2017 IL App (1st) 151957-U

No. 1-15-1957

Order filed November 17, 2017

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 9937
	)	
DAVON KETCHUM,	)	Honorable
	)	Tommy Brewer,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient to prove defendant guilty beyond a reasonable doubt of possession of cannabis with intent to deliver. The trial court did not abuse its discretion in imposing a sentence of 36 months of probation.

¶ 2 Following a bench trial, defendant Davon Ketchum was found guilty of two counts of possession of cannabis with intent to deliver (720 ILCS 550/5(d), (e) (West 2014)) and sentenced to 36 months of probation. On appeal, defendant contends that the State did not prove beyond a

reasonable doubt that he intended to deliver the cannabis and that his sentence was excessive. We affirm.

¶ 3 On May 12, 2014, Cook County sheriff's police executed a search warrant at a single family residence located at 14336 Irving Avenue in Dolton, Illinois. Defendant, codefendant Curtis Ketchum, and an individual named "Reggie" were inside the residence when the officers executed the search warrant. Defendant was charged with three counts of armed violence, two counts of possession of cannabis, two counts of possession of cannabis with intent to deliver, and one count of possession of a controlled substance.[1]

¶ 4 At trial, Cook County sheriff's police officer John Merola testified that, after he forced entry into the residence, he immediately saw defendant running from the living room towards the back of the residence, where he disappeared into a stairwell. Merola saw two other individuals on the floor against the wall in the dining room as he pursued defendant. When Merola reached the stairwell, which went down into the basement, he waited for his teammates before he continued down the stairs. As Merola's teammates arrived, defendant came up the stairs with his hands raised in the air and was detained.

¶ 5 Cook County sheriff's police sergeant Gary Newsome testified that, when he entered the residence, he observed defendant run down a stairwell. Merola followed defendant. When defendant came back upstairs, the officers detained him. Newsome asked defendant if there were any guns in the basement, and defendant told him that his mother might have a gun in a dresser in the basement.

[1] Curtis Ketchum, who was tried jointly with defendant, was acquitted of all charges, and is not a party to this appeal.

¶ 6 Cook County sheriff's police investigator Dignan testified that, when he entered the residence, Curtis Ketchum and "Reggie" were being detained in the "front room area." On an end table next to the couch in the living room, Dignan recovered a loaded handgun, four yellow pills, and two plastic bags containing suspect cannabis. From under the couch, he recovered one yellow pill. In the northeast bedroom, he recovered a "Mossberg" shotgun. In the northwest bedroom, he recovered two rifles and, from the bottom shelf of a nightstand, a bag containing suspect cannabis. In the basement, he recovered a "white bag containing a clear plastic bag with a significant amount of suspect cannabis in it." From a cabinet in the dining room, Dignan recovered multiple rounds of ammunition. He recovered $706.75 of United States currency from defendant's person.

¶ 7 On cross-examination, Dignan testified that defendant had a valid Firearm Owners Identification (FOID) card. Dignan did not recover any documents showing evidence of drug transactions. Defense counsel asked Dignan if he inventoried "any empty drug packaging." Dignan stated that he believed "there was some" "clear plastic bags" found in the kitchen. He could not recall if he saw "ziplock bags" or "plastic sandwich bags" but testified that "[t]here were some bags recovered in the kitchen."

¶ 8 Cook County sheriff's police investigator Sandoval testified that, in the northeast bedroom, from inside the top dresser drawer, he recovered "miscellaneous mail mailed" to defendant and "a small, clear plastic bags [*sic*] containing a green, leafy substance that was field tested positive for cannabis." In the northwest bedroom, from inside a drawer of a nightstand, Sandoval recovered a digital scale.

¶ 9 Cook County sheriff's police investigator Hernandez testified that, in the northwest bedroom, there was mail and other documents addressed to Curtis Ketchum and, from inside a shoe, he recovered a clear plastic bag containing a "green, leafy substance." At the police station, Hernandez read defendant his *Miranda* warnings. Defendant gave a statement, which was memorialized and read into the record by the State as follows:

> "On today's date the police raided my mother's house and found cannabis. When the police were there - - were entering the house, I ran who [*sic*] the basement with a pound of cannabis that I tried to hide. As I was walking up the stairs, the police stopped me and handcuffed me. My brother Curtis and my friend Reggie are not involved. The four weapons found on the first floor are registered to me. The gun found on in [*sic*] the basement belongs to my mother."

¶ 10 On cross-examination, Hernandez testified that defendant never told him that he sold the cannabis, packaged it for sale, or intended to give it to anyone else.

¶ 11 The State entered a stipulation that Dignan inventoried six plastic bags of "green, leafy substance" and four yellow tablets. The State also entered a stipulation that a forensic chemist from the Northeastern Illinois Regional Crime Laboratory would testify that she weighed three of the six bags and "the total weight of those three items was 579.9 grams and it tested positive for cannabis." The total weight included the cannabis recovered from the end table in the living room in the amount of 35.6 grams, the cannabis recovered from the northwest bedroom in the amount of 95 grams, and the cannabis recovered from the basement in the amount of 449.3 grams. She would also testify that the four pills recovered from the end table in the living room table tested positive for dihydrocodeinone in the amount of 1.71 grams.

¶ 12 Following argument, the trial court found defendant not guilty of the armed violence and possession of a controlled substance (dihydrocodeinone) counts. It found him guilty of two counts of possession of cannabis with intent to deliver (Class 2 delivery of more than 500 grams but less than 2000 grams; Class 3 delivery of more than 30 grams but less than 500 grams). It also found him guilty of two counts of possession of cannabis in the same amounts.

¶ 13 Defendant filed a motion for a new trial or to reconsider. At the hearing on the motion, defendant argued that, although he admitted he possessed the 579 grams of cannabis found in the home, there was no evidence that he intended to deliver the cannabis. The court denied defendant's motion.

¶ 14 "Considering the factors in aggravation and mitigation," the court then sentenced defendant to 36 months of probation. The court denied defendant's motion to reconsider sentence.

¶ 15 Defendant's first contention on appeal is that the State did not prove him guilty of possession of cannabis with intent to deliver because it did not prove that he intended to deliver the cannabis. He asserts, *inter alia*, that the recovered cannabis was not individually packaged for sale, the police did not find any packaging materials to show that he planned to package and sell the cannabis, and the cannabis could have been for personal use. Defendant requests that we reduce his convictions to simple possession of cannabis.

¶ 16 On appeal, when we review the sufficiency of the evidence, the question is 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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). It is the fact finder's responsibility "to determine the

credibility of the witnesses and draw reasonable inferences from the evidence." *People v. Robinson*, 167 Ill. 2d 397, 413 (1995). Circumstantial evidence is sufficient to support a conviction. *People v. Brown*, 2013 IL 114196, ¶ 49. We will not retry a defendant (*People v. Fleming*, 2013 IL App (1st) 120386, ¶ 71) and will only reverse a conviction if the evidence "is plainly contrary to the verdict or so improbable or unsatisfactory that there remains a reasonable doubt of the defendant's guilt" (*People v. McCarty*, 356 Ill. App. 3d 552, 565 (2005)).

¶ 17 To prove defendant guilty of possession of cannabis with intent to deliver, the State had to prove that (1) defendant had knowledge of the presence of the cannabis, (2) the cannabis was in his immediate control or possession, and (3) he intended to deliver the cannabis. *McCarty*, 356 Ill. App. 3d at 565. On appeal, defendant only challenges the sufficiency of the evidence with respect to the third element, his intent to deliver the cannabis.

¶ 18 The element of intent to deliver is generally proven by circumstantial evidence, as direct evidence of it is rare. *Robinson*, 167 Ill. 2d at 408. Factors courts consider to determine whether a defendant had intent to deliver include whether the quantity of the substance was too high to be considered for personal use, the high purity of the drug, the manner in which the substance was packaged, and whether the defendant possessed weapons, large amounts of cash, police scanners, beepers, cellular telephones, or drug paraphernalia. *Robinson*, 167 Ill. 2d at 408. However, this is not an "exhaustive" or "inflexible" list. *People v. Ellison*, 2013 IL App (1st) 101261, ¶ 14. Whether the evidence is sufficient to prove a defendant intended to deliver the controlled substance is determined on a case-by-case basis. *Robinson*, 167 Ill. 2d at 412-13.

¶ 19 There was sufficient circumstantial evidence to support the inference that defendant had the intent to deliver the cannabis found in the residence.

¶ 20 The total amount of cannabis recovered from the residence was 579.9 grams. The trial court could reasonably infer that 579.9 grams of cannabis was a high enough quantity that it could not reasonably be considered to be in defendant's possession for his personal use. See *McCarty*, 356 Ill. App. 3d at 565 (affirming the defendant's conviction for possession with intent to deliver more than 30 grams of cannabis, noting that 30 grams of cannabis was a "hefty quantity"). *People v. 1984 BMW 528E Auto*., 208 Ill. App. 3d 930, 935 (1991) (463 grams of cannabis was considered "more than a reasonable amount for personal use"). This amount of cannabis alone was sufficient to support the inference that defendant intended to deliver the cannabis. See *Robinson*, 167 Ill. 2d at 410-11 (when the amount of the controlled substance cannot reasonably be viewed as being possessed for personal use, then "the quantity of controlled substance alone can be sufficient evidence to prove intent to deliver beyond a reasonable doubt").

¶ 21 The $706.75 of United States currency found on defendant and his admitted ownership of the four weapons police recovered from the first floor of his residence provide additional circumstantial evidence supporting the inference that defendant intended to deliver the cannabis. See *Robinson*, 167 Ill. 2d at 408. (Possession of weapons and large amounts of cash are factors court consider probative of intent to deliver). Further, Dignan testified that he believed there was "some" "empty drug packaging" found in the kitchen. Although "ziplock" or "plastic sandwich bags" in a kitchen does not alone suggest that the bags were intended for drug packaging, given the other evidence probative of intent to deliver, including the 449.3 grams of cannabis defendant admitted to hiding in the basement, the trial court could reasonably infer that the plastic bags were intended for drug packaging.

¶ 22 Further, there was no evidence that drug paraphernalia associated with defendant's personal consumption of the cannabis, such as a pipes or other smoking devices, was found at the residence. See *People v. Williams*, 358 Ill. App. 3d 1098, 1103 (2005) (where the court affirmed the defendant's conviction for unlawful possession of a controlled substance with intent to deliver, it noted, among other factors, that no drug paraphernalia associated with the defendant's personal use of the substance was recovered); *People v. Johnson*, 334 Ill. App. 3d 666, 678 (2002) ("no drug paraphernalia used in personal consumption, such as pipes or other smoking devices, was found").

¶ 23 Similarly, the digital scale recovered from the residence is considered probative of intent to deliver. See *People v. Stewart*, 366 Ill. App. 3d 101, 111 (2006). Although the scale was not found in the same bedroom as the mail addressed to defendant, it was found in the same first floor bedroom as the two rifles. Given defendant's admission that he owned all the guns found on the first floor, it is therefore reasonable to infer that he was also in possession of the scale found in the same room as his rifles.

¶ 24 Viewed as a whole and in the light most favorable to the prosecution, the evidence was sufficient for a rational trier of fact to conclude that defendant possessed the 579.9 grams of cannabis with the intent to deliver. Thus, we affirm defendant's convictions for possession of cannabis with intent to deliver.

¶ 25 Defendant's second contention on appeal is that his sentence of 36 months' probation was excessive as it does not reflect adequate consideration of his potential for rehabilitation, specifically his young age, work history, schooling, family history, compliance with electronic

monitoring and curfew, and lack of criminal history. He requests that we reduce his probation term or remand for resentencing.

¶ 26 On review, we give great deference to the trial court's sentencing decision because it is in a better position to consider the relevant sentencing factors, including the particular circumstances of the case and the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). The defendant's rehabilitative prospects are a relevant sentencing factor. *People v. Bryant*, 2016 IL App (1st) 140421, ¶ 14. However, the trial court need not make an "express finding that the defendant lacked rehabilitative potential." *People v. Boclair*, 225 Ill. App. 3d 331, 335 (1992). Nor is it required to give more weight to rehabilitative potential than to the seriousness of the crime. *Boclair,* 225 Ill. App. 3d at 335-36. The trial court is in the best position to find an "appropriate balance between the goals of protecting society and rehabilitating the defendant." *People v. Risley*, 359 Ill. App. 3d 918, 920 (2005). The trial court is given great discretion to determine an appropriate sentence within the statutory limits (*Fern*, 189 Ill. 2d at 53), and we will not alter a sentencing decision absent an abuse of discretion (*People v. Jones*, 265 Ill. App. 3d 627, 639 (1994)).

¶ 27 Possession of between 500 grams to 2000 grams of cannabis with intent to deliver is a Class 2 felony (720 ILCS 550/5(e) (West 2014)) with a sentencing range of three to seven years in prison or a period of probation or conditional release not to exceed four years (730 ILCS 5/5-4.5-35(a) (West 2014); 730 ILCS 5/5-4.5-35(d) (West 2014)). The trial court sentenced defendant to 36 months, or 3 years, of probation, a term well within the permissible statutory range. Therefore, we presume the court did not abuse its discretion in sentencing, "unless the

sentence is greatly at variance with the purpose and spirit of the law or is manifestly disproportionate to the offense." *People v. Means*, 2017 IL App (1st) 142613, ¶ 14.

¶ 28 We conclude that the trial court did not abuse its discretion when it sentenced defendant to 36 months of probation.

¶ 29 The record indicates that the trial court was well aware of, and considered, the applicable mitigating factors. At sentencing, the court asked the State and defense counsel if they had any revisions to the PSI, defense counsel noted an error, and then the court orally explained it. Thus the record supports that the PSI was before the court when it imposed sentence. The PSI included information about defendant's criminal history, family, childhood, education, and health. Because the PSI was before the court, we presume the court considered the mitigating evidence contained therein, including factors related to defendant's rehabilitative potential. *People v. Benford*, 349 Ill. App. 3d 721, 735 (2004) ("Where mitigating evidence is before the court, it is presumed that the sentencing judge considered the evidence, absent some indication to the contrary, other than the sentence itself."); *People v. Babiarz*, 271 Ill. App. 3d 153, 164 (1995) ("Where the sentencing court examines a presentence report, it is presumed that the court considered the defendant's potential for rehabilitation."). Further, defense counsel orally presented mitigating evidence to the court, including defendant's lack of criminal history, his current employment with a relative, young age, that he had a valid FOID card at the time of arrest, lived with his mother, was in full compliance with the rules of his electronic monitoring and curfew, and would be "an excellent candidate for probation." The record therefore supports that the court heard the mitigating evidence that defendant now identifies on appeal.

¶ 30 When the court imposed sentence, it expressly stated that it considered the factors in aggravation and mitigation. Thus, the record shows that the court heard and considered the mitigating factors, and there is nothing in the record to show otherwise. See *People v. Dominguez*, 255 Ill. App. 3d 995, 1004 (1994) ("Where relevant mitigating evidence is before the court, it is presumed that the court considered it absent some indication in the record to the contrary other than the sentence itself."). Accordingly, we conclude that the court gave adequate consideration to the mitigating factors, including defendant's rehabilitative potential.

¶ 31 Defendant asserts the court "gave no explanation for the sentence." However, the court was not required to recite and assign value to each sentencing factor (*Bryant*, 2016 IL App (1st) 140421, ¶ 16) or to "articulate the process" it used to determine the appropriateness of defendant's sentence (*People v. Wright*, 272 Ill. App. 3d 1033, 1046 (1995)).

¶ 32 Finally, given that the court imposed a probation term of three years when defendant was subject to a prison term of three to seven years, we cannot find that defendant's sentence of probation is "greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense." *Fern*, 189 Ill. 2d at 54. We therefore conclude that the court did not abuse its discretion in imposing a sentence of 36 months of probation.

¶ 33 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 34 Affirmed.