2016 IL App (1st) 130700-U

FIRST DIVISION
May 31, 2016

No. 1-13-0700



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 10 C4 41005 |
| | ) | |
| KEITH MANNING, | ) | Honorable |
| | ) | Noreen Valeria Love, |
| Defendant-Appellant. | ) | Judge Presiding. |

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

**ORDER**

¶ 1 *Held*: (1) The trial court properly denied defendant's motions to quash and suppress; (2) The alleged evidentiary errors did not rise to the level of plain error; (3) The State conceded that the evidence was insufficient to prove defendant was within 1000 feet of a church when he committed possession with intent to deliver; (4) The trial court properly found that defendant knowingly and intelligently waived his right to a jury trial; (5) The trial court was not required to make a *Krankel* inquiry; and (6) Defendant's sentencing contentions are moot based on the vacation of his conviction for possession with intent to deliver within 1000 feet of a church.

¶ 2 After a bench trial, defendant Keith Manning was convicted of possession of cocaine with intent to deliver within 1000 feet of a church and possession of cannabis with intent to

deliver, and sentenced to concurrent prison terms of 15 and 5 years, respectively. On appeal, defendant contends: (1) the trial court erred in denying his pretrial motions to quash the search and suppress the evidence; (2) three statements made by the State's witness at trial were erroneously admitted; (3) the evidence at trial was insufficient to prove that his possession with intent to deliver was committed within 1000 feet of a church; (4) the trial court erred in finding that defendant knowingly and intelligently waived his right to a jury trial; (5) the trial court erred in not conducting a *Krankel* inquiry based on defendant's "readily-apparent and cognizable ineffective assistance of counsel claim" made in his presentence investigation (PSI) report; and (6) the trial court abused its discretion by considering the harm caused by drug dealing to children as an aggravating factor in sentencing and by imposing an excessive sentence. For the following reasons, we affirm in part, vacate in part, and remand for resentencing.

¶ 3 BACKGROUND

¶ 4 Defendant was charged by information with three counts under the Illinois Controlled Substances Act (720 ILCS 570/100 *et seq*. (West 2010)), including: count 1, possession of between one and fifteen grams of cocaine with intent to deliver within 1000 feet of a church (720 ILCS 570/401(c)(2), 407(b)(1) (West 2010)); count 2, possession of between 100 and 400 grams of cocaine with intent to deliver (720 ILCS 570/401(a)(2)(B) (West 2010)); and count 4, possession of between 100 and 400 grams of cocaine (720 ILCS 570/402(a)(2)(B) (West 2010)). He was also charged with three counts under the Illinois Cannabis Control Act (720 ILCS 550/1 *et seq*. (West 2010)), including: count 3, possession of between 500 and 2000 grams of cannabis with intent to deliver within 1000 feet of a school (720 ILCS 550/5.2, 550-5(e) (West 2010)); count 5, possession of between 500 and 2000 grams of cannabis with intent to deliver (720 ILCS 550/5(e) (West 2010)); and count 6, possession of between 500 and 2000 grams of cannabis (720 ILCS 550/4(e) (West 2010)).

¶ 5 A. Pre-Trial Motion to Quash the Search Warrant

¶ 6 In August 2010, the police executed a search warrant at 1937 South 17th Avenue, Apartment 1-N, in Broadview, Illinois, and defendant was charged based on the drugs recovered from the search. Prior to trial, defendant filed two motions to quash the search warrant based on two separate grounds: (1) the police seized three items that were outside the scope of the warrant, which turned it into an improper general search warrant and the search into an impermissible general search; and (2) the police unreasonably executed the search warrant at 4:35 a.m. so that their knock and announce "would be meaningless" and their forced entry was unreasonably "tumultuous" due to the launch of "a barrage of noisemakers and smoke bombs."

¶ 7 The language of the search warrant permitted the police to search defendant and "the entire residence located at 1937 S. 17th Ave, apartment 1 North, Broadview, Cook County, Illinois." The police were allowed to seize any of the following items:

> "Cocaine, cocaine paraphernalia, scales, any related or co-mingled United States Currency, Official Advanced Funds, any documents showing proof of residency, records involved in drug transactions, which have been used in the commission of or constitutes evidence of the Delivery of A Controlled Substance and Unlawful Possession of a Controlled Substance."

¶ 8 The motions proceeded on argument only; no evidence was presented. At the hearing on defendant's first motion, he specifically argued that, during the search, the police seized a laptop computer (along with the mouse, power cord, and wireless card), a 32-inch television, and a 42-inch television, exceeding the scope of the search warrant and converting the warrant into an improper general search warrant and the search into an improper general search. In response, the State claimed that the recovered laptop was covered under the warrant because it possibly

contained drug transaction records and that the televisions "were evidence of illegal drug proceeds," or alternatively, "could have been used as a place to secrete records or narcotics."

¶ 9 As to defendant's second motion, based on an unreasonable entry, defendant first explained that the agreed-to facts included that: the warrant was executed between 4:30 and 5 a.m.; "the police would testify that they knocked on the door and announced their office"; the "occupants would testify they were asleep" and did not hear any knocking or announcing; the police "busted in the door" and detonated a noise flash device (NFD) which "gives off some amount of smoke and creates a tremendous amount of noise"; and that the police then went into the bedroom and saw defendant and a woman in bed. Based on these facts, defendant argued at the hearing that "to go into a location at an hour where you wouldn't expect anyone to be able to respond to a knock and announce makes the knock and announce a meaningless act in itself." Defendant further contended that the execution of the warrant was unreasonable based on the early morning hour the police chose to knock and announce their presence in combination with the police then "bust[ing]" down the door and detonating an NFD. The State argued that the NFD was "deployed in the rear of the apartment into the kitchen" and that before the device is deployed, protocol requires the officer to "look into the room to make sure nobody is actually in there, no stove is on or anything like that." According to the State, this protocol was followed by the police, and the device was placed "immediately inside of the door just a few feet." The State also claimed that "no case law out there *** says picking a time like 4:35 [a.m.] is unreasonable." The State further argued that the time "was chosen purely for officer safety, and that was a probable [ ] time that the target would be home. The officers had information that the defendant was involved in narcotics sales, possessing narcotics in large amounts." The State concluded that "there was nothing unreasonable about this entry." The trial court denied both motions.

¶ 10 B. The Trial

¶ 11 Just before trial began, the following exchange occurred:

"THE COURT: Mr. Manning, I have here, sir, what's known as a jury waiver.

Is that your signature?

THE DEFENDANT: Yes.

THE COURT: Do you understand by signing that you are giving up the right to have a trial by jury?

THE DEFENDANT: Yes.

THE COURT: And do you know what a jury trial is?

THE DEFENDANT: Yes.

THE COURT: Okay."

¶ 12 At trial, Detective Akim testified that at approximately 4:35 a.m. on August 19, 2010, he was part of a team that executed a search warrant at the apartment in question. Once inside, a "couple minutes" after the police entered the apartment, Detective Akim found defendant on the bed in the bedroom. Detective Akim searched the bedroom and, on top of the nightstand, found a "white pill bottle containing 18 pieces of crack cocaine." He also found a cardboard box in the closet that held five plastic baggies which contained cannabis. One of the baggies contained "21 individually knotted baggies containing [cannabis]" and another bag contained "two [cannabis] filled cigars with loose [cannabis]." Detective Akim further recovered "currency totaling $2,340 in three separate bundles" from men's jackets in the closet. In a kitchen cabinet, within a sherbet container, Detective Akim found "three individually knotted baggies containing cocaine as well as another pill bottle containing 87 pieces of crack cocaine, and a separate *** plastic baggie containing crack cocaine." The kitchen also contained two boxes of Ziploc baggies that were the

same as those that were found with cocaine and cannabis inside. Detective Akim said that, judging by his experience as a police officer, the plastic bags he recovered are associated with narcotics packaging and, with respect to the 21 smaller bags of cannabis, that was a common method of sub-packaging materials for sale.

¶ 13 When the State asked Detective Akim about any proof of residency, he testified that he saw a bill from Commonwealth Edison (ComEd) in the living room that was addressed to defendant. Defendant objected to this testimony on the basis of hearsay, but was overruled. Detective Akim explained that the bill was addressed to "Keith Manning at 1937 South 17th Avenue, Apartment 1-N." The State then asked whether defendant had given his address as being 1937 South 17th Avenue, Apartment 1-N when he was processed and Detective Akim answered affirmatively. Defendant objected to the testimony and was once again overruled. Detective Akim also testified that he saw a tan Nissan Altima in the rear parking lot of the apartment complex. He performed a public records search that showed the car was owned by defendant and registered at 1937 South 17th Avenue, Apartment 1-N.

¶ 14 The recovered drugs were sent to the Illinois State Police crime lab for testing and analysis. Detective Akim also testified that the distance between defendant's apartment and the nearby church measured 788.8 feet. He determined the distance by measuring from the apartment building's rear parking lot to the public walk in front of the church. Although there was a school near the church, Detective Akim did not measure the distance between the apartment building and the school.

¶ 15 On cross-examination, Detective Akim admitted that, although there were six separate units in the apartment building, he did not measure the distance from the front door of the apartment where defendant was found to the church property line. He also testified that a woman was with defendant in the apartment when the police executed the warrant.

¶ 16 The parties stipulated that if Melissa McCann, a forensic chemist from the Illinois State Police, had been called to testify, she would have been qualified as an expert in the field of forensic chemistry, and she would have testified to receiving and testing over 188 grams of substance testing positive for cocaine and over 990 grams of a "plant material" testing positive for cannabis.

¶ 17 After the close of evidence, the State nolle prossed count 3, possession with intent to deliver within 1000 feet of a school. Following closing argument, the trial court found defendant guilty of all the remaining counts.

¶ 18 Defendant filed a motion for new trial in which he argued that he was not proven guilty beyond a reasonable doubt and that the court erred in denying his motions to quash and suppress. The motion was denied.

¶ 19 At the sentencing hearing, after the parties made arguments in aggravation and mitigation, the defendant spoke in allocution:

> "I'm sorry for all the trouble I caused, your Honor. I was going to go back to school and going to NA/AA classes, but I have been through that, and I feel that I would make a good teacher for that. I can apologize to my wife, she don't deserve this, and I'm just sorry for all the trouble I caused.
>
> Like I said, I am not trying to justify what I did. I have changed my life, my wife changed me, my faith in God changed me. I went to church when I was younger, but I strayed, but I got back into it, and I am sick of this life, I am changing my life."

¶ 20 Before sentencing defendant, the court stated:

> "Well, in looking at your background, I would have to agree that you have made some poor choices, but you know, I look at offenses for which you have been charged, and they're the same kind of offenses that I have here before me.
>
> And, you know, people say, well, I made bad choices, well, you make a bad choice, you're supposed to learn from that and not make that same mistake again, but you have done it over and over again.
>
> This is a huge concern, especially in drugs, because, you know, I can tell you I have so many people come before me with drug problems who have been using from 9, 10, 11 years old, and continue to put this horrible thing out there on the street where these kids get involved and, you know, 9, 10, 11-year-olds, they're never going to get help until they're adults [ ] that have been using for 20 years. It's just completing [*sic*] ruining their lives. Unfortunately, they don't have a chance. Parents hopefully are trying to teach their children to say no to drugs, but how impressionable are kids that young? They can't think the way we think as adults. We are supposed to be trying to protect them."

¶ 21 On February 5, 2013, The court sentenced defendant to 15 years in prison on count 1 for possession of between one and fifteen grams of cocaine with intent to deliver within 1000 feet of a church (720 ILCS 570/401(c)(2), 407(b)(1) (West 2010)) and five years on count 5 for possession of between 500 and 2000 grams of cannabis with intent to deliver (720 ILCS 550/5(e) (West 2010)), to run concurrently. Defendant's remaining convictions for possession and possession with intent to deliver were merged. Defendant filed his notice of appeal on March 5, 2013.

¶ 22 ANALYSIS

¶ 23 A. Motions to Quash and Suppress

¶ 24 First, defendant contends that the trial court erred in denying his motions to quash the search and suppress the evidence recovered from the search, because: (1) the execution of the warrant was unreasonable and; (2) items seized during the search went beyond the scope of the search warrant, turning the warrant into an improper general search warrant and the search into an impermissible general search.

¶ 25 The fourth amendment of the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. The Illinois Constitution of 1970 similarly guarantees the right of the people "to be secure in their persons, houses, papers and other possessions" against unreasonable searches and seizures. Ill. Const. 1970, art. I, § 6.

¶ 26 On a motion to suppress, the burden of proving that a search or seizure was unlawful is on the defendant. 725 ILCS 5/114-12(b) (West 2010); *People v. Cregan*, 2014 IL 113600, ¶ 23; *People v. Gipson*, 203 Ill. 2d 298, 306 (2003). If a defendant makes a *prima facie* showing that the search was unreasonable, the burden then shifts to the State to provide evidence countering defendant's *prima facie* showing. *Cregan*, 2014 IL 113600, ¶ 23. The ultimate burden, however, remains with the defendant. *Id*. A circuit court's ruling on a motion to suppress generally involves a mixed question of law and fact. *People v. Lampitok*, 207 Ill. 2d 231, 240 (2003). Factual findings of the trial court will be upheld by the reviewing court unless they are against the manifest weight of the evidence. *Id*. The ultimate conclusion of whether suppression was warranted under those findings, however, is reviewed *de novo*. *Id*. "A court of review 'remains free to engage in its own assessment of the facts in relation to the issues presented and may draw

its own conclusions when deciding what relief should be granted.' " *People v. Gherna*, 203 Ill. 2d 165, 175-76 (2003) (quoting *People v. Crane*, 195 Ill. 2d 42, 51 (2001)).

¶ 27 1. Whether the Execution of the Warrant was Reasonable

¶ 28 Defendant first claims that the trial court erred in denying his motion to quash the search because the execution of the warrant was unreasonable, arguing specifically that the early morning hour in combination with the forcible entry and NFD detonation rendered the entry improper as a whole.

¶ 29 "The underlying command of the fourth amendment is that searches and seizures by governmental officials be reasonable." *People v. Krueger*, 175 Ill. 2d 60, 65 (1996). A factor in determining whether a search and seizure was reasonable is whether police followed the knock-and-announce rule. *Id.* "The basic principle behind this rule is that an officer may not enter a dwelling, even pursuant to a valid warrant, without first requesting admittance and announcing the reason why the officer is there." *Id.* The general purposes behind the knock-and-announce rule are:

> "(1) to decrease the potential for violence, as it is recognized that an unannounced breaking and entering could easily lead the occupants to take defensive measures; (2) to protect privacy as much as possible by giving the occupants notice of the impending intrusion by police and time to respond; and (3) to prevent the physical destruction of property where it is not necessary." *Id.*

¶ 30 In the present case, no evidence was presented at the hearing on the motion to suppress and no formal stipulation was offered in lieu of testimony. Rather, the parties simply argued the motion based on a somewhat common understanding of what occurred on the morning of the search, including the following basic facts: (1) the police executed the warrant between 4:30 and

5 a.m.; (2) the police would testify "that they knocked on the door and announced their office"; (3) the occupants of the home would testify that they were sleeping; (4) the police "busted in the door" and detonated an NFD; and (5) the NFD let off some amount of smoke and made a "huge noise." Now on appeal, defendant claims that "the evidence supports a finding that the police failed to allow a sufficient period of time to elapse before busting in the door, detonating an explosive device, and swarming into the apartment." This argument ignores the fact that absolutely no evidence was presented with respect to the circumstances surrounding the warrant's execution. Nothing in the record gives any indication of how long the police may have waited before "bust[ing] in the door" and detonating the NFD after their knock and announce. It was defendant's burden to make a *prima facie* showing that the execution of the warrant was unreasonable and, instead of introducing evidence to support such a showing, defendant presented only a bare-bones picture of what occurred during the warrant execution based on nothing more than counsels' arguments. More is needed to make a *prima facie* showing of unreasonableness. See *People v. Knoblett*, 179 Ill. App. 3d 1015, 1016 (1989) (defining *prima facie* evidence as "evidence sufficient to establish a fact and which will remain sufficient if unrebutted").

¶ 31 Notably, defendant has not cited and our research has not revealed any case law to support the conclusion that a warrant executed in the early morning, even combined with the detonation of an NFD, is *per se* unreasonable. See, *e.g.*, *People v. Chapman*, 379 Ill. App. 3d 317 (2007) (affirming the trial court's denial of the defendant's motion to suppress even where the warrant was executed at 3:30 a.m., a device similar to an NFD was detonated by the police in the backyard of the house before they knocked and announced their presence, and occupants of the house testified that they did not hear the police knock and announce). Because this was not a *per se* unreasonable method of entry, and defendant has provided no other support, we find that he

has failed to make a *prima facie* showing that the execution of the warrant was unreasonable. See *People v. Paige*, 385 Ill. App. 3d 486, 489-90 (finding that the defendant's evidence merely established that he was stopped at a police roadblock rather than a *prima facie* case that the roadblock was unreasonable, in part because "a roadblock is not *per se* unreasonable").

¶ 32 2. Whether the Scope of the Search Warrant was Exceeded

¶ 33 Defendant next claims that the trial court erred in denying his motion to suppress the evidence because items seized during the search went beyond the scope of the search warrant, turning the warrant into an improper general search warrant and the search into an impermissible general search. The trial court made no factual findings bearing on this issue and we review the ultimate legal question of whether suppression was warranted *de novo*. *Lampitok,* 207 Ill. 2d at 240.

¶ 34 With respect to search warrants, the fourth amendment of the United States Constitution states that "no [w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., amend. IV. Similarly, our state constitution provides that "No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized." Ill. Const. 1970, art. I, § 6. "The purpose of the requirement of particularity of description in search warrants is to prevent the use of general warrants, which would give the police broad discretion as to where they may search and what they may seize." *People v. Fragoso,* 68 Ill. App. 3d 428, 532 (1979).

¶ 35 Here, defendant does not take issue with the particularity of the warrant on its face. Rather, he claims that because the police seized three items that were not specifically listed in the warrant—two television sets and a laptop computer—the warrant was "transformed" into a general warrant. Even if we were to find that the seizure of these items exceeded the scope of the

warrant, defendant has cited no case law supporting the conclusion that this somehow retroactively changed the warrant into a general warrant. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (requiring that the appellant's argument "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities *** relied on").

¶ 36 Defendant also argues that blanket suppression of the evidence seized is warranted because the officers exhibited "flagrant disregard" for the terms of the warrant. However, the case on which defendant relies to support this contention, *United States v. Medlin*, 842 F.2d 1194 (10th Cir. 1988), is a federal case and is not binding authority on this court. See *Zahl v. Krupa*, 365 Ill. App. 3d 653, 662 (2006) (noting that federal cases are not binding on the Illinois appellate court). Moreover, the actions of the police in *Medlin* exceeded the scope of the warrant in that case to a degree that is entirely distinguishable from the present case. See *Medlin*, 842 F.2d at 1195-96, 1200 (affirming blanket suppression of evidence recovered pursuant to a search warrant where, in addition to the 130 firearms which were authorized to be seized by the warrant, 667 additional items of property "none of which were identified in the warrant authorizing the search," were also seized).

¶ 37 Furthermore, defendant's fourth amendment rights were not even implicated by the police seizure of the items that were arguably outside the scope of the warrant because they were not introduced against him at trial. See *People v. Wright*, 302 Ill. App. 3d 128, 135 (1998), *rev'd on other grounds*, 194 Ill. 2d 1 (2000) (noting that the "fourth amendment is not implicated where items allegedly seized illegally are not introduced as evidence against defendant at trial"); see also *People v. Foster*, 199 Ill. App. 3d 372, 385 (1990) (finding that because no evidence which resulted from the allegedly illegal search was introduced against the defendant at trial, the court did not need to consider whether the trial court should have conducted a hearing on the defendant's motion to suppress).

¶ 38 *People v. Harmon*, 90 Ill. App. 3d 753 (1980), on which defendant relies, is clearly distinguishable on this point. In *Harmon*, the defendant was convicted of "the theft of a CB transceiver valued at less than $150." *Id*. at 754. On appeal, the defendant argued that the trial court erred in denying his motion to suppress because the CB radio "upon which his prosecution was based" was illegally seized in violation of the fourth amendment. *Id*. The reviewing court first found that the warrant, which "permitted the seizure of 'any and all items of stolen railroad property' " was "clearly general in nature and invited the sweeping search and seizure that occurred" in that case. *Id*. at 756. The court also noted that the CB radio in question "was unquestionably not an item named in the search warrant." *Id*. The court went on to find that, despite the police officer's testimony that the items the police were searching for were "large items of railroad property," the inventory list of the more than 100 items seized showed that "the police searched every nook and cranny of the house and seized countless items, large and small." *Id*. at 756-57. Because the CB radio was not named in the warrant and did not fall under the plain view exception, the court concluded that it should have been suppressed. *Id*. at 757.

¶ 39 In contrast here, the warrant itself was sufficiently particular with respect to the items to be seized. Additionally, the items that were arguably outside the scope of the warrant were not only not the items "upon which [defendant's] prosecution was based" (*Id*. at 754), they were not even introduced against defendant. Under these circumstances, we cannot conclude that the trial court erred in denying defendant's motion to suppress.

¶ 40 B. Evidentiary Errors

¶ 41 Next, defendant contends that three of Detective Akim's statements at trial were erroneously admitted. The challenged statements include that: (1) Detective Akim saw a ComEd bill that was addressed to defendant at "1937 South 17th Avenue, Apartment 1-N"; (2) during processing, defendant gave as his address 1937 South 17th Avenue, Apartment 1-N; and

(3) Detective Akim performed a public record search with respect to a vehicle in the apartment building's parking lot which showed that the car was owned by defendant and registered at 1937 South 17th Avenue, Apartment 1-N.

¶ 42 Initially, the State claims that defendant has forfeited this issue because he did not include it in his posttrial motion. Defendant responds that the evidence at trial was closely balanced and that, without the allegedly improper evidence, the State would have failed to prove the essential element of possession. We only review for plain error where the argument is advanced by a party. See *People v. Hillier*, 237 Ill. 2d 539, 550 (2010) (where the defendant "did not argue plain error, the appellate court should not have reached the merits of those issues"). Although defendant does not expressly invoke the plain error doctrine, his claim that the evidence was closely balanced does so indirectly. Accordingly, we will consider defendant's claim pursuant to the plain error doctrine.

¶ 43 " '*Both* a trial objection *and* a written post-trial motion raising the issue are required [to preserve] alleged errors that could have been raised during trial.' (Emphases in original.)" *People v. Bannister*, 232 Ill. 2d 52, 65 (2008) (quoting *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)). However, under the plain error doctrine, a forfeited issue may be considered "if a clear and obvious error occurred and either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error is so serious that it affected the fairness of the trial and undermined the integrity of the judicial process." *People v. Booker*, 2015 IL App (1st) 131872, ¶ 52 (citing *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)). The defendant has the burden of persuasion under both prongs and, if his burden is not satisfied, "procedural default must be honored." (Internal quotation marks omitted.) *People v. Walker*, 232 Ill. 2d 113, 124 (2009).

¶ 44 In this case, we need not reach the question of whether the challenged statements were erroneously admitted because we find that, even if they were, the remaining evidence at trial was not so closely balanced that the statements alone threatened to tip the scales of justice against defendant. Accordingly, defendant cannot show that their admission rose to the level of plain error.

¶ 45 Defendant only argues that the evidence was closely balanced with respect to the element of possession. To prove that a defendant had unlawful possession of a controlled substance, the State must show that he had knowledge of the substance and that it was in his immediate and exclusive control. *People v. Frieberg*, 147 Ill. 2d 326, 360 (1992). Possession may be actual or constructive. *People v. Givens*, 237 Ill. 2d 311, 335 (2010). Constructive possession exists where the defendant "has the 'intent and capability to maintain control and dominion' over the item but not immediate personal control of it." *People v. Carodine*, 374 Ill. App. 3d 16, 25 (2007) (quoting *Frieberg*, 147 Ill. 2d at 361). "Proof that a defendant had control over the premises where the drugs were located *** gives rise to an inference of knowledge and possession of the drugs." *Givens*, 237 Ill. 2d at 335. Moreover, proving a defendant had constructive possession over a premises does not require proof of his ownership or legal interest in that premises. *People v. Williams*, 98 Ill. App. 3d 844, 848 (1981). Constructive possession is generally shown by circumstantial evidence. *People v. McLaurin*, 331 Ill. App. 3d 498, 502 (2002). In addition, when determining whether constructive possession has been shown, "the trier of fact is entitled to rely on reasonable inferences of knowledge and possession, absent other factors that might create a reasonable doubt as to the defendant's guilt." *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 17.

¶ 46 At trial, Detective Akim testified that at approximately 4:35 a.m., he found defendant on the bed, in the bedroom of the residence, which was a one-bedroom apartment, a "couple minutes" after the police entered the apartment. In the bedroom, Detective Akim found a pill

bottle containing crack cocaine on the nightstand; in the bedroom closet, he found a cardboard box containing plastic baggies of cannabis. He also recovered "three separate bundles" of currency totaling $2,340 from men's jackets in the closet. From the kitchen, Detective Akim recovered another pill bottle of crack cocaine, additional baggies of cocaine and cannabis, and two boxes of Ziploc baggies.

¶ 47 We acknowledge that a woman was also present in the apartment when the warrant was executed; however, that fact alone is not enough to destroy the inference of defendant's possession. See *People v. Schmalz*, 194 Ill. 2d 75, 82 (2000) (noting that "[t]he rule that possession must be exclusive does not mean that the possession may not be joint"). We further note that presence, alone, is not sufficient to show constructive possession (*People v. Josephitis*, 394 Ill. App. 3d 293, 299 (2009)), however, here defendant was not simply present. Based on the testimony, defendant was the only man in the apartment and was found on the bed in the only bedroom at 4:30 in the morning, the closet contained men's jackets, those men's jackets contained a significant amount of cash, and the closet also contained a significant amount of drugs. In addition, although defendant was not found in the kitchen, the kitchen contained similar drug paraphernalia as that which was recovered from the bedroom: a pill bottle of crack cocaine, additional cocaine and cannabis in plastic baggies, and two boxes of Ziploc baggies of the same type used to package the drugs. A trier of fact could draw the reasonable inference that defendant exercised control over both the bedroom and the kitchen, particularly in light of the absence of contradictory evidence. See *Spencer*, 2012 IL App (1st) 102094, ¶ 17 ("the trier of fact is entitled to rely on reasonable inferences of knowledge and possession, absent other factors that might create a reasonable doubt as to the defendant's guilt").

¶ 48 Defendant argues that the presence of men's clothes in the closet is insignificant because no evidence was presented showing that the clothing belonged to defendant. However, no

evidence was presented to the contrary and, as we noted above, there was no evidence that another man was present or exercised control over the premises. "The requirement that a defendant's guilt be proved beyond a reasonable doubt does not mean that inferences flowing from the evidence should be disregarded." *Schmalz*, 194 Ill. 2d at 81. Under these circumstances, reasonable inferences drawn from the uncontroverted evidence lead to the conclusion that defendant had control of the premises and, therefore, constructive possession of the drugs. Even though the challenged evidence strengthens the State's case against defendant, the absence of that evidence does not render the evidence closely balanced. Because we find that, even without the contested testimony, the evidence at trial was not closely balanced, there was no plain error and forfeiture must be honored.

¶ 49 C. Sufficiency of the Evidence

¶ 50 Defendant next claims, and the State concedes, that the evidence at trial was insufficient to prove beyond a reasonable doubt that defendant committed the drug offenses within 1000 feet of a church.

¶ 51 "The due process clause of the fourteenth amendment protects a defendant from conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' " *People v. Green*, 225 Ill. 2d 612, 622 (2007) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). Defendant was convicted of possession of between one and fifteen grams of cocaine with intent to deliver within 1000 feet of a church, pursuant to sections 401(c)(2) and 407(b)(1) of the Illinois Controlled Substances Act (720 ILCS 570/401(c)(2), 407(b)(1) (West 2010)). Accordingly, the State was required to prove beyond a reasonable doubt that defendant was within 1000 feet of a church at the time he committed the offense.

¶ 52 In its appellate brief, the State admits that "the measurement taken failed to show beyond a reasonable doubt that defendant was within 1000 feet of a church at the time he committed the

offense of possession of a controlled substance with intent to deliver." We therefore vacate defendant's conviction under count 1, possession of cocaine with intent to deliver within 1000 feet of a church.

¶ 53 D. Jury Waiver

¶ 54 Defendant next contends that the trial court erred by failing to ensure he knowingly and intelligently waived his right to a jury trial. Specifically, defendant claims that the trial court erroneously accepted his jury waiver "without inquiring into his understanding of his right to a jury trial or of the ramifications of waiving that right."

¶ 55 Defendant acknowledges that he did not raise this issue before the trial court, either by objecting or in a posttrial motion, but argues that we may consider the issue under the plain error doctrine. As we stated above, the plain error doctrine allows a reviewing court to consider an otherwise forfeited issue "if a clear and obvious error occurred and either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error is so serious that it affected the fairness of the trial and undermined the integrity of the judicial process." *Booker*, 2015 IL App (1st) 131872, ¶ 52 (citing *Piatkowski*, 225 Ill. 2d at 565). First, we will consider whether error occurred because "without error, there can be no plain error." *People v. Smith*, 372 Ill. App. 3d 179, 181 (2007).

¶ 56 "The right to a trial by jury is a fundamental right guaranteed by the federal Constitution [citations] and the Illinois Constitution of 1970 [citation]." *Bannister*, 232 Ill. 2d at 65. In addition, "based on our state constitution, an Illinois criminal defendant's right to a trial by jury includes the right to waive a jury trial." *Id.* at 65. A valid waiver of a jury trial must be made both knowingly and voluntarily. *Id.*; see also 725 ILCS 5/103-6 (West 2010) (requiring that "[e]very person accused of an offense *** have the right to a trial by jury unless *** understandingly waived by defendant in open court"). However, the validity of a jury waiver

"cannot rest on any precise formula, but rather depends on the facts and circumstances of each particular case." *Bannister*, 232 Ill. 2d at 66. A trial court has the duty to ensure a defendant waives his right to a jury trial "expressly and understandingly," but it "need not give any specific admonition or advice for a defendant to make an effective jury waiver." *Id*. Moreover, although it is " 'preferable' " that a trial court "apprise a defendant of the jury trial right," there is no constitutional requirement that the court do so. *People v. Rincon*, 387 Ill. App. 3d 708, 718 (2008) (quoting *People v. Steiger*, 208 Ill. App. 3d 979, 981 (1991)). In addition, a waiver will be considered valid where "it is made by defense counsel in defendant's presence in open court, without an objection by defendant." *People v. Bracey*, 213 Ill. 2d 265, 270 (2004). While the existence of the written waiver, alone, is insufficient to establish a valid waiver (*People v. Scott*, 186 Ill. 2d 283, 284 (1999)), it does support "a finding of a knowing waiver when accompanied by defense counsel's request for a bench trial made in open court and in the defendant's presence" (*Steiger*, 208 Ill. App. 3d at 982). "When a defendant waives the right to a jury trial, the pivotal knowledge that the defendant must understand—with its attendant consequences—is that the facts of the case will be determined by a judge and not a jury." *Bannister*, 232 Ill. 2d at 69.

¶ 57 The defendant bears the burden of showing that a jury waiver was invalid. *People v. Gibson*, 304 Ill. App. 3d 923, 929-30 (1999). Because the question of whether defendant validly waived his right to a jury trial is a question of law, and the relevant facts are not in dispute, our review is *de novo*. *Bannister*, 232 Ill. 2d at 66.

¶ 58 Here, the record shows that defendant knowingly and voluntarily waived his right to a jury trial. First, defendant signed a jury waiver, was represented by counsel, and was admonished by the trial court just before trial. The court asked defendant whether it was his signature on the jury waiver form, whether he understood by signing the form that he was "giving up the right to have a trial by jury," and whether he knew what a jury trial was. Defendant responded

affirmatively to all three questions. Although defendant suggests that the court's discussion with him about his jury waiver was "limited," a trial court "does not necessarily have to give a defendant an explanation concerning the ramifications of a jury waiver unless there is an indication that the defendant did not understand his right to a jury trial." *Steiger*, 208 Ill. App. 3d at 981. The record does not show, and defendant has not demonstrated, any indication that he did not understand his right to a jury trial. We also note this discussion was not the first time defendant was present when the bench trial was discussed; he was present for at least one status date in July 2012 where his attorney agreed that they were proceeding with a bench trial and nothing in the record shows defendant protested to proceeding in this manner. Finally, the record shows that defendant was familiar with the criminal justice system, a factor our supreme court has determined weighs in favor of a finding that waiver was made knowingly and understandingly. See *Bannister*, 232 Ill. 2d at 71. Defendant has a 1991 Michigan conviction for the delivery and manufacture of a controlled substance for which he received probation and a 1995 Michigan conviction for the delivery and manufacture of a controlled substance for which he received a 20-year prison sentence; he also pled guilty in 2006 to driving with "any amount" of cannabis and in 2008 he pled guilty to possession of cannabis.

¶ 59 Defendant relies on *People v. Sebag*, 110 Ill. App. 3d 821 (1982), to support his claim. The defendant in *Sebag* was charged with public indecency and battery. *Id*. at 822. With respect to the battery charge only, the court informed the *pro se* defendant before trial that he could have his case "tried before a jury or judge," to which the defendant replied "Judge." *Id*. at 828-29. The court then asked whether the defendant understood "that by waiving a jury at this time" he could not "reinstate it," and the defendant replied "Yes." *Id*. at 829. The defendant was convicted of public indecency and argued on appeal, *inter alia*, that his jury waiver was insufficient. *Id*. at 822. The reviewing court noted that the record included a signed jury waiver form from the

defendant, but also that "[t]he defendant was without benefit of counsel, and it [did] not appear that he was advised of the meaning of a trial by jury nor [did] it appear that he was familiar with criminal proceedings." *Id*. at 829. The court ultimately agreed with the defendant that the record did not "adequately establish a waiver of [the] defendant's right to a jury trial on the public indecency charge." *Id*. Here, in contrast, defendant was represented by counsel and familiar with the criminal justice system. Accordingly, *Sebag* is distinguishable and does not guide our analysis.

¶ 60 Under these circumstances, the trial court properly ensured defendant knowingly and voluntarily waived his right to a jury trial. Because there was no error, there was no plain error. *Smith*, 372 Ill. App. 3d at 181.

¶ 61 E. *Krankel* hearing

¶ 62 Next, defendant argues that the trial court erred by not conducting an inquiry into the "readily-apparent and cognizable ineffective assistance of counsel claim" contained in his PSI report, as required by *People v. Krankel*, 102 Ill. 2d 181 (1984).

¶ 63 According to the PSI report, under the section labeled "Education," defendant made the following statement to the probation department investigator:

> "The Defendant adds that he can read and write adequately, but had trouble with his attorney, 'me and the attorney didn't have good communication, he never answered my calls, didn't come to see me in jail. My wife tried to call, he don't answer the phone. He says he's working on Drew Peterson. I believe he could have done better on my case. I feel like I wasn't represented well.' "

¶ 64 Pursuant to *Krankel*, "when a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should *** examine the factual basis of the defendant's

claims." *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). "[A] *pro se* defendant is not required to do any more than bring his or her claim to the trial court's attention." *Id.* at 79. However, a defendant's complaints about counsel, solely contained in a PSI report, are not sufficient to bring a claim of ineffective assistance of counsel to the trial court's attention and require further inquiry. *People v. Harris*, 352 Ill. App. 3d 63, 71-72 (2004); *People v. Reed*, 197 Ill. App. 3d 610, 612 (1990). A defendant must take some affirmative action to bring his claim to the court's attention. See, *e.g.*, *Moore*, 207 Ill. 2d at 76-77, 79 (*Krankel* inquiry required where the defendant filed a written *pro se* posttrial motion for appointment of counsel other than the public defender which raised several specific allegations of ineffective assistance of counsel); *People v. Vargas*, 409 Ill. App. 3d 790, 800-02 (2011) (*Krankel* inquiry required where, during allocution, the defendant spoke extensively to the trial court about alleged instances of ineffective assistance of his trial counsel); *People v. Peacock*, 359 Ill. App. 3d 326, 330, 339 (2005) (*Krankel* inquiry required where the defendant filed a letter with the trial court, directly addressing the judge, alleging several specific instances of receiving ineffective assistance of counsel).

¶ 65 In *Reed*, after the defendant was convicted of armed robbery, he made a statement to the court during sentencing, saying "most of the stuff in my case here I'm not sure you are aware of it, but it wasn't brought up. You know, there is a few people that don't even know me that can verify that I was Cook County [*sic*] at the time." *Reed*, 197 Ill. App. 3d at 611. When the court asked whether he wanted to say anything further, the defendant declined. *Id.* at 611-12. In addition, the trial court "considered defendant's [PSI] report which indicate[d] in the 'summary and impressions' section that defendant 'expressed his opinion that he was poorly represented at his trial and said he plans to file an Appeal.' " *Id.* at 612. Upon review, the *Reed* court held:

> "Defendant's argument assumes that allegations of ineffective assistance of counsel were properly presented to the trial court. Such is not the case,

> however, as defendant never referred to his trial counsel in his oral comments at his sentencing hearing and only vaguely commented on some possible alibi witnesses. Although there is a mention in his presentence report that he felt he was 'poorly represented,' there are no allegations supporting that opinion or supporting an ineffective assistance of counsel claim. Nor did defendant in any manner request counsel to assist him with a claim of ineffective counsel. *** While we do not suggest that a *pro se* claim of ineffective trial counsel need take a specific form, we cannot expect the trial court to divine such a claim where it is not even arguably raised." *Id*.

The *Reed* court accordingly concluded that no *Krankel* inquiry was required. *Reed*, 197 Ill. App 3d at 612.

¶ 66 Similarly here, defendant did not bring a claim of ineffective assistance of counsel to the trial court's attention. He did not bring an oral or written motion alleging ineffective assistance of counsel before the trial court—he made no motion to the trial court at all complaining about counsel's performance. Furthermore, he did not mention counsel or counsel's performance during his oral statement at sentencing. We acknowledge that defendant's statement in the PSI report in this case arguably contained more supporting details than that in *Reed*. The statements were nevertheless made to a probation department investigator, not the trial court. Although the trial court has a duty to "consider" the PSI report (730 ILCS 5/5-4-1(a)(2) (West 2010)), the act of making a statement to an investigator, which may or may not be included in the report, does not put the statement "before the court." A trial court is only required to conduct a *Krankel* hearing if the defendant "bring[s] his or her claim to the trial court's attention." *Moore*, 207 Ill. 2d at 79. Requiring the trial court to *sua sponte* conduct a *Krankel* hearing based only on a statement in a

PSI report would relieve a defendant of his responsibility to affirmatively bring a claim of ineffective assistance to the trial court's attention. Under these circumstances, the trial court was not required to conduct a *Krankel* inquiry and therefore did not err by not doing so.

¶ 67 F. Excessive Sentence

¶ 68 Finally, defendant argues that the trial court's imposition of a 15-year prison sentence was an abuse of discretion because: (1) the trial court improperly considered in aggravation the harm caused by drug dealing, a factor inherent in the offense on which he was sentenced; and (2) the sentence was excessive in light of defendant's "history, age, and rehabilitative potential."

¶ 69 Here, defendant's 15-year sentence was imposed on his conviction under count 1, possession with intent to deliver within 1000 feet of a church. However, as we have vacated that conviction, defendant's arguments with respect to his sentence are moot, and we decline to consider them.

¶ 70 CONCLUSION

¶ 71 For the foregoing reasons, we vacate defendant's conviction under count 1 and affirm the trial court's judgment in all other respects. However, because defendant's unsentenced convictions under counts 2 and 4 were merged into his now-vacated conviction under count 1, we remand the matter to the trial court for resentencing on those counts. *People v. Dean*, 61 Ill. App. 3d 612, 619-20 (1978) ("where the judgment of the reviewing court is an affirmance of a trial court's judgment of conviction, but the judgment remains incomplete because no sentence had been entered thereon, the reviewing court must order the judgment to be made final by the imposition of a sentence"). We further note that our decision has no affect on the sentence and convictions with respect to counts 5 and 6. On remand, the trial court should give credit and due consideration to the time defendant has already served.

¶ 72 Affirmed in part, vacated in part; cause remanded for resentencing.