

No. 1-13-2593

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 12 CR 1757
)	
ROGER CLINTON,)	Honorable
)	Vincent M. Gaughan,
Defendant-Appellant.)	Judge Presiding.

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

O R D E R

¶ 1 *Held:* Defendant's conviction is affirmed as the evidence at trial sufficiently established defendant possessed a controlled substance beyond a reasonable doubt. However, we remand for a new preliminary hearing on defendant's *pro se* motion asserting ineffective assistance of counsel pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), and order the fines and fees order be modified.

¶ 2 Following a jury trial, defendant Roger Clinton was found guilty of possession of a controlled substance (720 ILCS 570/402(c) (West 2012)) and sentenced to four years' imprisonment. On appeal, defendant argues the State failed to prove him guilty beyond a

reasonable doubt, the trial court improperly denied him assistance of counsel during the hearing on his *pro se* ineffective assistance of counsel claim according to *Krankel*, 102 Ill. 2d 181 (1984), and the court incorrectly assessed him certain fines and fees. We affirm defendant's conviction, remand for a new preliminary *Krankel* hearing, and order the clerk of the circuit court to modify the fines and fees order.

¶ 3 Defendant was charged with possession of one gram or more of a controlled substance, specifically 1.3 grams of heroin, with the intent to deliver (720 ILCS 570/401(c)(1) (West 2012)). The evidence at trial established the heroin was recovered by Chicago Police Officer Borkowski following the surveillance operation that resulted in defendant's arrest.

¶ 4 Officer Borkowski testified that on December 22, 2011, at 1:30 a.m., he was on patrol, in uniform, in a marked police vehicle with his partner. He observed an "unusual amount of foot traffic" in the area of 937 North St. Louis in Chicago for "that time of night." He set up surveillance in front of the building and saw defendant standing in front of the building, which Officer Borkowski knew to be abandoned. Officer Borkowski was approximately 50 feet from where defendant was standing. He had a "front" view of defendant, was looking directly at him, and nothing obstructed his view of defendant. During the period of surveillance, Officer Borkowski observed what he believed to be three "hand to hand narcotics transactions." In each instance, he observed an unknown individual walk up to defendant, have a short conversation with him, and tender to defendant an unknown amount of U.S. currency. Defendant then walked to the north side of the abandoned building, retrieved a pill bottle from underneath the porch, took a small object from the bottle and replaced the bottle underneath the porch. He tendered the

object to the unknown individual, who then walked away. From Officer Borkowski's past experience as a participant in hundreds of previous narcotics operations, he surmised that he had witnessed a "hand to hand" narcotics transaction.

¶ 5 After the third transaction, defendant stood in front of the building for approximately five minutes, then walked to his vehicle and drove away. Officer Borkowski notified two additional enforcement officers assisting with the surveillance operation, Officers Clarke and Gallagher, that defendant was leaving the scene in his vehicle. Officer Borkowski then broke surveillance and recovered from underneath the porch of the abandoned building a pill bottle with six small plastic "Ziploc" bags. Each bag had a Batman logo printed on it and contained a tinfoil packet with a white powdery substance. Officer Borkowski also recovered from "next to the pill bottle" a cigarette box with three plastic "baggies" containing a white powdery substance. These "baggies" were printed with a Superman logo.

¶ 6 Officers Clarke and Gallagher had stopped defendant's vehicle and taken him into custody. They drove defendant to Officer Borkowski's location, where Officer Borkowski confirmed that defendant was the person he observed conducting the alleged narcotics transactions. Officer Borkowski then went to where defendant's vehicle was parked. He identified the vehicle as the same vehicle in which he had seen defendant drive away. Officer Borkowski searched the vehicle and found \$130 in U.S. currency in the vehicle. He testified that he did not confiscate the money, as police protocol prohibits recovery of narcotics currency less than \$500. Officer Borkowski returned to the police station where his partner inventoried the pill bottle and cigarette box. Neither drugs nor money were recovered from defendant's person or

vehicle, nor were the items recovered from the porch tested for fingerprints. Officer Borkowski identified photographs of the area of the surveillance, indicating where, *inter alia*, he was standing, defendant was standing, and where the bottle and box were hidden under the porch. He did not take photographs that night or use any surveillance equipment. Officer Borkowski did not know who had placed the drugs under the porch or how long they had been there.

¶ 7 Adrienne Hirsch, a forensic analyst with the Illinois State Police Crime Lab, testified that she analyzed all three bags recovered from the cigarette box and concluded they contained a total of 1.2 grams of heroin. She also tested one of the plastic bags from the pill bottle and concluded that it contained .1 grams of heroin. Following Hirsch's testimony, the State rested and defendant's motion for directed verdict was denied.

¶ 8 Defendant's nephew, Derrick Cummings (Cummings), testified for the defense that he, his uncle (defendant), defendant's friend, Donald, and his aunt, Vickie Cummings, were at defendant's home at 208 North Laporte in Chicago at approximately midnight on the night of the offense. Cummings, defendant, and Donald left the home and drove, in defendant's vehicle, to a gas station to buy cigars. On the way there, they were stopped by police officers. The officers "grabbed" defendant and Donald from the car. They ordered Cummings to go home because they were looking for "the guy in the red hoodie," which was defendant's friend Donald. Cummings and his aunt subsequently returned to defendant's vehicle and found no money inside the vehicle. Cummings denied that, prior to being stopped by police, defendant had stopped and "made drug sales."

¶ 9 In rebuttal, Officer Kevin Clarke testified that he had curbed defendant's vehicle pursuant to the directions of Officer Borkowski. He made an in-court identification of defendant as the driver of the vehicle and stated that there was no one else in the vehicle. Officer Clarke denied knowing a person named Derrick Cummings, and denied that Cummings or a passenger named Donald in a red "hoodie" were present in the vehicle. After placing defendant in handcuffs, Officer Clarke had searched him but found no drugs or money.

¶ 10 During deliberations, the jury sent a note to the trial court asking if it could have a copy of the police report, what description of defendant was given to Officer Clarke, and where defendant's vehicle was parked. The trial court responded by denying the jury's request for a copy of the police report, explaining it could not answer the questions because the jury "heard all of the evidence in this case." It directed the jury to continue deliberating. Following deliberations, the jury found defendant not guilty of possession of a controlled substance with the intent to deliver and guilty of possession of a controlled substance. The court continued the case for sentencing.

¶ 11 Defendant filed a *pro se* motion for new trial alleging ineffective assistance of trial counsel for, *inter alia*, encouraging Cummings to perjure his testimony. Defense counsel also filed a motion for new trial on defendant's behalf. At a posttrial hearing, counsel requested leave to withdraw as defendant's appointed counsel as defendant's allegations in his *pro se* motion created a conflict. The court denied counsel's request to withdraw and defendant's request to appoint substitute counsel, but continued the case to allow defendant time to hire private counsel.

¶ 12 Defendant was unable to hire private counsel by the next court date. The trial court therefore heard the motion for new trial argued and filed by defendant's original trial counsel. The court denied the motion, and then proceeded to hear defendant's *pro se* motion. It informed defendant that "appellate decisions say that this should be held as an informal type of hearing, so you're going to be presenting your own motion." Defendant advised the court that he was attempting to obtain the required funds to hire new counsel to argue the motion on his behalf, but the court informed him that "[t]hat has nothing to do with this motion right now," as it was a *Krankel* hearing. Defendant again informed the court that he required an attorney, but the trial court stated that he was not entitled to one and directed defendant to "proceed on [his] motion."

¶ 13 Defendant argued the merits of his motion *pro se*, alleging, *inter alia*, that trial counsel "made [his] case impeached" by telling Cummings to lie about several facts in his testimony, including where he, defendant, and Donald were coming from on the night of the offense. Defense counsel denied the allegation and detailed his efforts on defendant's behalf. Defendant informed the court that he sent an affidavit to Cummings that had not yet been returned, and that his fiancé, Vickie Cummings, could testify that defense counsel had directed Cummings to lie at trial. Defendant called Vickie Cummings as a witness.

¶ 14 Prior to Vickie Cummings' testimony, the court asked defendant to address the other points of his motion and allowed defense counsel to respond. It then informed the State, over the State's objection, that the State would cross-examine Ms. Cummings. Defendant examined Ms. Cummings, but defense counsel, not the State, cross-examined her. After this testimony, defendant rested. Following a sidebar requested by the State, the trial court struck all the

testimony elicited on cross-examination, but allowed defense counsel to respond to Ms. Cummings' testimony. The court denied defendant's *pro se* motion for new trial, but allowed counsel to withdraw. It appointed the public defender's office to represent defendant at the sentencing hearing.

¶ 15 After arguments in aggravation and mitigation, the trial court sentenced defendant to an extended-term sentence of four years' imprisonment based on his prior convictions. It assessed \$1354 in fines and fees including a \$100 Methamphetamine Law Enforcement fine, \$25 Methamphetamine Drug Traffic Prevention Fund fine and a \$5 electronic citation fee.

¶ 16 Defendant raises three arguments on appeal. He first contends that the evidence was insufficient to prove beyond a reasonable doubt that he possessed the recovered heroin because (1) Officer Borkowski's testimony was incredible as it was contrary to human experience; and (2) the State failed to produce evidence that defendant constructively possessed the heroin in the cigarette box.

¶ 17 When a defendant challenges the sufficiency of the evidence to sustain a conviction, the relevant question on review is whether, after considering the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). It is not the function of this court to retry the defendant. *People v. Tenney*, 205 Ill. 2d 411, 428 (2002). The jury, as finder of fact, is responsible for determining the credibility of witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence. *Id.* A conviction will only be overturned where the evidence is so

improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of the defendant's guilt. *Beauchamp*, 241 Ill. 2d at 8. The testimony of a single witness, if positive and credible, is sufficient to convict even if it is contradicted by the defendant. *People v. Singuenza-Brito*, 235 Ill. 2d 213, 228 (2009).

¶ 18 To sustain the conviction for possession of a controlled substance, the State had to prove that defendant had knowledge of the presence of a controlled substance that was in his immediate and exclusive possession or control. *People v. Woods*, 214 Ill. 2d 455, 466 (2005). Possession may be actual or constructive. *People v. Frieberg*, 147 Ill. 2d 326, 361 (1992). Actual possession requires "immediate and exclusive dominion or control" by the defendant over the controlled substance. *People v. Schmalz*, 194 Ill. 2d 75, 82 (2000). Conversely, constructive possession exists where the defendant has "the intent and capability to maintain control and dominion over the controlled substance" without immediate, actual control. *People v. Eghan*, 344 Ill. App. 3d 301, 307 (2003). "Where actual possession requires proof of control, constructive possession requires proof of intent and capability to control." *People v. Pittman*, 2014 IL App (1st) 123499, ¶ 36. Whether there is knowledge and possession or control are factual questions for the trier of fact to determine. *Schmalz*, 194 Ill. 2d at 81.

¶ 19 Defendant's primary challenge to the evidence at trial is that Officer Borkowski testified incredibly and his testimony was contrary to human experience. Defendant argues Officer Borkowski's testimony that defendant conducted three hand-to-hand narcotics transactions while Officer Borkowski was only 50 feet away, in uniform and directly in front of defendant was improbable, finding it inconceivable that defendant did not notice the officers. He asserts that

Officer Borkowski's testimony that defendant left the scene without the drugs was implausible and that the officer's decision to conduct surveillance in the dark cold night without surveillance equipment was suspect. He also challenges Officer Borkowski's assertion that he conducted the surveillance because he observed an unusual amount of foot traffic in the area, claiming it is highly doubtful that there was anyone in the area at 1:30 a.m. Defendant argues that Officer Borkowski's testimony taxed "the gullibility of the credulous" (*People v. Coulson*, 13 Ill. 2d 290, 296 (1958)), and the State, therefore, did not meet its burden. He also argues Officer Borkowski's incredible testimony could not support either actual or constructive possession.

¶ 20 Credibility of witnesses is for the jury to determine. *People v. Moss*, 205 Ill. 2d 139, 164 (2001). Given the jury's verdict, it necessarily found Officer Borkowski credible regarding defendant's possession of the heroin. The jury's determination is entitled to great deference and we find nothing in the record to show the jury's finding was unreasonable. See *id.* at 165.

¶ 21 Officers Borkowski and Clarke positively identified defendant in court. Officer Borkowski also identified defendant at the scene. He testified that his view was unobstructed, which was corroborated by the photographs depicting the surveillance area and his vantage point. Despite defendant's attempt to impeach Officer Borkowski's testimony by providing Cummings as an alibi witness for his whereabouts, Officers Borkowski's and Clarke's testimony were substantially similar and corroborated one another's version of events putting defendant at the scene. Further, Officer Clarke testified there was no one else in the defendant's vehicle when he stopped it. The jury heard the officers' testimony and found it to be credible. We will not substitute our judgment for that of the jury on this credibility question. *People v. Baugh*, 358 Ill.

App. 3d 718, 737-38 (2005). Further, the jury was not required to give more weight to Cumming's testimony than that of the police officers. *Tenney*, 205 Ill. 2d at 428 (finding testimony of accomplice witness sufficient to convict defendant despite its inherent weaknesses; the jury found the testimony credible and was not required to elevate any possible explanation compatible with the defendant's innocence to the level of reasonable doubt).

¶ 22 Physical evidence corroborating Officer Borkowski's identification of defendant is not necessary to sustain the conviction as his identification of defendant was neither vague nor doubtful and he viewed defendant at the scene under circumstances permitting a positive identification. *People v. Negron*, 297 Ill. App. 3d 519, 530-33 (1998). Officer Borkowski observed defendant conduct the three transactions directly in front of him. He was only 50 feet away, had his full attention focused on defendant and, within five minutes of calling in Officer Clarke, had identified defendant to Clarke as the man he saw conducting the transactions. Viewing Officer Borkowski's testimony in the light most favorable to the prosecution, his testimony was more than sufficient to uphold his eyewitness identification of defendant. *Id.* at 530-33.

¶ 23 Officer Borkowski's testimony established that defendant was in actual possession of the pill bottle containing heroin. He saw defendant remove the pill bottle from underneath the porch of the abandoned building, remove a small item from the bottle, then replace the pill bottle in its original hiding place. Officer Borkowski's testimony established the necessary proof of immediate and exclusive control over the heroin in the pill bottle to establish actual possession.

¶ 24 Officer Borkowski's testimony also established that defendant constructively possessed the heroin in the cigarette box. Officer Borkowski found the box with heroin hidden directly next to the pill bottle. The heroin was packaged in a similar fashion to that in the pill bottle and contained the same substance as in the pill bottle. The jury could infer from this evidence that, although Officer Borkowski did not see defendant in actual possession of the cigarette box, defendant had knowledge of the presence of heroin in the box and the intent and capability to maintain control over that heroin. Accordingly, the evidence showed defendant's constructive possession over the heroin in the cigarette box. See *Pittman*, 2014 IL App (1st) 123499, ¶ 36 (constructive possession requires proof of intent and capability to control the substance).

¶ 25 Defendant argues the evidence did not establish that he knew the cigarette box contained heroin or that he had the intent and capability to maintain exclusive control over the drugs as they were found underneath the porch of an abandoned building to which he did not have exclusive access. The fact that the drugs were found underneath the porch of an abandoned building to which multiple people presumably had access is not dispositive of defendant's possessory intent. See *Schmalz*, 194 Ill. 2d at 82 ("The rule that possession must be exclusive does not mean that the possession may not be joint"). Further, defendant had control over the premises at the time the offense was committed because he was the only person Officer Borkowski saw accessing the porch area where the drugs were hidden. He was seen to access the hiding place multiple times and the jury could reasonably infer from this his knowing possession of the contents of that hiding place: the drugs. See *People v. Hester*, 87 Ill. App. 3d 50, 52-53

(1980) (evidence showing that the defendant had control over the premises where the drugs were found gives rise to an inference of knowledge and possession of drugs).

¶ 26 Finally, defendant's "careful hiding of the drugs circumstantially established his intent and capability to return later and only then exercise actual control." *Pittman*, 2014 IL App (1st) 123499, ¶ 37. Further, his relationship to the narcotics contained in the bottle and box also gave rise to an inference of possession. *People v. Minniweather*, 301 Ill. App. 3d 574, 578 (1998) ("Where narcotics are found on premises that are *not* under the defendant's control, defendant's control of the premises is not dispositive. Rather, it is defendant's relationship *to the contraband* that must be examined." (Emphasis in original.)). Defendant was seen in actual possession of the pill bottle containing the same substance as inside the cigarette box. The contents of the bottle and box were packaged similarly and the bottle was hidden directly next to the cigarette box. Therefore, it was not unreasonable or improbable for the jury to infer that defendant had knowledge of the contents of, and the ability to maintain exclusive control over, the cigarette box to warrant an inference of constructive possession of the heroin contained therein.

¶ 27 In conclusion, Officer Borkowski's testimony, which the jury found credible, sufficiently established that defendant was in actual possession of the heroin contained in the pill bottle, and the jury could reasonably infer from the testimony that defendant was in constructive possession of the heroin in the cigarette box. Therefore, the evidence is not so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt that defendant was in possession of a controlled substance. Accordingly, we will not reverse defendant's conviction. *Beauchamp*, 241 Ill. 2d at 8.

¶ 28 Defendant next argues that the trial court's denial of his *pro se* motion for new trial alleging ineffective assistance of counsel should be vacated and the cause remanded for the appointment of counsel and a new evidentiary hearing. The State concedes the case should be remanded for a new *Krankel* hearing in light of our supreme court's clarification of the parameters of an appropriate preliminary *Krankel* inquiry in *People v. Jolly*, 2014 IL 117142. Accordingly, we vacate the trial court's denial of defendant's *pro se* motion for new trial alleging ineffective assistance of counsel and remand the cause for a new preliminary *Krankel* inquiry. *Jolly*, 2014 IL 117142, ¶ 47; see also *Moore*, 207 Ill. 2d at 81. However, defendant's request for the appointment of counsel to argue his motion is premature. *Jolly*, 2014 IL 117142, ¶ 39 (quoting *People v. Patrick*, 2011 IL 111666, ¶ 39 ("*Krankel* serves the narrow purpose of allowing the trial court to decide whether to appoint independent counsel to argue a defendant's *pro se* posttrial ineffective assistance claims")).

¶ 29 Defendant lastly argues, and the State concedes, that he was improperly assessed a \$100 Methamphetamine Law Enforcement Fund fine, a \$25 Methamphetamine Drug Traffic Prevention Fund fine, and a \$5 electronic citation fee.

¶ 30 Previously, Illinois courts have held that when a fine imposed does not conform to a statutory requirement, the fine is void and the issue may not be forfeited on appeal. See *People v. Milsap*, 2012 IL App (4th) 110668, ¶ 26. A recent supreme court decision in *People v. Castleberry*, 2015 IL 116916, ¶ 19, held this rule no longer applies. However, under Illinois Supreme Court Rule 615(b) (eff. Aug. 27, 1999), we may modify the fines and fees order without remanding the case back to the circuit court. Ill. S. Ct. R 615(b)(1) ("[o]n appeal the

reviewing court may *** modify the judgment or order from which the appeal is taken"); See *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995) ("[r]emandment is unnecessary since this court has the authority to directly order the clerk of the circuit court to make the necessary corrections"). We review *de novo* the propriety of court-ordered fines and fees. *People v. Elcock*, 396 Ill. App. 3d 524, 538 (2009).

¶ 31 An electronic citation fee may only be imposed when a defendant is convicted of a traffic violation. 705 ILCS 105/27.3e (West 2012). Defendant was not convicted of a traffic offense. Therefore, the electronic citation fee should not have been imposed. The \$100 and \$25 methamphetamine fines were also improperly assessed, as defendant was convicted of possession of heroin, not of a "methamphetamine related offense involving possession or delivery of methamphetamine ****." See 730 ILCS 5/5-9-1.1-5(a) (West 2012). Accordingly, we vacate the \$100 Methamphetamine Law Enforcement Fund fine, the \$25 Methamphetamine Drug Traffic Prevention Fund fine, and the \$5 electronic citation fee, and direct the clerk of the circuit court to amend the fines and fees order to reflect the corrected total of \$1224.

¶ 32 For these reasons, we affirm defendant's conviction for possession of a controlled substance; vacate the trial court's denial of defendant's *pro se* motion alleging ineffective assistance of counsel; remand the cause for a new preliminary *Krankel* hearing; vacate the fines and fees set forth above; and order the fines and fees order be modified.

¶ 33 Affirmed in part; vacated in part; fines and fees order modified; cause remanded.