2015 IL App (1st) 133817-U

THIRD DIVISION
December 23, 2015

No. 1-13-3817

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. 13 CR 9017
	)	
ROY AKINS,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's convictions for possession of a controlled substance are affirmed where the evidence showed he was in actual physical possession of the contraband, and defendant forfeited his contention that the trial court failed to ensure that his jury waiver was knowingly made.

¶ 2 Following a bench trial, defendant Roy Akins was convicted of two counts of possession of a controlled substance and sentenced to two concurrent terms of three years' imprisonment. On appeal, Akins challenges the sufficiency of the evidence to sustain his convictions and the validity of his jury waiver. We affirm.

¶ 3 On April 12, 2013, at about 11:00 a.m., Officer Erik Haney of the Chicago police department and his partners were on routine patrol in an unmarked vehicle near 714 North Lawndale Avenue in Chicago. Haney was wearing plain clothes, had on a bullet proof vest, a gun belt, and his police star was visible. While in the front passenger seat of the vehicle, Haney saw Akins in the backyard of 714 North Lawndale Avenue. Akins looked in the direction of the officers, ran away, and dropped a small black item from his left hand.

¶ 4 Before Akins looked at him, Haney did not notice that Akins' hands were clenched, did not observe an item protruding from his hands, and never observed him soliciting unlawful business. Haney, who was about 20 feet away from Akins, exited the vehicle and chased Akins, losing sight of the dropped item momentarily. Haney detained Akins halfway down the block and returned to the item, which was a torn piece of a black plastic bag containing 18 baggies of suspect heroin and 13 baggies of suspect crack cocaine. Haney recovered the item and kept it in his possession until it was inventoried at the police station.

¶ 5 At trial, the parties stipulated that Kathy Regan, a forensic scientist, would testify that after performing tests on the contents of 14 of the 18 recovered powder-like substances, her expert opinion within a reasonable degree of scientific certainty was that the tested items were positive for the presence of heroin and weighed 3.3 grams. She would further testify that after performing tests on the contents of all 13 recovered rock-like substances, her expert opinion within a reasonable degree of scientific certainty was that the tested items were positive for the presence of cocaine and weighed 1.1 grams.

¶ 6 Following closing arguments, the trial court found Akins guilty of two counts of possession of a controlled substance, *i.e.* heroin and cocaine. The court found that Haney was "very credible" and "was being very forthright when he admitted what he saw, including the fact

that he lost sight of the object that he saw the Akins drop during the course of the chase[.]" The court also indicated that it believed the officer was able to identify the object when he returned to the scene almost immediately after Akins was arrested, and that Haney recovered the same item he saw Akins drop.

¶ 7 At sentencing, the State noted in aggravation that Akins had four prior felony convictions, which included convictions for possessing and delivering controlled substances. Following arguments in aggravation and mitigation, the court sentenced Akins to two concurrent terms of three years' imprisonment on his convictions for possession of a controlled substance.

¶ 8 On appeal, Akins contends that the State failed to prove him guilty of both counts of possession of a controlled substance beyond a reasonable doubt where Haney's testimony was unbelievable. In particular, Akins maintains that Haney's testimony that Akins looked in the officer's direction, dropped a bag in front of him, and fled, described such patently self-incriminating conduct that it defied logic and ran counter to basic human experience.

¶ 9 In resolving a challenge to the sufficiency of the evidence, we 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)). On review, we will not retry defendant, and the trier of fact remains responsible for determining the credibility of witnesses and the weight to be given to their testimony. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). A defendant's conviction will be reversed 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.

¶ 10 In order to sustain a conviction for possession of a controlled substance, the State must

prove beyond a reasonable doubt that the defendant had knowledge of the presence of the controlled substance and immediate and exclusive possession or control over the narcotics. *People v. Woods*, 214 Ill. 2d 455, 466 (2005). Actual possession is proved by evidence showing that the defendant exercised some form of dominion over the illicit material. *People v. Schmalz*, 194 Ill. 2d 75, 82 (2000). Dominion includes attempts to conceal or throw away the contraband. *People v. Love*, 404 Ill. App. 3d 784, 788 (2010). "Whether there is knowledge and whether there is possession or control are questions of fact to be determined by the trier of fact." *Schmalz*, 194 Ill. 2d at 81.

¶ 11 Viewing the evidence in the light most favorable to the State, as we must, the evidence showed that Akins was in actual physical possession of a black plastic bag containing heroin and cocaine. When Akins looked in the direction of the officers, he ran away, dropping the bag. After pursuing and detaining Akins, Haney recovered the bag Akins dropped, which contained 18 baggies of heroin and 13 baggies of crack cocaine. This physical evidence, and the evidence of Akins' acts and conduct in connection with the bags of controlled substances (*People v. Chavez*, 327 Ill. App. 3d 18, 24 (2001)), were sufficient to prove that he was in knowing possession of the contraband beyond a reasonable doubt.

¶ 12 Nevertheless, Akins characterizes Haney's testimony as "dropsy" testimony and thus subject to suspicion. Akins relies on *People v. Ash*, 346 Ill. App. 3d 809, 816 (2004), which explained that a "dropsy case" is one in which a police officer, to avoid the exclusion of evidence on fourth amendment grounds, falsely testifies that the defendant dropped the narcotics in plain view. Akins contends that it is improbable that he would see an officer and drop a bag filled with heroin and cocaine in plain view. Akins also argues it is improbable that Haney could see him drop an item from 20 feet away in a moving car, with no particular reason to be looking at him as

Haney was on routine patrol.

¶ 13 Significantly, this court rejected a similar argument in *People v. Moore*, 2014 IL App (1st) 110793-B. The defendant in *Moore* was convicted of aggravated unlawful use of a weapon and challenged the sufficiency of the evidence used to convict him, arguing that it belied common sense that he would remove a weapon from his person near police. *Id*., ¶¶ 6, 10. We disagreed, and affirmed the defendant's conviction, finding that it is not only believable, but common that a criminal would attempt to dispose of contraband after seeing police. *Id*., ¶¶ 10, 14. This court rejected the defendant's argument that the officer's description of events consisted of unreliable "dropsy" testimony, reasoning that anecdotal evidence concerning "dropsy" testimony in other cases does not require the trier of fact to disbelieve any officer's testimony which describes a defendant dropping contraband, but is merely a factor to consider in judging credibility. *Id*., ¶¶ 12-14. Likewise, the *Ash* court affirmed the defendant's conviction, noting that the officer's testimony, which at first blush might seem convenient, was not contrary to human experience or unworthy of belief. *Ash*, 346 Ill. App. 3d at 817-18.

¶ 14 We find Akins' attempt to distinguish *Moore* unpersuasive. Akins points out that unlike *Moore*, where police were responding to a specific complaint of violent behavior (*Id*., ¶¶ 4-5), the police here were simply on routine patrol when they saw Akins alone in a backyard in broad daylight. Thus, Akins reasons, Haney's testimony was more suspicious than the officers in *Moore*. Despite Akins' contentions to the contrary, our analysis of the "dropsy" testimony in *Moore* was not limited to scenarios where police were called to the scene to investigate a specific complaint, and we find that our analysis in *Moore* applies equally to the circumstances of this case.

¶ 15 Here, Haney testified that defendant dropped a black plastic bag, later determined to

contain heroin and cocaine, in plain view. As a threshold matter, we note that the evidence in the record is that Haney observed Akins drop a small black bag, which Haney described as torn. Haney may well have suspected that the bag contained contraband, but without examining its contents, would not have been able to make that determination. Thus, Akins may have believed that he could escape detection by dropping what appeared to be garbage on the ground.

¶ 16 Although Akins argues that it defies logic and runs counter to human experience that he would engage in such conduct within view of a police officer, such conduct, as we found in *Moore*, is both believable and common. *Id*., ¶ 10. Moreover, mere possibilities, or speculation, are insufficient to raise a reasonable doubt regarding defendant's guilt (*People v. Phillips*, 215 Ill. 2d 554, 574 (2005)), and it is not the function of this court to speculate as to why Akins dropped the bag in plain view of Haney. To the extent Akins argues Haney could not have seen him drop a bag from 20 feet away in a moving car, our review of the record shows that this alleged deficiency in Haney's testimony was fully explored at trial and resolved by the court in favor of the State. The trial court assessed the credibility of Haney, finding him to be "very credible" and "forthright," distinguishing this case from *People v. Warren*, 40 Ill. App. 3d 1008, 1011 (1976), cited by Akins, in which a conviction was reversed because the trial court expressed its general dissatisfaction with the State's evidence. We thus find no reason to substitute our judgment for that of the trial court on these credibility determinations. *Ross*, 229 Ill. 2d at 272.

¶ 17 Akins further claims that his right to a jury trial was violated because the trial court failed to ensure that his waiver of this fundamental right was knowingly and intelligently made. In particular, Akins maintains that the court accepted his jury waiver without conducting any inquiry into his understanding of his right to a jury trial or of the ramifications of waiving that right. Akins admits that he did not challenge the validity of his jury waiver below, but argues that

this issue should be reviewed pursuant to the plain error doctrine.

¶ 18 Under the plain error doctrine, a reviewing court may consider an issue that was not preserved when either (i) the evidence was closely balanced such that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (ii) the error was so serious it affected the fairness of the proceedings and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Whether a defendant's fundamental right to a jury trial has been violated may be considered under the second prong. *People v. Campbell*, 2015 IL App (3d) 130614, ¶ 22. The first step in the application of the plain error doctrine is to determine whether any error occurred. *People v. Patterson*, 217 Ill. 2d 407, 444 (2005).

¶ 19 The validity of a jury waiver does not rest on any precise formula, but rather depends on the facts and circumstances of a particular case. *In re R.A.B.*, 197 Ill. 2d 358, 364 (2001). Although the trial court must ensure that a defendant's jury waiver is understandingly made, no set admonition is required before an effective waiver may be made. *Id*. Moreover, the trial court is not required to explain the ramifications of a jury waiver unless there is an indication that the defendant did not understand the right to a jury trial. *People v. Steiger*, 208 Ill. App. 3d 979, 981 (1991).

¶ 20 Here, the record shows that Akins was present during pretrial proceedings when a bench trial was agreed upon. In particular, on July 23, 2013, with Akins present in court, defense counsel requested a date of August 20, 2013 for a bench trial. On August 20, 2013, Akins was again present when defense counsel noted that both parties were asking for a continuance and expressed to the court it was, "[f]or bench, Judge." On the following court date of September 13, 2013, Akins was present when the trial court clarified "[t]his is set for bench trial today," at

which point the State indicated it needed a continuance and the court set a trial date of October 23, 2013. Finally, at the commencement of trial on October 23 the court indicated the matter was set for a bench trial, and then the following colloquy occurred:

"THE COURT: [Defendant], is this your signature on this document indicating you want to waive your right to trial by jury and submit your case to me to decide what's called a bench trial?

DEFENDANT: Yes, sir.

THE COURT: Anybody force you or threaten you or promise you anything to get you to sign the jury waiver?

DEFENDANT: No, sir.

THE COURT: Do you know what a jury trial is?

DEFENDANT: Yes, sir.

THE COURT: All right, jury waiver will be accepted and made part of the record."

¶ 21 This transcript shows that Akins, who was represented by counsel, was present during several pretrial proceedings when counsel and the court indicated that the matter was set for a bench trial. Akins raised no objection to counsel's announcement on the type of trial, and is therefore deemed to have acquiesced in the waiver. *People v. Smith*, 326 Ill. App. 3d 831, 848 (2001). Akins also personally confirmed that decision when he was questioned directly by the court, answered affirmatively when the court asked him if he "kn[e]w what a jury trial is," indicated that no one made any promises or threats to get him to give up his right to a jury trial, and executed a written waiver. Under these circumstances, we find that Akins' jury waiver was valid. *People v. Clay*, 363 Ill. App. 3d 780, 791 (2006).

¶ 22 In reaching this conclusion, we have considered *People v. Sebag*, 110 Ill. App. 3d 821 (1982), cited by Akins, and find it factually distinguishable. In *Sebag*, the defendant was not represented by counsel, had no familiarity with criminal proceedings, was not advised of the meaning of a jury trial, and there were ambiguities related to the admonishments and the charged offense. *Id*. at 829. None of these factors were present in this case. We find that the trial court did not err, and, accordingly, there can be no plain error and we must honor Akins' procedural default. *People v. Williams*, 193 Ill. 2d 306, 349 (2000).

¶ 22 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 23 Affirmed.