2016 IL App (1st) 140323-U

FOURTH DIVISION
March 31, 2016

No. 1-14-0323

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 MC4 003969
	)	
MARCUS FRIERSON,	)	Honorable
	)	Pamela M. Leeming,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's conviction for possession of cannabis is reversed where evidence was insufficient to establish beyond a reasonable doubt that the nature of the substance in defendant's possession was, in fact, cannabis.

¶ 2 Following a stipulated bench trial, defendant Marcus Frierson was convicted of misdemeanor possession of cannabis and sentenced to one day in jail, time considered served. On appeal, defendant challenges the sufficiency of the evidence to sustain his conviction. Alternatively, he contends that any evidence that he was in possession of cannabis (also called

marijuana) was obtained through an illegal search and seizure and thus, this evidence should be suppressed and his conviction reversed.

¶ 3 Defendant was charged with violation of a Maywood municipal ordinance prohibiting consumption of alcohol on public roadways (Maywood Municipal Code §117.59(A)(1) (adopted July 19, 2004)) and possession of cannabis (720 ILCS 550/4-A (West 2012)).

¶ 4 Prior to trial, defendant filed a motion to quash arrest and suppress evidence on the basis that the evidence of cannabis was obtained due to an unlawful search and seizure in violation of his constitutional rights under the Fourth Amendment. U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6. At the hearing on this motion, Maywood police officer Patrick Reilly testified that on August 4, 2013, he detained defendant after observing him standing on the sidewalk with an open beer bottle in his hand and a second open beer bottle on the sidewalk next to him. He performed a "pat down" search of defendant for "officer safety" and asked defendant if he "had anything illegal on his person." Defendant replied that he had two bags of marijuana in his right pocket. Officer Reilly recovered the bags then placed defendant under arrest.

¶ 5 Officer Reilly testified the area where he approached defendant was known to him as a high crime area based upon his numerous previous patrols of the area. He did not recall seeing any bulges in defendant's pants and there were no warrants for defendant's arrest. Officer Reilly did not see any visible weapons, did not observe defendant drink from the bottle of beer, nor did he see anything else in defendant's hands besides the beer bottle.

¶ 6 The parties conceded that Officer Reilly had reasonable suspicion to perform an investigatory stop based upon defendant's presumed violation of the municipal ordinance. Defense counsel argued, however, that absent reasonable suspicion that defendant was armed, the frisk was performed unlawfully. Counsel also argued that the search could not be justified as

a search incident to an arrest because the officer lacked probable cause to infer that defendant was involved in criminal activity as the municipal ordinance prohibited consumption of alcohol on public roadways and the officer did not see defendant drink from the beer bottle. The State countered that the officer's search was "justified *** under *Terry"* (*Terry v. Ohio*, 392 U.S. 1 (1968)).

¶ 7 Specifically, the State argued it was not necessary that the officer observe defendant consume the beer to infer he violated the municipal ordinance and that the officer's observations were sufficient to establish "reasonable suspicion that there is criminal activity occurring, despite there not being probable cause that [defendant] had actually consumed the alcohol as he was observing the defendant." Rather, the State asserted that because defendant "[was not] under arrest at that time *** [the stop] need not be based on probable cause *** therefore, the stop was justified. As to the frisk, *** this is a high crime area. The officer patrolled that area over a hundred times, more than he can even count."

¶ 8 The trial court denied defendant's motion to quash arrest and suppress evidence and defendant filed a motion to reconsider.

¶ 9 At the hearing on the motion to reconsider, the trial court, citing *People v. Fitzpatrick*, 2011 IL App (2d) 100463 (search incident to custodial arrest for petty offense does not violate prohibition against unreasonable searches and seizures), concluded the search and seizure was justified because it was a search incident to an arrest although the original violation was an offense only punishable by fine. The court then denied defendant's motion to reconsider and the matter proceeded to a bench trial.

¶ 10 At trial, the parties stipulated to Officer Reilly's testimony from the hearing on the motion to quash and defendant renewed his objection to the admission of any evidence or testimony

relating to marijuana. Over defendant's objection, the trial court admitted this evidence and found defendant guilty of possession of cannabis.

¶ 11 On appeal, defendant first contends that the evidence was insufficient to establish beyond a reasonable doubt that he was in possession of cannabis. Specifically, citing *People v. Park*, 72 Ill. 2d 203 (1978), defendant argues that his alleged admission to Officer Reilly that he had two bags of marijuana and the officer's "bare" testimony that he recovered cannabis were insufficient to establish that the substance recovered was, in fact, cannabis. Defendant argues that absent sufficient proof beyond a reasonable doubt of the identity of the substance, his conviction must be reversed. For the reasons that follow, we agree and reverse.

¶ 12 When a defendant challenges the sufficiency of the evidence to sustain his 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). The State bears the burden of proving each element of the charged offense beyond a reasonable doubt and a conviction will only be overturned where the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt. *People v. Diaz*, 377 Ill. App. 3d 339, 345 (2007); *Beauchamp*, 241 Ill. 2d at 8.

¶ 13 Section 550 of the Cannabis Control Act provides that it is "unlawful for any person knowingly to possess cannabis." 720 ILCS 550/4 (West 2012). In order to sustain a conviction for possession of cannabis, the State must prove beyond a reasonable doubt that, *inter alia*, the substance in question was, in fact, cannabis. *Park*, 72 Ill. 2d at 211-12. The identity of the substance may be established through expert testimony or, in the absence of expert testimony, through other evidence, including circumstantial evidence. *People v. Ortiz*, 197 Ill. App. 3d 250,

255 (1990). Crucially, as explained by our supreme court in *Park*, 72 Ill. 2d at 212, a defendant's admission regarding the identity of the substance must be corroborated by substantial independent evidence – circumstantial or otherwise. *Park*, 72 Ill. 2d at 212.

¶ 14 In *Park*, two police officers testified that defendant admitted that he was in possession of marijuana found in an envelope recovered after officers conducted an investigatory stop pursuant to a tip they received that the defendant was involved in an illegal drug transaction. *Park*, 72 Ill. 2d at 206. The only direct evidence that the envelope contained marijuana was testimony from a deputy sheriff. *Id.* The supreme court held this testimony inadmissible, finding the officer's limited experience and lack of training in identifying marijuana did not qualify him to state an opinion on the identification of the substance received from the defendant. *Id.* at 210-11.

¶ 15 The court concluded that in absence of any substantial independent corroborating evidence – circumstantial or otherwise – defendant's admission was not sufficient to sustain his conviction for possession of cannabis. *Id.* at 212. In so finding, the court stated:

> "While we have no doubt that the State produced evidence from which the jury could have concluded that the defendant believed the substance contained cannabis, the defendant was not charged with possession of a substance which he believed to contain cannabis. Rather, he was charged with possession of a substance which, *in fact*, contained cannabis. The State therefore was required to prove the actual identity of the substance in question beyond a reasonable doubt." (Emphasis in original.) *Id.* at 211-12.

In the absence of any evidence showing the defendant "had some means of knowing that the substance in question contained cannabis," the defendant's statement that the envelope contained cannabis was insufficient to establish the substance was, in fact, cannabis. *Id.* at 212. The court noted there was no proof that "the principals had taken steps to assure themselves of the identity

of the substance" as there was no evidence that the drugs were sold at a high price, that a large quantity of drugs was involved, nor "evidence of the effect of the substance upon a human subject." *Id.* at 212-213.

¶ 16 Here, the State's only proof of the identity of the substance in the bags removed from defendant's pocket was Officer Reilly's testimony. Officer Reilly testified as follows:

> "A. [Officer Reilly] I asked if he [defendant] had anything illegal on his person.
>
> ***
>
> A. He replied that he had I believe two bags of marijuana on him in his right pocket.
>
> Q. Did you subsequently recover marijuana?
>
> A. I did."

The entirety of this colloquy can be summarized as follows: Defendant believed the substance he held in his pocket was marijuana and informed Officer Reilly of its existence. Officer Reilly then recovered "marijuana." Further, the record is devoid of even a basic description of the contents of the bags.

¶ 17 Standing alone, defendant's statement that the bags contained marijuana is insufficient to establish that the substance was indeed marijuana. *Id.* at 212. Officer Reilly's testimony, the only evidence submitted by the State, does not provide the necessary corroboration to establish that identity. It is unclear from Officer Reilly's testimony whether he was relying on defendant's own belief that what he possessed was marijuana or whether the officer made this determination himself. The record does not contain any evidence regarding Officer Reilly's basis for identifying the substance as marijuana or his qualifications to make such identification, nor does it contain even a basic description of the contents of the bags from which to infer the composition of the contents. As in *Park,* the State failed to introduce evidence that sufficiently established a

substantial and independent basis to corroborate defendant's admission that the substance in his possession was marijuana. *Id.* at 212-213. We therefore conclude the State has failed to meet its burden to prove the identity of the substance beyond a reasonable doubt.

¶ 18 We acknowledge that chemical testing is not necessary to establish that a recovered substance was a controlled substance. *People v. Robinson*, 14 Ill. 2d 325, 330-31 (1958). Nevertheless, police officers are not presumed to possess the experience required to identify narcotic substances. *Park*, 72 Ill. 2d at 211. Here, the only testimony regarding the officer's level of expertise or the basis of the officer's knowledge was his statement that he knew the area where he encountered defendant was a "high crime area," based upon previously participating in "too many [patrols] to count." This fact, however, does not address whether the officer was familiar with or able to identify marijuana based upon his training, experience, or familiarity with the drug. See *e.g. People v. Glisson*, 359 Ill. App. 3d 962, 969 (2005) (finding officers' testimony sufficient to identify substance as anhydrous ammonia where, although not experts, officers testified that they have encountered the substance previously and noted it has a highly distinctive smell). In fact, there is no basis in the record for the identification at all.

¶ 19 The State nevertheless contends that *Ortiz*, 197 Ill. App. 3d 250 (1990), supports its position that sufficient corroborating evidence existed to establish the identity of the substance as cannabis. In *Ortiz*, the only direct evidence that the substance the defendant possessed was cocaine was his voluntary admission that he possessed cocaine when filing a complaint against the police after his arrest, and the stipulated "chemist's report" that the substance recovered from defendant tested positive for cocaine. *Id.* at 255-256. The chemist's report, however, was not given the weight of "expert testimony" where the State failed to stipulate to the chemist as an expert witness and thus was given little to no weight. *Id.* Nevertheless, the court concluded that

there was sufficient corroborating evidence to establish the recovered substance was cocaine based upon several factors including: the defendant's "actual knowledge that a substance was a drug," "[the officer's] identification of the substance as a white powder," and "[the] defendant's voluntary admission." *Id.* at 256.

¶ 20 Relying on *Park*, the *Ortiz* court determined the defendant's "actual knowledge" that the substance did contain cocaine based upon the following corroborating circumstances: "the manner in which [the] defendant clasped the bag with the substance, his stubborn refusal to open his hands when ordered to do so, his sudden attack on the police officer, his attempted flight from the police officers and his determined refusal to turn the bag over to the police until after the 10 minute struggle." *Id.* (citing *People v. Jones*, 75 Ill. App. 3d 214, 222 (1979) (finding "substantial evidence that defendant had a means of knowing that the substance in question contained cannabis" where the "evidence revealed that defendant smoked some of the substance *** and that after smoking some of it *** he agreed with *** [the] characterization of the marijuana as "fair stuff for being Mexican.")).

¶ 21 In addition, *Ortiz* distinguished itself from *Park* on the basis that: "In *Park*, although there was an admission by defendant, the admission was made under the pressure of a police investigation of the crime and there were insufficient corroborating circumstances." *Id.* at 257. In contrast, in *Ortiz*, the defendant made the admission voluntarily that the white powder he possessed was cocaine when filing a complaint against the arresting officers. *Id.* at 256.

¶ 22 We find *Ortiz* distinguishable and agree with defendant that the case at hand is squarely controlled by the precedent set by our supreme court in *Park*. Unlike in *Ortiz*, there is no corroborating evidence in the present case. Officer Reilly did not provide a description of the contents of the bags he recovered from defendant's pocket. There was also no evidence presented

regarding any evasive actions taken by defendant or regarding his personal knowledge from which to infer defendant had "actual knowledge" that the substance was cannabis.

¶ 23 Instead, as in *Park*, the only evidence that the substance recovered was cannabis was defendant's admission to the officer that he possessed the marijuana after police detained and frisked him. As previously stated, Officer Reilly's response "I did" to the question, "Did you subsequently recover marijuana?" is insufficient to constitute substantial and independent corroborating evidence. Moreover, as in *Park* and unlike in *Ortiz*, defendant's admission was made under pressure pursuant to an investigatory stop and thus, "its probative value or weight is limited, in the absence of substantial evidence that [defendant] had some means of knowing that the substance in question contained cannabis." *Park*, 72 Ill. 2d at 212. We have no such evidence of defendant's knowledge here.

¶ 24 Therefore, the State failed to prove beyond a reasonable doubt that the substance recovered from defendant was, in fact, cannabis, and thus, no rational trier of fact could conclude that the elements of the instant conviction for possession of cannabis were proven beyond a reasonable doubt.

¶ 25 Given this determination, we need not address defendant's alternative contention that his conviction should be reversed because the evidence was obtained unlawfully.

¶ 26 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County.

¶ 27 Reversed.