, a strainer, a measuring spoon, a scale, a coffee grinder, and a bottle of Dormin sleeping pills. Based on his experience as a narcotics investigator, Sergeant Diaz knew that these items were typically used in the sale of personal doses of heroin. Sergeant Diaz recovered the heroin and packaging materials, which were inventoried at the police station, then sent to the Illinois State Police Crime Lab for testing. Illinois State Police Crime Lab forensic chemist Peter Anzalone testified that he tested one of the four bags of recovered narcotics as described by Sergeant Diaz, and found that it contained .1 gram of heroin, with a total estimated weight for all of the bags of .5 gram.

¶ 5 The State then rested and the trial court denied defendant's motion for a directed verdict. Defendant rested without presenting any evidence, and the jury found him guilty of possession of a controlled substance with intent to deliver.

¶ 6 Defendant filed a motion for a new trial or, in the alternative, a judgment notwithstanding the jury's verdict, claiming as his "main point of contention" that the evidence more properly reflected simple possession, rather than possession with intent to deliver. The State responded that "defendant chose the jury to be the trier of fact, not your Honor. So to make this argument—it's inappropriate to make it to your Honor, because all of the facts and evidence were presented to the jury, and they made their decision that the defendant should be found guilty of possession of a controlled substance with intent to deliver."

¶ 7 In denying defendant's motion, the court stated:

"[T]he State is correct in saying that you chose to have a jury hear this case. I don't believe that there was any request for an alternative jury instruction for straight possession.

The jury heard the evidence, heard your arguments that you made, and they determined that the defendant was guilty of the charge. So I'm not in a position at this point, nor was I after the State's case, to take that decision away from the jury, and, therefore, the motion for new trial is denied."

The State then clarified that "[t]he jury actually was given the option of finding just possession of a controlled substance per the jury instruction." The court acknowledged that clarification stating that the jury "took that into consideration, and they determined from the evidence that the defendant was guilty of the possession with intent." In response to defendant's statements in allocution, the court again pointed out that:

"[Y]ou chose to have a jury make the decision about whether you were guilty or not guilty of the charges. The jury was given the opportunity to find you guilty of a lesser included offense. They heard evidence that they felt proved the charge of possession with intent to deliver—with intent beyond a reasonable doubt, and that decision will stand."

After considering the appropriate factors in mitigation and aggravation, the court sentenced defendant to eight years' imprisonment.

¶ 8 The State then motioned for reimbursement of county funds expended for the cost of court-appointed counsel through the bond defendant posted. The court observed that defendant's "friend Danielle Harris, now his wife, posted the bond in this case," and that defendant was working. The court asked defendant if there was anything he wanted to add, and defense counsel stated that "we would object to that, Judge, because it was Miss Harris' money." The court clarified that defense counsel was objecting to the reimbursement of funds for his services, and defense counsel replied: "That's correct *** based on the fact that Miss Harris is the person who posted it." The court then stated:

"I understand. But she also signed as a surety knowing that the bond money could be used to pay court costs or legal fees. And so now I believe the County is entitled to be paid for the services of the Public Defender's office since the defendant was working at the time as he testified to. And you have provided services on this case for how long? Since July of 2012. Two years—or about a year and a half?"

The court then granted the State's motion for reimbursement of \$300 to the County.

¶ 9 In this appeal from that judgment, defendant first contends that because the trial court erroneously believed that it did not have discretion to vacate the jury's judgment and enter a conviction for the lesser-included offense as requested in his posttrial motions, this court should

vacate his conviction and remand his cause to the circuit court for new posttrial motions and sentencing. The State responds that the trial court denied defendant's posttrial motions, and was not operating under any mistaken belief as to its ability to grant the relief requested.

¶ 10 Following a verdict or finding of guilty, a court may grant defendant a new trial and the motion for a new trial shall specify the grounds therefor. 725 ILCS 5/116-1(a), (c) (West 2012). The question of whether to grant a motion for a new trial is reserved to the sound discretion of the trial court, and this court will not disturb that decision on review, absent a clear abuse of discretion. *People v. Gibson*, 304 Ill. App. 3d 923, 930 (1999), citing *People v. Nunez*, 125 Ill. App. 3d 224, 229 (1984). However, a trial court commits error when it refuses to exercise its discretion based on the erroneous belief that it does not have discretion. *People v. Pinkston*, 2013 IL App (4th) 111147, ¶ 14, citing *People v. Queen*, 56 Ill. 2d 560, 565 (1974). That said, the trial court is presumed to know the law and apply it properly, and this presumption may be rebutted only where the record affirmatively shows otherwise. *People v. Hernandez*, 2012 IL App (1st) 092841, ¶ 41.

¶ 11 In making his argument, defendant focuses on the trial court's ruling on his motion for a new trial or a judgment notwithstanding the verdict (judgment *n.o.v.*) where it stated that "[T]he jury heard the evidence, heard your arguments that you made, and they determined that the defendant was guilty of the charge. So I'm not in a position at this point, nor was I after the State's case to take that decision away from the jury." Defendant maintains that the court's use of the phrase "I'm not in a position" reflects the court's belief that it did not have discretion to enter a judgment for the lesser-included offense.

¶ 12 Contrary to defendant's contention, we find that the court's statements, considered as a whole, do not reflect an erroneous belief that it did not have discretion, but rather show that the

court properly exercised its discretion in denying defendant's motion. Although motions for directed verdicts and judgments *n.o.v.* are made at different times, they raise the same questions and are governed by the same rules of law, *i.e.*, the motion should be granted only when all of the evidence, viewed in a light most favorable to the non-moving party, so overwhelmingly favors the movant, that no contrary verdict based on that evidence could ever stand. *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 37, and cases cited therein. The standard for a judgment *n.o.v.* is high and it is inappropriate where reasonable minds might differ as to the inferences or conclusions to be drawn from the facts presented. *Id.* Here, after carefully considering the record, we cannot say that the trial court's statement that it was not "in a position at this point, nor after the State's case" to take the decision away from the jury reflects the court's erroneous belief that it lacked discretion to grant defendant's motion but, rather, given the evidence presented, and the reasonable inferences therefrom, that there was not a total failure or lack of evidence to support the jury's verdict to warrant the relief requested. *Id.* ¶ 46.

¶ 13 As for defendant's contention that the trial court should have set aside the jury's verdict and entered a judgment for the lesser-included offense of simple possession, we note that it is within the province of the jury to resolve conflicts in the evidence, to pass upon the credibility of the witnesses, and to decide the weight to be given to that testimony. *People v. Holmes*, 141 Ill. 2d 204, 243 (1990). The trial court cannot reweigh the evidence and set aside a verdict merely because the jury could have drawn different inferences or conclusions, or because the court determines that other results are more reasonable. *Maple v. Gustafson*, 151 Ill. 2d 445, 452 (1992). Here, as noted above, the trial court's statements, considered as a whole, do not reflect its erroneous belief that it lacked the discretion to grant the relief requested, but rather, indicate the

trial court's deference to the jury's assessment of the testimony and the reasonable inferences and conclusions to be drawn from the evidence presented.

¶ 14 Defendant, nonetheless, compares his case to *Queen*, 56 Ill. 2d at 565, where the jury, during deliberations, sent a note to the trial court requesting "defendant's words on the stand." The court replied to the jury: "You must decide on the basis of the testimony heard in the courtroom. I cannot have any testimony of any witnesses read to you." *Id.* In remanding the cause, the supreme court stated that the court's reply amounted to a declaration that the court was without discretion. *Id.* at 566.

¶ 15 Here, by contrast, there is nothing on the record that affirmatively shows that the court declared that it did not have discretion. *Hernandez*, 2012 IL App (1st) 092841, ¶ 41. As discussed above, the court in this case stated that it was not "in a position," indicating that it did not believe defendant met the standard required for a new trial or for a judgment *n.o.v.* The court's statements do not reflect that it believed that it did not have discretion to act, but rather that it chose not to grant defendant's motion based on the fact that the jury had heard all of the evidence and was issued an instruction for the lesser-included offense, which it rejected, and found defendant guilty of possession of a controlled substance with intent to deliver. We thus find no error or abuse of discretion by the court in this matter.

¶ 16 Defendant next contends that the trial court improperly assessed him a \$300 public defender fee under Section 113-3.1 of the Code of Criminal Procedure of 1963 (Code) without conducting a hearing on his ability to pay. Pursuant to that section, upon the motion of the State or the court, the circuit court may order defendant to pay "a reasonable sum to reimburse" the cost of court-appointed counsel by conducting a hearing into defendant's financial circumstances and ability to pay. 725 ILCS 5/113-3.1 (West 2010); *People v. Love*, 177 Ill. 2d 550, 551 (1997).

"An adequate *Love* hearing need not be lengthy or complex," but "defendant must have notice that the trial court is considering imposing a payment order under section 113-3.1 of the Code and be given the opportunity to present evidence or argument regarding his ability to pay and other relevant circumstances." *People v. Barbosa*, 365 Ill. App. 3d 297, 301-02 (2006). Where the trial court fails to comply with the hearing requirement, the appropriate remedy is remand for a new evidentiary hearing. *People v. Somers*, 2013 IL 114054, ¶ 20.

¶ 17 The State concedes, and we agree, that remand for a proper hearing under the Code is warranted in this case. The record shows the court noted that defendant was working, that defendant's wife had posted the bond money, and that the public defender had been on the case for nearly two years. Based on this "hearing," the court ordered a reimbursement of \$300 from the cash bond which had been posted on defendant's behalf. The statute requires, however, that after defendant is informed of the nature of the proceeding, the court receive evidence on his ability to pay, make a finding thereon, state for the record what evidence the court considered in making its finding, and, if the ability to pay has been found, determine and set a reasonable reimbursement figure. *Barbosa*, 365 Ill. App. 3d at 302. Under the circumstances reflected in the record, we find that the trial court failed to conduct an adequate *Love* hearing. *Id.* We, therefore, vacate the court's order requiring defendant to pay \$300 for court-appointed counsel fees and remand the cause for a hearing pursuant to the applicable case law and section 113-3.1 of the Code. *People v. Bass*, 351 Ill. App. 3d 1064, 1070 (2004).

¶ 18 Accordingly, we order the clerk of the circuit court to vacate the \$300 public defender fee, remand the cause for a proper hearing on the assessment of a public defender fee, and affirm the judgment in all other respects.

¶ 19 Affirmed in part, vacated in part, and remanded with directions.