FOURTH DIVISION
April 21, 2016

No. 1-14-1385

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 10636
	)	
GRADY BISHOP,	)	Honorable
	)	Rickey Jones,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial evidence established defendant was guilty beyond a reasonable doubt of delivery of a controlled substance; defendant was entitled to two extra days of presentence custody credit; the fines and fees order was ordered corrected to vacate three inapplicable fees and to reflect the offset of certain fines against presentence custody credit.

¶ 2 Following a bench trial, defendant Grady Bishop was found guilty of delivery of a controlled substance (cocaine). He was sentenced to six years in prison and was awarded 336 days of presentence custody credit. On appeal, defendant contends the State failed to prove him guilty beyond a reasonable doubt. Defendant also asserts that he should have been awarded two

additional days of presentence custody credit and that some assessments in the order assessing fines and fees either are inapplicable or should have been offset by the $5 per day credit for presentence time in custody. We affirm defendant's conviction and amend the mittimus to correct defendant's presentence custody credit and assessment of fines and fees.

¶ 3 Defendant was charged by information with multiple drug counts. The State proceeded to trial on one count of delivery of a controlled substance.

¶ 4 At trial, Officer Melvin Ector, a 20-year veteran of the Chicago Police Department (CPD), testified that at about 3:30 p.m. on May 13, 2013, he was assigned as part of a team of undercover officers investigating drug offenses. Ector observed a man on West 60th Street, "in front of 2613 on the porch area" which was "two houses down from the corner." The man was wearing a tan jacket and blue jeans. Ector approached the man and asked if he knew "where I could find some C." Defendant said, "Yes," and asked Ector how many he wanted. Ector replied that he wanted two bags. At trial, Ector testified that "C" stood for crack cocaine and identified defendant as the man with whom he had the conversation about supplying cocaine.

¶ 5 Ector testified that defendant placed a call on a cell phone. Defendant was standing on the sidewalk during the phone call. Ector heard defendant tell someone on the phone that he had a customer looking for two C's. The phone call took about one minute. Then defendant hung up the phone and told Ector to give him $20. Ector tendered to defendant a $20 bill in "Chicago Police Department 1505 funds." Defendant told Ector to follow him and walked east to Rockwell, then south, and eventually arrived at 70th and Maplewood. Defendant instructed Ector to wait, and then left. Ector lost sight of defendant when he went down an alley. Ector sat on a fire hydrant and waited for defendant, who returned about five minutes later. Defendant spit from

his mouth into his hand two knotted bags containing a "white rock-like substance, suspect crack cocaine," and gave them to Ector. Ector gave his surveillance officer a prearranged signal to alert that a positive narcotics transaction had taken place. Then Ector went to his vehicle and radioed to his team members, giving them defendant's description, last known location, and details of the transaction.

¶ 6 About five minutes later, Ector was notified that defendant had been detained. Ector "did a drive by" on Maplewood from his vehicle. He believed the showup address was 6900 Maplewood, but he was not sure of the exact address. The showup took place on the same block as where the delivery occurred, about 50 feet away. Defendant had been detained by Officers Zinchuk and Troutman who were in the enforcement car. Ector stopped his car, positively identified defendant as the individual who had sold him the bags of suspect cocaine, and then drove off; Ector never got out of his car. At trial, he could not recall what defendant was wearing on his head or under his jacket on the date of the transaction.

¶ 7 Ector secured possession of the two bags until he turned them over to Officer Troutman, his evidence officer, and watched as Troutman inventoried and heat-sealed the bags and placed them in an evidence locker to be given to the Illinois State Police crime lab. Defense counsel showed Ector five photographic exhibits. He testified he did not recognize the building depicted in the first photograph and did not recognize what was depicted in the other four exhibits. (K19-20)

¶ 8 Officer Edwin Utreras testified that he was working as a surveillance officer on the same team as Officer Ector on the afternoon of May 13, 2013. He observed Ector exit his undercover vehicle, go to "the address of approximately 2613 West 69th Street" and have a brief

conversation with defendant, who was wearing a white Michael Jordan ball cap, a tan shirt, and blue jeans. Utreras, who was observing this from his car about 100 feet away, saw Ector hand defendant some money. Ector and defendant walked east and south, and Utreras followed them in his car. He did not need any visual aid to maintain his observation of defendant and Ector. Utreras saw the two men walk to Maplewood and 70th Street and stop next to a fire hydrant. Ector stayed by the hydrant while defendant walked east and then south in the alley between Maplewood and Campbell. He then "cut inside one of the gangways, and then we lost sight of him." Defendant reappeared about five minutes later and walked back to Ector. Defendant spit something out of his mouth and handed it to Ector, who gave a prearranged signal and walked away. The exchange took place in less than a minute. Defendant remained by the fire hydrant until he was detained less than five minutes later by enforcement officers.

¶ 9 Utreras testified that the location where Ector first approached defendant was residential. He testified, "I believe it was approximately 2613 West 69th Street." Utreras was shown the five defense photographs. He testified the first photograph showed a two-flat apartment which he did not recognize. He did not recognize what was in the other four exhibits. He did not believe any of the photographs depicted the location where he saw Ector approach defendant, which would be on the south side of the street. It was "approximately 2613, I don't recall what was on either side." Utreras did not recall what color the building was, how tall it was, or anything about it. Utreras testified that no drugs and no 1505 funds were recovered from defendant's person.

¶ 10 Officer Jeffrey Troutman testified that on May 13, 2013, he was acting as an enforcement officer with Utreras and Ector's team. Troutman was given a description of a male black wearing a tan jacket and blue jeans and standing approximately on the corner of 70th and Maplewood.

Troutman observed defendant on that day at that location. Observing that defendant matched the description given by Ector, Troutman and other officers detained him. Moments later, Officer Ector came by and made a positive identification of defendant by radio as the man who sold cocaine to him. Defendant was standing on the corner of 70th and Maplewood with Troutman and Officer Zinchuk. Following Ector's identification, Troutman placed defendant under arrest. No drugs, weapons, 1505 funds, or large sums of money were found on defendant's person. Troutman testified to the inventorying and chain of custody of the two bags of suspect cocaine Ector purchased from defendant.

¶ 11 The parties stipulated that, if called to testify, forensic chemist Kimberly Blood would testify that she received the two inventoried clear bags containing a chunky substance. She tested the contents of one of the bags and determined within a reasonable degree of scientific certainty that the contents tested positive for cocaine. The estimated weight of the two bags was 0.2 gram and the actual weight was 0.1 gram.

¶ 12 After the State rested, the defense called Alicia Stewart, an investigator for the Cook County Public Defender's Office. On October 7, 2013, she was sent to photograph the crime scene at 2613 West 69th Street. She was unable to find a building with that particular address number. She took the five photographs constituting the defense exhibits shown to the State witnesses. The photographs depicted buildings at 2609, 2611, 2615, and 2617 West 69th Street.

¶ 13 The trial court found defendant guilty of delivery of a controlled substance after finding that the four State witnesses were credible and that inconsistencies in their testimony were "minor and insignificant." Subsequently, the trial court denied defendant's motion for new trial. The court sentenced defendant to six years in prison, credited him for 336 days of presentence

custody, and ordered the imposition of court costs and fees. The order assessing fines, fees and costs reveals that defendant was assessed a total of $2,054.

¶ 14 On appeal, defendant asserts that the evidence was not sufficient to establish his guilt beyond a reasonable doubt. He contends the testimony of the police officers was "riddled with inconsistencies, inaccuracies, and improbable events."

¶ 15 When considering a challenge to a criminal conviction based upon the sufficiency of the evidence, our inquiry is limited to "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); accord, *People v. Rowell*, 229 Ill. 2d 82, 98 (2008). This standard of review recognizes the responsibility of the trier of fact to assess witness credibility, to weigh the evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the testimony. *People v. Billups*, 384 Ill. App. 3d 844, 846 (2008). "Because the trial judge is in a superior position to weigh the evidence and decide on the credibility of the witnesses, we may not reverse the judgment merely because we might have reached a different conclusion." *People v. Love*, 404 Ill. App. 3d 784, 787 (2010). A reviewing court must allow all reasonable inferences from the record in favor of the prosecution and will not overturn the decision of the trier of fact unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). Rather, the relevant inquiry is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Rowell*, 229 Ill. 2d at 98.

¶ 16 Defendant contends that the State failed to establish his guilt beyond a reasonable doubt because of flaws in the testimony of the State's witnesses. Defendant notes that Ector could not remember the date of the offense without referring to a police report and that Ector and Utreras testified they saw defendant at 2613 West 60th Street, an address that did not exist. Defendant argues that they differed in their descriptions of him, with Utreras describing him as wearing a white Michael Jordan baseball cap, tan shirt, blue jeans and Ector testifying he wore a tan jacket and blue jeans but could not remember what he wore on his head. Ector testified defendant made a phone call before he asked Ector for the $20; Utreras's testimony did not mention the phone call. The alleged flaws in the testimony of the State witnesses were minor. In all other respects, the testimony of the officers was clear and detailed. Moreover, these same alleged imperfections in the State's case were presented to and rejected by the trial court in defendant's written posttrial motion and his counsel's argument on the motion. Where the same argument was presented to the trial court, it is not our prerogative to retry the case. *People v. Castillo*, 372 Ill. App. 3d 11, 20 (2007).

¶ 17 Defendant also argues that the testimony of the two officers differed as to the exact site of his arrest. He points out that Utreras testified defendant stayed by the fire hydrant after the drug sale, but that Ector testified defendant was arrested about 50 feet from where he delivered the drugs. Defendant misapprehends the record. Ector testified to the location of the showup, not the arrest. Consequently, the officers' testimony was not conflicting.

¶ 18 Defendant further asserts that Ector and Utreras testified to "highly improbable" events. Defendant queries why Ector approached him in the first place, *i.e.*, why Ector thought defendant was a drug seller. Defendant also posits that Utreras's testimony, that defendant remained

standing by the fire hydrant for five minutes after delivering the drugs to Ector, was improbable. Defendant's argument asks us to speculate on what might have been the purpose, reason, or motivation in Ector or defendant acting a certain way. However, the standard of review focuses on the sufficiency of the evidence actually presented at trial by the State. *People v. Howard*, 376 Ill. App. 3d 322, 330 (2007). That the answers to defendant's questions were not in the record does not make the testimony improbable. Each of the three officers giving trial testimony provided a consistent and corroborated chain of events leading to defendant's arrest. Their credibility was a matter within the province of the trier of fact. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). Defendant's contentions are no more than an attack on the officers' credibility and the weight to be assigned to their testimony. In reviewing a challenge to the sufficiency of the evidence, it is not the function of this court to substitute its judgment for that of the trier of fact on issues of the weight of evidence or the credibility of witnesses. *People v. Cooper*, 194 Ill. 2d 419, 431 (2000).

¶ 19 Additionally, defendant contends that the showup identification procedure was "so suggestive that it could not have been deemed reliable." We disagree. The showup procedure here did not undermine the reliability of Ector's identification of defendant. Generally, identification testimony is based on the factors presented in *Neil v. Biggers*, 409 U.S. 188 (1972): (1) the opportunity the witness had to view the offender at the time of the crime; (2) the degree of attention given by the witness; (3) the accuracy of the witness' prior description of the offender; (4) the level of certainty the witness demonstrated when identifying the perpetrator in person; and (5) the amount of time that lapsed between the crime and the in-person identification. *People v. Slim*, 127 Ill. 2d 302, 307-08 (1989). Only the third factor is not

applicable. Under the remaining factors, Ector's identification was reliable. He had an excellent opportunity to observe defendant both before and after defendant procured the cocaine and tendered it to him. As a police officer witness, Ector's degree of attention would be high and greater than that of an average citizen witnessing a crime. See *People v. Stanley*, 397 Ill. App. 3d 598, 611 (2009). Ector was certain of his identification in the showup that occurred only minutes after the drug deal was consummated. Consequently, we reject defendant's contention that the showup was suggestive and the identification unreliable. We conclude that defendant's guilt of the offense charged was established beyond a reasonable doubt.

¶ 20 Defendant also argues and the State properly concedes that he is entitled to two additional days of credit for presentence custody. Defendant was arrested on May 13, 2013, and was sentenced on April 16, 2014. He was awarded 336 days of credit for time served in custody. We agree with defendant's calculation that he spent 338 days in custody excluding the sentencing date and must be awarded an additional two days of credit for presentence custody.

¶ 21 Defendant next contests the order assessing a total of $2,054 in fines, fees and costs. We review the propriety of a trial court's imposition of fines and fees *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 22 Defendant contends, and the State agrees, that he is entitled to a $1,690 credit, based on a statutory $5-per-day credit for enumerated fines assessed against him, for the 338 days he spent in presentence incarceration. 725 ILCS 5/110-14(a) (West 2014). The presentence custody credit applies only to reduce fines, not fees. *People v. Jones*, 223 Ill. 2d 569, 599 (2006). A fine is a punitive charge imposed as punishment on a person convicted of a criminal offense. *Id*. at 581.

In contrast, a fee is not pecuniary and seeks only to reimburse the State for expenses incurred for prosecuting a particular defendant. See *People v. Graves*, 235 Ill. 2d 244, 250 (2009).

¶ 23 Defendant is entitled to $1,180 worth of presentence incarceration credit toward the following charges, and the State agrees: $10 Mental Health Court charge (55 ILCS 5/5-1101(d-5) (West 2014)); $5 youth diversion/peer court charge (55 ILCS 5/5-1101(e) (West 2014)); $5 drug court charge (55 ILCS 5/5-1101(f) (West 2014)); $30 Children's Advocacy Center charge (55 ILCS 5/5-1101(F-5) (West 2014)); $30 juvenile expungement charge (730 ILCS 5/5-9-1.17 (West 2014)); $1,000 controlled substance charge (720 ILCS 570/411.2(a) (West 2014)); and $100 trauma center charge (730 ILCS 5/5-9-1.1(b) (West 2014)).

¶ 24 Defendant asserts, and the State concedes, that three fees assessed against him should be vacated. We accept the State's concession that those three charges should be vacated because they are inapplicable to defendant's offense. The $20 Probable Cause Hearing fee (5 ILCS 5/4-2002.1(a) (West 2014)) is inapplicable where defendant was charged by indictment. *People v. Smith*, 236 Ill. 2d 162, 174 (2010). The $250 State DNA ID System Analysis charge (730 ILCS 5/5-4-3(a),(j) (West 2014)) must be vacated because defendant had prior felony convictions that would have required a specimen of his DNA to be taken and, consequently, he was not required to submit another sample or pay another DNA analysis fee. *People v. Marshall*, 242 Ill. 2d 285, 302 (2011). The $5 Electronic Citation fee (705 ILCS 105/27.3e (West 2014)) must also be vacated because it is applicable only in traffic, misdemeanor, municipal ordinance, or conservation cases.

¶ 25 Defendant asserts he was improperly assessed $77 for four charges that were improperly assessed as fees but should have been assessed as fines and offset by presentence credit: a $15

State Police Operations charge, $50 Court System charge, $2 Public Defender Records Automation charge, and $10 Probation and Court Services Operations charge.

¶ 26 The State concedes that $15 State Police operations charge (705 ILCS 105/27.3a(1.5) (West 2014)) and the $50 Court System charge (55 ILCS 5/5-1101(c) (West 2014)) are fines subject to offset by presentencing incarceration credit, according to the reasoning in *Jones*, 223 Ill. 2d at 588. We agree that the $15 State Police Operations assessment is a fine and should have been offset by presentence credit. Moreover, this court has repeatedly held that the Court System charge is a fine and not a fee. See *People v. Ackerman*, 2014 IL App (3d) 120585, ¶ 30; *People v. Wynn*, 2013 IL App (2d) 120575, ¶ 17. Thus, the $65 from these two charges were improperly assessed as fees but should have been assessed as fines and offset by presentence credit, raising the total of fines offset by credit to $1,245.

¶ 27 The State contends, however, that defendant's presentence incarceration credit is not applicable to offset the $2 Public Defender Records Automation charge (55 ILCS 5/3-4012 (West 2014)) and the $10 Probation and Court Services Operations charge (705 ILCS 105/27.3a-1.1 (West 2014)) are compensatory in nature and, therefore, are fees not eligible to be offset by credit.

¶ 28 As to the $2 Public Defender Records Automation fee, we have considered and rejected previously the same argument posed here by defendant and have held that this charge constitutes a fee, not a fine. *People v. Bowen*, 2015 IL App (1st) 132046, ¶¶ 62-65. We find no reason to depart from that holding here.

¶ 29 Likewise, we agree with the State that the $10 Probation and Court Services Operations charge is a fee. Defendant acknowledges this court's holding in *People v. Rogers*, 2014 IL App

(4th) 121088, ¶¶ 37-38, where we discussed the compensatory nature of probationary charges and held that when a probation officer is involved in the defendant's prosecution, this assessment constitutes a fee. Here, pursuant to the trial court's order, the probation office was used to create a presentence investigation report which the trial court considered during sentencing. Thus, this assessment is reimbursing the State for charges incurred in defendant's prosecution. We decline to depart from our holding in *Rogers* and conclude that the $10 Probation and Court Services Operations charge is a fee which may not be offset by presentence incarceration credit.

¶ 30 Pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999) and our authority to correct a mittimus without remand (*Bowen*, 2015 IL App (1st) 132046, ¶ 68), we direct the clerk of the circuit court to correct the mittimus to reflect that defendant is to be credited with 2 additional days for a total credit of 338 days of presentence credit; we vacate the inapplicable $20 Probable Cause Hearing fee, $250 State DNA ID System Analysis fee, and $5 Electronic Citation fee (reducing the total of assessments to $1,779); and apply the $5 *per diem* credit for presentence custody served to offset the $10 Mental Health Court charge, $5 Youth Diversion/peer court charge, $5 Drug Court charge, $30 Children's Advocacy Center charge, $30 Juvenile Expungement charge, $1,000 Controlled Substance charge, $100 Trauma Center charge, $15 State Police Operations charge, and $50 Court System charge, increasing the amount of fines offset by presentence incarceration credit to $1,245, thus reflecting a total assessment of $534 ($1,779 minus $1,245 credit offset). We order the clerk of the circuit court to modify the fines and fees order accordingly. We affirm the judgment of the circuit court in all other respects, including with regard to the $2 Public Defender Records Automation fee and the $10 Probation and Court Services Operations fee.

¶ 31 Affirmed; mittimus and fines and fees order corrected.