2015 IL App (3d) 130865-U

Order filed October 2, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Tazewell County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-13-0865
v.	)	Circuit No. 12-CF-27
	)	
DEMARIUS WILLIAMS,	)	Honorable Kevin R. Galley,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE McDADE delivered the judgment of the court.
Justices Carter and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Evidence was sufficient for the jury to conclude beyond a reasonable doubt that defendant intended to deliver a controlled substance; (2) trial court's potential misapprehension of defendant's sentencing range was nonprejudicial where the court did not sentence defendant in the disputed range; (3) trial court's reliance on improper aggravating factors was nonprejudicial where ultimate sentence imposed was significantly less than the maximum sentence despite defendant's seven previous felony drug convictions.

¶ 2 Defendant, Demarius Williams, was found guilty by a jury of unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(c)(2) (West 2012)). The court

sentenced defendant to a term of 20 years' imprisonment. On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt. He also maintains that the court erred in finding him eligible for a sentence of up to 60 years' imprisonment and in considering certain improper aggravating factors. We affirm defendant's conviction and sentence.

¶ 3 FACTS

¶ 4 On February 2, 2012, the State charged defendant by indictment with unlawful possession of a controlled substance with intent to deliver, a Class 1 felony (720 ILCS 570/401(c)(2) (West 2012)). The indictment alleged that on January 11, 2012, defendant possessed with the intent to deliver one or more, but less than 15, grams of a substance containing cocaine. A jury trial commenced on July 9, 2013.

¶ 5 Peoria Police Officer Matthew Lane testified that on January 9, 2012, he obtained a search warrant for defendant and his residence. On January 11, 2012, when Lane and other officers were surveilling the residence, Lane observed defendant exit the residence with another man. The two men drove away in a Mitsubishi and officers followed the vehicle to a residence in East Peoria. There, a man exited the vehicle and entered the residence. Shortly thereafter, the same man returned to the vehicle; Lane and the other officers followed the vehicle to the parking lot of a nearby Kroger.

¶ 6 Lane testified that a black sport utility vehicle (SUV) entered the parking lot and parked near defendant's vehicle. A man, later identified as defendant, exited the Mitsubishi and entered the SUV. A few minutes later, defendant exited the SUV and returned to the Mitsubishi. At that point, the officers converged on the vehicles, and arrested defendant, the driver of the Mitsubishi, and the driver of the SUV. A search of defendant revealed suspected cocaine and suspected cannabis. Additionally, $30 in cash was found on his lap. When Lane interviewed defendant

later, defendant told him he got into the SUV in order to attempt to borrow the driver's cell phone. When the driver of the SUV declined, defendant went back to the Mitsubishi.

¶ 7 Peoria Police Officer Corey Miller participated in the execution of the arrest in the Kroger parking lot. He identified people's exhibit three as the suspected cocaine found on defendant. He identified people's exhibit two as a small baggy containing suspected cocaine found on the running board of the SUV. Miller testified that he field-tested each exhibit, and each tested positive for cocaine.

¶ 8 Miller also participated in the search of defendant's residence following the arrest. He identified people's exhibit five as plastic baggies and "tear-offs" found in the garbage at defendant's residence. Miller explained that tear-offs are indicative of the distribution of drugs because drug dealers tend to tear off the corners of plastic baggies to package drugs, then discard the rest of the baggy that is not being used. Miller testified that it is common to find the knotted corners of the baggies in the homes of drug addicts, while it is common to see the remnants of the baggies with the corners removed in the homes of the dealers. No drugs or drug paraphernalia were found at defendant's residence. When the residence was searched, it was occupied by three adults—one of whom stated that she lived in the residence—and two children.

¶ 9 Forensic scientist Michelle Dierker testified that people's exhibit three weighed 15.5 grams and contained cocaine. People's exhibit two weighed .5 grams, but Dierker did not test that exhibit for cocaine.

¶ 10 Lane testified that he had been a Peoria police officer for nearly 13 years, including 4 to 5 years in the vice unit. The vice unit focused on drug dealing, narcotics, trafficking, and prostitution. Lane estimated that he had made "well over" 100 drug arrests before joining the vice unit. While in the vice unit, Lane had made approximately 50 drug arrests before arresting

defendant, and approximately 35 arrests after. He had taken an 80-hour Drug Enforcement Administration (DEA) training session where he learned about drugs and how drug dealers operate. While Lane admitted that a drug user could consume 15.5 grams of cocaine in one day or over several days, he had never encountered a person with such a large quantity of drugs intended for personal use. Lane explained that personal drug users do not have the money to buy such a large quantity of cocaine. It was Lane's opinion that such a high quantity of drugs indicated that a person was selling the narcotics.

¶ 11 Miller testified that he had over 13 years' experience on the Peoria police department, and had been working in the vice unit since 2006. He also participated in the 80-hour DEA training session. He estimated that he had made over 500 drug arrests before joining the vice unit, and 1,500 drug arrests after. Miller testified that he has spoken to people addicted to cocaine, and the most that an addict can usually afford to buy is 3.5 grams of cocaine per day. He testified that he has never arrested someone with 15.5 grams of cocaine intended for personal use. Miller opined that the amount of drugs indicated that defendant intended to deliver cocaine.

¶ 12 The driver of the black SUV was Richard Houlihan. Houlihan testified that on January 11, 2012, he drove to the Kroger parking lot intending to buy cannabis. He put $30 on the passenger seat before defendant entered the vehicle. When Houlihan told defendant he wanted cannabis, defendant replied either that he did not have cannabis or that he would "take care" of Houlihan. After defendant exited the vehicle but before he was stopped by police, Houlihan saw a package on the seat or console. He assumed it was illegal and tossed it through his window. Houlihan later pled guilty to unlawful possession of cocaine.

¶ 13 Following closing arguments and deliberations, the jury found defendant guilty of unlawful possession of a controlled substance with intent to deliver.

¶ 14 A sentencing hearing was held on August 29, 2013. Before the court at sentencing was a presentence investigation report (PSI). The PSI showed defendant was 28 years old at the time of sentencing and 26 years old at the time of the offense. The PSI showed that defendant was arrested for the present offense while released on bond in a pending Peoria County case. He was also on parole for prior felony convictions. On December 21, 2012, while the present charge was pending, defendant was again arrested in Tazewell County for unlawful possession of a controlled substance. On May 16, 2013—just less than two months before the trial in the present case—defendant was convicted of unlawful possession with intent to deliver a controlled substance in the previously pending Peoria County case. The parties agreed to a sentencing cap of 15 years' imprisonment in the Peoria County case, but sentencing was continued until the resolution of the present Tazewell County case. On June 10, 2013, defendant was charged again with a separate count of unlawful possession with intent to deliver a controlled substance in Peoria County.

¶ 15 The PSI showed that defendant had a number of prior felony convictions on his record. Defendant had three Class 4 felony convictions for possession of a controlled substance, for which he received combined sentences of 14 years' imprisonment. Defendant also had multiple Class 1 felony convictions for the manufacture or delivery of a controlled substance, with sentences totaling 18 years' imprisonment. The PSI also showed numerous misdemeanor traffic and cannabis convictions.

¶ 16 In the PSI, defendant denied selling drugs. He stated that he had taken some college courses and wanted to finish his education so he could work in the multimedia field. In a letter written by defendant to the judge, appended to the PSI, defendant asked for help with his drug

problem. Also attached to the PSI were letters from two professors at Illinois Central College, attesting to defendant's character and potential.

¶ 17 At sentencing, the parties argued about the applicable sentencing range. Defendant, through his attorney, argued that the range was between 4 and 30 years' imprisonment, because the offense committed was a Class 1 felony, and a prior Class 1 conviction made defendant eligible for an extended-term sentence. The State argued that the range was between 4 and 60 years' imprisonment because, under the Illinois Controlled Substances Act (Act) (720 ILCS 570/408 (West 2012)), defendant's prior drug convictions doubled the maximum term. The trial court ultimately agreed with the State. The court also agreed to take judicial notice of another pending drug charge against defendant.

¶ 18 Neither party presented any formal evidence in aggravation or mitigation. The court stated that it considered the statutory factors in aggravation and mitigation. In aggravation, the court specifically noted the need for deterrence, defendant's significant history of criminal activity, the fact that defendant was on parole when committing the present offense, and the fact that defendant was "engaged in an enterprise that provided monetary compensation." The court did not find any statutory factors in mitigation. The court sentenced defendant to a term of 20 years' imprisonment.

¶ 19 Defendant filed a motion to reconsider sentence, challenging the sentence as excessive. A hearing on that motion was held on November 13, 2013. At the hearing, the issue of the sentencing range was raised again, with defendant again arguing that the appropriate range was 4 to 30 years' imprisonment. The court stated: "[E]ven taking out of the equation the language that [the prosecutor] argued allowing a doubling of the sentence, the 20-year sentence does not invade that possible sentence 30 to 60 years." The court concluded that the sentence was not

excessive, stating: "The sentence is within the statutory range generally available for a Class 1 felony offense into the extended range of authorized sentences. The Court believes, and for the reasons noted of record, that the sentence is appropriate to the circumstances of this case."

¶ 20 ANALYSIS

¶ 21 On appeal, defendant argues first that the evidence presented by the State was insufficient to establish beyond a reasonable doubt that he intended to deliver cocaine. Defendant also contends that the maximum sentence he faced was only 30 years' imprisonment and that the trial court considered improper aggravating factors. We reject all three of defendant's claims.

¶ 22 I. Sufficiency of the Evidence—Intent

¶ 23 When a challenge is made to the sufficiency of the evidence at trial, we review to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056, ¶ 31; *People v. Collins*, 106 Ill. 2d 237, 261 (1985). In making this determination, we review the evidence in the light most favorable to the prosecution. *Baskerville*, 2012 IL 111056, ¶ 31. All reasonable inferences from the record in favor of the prosecution will be allowed. *People v. Bush*, 214 Ill. 2d 318, 327 (2005).

¶ 24 It is not the purpose of a reviewing court to retry a defendant. *People v. Milka*, 211 Ill. 2d 150, 178 (2004). Instead, great deference is given to the trier of fact. See, *e.g.*, *People v. Saxon*, 374 Ill. App. 3d 409, 416-17 (2007). The weight to be given to witnesses' testimony, the witnesses' credibility, and the reasonable inferences to be drawn from the evidence, are all the responsibility of the fact finder. *Milka*, 211 Ill. 2d at 178. The trier of fact is not required to accept or otherwise seek out any explanations of the evidence that are consistent with a

defendant's innocence; nor is the trier of fact required to disregard any inferences that do flow from the evidence. *People v. Campbell*, 146 Ill. 2d 363, 380 (1992).

¶ 25 The element of intent to deliver is a mental state rarely susceptible to direct proof. *People v. Neylon*, 327 Ill. App. 3d 300, 310 (2002). Instead, such intent must often be inferred from circumstantial evidence. *Id*. "[T]he quantity of controlled substance alone can be sufficient evidence to prove an intent to deliver beyond a reasonable doubt. However, such is the case only where the amount of controlled substance could not reasonably be viewed as designed for personal consumption." *People v. Robinson*, 167 Ill. 2d 397, 410-11 (1995). "The inference of intent to deliver may be enhanced by the combination of drugs and the manner in which they are kept [citations]; by the presence of drug paraphernalia [citations]; and by large amounts of cash and weapons." *People v. Berry*, 198 Ill. App. 3d 24, 28-29 (1990). These indicia of intent to deliver, however, are not exclusive. *Id*. at 29.

¶ 26 In the present case, defendant was found with 15.5 grams of cocaine on his person. Lane and Miller each testified that they had never encountered a person with that much cocaine intended for personal use, though Lane admitted it was conceivable. In fact, Miller testified that the amount was more than four times what most drug users are found with. Both officers opined that the amount was indicative of intent to deliver.

¶ 27 The details of defendant's arrest also supported an inference of intent to deliver. Defendant stopped in a parking lot and got into the black SUV. The driver of the black SUV later admitted he was there to purchase drugs. Immediately following the encounter, defendant was found with 15.5 grams of cocaine and $30 on his lap. Also following the encounter, the driver of the SUV found a package containing a substance that field-tested positive for cocaine in his passenger seat and threw it out of the vehicle. Moreover, the garbage at defendant's residence

had remnants of plastic baggies that Miller and Lane testified are used for drug packaging. These facts, combined with the large amount of cocaine found on defendant's person, support a reasonable inference that defendant intended to deliver cocaine.

¶ 28 Defendant relies heavily on the fact that Lane admitted 15.5 grams of cocaine could possibly be for personal use, arguing that this possibility defeats an inference that defendant intended to deliver the cocaine. However, the finder of fact is not obligated to seek out or accept every possible explanation of the evidence consistent with a defendant's innocence. *Campbell*, 146 Ill. 2d at 380. Moreover, our supreme court has held that the quantity of a controlled substance *alone* may support an inference of intent to deliver only where the amount could not reasonably be for personal consumption. *Robinson*, 167 Ill. 2d at 410-11. In the present case, the reasonable inference of intent to deliver is supported by numerous facts, aside from the large amount of cocaine found on defendant's person.

¶ 29 II. Sentencing Range

¶ 30 The offense of unlawful possession of a controlled substance with intent to deliver is a Class 1 felony. 720 ILCS 570/401(c)(2) (West 2012). Because defendant had a prior Class 1 felony conviction, he was eligible for extended-term sentencing for the present conviction. See 730 ILCS 5/5-5-3.2(b)(1) (West 2012). The standard sentencing range for a Class 1 felony is between 4 and 15 years' imprisonment, while extended-term eligibility increases the potential maximum sentence to a term of 30 years' imprisonment. 730 ILCS 5/5-4.5-30(a) (West 2012).

¶ 31 Under the Act, "[a]ny person convicted of a second or subsequent offense under th[e] Act may be sentenced to imprisonment for a term up to twice the maximum term otherwise authorized." 720 ILCS 570/408(a) (West 2012). The State maintains that this statutory provision should be applied in concert with the extended-term statute, rendering defendant

eligible for a sentence of up to 60 years' imprisonment. Defendant does not challenge his eligibility for an extended-term sentence (up to 30 years' imprisonment). Instead, defendant argues that section 408 cannot be used to double the extended term (up to 60 years' imprisonment). Specifically, defendant contends that section 408 of the Act was not intended to work in conjunction with other recidivist statutes, and the trial court erred in finding otherwise.

¶ 32 Notably, defendant was sentenced to only a term of 20 years' imprisonment—a term outside of the 30 to 60 year range being disputed here. Accordingly, defendant's sentence is not void, but merely voidable. See *People v. Thompson*, 209 Ill. 2d 19, 23 (2004) (void sentence is one that is not authorized by statute). Thus, in order to obtain relief in the form of *vacatur* of the sentence imposed and remand for resentencing, defendant—in addition to prevailing on his section 408 argument—must also show that the trial court's mistaken belief as to the sentencing range may have influenced the sentencing decision. See *People v. Myrieckes*, 315 Ill. App. 3d 478, 483 (2000). In determining whether a mistaken belief influenced the trial court's sentencing decision, "a reviewing court looks to whether the trial judge's comments show that the trial judge relied on the mistaken belief or used the mistaken belief as a reference point in fashioning the sentence." *Id*. at 484.

¶ 33 In the recent case of *People v. Williams*, 2014 IL App (3d) 120824, this court considered the question of the applicability of section 408 in conjunction with other recidivist statutes. Finding a conflict between section 408 and the sentencing provision under the Unified Code of Corrections (Code) (see 730 ILCS 5/5 *et seq*. (West 2012), we held that the Code was controlling, and thus the defendant's sentence could not be extended twice. *Williams*, 2014 IL App (3d) 120824, ¶¶ 19-22. In the present case, however, we need not address that issue again. Even assuming, without deciding, that defendant was only eligible for a term of up to 30 years'

imprisonment, the record makes it clear that if the trial court did consider him eligible for a term of up to 60 years' imprisonment, that misapprehension did not affect the ultimate sentence imposed.

¶ 34 Though the trial court agreed that defendant was eligible for a sentence of up to 60 years' imprisonment, it did not expressly use a potential 60-year maximum sentence as a reference point, nor did it make any comments that would indicate any significant reliance upon its belief that 60 years was the maximum sentence. Indeed, the court squarely addressed the issue in ruling upon defendant's motion to reconsider sentence, noting that, when taking the possibility of sentence-doubling pursuant to the Act out of the equation, the imposed sentence was properly within the permissible Class 1 extended range. Without reference to the 60-year maximum, the court stated that the 20-year sentence was "appropriate to the circumstances of this case." Thus, nothing in the trial court's comments indicated that the court "relied on the [60-year maximum] or used [it] as a reference point in fashioning the sentence." *Myrieckes*, 315 Ill. App. 3d at 484.

¶ 35 In *People v. Arbuckle*, 2015 IL App (3d) 121014, ¶ 32, we found that the trial court's possible misapprehension as to the sentencing range was not prejudicial. In that case, the trial court at sentencing merely noted that the State had informed the court that the defendant was extended-term eligible, before ultimately sentencing the defendant to a term in the standard range. *Id*. ¶ 15. On review, we held that "even if the court here did believe that defendant was extended-term eligible, this mistaken belief did not affect the sentencing decision." *Id*. ¶ 32.

¶ 36 We find *Arbuckle* to be analogous to the case at hand. In *Arbuckle*, the court noted the State's suggestion that defendant was extended-term eligible, but did not again reference that eligibility or use it as a reference point in sentencing. Here, the trial court accepted the State's argument at sentencing that defendant was eligible for up to 60 years' imprisonment, but never

again referenced the potential maximum, either at initial sentencing or upon defendant's motion to reconsider. Indeed, when defendant against raised the issue of the sentencing range, the court implied that the sentence would be the same whether defendant faced 30 or 60 years' imprisonment. As in *Arbuckle*, we can be reasonably certain that, if the court's belief that defendant was eligible for a term of 60 years' imprisonment was erroneous, that error did not affect the ultimate sentencing decision.

¶ 37 III. Aggravating Factors

¶ 38 Defendant contends that the trial court considered a number of improper factors in imposing sentence. Namely, defendant argues the trial court erred in considering his receipt of monetary compensation where that factor was inherent in the offense of unlawful possession of a controlled substance with intent to deliver. Defendant also argues the trial court erred in taking judicial notice of a pending charge against him. Because defendant failed to preserve these claims of error in his motion to reconsider sentence, they are considered forfeited unless we deem them to be plain errors. *People v. Hillier*, 237 Ill. 2d 539, 544-45 (2010).

¶ 39 The first step in plain error analysis is to determine whether any error has been committed at all. *People v. Walker*, 232 Ill. 2d 113, 124-25 (2009). In the present case, the State does not dispute that the trial court erred in considering the compensation aggravating factor or in taking judicial notice of the pending charge. See *People v. Smith*, 198 Ill. App. 3d 695 (1990) (finding compensation aggravating factor inherent in most deliveries of a controlled substance); *People v. Johnson*, 347 Ill. App. 3d 570, 575 (2004) ("Bare arrests and pending charges may not be utilized in aggravation of a sentence."). Instead, the State argues that the trial court placed so little weight on these factors that they did not lead to a greater prison sentence for defendant.

¶ 40 In traditional harmless-error analysis, where the error has been preserved for appeal, it is the State's burden to prove that the claimed error was not prejudicial to the defendant. *People v. Thurow*, 203 Ill. 2d 352, 363 (2003). "The situation is different under a plain-error analysis, which applies where the defendant has failed to make a timely objection. There, '[i]t is the defendant rather than the [State] who bears the burden of persuasion with respect to prejudice.' " *Id*. (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)); see also *People v. Crespo*, 203 Ill. 2d 335, 347-48 (2001) ("[U]nder plain-error analysis, a defendant's conviction and sentence will stand unless the defendant shows the error was prejudicial."). We find that defendant has not met his burden.

¶ 41 Defendant's prior criminal record is extensive. Defendant was convicted on three occasions for unlawful possession of a controlled substance. He was convicted three times for the manufacturing or delivery of controlled substances, each a Class 1 felony. For his six previous felony convictions, defendant was sentenced to a total of 32 years' imprisonment, though the sentences did not run consecutively. He was arrested for the present offense while on parole from those sentences and on bond for a pending Peoria County drug charge.

¶ 42 Defendant's lengthy rap sheet continued to grow even after being arrested for the present offense. He was convicted in Peoria County of Class 1 unlawful possession of a controlled substance with the intent to deliver. After his conviction in Peoria County, the parties agreed to a sentencing cap of 15 years' imprisonment, but sentencing was continued until the resolution of the present Tazewell County case.

¶ 43 The present case marked defendant's eighth felony drug conviction. For this conviction he was sentenced to a term of 20 years' imprisonment, just 66% of the potential 30-year

maximum.[1] Moreover, the trial court did not dwell on either factor at sentencing. In fact, though the court took judicial notice of the pending charge, it never explicitly referenced that charge in aggravation. Given defendant's protracted criminal history, and the relatively lenient sentence he received, the conclusion that the two factors cited herein by defendant did not contribute to the length of his sentence is reasonable. See *People v. Rivera*, 307 Ill. App. 3d 821, 835 (1999) ("The court's insignificant weight of the above factor is further reflected in the length of the sentence imposed, which fell well below the maximum eligible term of imprisonment.").

¶ 44 CONCLUSION

¶ 45 The judgment of the circuit court of Tazewell County is affirmed.

¶ 46 Affirmed.

[1]As in section II, we assume without deciding that the maximum sentence defendant faced was 30 years' imprisonment. *Supra* ¶¶ 29-34. If the trial court was indeed proceeding under the belief that defendant's maximum potential sentence was 60 years' imprisonment, defendant's actual sentence of 20 years' imprisonment appears even smaller in comparison, bolstering our conclusion that the trial court put little, if any weight on the aggravating factors raised on this appeal.