2017 IL App (1st) 152008-U

No. 1-15-2008

Order filed November 28, 2017

Second Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 13 CR 23740
	)	
CORNELIUS HALMON,	)	Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Neville and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction is affirmed over his contention that the State did not prove him guilty beyond a reasonable doubt because the State's case depended on a witness who was not credible. We remand to the circuit court to correct the fines, fees, and costs order.

¶ 2 Following a bench trial, defendant Cornelius Halmon was convicted of possession of a controlled substance and sentenced to three years in prison. On appeal, defendant contends that the State did not prove him guilty beyond a reasonable doubt because the State's case relied on a

witness, Officer Cox, who was not credible. Defendant asserts that Cox's testimony was "incredible" because, *inter alia*, no money was ever recovered from codefendant Lance Riley when he was detained even though Cox testified that he saw Riley accept money during three separate transactions and that he never lost sight of Riley from the time the transactions took place to when Riley was detained.[1] Defendant also challenges the assessed fines and fees. For the reasons below, we affirm defendant's conviction, and remand to the circuit court to correct the fines, fees, and costs order.

¶ 3 At trial, Chicago police officer Cox testified that, at about 8:30 p.m., on November 18, 2013, he was working narcotics surveillance with Officers Salgado and Verdon. Salgado and Verdon were enforcement officers and Cox was on a fixed surveillance. From about 100 feet away, with the use of binoculars, Cox observed defendant, who was wearing a tan hat, tan boots, and "black udder jacket," and codefendant Lance Riley, who was wearing a black hoodie and blue jeans, "loitering" "in the area of 1509 Ridgeway." There was artificial lighting on the street and in the alley. Cox also observed another individual, Tavares Stevenson, yelling "blows," which is a term for heroin.

¶ 4 After Stevenson yelled "blows, blows" several times, Cox observed defendant engage in two similar but separate transactions. In each incident, a man approached defendant and tendered United States currency to him. Defendant accepted the currency and then walked east through an empty lot to the rear of an abandoned building located at 1510 South Lawndale, where he was now about 40 or 50 feet away from Cox. Defendant reached under a piece of wood that was touching the building, removed a plastic baggie from under the wood, removed a small item, put

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

the plastic baggie back underneath the piece of wood, and walked back to 1509 South Ridgeway. He then tendered the same small item to the individual. The two transactions took place two minutes apart from each other.

¶ 5 After he observed defendant engage in these two transactions, Cox observed Riley engage in three separate but similar transactions. On these three separate occasions, a man approached Riley and tendered United States currency to him. Riley then walked to the rear of 1510 South Lawndale, reached under the siding of the building, removed a plastic baggie from underneath the siding, removed a small item from the plastic baggie, and placed the baggie back under the siding. Riley then walked back to 1509 South Ridgeway and tendered that item to the individual.

¶ 6 There was nothing obstructing Cox's view of defendant or Riley, he never lost sight of them, and he never observed anyone else go to the building on 1510 South Lawndale to "manipulate the wood or the siding." The wood and siding area, where, respectively, defendant and Riley retrieved the items were separate locations and about 20 feet away from each other.

¶ 7 Cox directed Salgado and Verdon to detain defendant and Riley. Cox also directed Verdon to go to where Cox had observed defendant and Riley at 1510 South Lawndale. When Verdon returned from that location, he showed Cox, "one plastic baggie that contained nine smaller Zip-Loc baggies containing suspect heroin and eight smaller Zip-Loc baggies containing suspect crack cocaine."

¶ 8 On cross-examination, Cox testified that none of the other individuals involved in the transactions with defendant and Riley were apprehended or detained. Although he used binoculars, this was not noted in his police reports. Cox testified that, although he believed that

defendant tendered drugs to the two individuals involved in the transactions, he could not tell what the items were. Money was recovered from defendant and then returned to him.

¶ 9 Chicago police officer Donald Verdon testified that at 8:30 p.m., on November 18, 2013, he was working narcotics surveillance as an enforcement officer with Cox and Salgado. Cox informed him through radio communication that narcotics transactions were occurring and directed him to 1509 South Ridgeway to detain defendant and Riley. Cox also directed him to the back of the abandoned home located on Lawndale.

¶ 10 Verdon testified that, at the rear of this home, "there was a 2 by 4 adjacent to the home and to the siding that was peeled off of the building." Under the "2 by 4," or piece of wood, there were "[n]ine Zip-Loc baggies of white powdery substance, suspect heroin." He also went to the "siding area" of that same building. He removed the siding and retrieved a baggie "containing eight smaller Zip-Loc baggies with crack cocaine." Verdon kept the suspect heroin and cocaine in his constant care and possession and inventoried the items at the police station. On cross-examination, Verdon testified that he did not inventory any drugs that were recovered from defendant's person.

¶ 11 The State presented a stipulation that Officer Salgado would testify that he was an enforcement officer on November 18, 2013, and that $94 in United States currency was recovered from, and later returned to, defendant. The State also presented a stipulation that Julia Edwards, an expert in forensic chemistry from the Illinois State Police Crime Lab, would testify that seven of the nine bags of suspect heroin tested positive for heroin in the amount of 3.4 grams and the two other bags had an additional weight of 0.9 grams. She would also testify that one of

the eight bags of suspect cocaine testified positive for cocaine in the amount of 0.1 grams and the other seven bags had an additional weight of 0.7 grams.

¶ 12 The State and Riley entered into a stipulation that no money was recovered from Riley.

¶ 13 Following argument, the trial court found that the State did not prove that defendant possessed the heroin with intent to deliver but it found him guilty of the lesser-included offense of possession of a controlled substance. In finding defendant guilty of possession of the heroin, it described the evidence:

> "[defendant] went to an area where there was a piece of wood later described as a 2 by 4, held up a bag and after receiving monies from individuals, returned with small items, tendered those items to individuals. As that was occurring or perhaps before that was occurring a third individual was yelling, blows, blows. That particular—those particular narcotics were recovered from the same area that Officer Cox saw [defendant] go to. And when [defendant] was arrested, he did possess United States currency."

The trial court acquitted Riley on all charges, noting that defendant's case was different than Riley's case because no money was recovered from Riley and concluding that the State did not prove Riley guilty beyond a reasonable doubt. It denied defendant's motion for a new trial and sentenced him to three years in prison.

¶ 14 Defendant's first contention on appeal is that the State did not prove him guilty beyond a reasonable doubt because the State's case depended on Cox's testimony, which was "wholly incredible." Defendant requests that we reverse his conviction.

¶ 15 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." *People v. Harden*, 2011 IL App (1st) 092309, ¶ 27. As the fact finder, it is the trial court's responsibility to determine the "the weight to be given to the witnesses' testimony, their credibility, and the reasonable inferences to be drawn from the evidence." *People v. Eghan*, 344 Ill. App. 3d 301, 306 (2003). Because the trial court had the opportunity to hear and observe the witnesses, its factual determinations and credibility assessments are given "great weight." *People v. Simpson*, 2015 IL App (1st) 130303, ¶ 41 (quoting *People v. Wheeler*, 226 Ill. 2d 92, 115 (2007)). We will only reverse a conviction if the "evidence or the credibility of the witnesses is so improbable as to raise a reasonable doubt of guilt." *People v. Mays*, 81 Ill. App. 3d 1090, 1099 (1980).

¶ 16 To prove defendant guilty of possession of a controlled substance, the State had to prove that defendant had knowledge and possession of the heroin. See *Givens*, 237 Ill. 2d at 334-35; 720 ILCS 570/402 (West 2012). Possession may be established by either actual or constructive possession. *People v. Tates*, 2016 IL App (1st) 140619, ¶ 19. To prove defendant guilty of constructive possession, the State must prove that defendant had "intent and capability to maintain control and dominion" over the controlled substance. *People v. Scott*, 367 Ill. App. 3d 283, 285 (2006). " 'Knowledge and possession are factual issues, and the trier of fact's findings on these questions will not be disturbed unless the evidence is so unbelievable, improbable, or palpably contrary to the verdict that it creates a reasonable doubt of the defendant's guilt.' " *People v. Carodine*, 374 Ill. App. 3d 16, 25 (2007) (quoting *People v. Brown*, 277 Ill. App. 3d 989, 998 (1996)).

¶ 17 Viewing the evidence in the light most favorable to the State, we conclude that any rational trier of fact could have found beyond a reasonable doubt that defendant had knowledge of, and constructively possessed, the heroin.

¶ 18 Officer Cox testified that he heard Stevenson yell "blows," a term for heroin. From about 100 feet away, Cox then observed defendant engage in two separate but similar transactions. In each transaction, defendant accepted United States currency from a man and then walked to the back of an abandoned building, about 40 to 50 feet away from Cox. From under a piece of wood, defendant removed a small item from a plastic baggie, placed the baggie back under the wood, walked back to the individuals, and tendered the item to them. Defendant's conduct during these transactions demonstrates that he knew where the heroin was located and had the intent and capability to maintain control over it, and therefore, that he constructively possessed the heroin. See *People v. Jones*, 295 Ill. App. 3d 444, 453-54 (1998).

¶ 19 Defendant does not contend that Cox's testimony, if true, was insufficient to support a finding of guilty. Defendant contends, however, that Cox's testimony was not credible, because it "contained outright falsehoods and several inconsistencies." Specifically, he contends that Cox's testimony should not be believed because (1) no money was recovered from Riley and (2) his testimony about how the recovered bags of cocaine and heroin were packaged was inconsistent. Defendant argues therefore that Cox's testimony cannot support his conviction.

¶ 20 Defendant first claims that Cox's testimony was not credible because no money was recovered from Riley after he was detained, but Cox testified that he never lost sight of Riley and that Riley accepted money in three transactions. With respect to the court's ruling on Riley's case, it noted that no money was recovered from Riley and stated:

> "In fact, Officer Cox said he never lost sight of [Riley] and there was no testimony on his behalf of that any exchange of money took place between [Riley] and [defendant] or [Riley] and [Stevenson], or anyone else. He left the scene momentarily which would explain perhaps where the money was. There's not even circumstantial evidence that there was some way for [Riley] to get rid of the evidence."

Defendant asserts that "[t]he only reasonable conclusion one can draw from this is that Cox's testimony was not true." We disagree.

¶ 21 Although the court took issue with the sufficiency of the State's evidence against Riley, it never found that Cox's testimony was not believable or that it did not believe his testimony with respect to defendant's case. In fact, the court noted that Riley's case was different than defendant's case. Based on the court finding defendant guilty of possession of the heroin, it necessarily determined that Cox's testimony with respect to defendant was credible, which was its "prerogative in its role as the trier of fact." See *People v. Moody*, 2016 IL App (1st) 130071, ¶ 52. Further, as the trier of fact, the court was free to reject as much or as little as Cox's testimony as it wanted to. See *People v. Peoples*, 2015 IL App (1st) 121717, ¶ 67 (" 'The trier of fact is free to accept or reject as much or as little of a witness's testimony as it pleases.' ") (quoting *People v. McCarter*, 2011 IL App (1st) 092864, ¶ 22). Thus, given the trial court's findings, we will not reverse defendant's conviction simply because he claims that Cox's testimony was not credible. See *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009).

¶ 22 Defendant also asserts that the testimony about how the recovered bags of heroin and cocaine were packaged was inconsistent. We acknowledge that Verdon testified that only the eight bags of suspect cocaine were contained in a "baggie" and that Cox testified that defendant

and Riley retrieved the items from separate plastic bags and that, when Verdon initially showed him the recovered items, he showed Cox, "one plastic baggie" containing the nine bags of suspect heroin and the eight bags of suspect cocaine. However, Cox's testimony as to the number of bags recovered of each drug, including nine bags of heroin and eight bags of cocaine, was consistent. And from our review of the testimony on this issue, we find that Cox's testimony about how the nine bags of heroin and eight bags of cocaine were packaged is, at most, a minor inconsistency that did not destroy or undermine Cox's credibility. *Mays*, 81 Ill. App. 3d at 1099 ("Minor discrepancies in the testimony of an eyewitness do not destroy his credibility and are for the trier of fact to weigh in its deliberations."). Thus, we do not agree with defendant's contention that we should reverse his conviction because Cox's testimony was inconsistent.

¶ 23 Finally, from our review of Cox's testimony as a whole, we cannot find that it was, as defendant asserts, "wholly incredible" or "affirmatively proven to be untrue" such that no reasonable person could accept it. *Simpson*, 2015 IL App (1st) 130303, ¶ 41 (" '[t]estimony may be found insufficient *** only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt.' ") (quoting *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004)).

¶ 24 Defendant's second contention on appeal is that the assessed fines, fees, and costs should be amended to reflect that he owes a total of $84. He argues that (1) certain fees were erroneously imposed and (2) he is entitled to presentence incarceration credit to be applied against various fees that are actually considered fines.

¶ 25 Although defendant concedes that he did not raise his challenge to the assessed fines and fees in the trial court, he asserts that we may review his challenge to the erroneously imposed

fees under the plain error doctrine. See *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). With respect to his challenge to the presentence incarceration credit, he asserts that the "$5-per-day credit is mandatory and not subject to the normal rules of waiver." In the alternative, defendant argues that his trial counsel was ineffective for failing to challenge the assessments. The State agrees with defendant that his claims are reviewable.

¶ 26 We disagree that defendant's challenge to the assessed fees is reviewable under the plain error doctrine. *People v. Grigorov*, 2017 IL App (1st) 143274, ¶ 15; *People v. Griffin*, 2017 IL App (1st) 143800, ¶¶ 9, 24-25. Further, with respect to defendant's challenge to the presentence custody credit, because he is not arguing that he was not awarded *per diem* monetary credit for assessed fines or that there was a mathematical error but is arguing that he is entitled to presentence custody credit to be applied against certain charges that are labeled as "fees," his challenge is subject to the rules of forfeiture. See *People v. Brown*, 2017 IL App (1st) 150203, ¶40; *People v. Reed*, 2016 IL App (1st) 140498, ¶ 13. Nevertheless, because the State does not argue that defendant has forfeited review of his challenge to the fines and fees assessed against him, the State has forfeited any forfeiture argument. See *Reed*, 2016 IL App (1st) 140498, ¶ 13 ("By failing to timely argue that a defendant has forfeited an issue, the State waives the issue of forfeiture."). Therefore, even though defendant did not raise his challenge to the assessed fines and fees in the trial court, we will review his claims. The propriety of court-ordered fines and fees is reviewed *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 27 Defendant first contends, and the State correctly concedes, that we should vacate the $110 misdemeanor, business or petty offense complaint filing fee (705 ILCS

105/27.2a(w)(1)(B), (C), (D) (West 2014)) and the $5 electronic citation fee (705 ILCS 105/27.3e (West 2014)).

¶ 28 First, the statute authorizing the misdemeanor, business or petty offense complaint filing fee provides that the clerk is entitled to a minimum of $75 and a maximum of $110 for misdemeanor, business, and petty offense complaints. 705 ILCS 105/27.2a(w)(1)(B), (C), (D) (West 2014). Here, defendant was convicted of possession of a controlled substance, which is a Class 4 felony. 720 ILCS 570/402(c) (West 2012). Thus, because defendant was not convicted of a misdemeanor or business or petty offense, we vacate this fee.

¶ 29 Second, the statute authorizing the $5 electronic citation fee provides that the circuit court clerk may collect an electronic citation fee in "any traffic, misdemeanor, municipal ordinance, or conservation case upon a judgment of guilty or grant of supervision." 705 ILCS 105/27.3e (West 2014). However, if a defendant has been convicted of a felony, the electronic citation fee is not applicable. *People v. Moore*, 2014 IL App (1st) 112592-B, ¶ 46. Here, as previously stated, defendant was convicted of possession of a controlled substance, a Class 4 felony. 720 ILCS 570/402(c) (West 2012). Therefore, the $5 electronic citation fee does not apply and we vacate it.

¶ 30 Defendant next contends that certain fees assessed against him are entitled to be offset by his presentence custody credit. Under section 110-14(a) of the Code of Criminal Procedure, a defendant is entitled to a credit of $5 for each day spent in presentence custody to be applied against the assessed fines. 725 ILCS 5/110-14(a) (West 2014). The statute applies only to "fines" imposed after a conviction and does not apply to any other costs or "fees" assessed against a defendant. *People v. Tolliver*, 363 Ill. App. 3d 94, 96 (2006). A "fine" is considered "part of the punishment for a conviction," and a "fee" is imposed to "recoup expenses incurred by the state—

to 'compensat[e]' the state for some expenditure incurred in prosecuting the defendant." *People v. Jones*, 223 Ill. 2d 569, 582 (2006). Even if the charge is labeled a "fee," it still may be considered a "fine." *Jones,* 223 Ill. 2d at 599. To determine whether a charge is considered a "fine" or a "fee," our supreme court has held that "the most important factor is whether the charge seeks to compensate the state for any costs incurred as the result of prosecuting the defendant." *People v. Graves*, 235 Ill. 2d 244, 250 (2009). We review *de novo* the issue of whether a defendant is entitled to presentence custody credit, as it is a matter of statutory interpretation. *People v. Brown*, 2017 IL App (1st) 142877, ¶ 73. The fines, fees, and costs order provides that defendant was in presentence custody for 564 days. Therefore, he is entitled to a maximum of $2,820 in presentence custody credit.

¶ 31 Defendant argues that the following six fees assessed against him are actually fines subject to be offset by his presentence custody credit: the $190 Felony Complaint filing fee (705 ILCS 105/27.2a(w)(1)(A) (West 2014)), the $15 automation fee (705 ILCS 105/27.3a(1), (1.5) (West 2014)), the $15 State Police operations fee (705 ILCS 105/27.3a(1.5) (West 2014)), the $15 document storage fee (705 ILCS 105/27.3c(a) (West 2014)), the $25 court services (sheriff) fee (55 ILCS 5/5-1103) (West 2014)), and the $50 court system fee (55 ILCS 5/5-1101(c)(1) (West 2014)). The State concedes that two of these charges, the $15 State Police operations fee and the $50 court system fee, are considered fines and, therefore, should be offset by his presentence custody credit. However, the State maintains that the other challenged assessments are considered fees.

¶ 32 First, we agree with the parties that the $15 State Police operations fee and the $50 court system fee are considered "fines." These assessments do not reimburse or compensate the State

for the costs incurred to prosecute defendant. *People v. Milsap*, 2012 IL App (4th) 110668, ¶ 31 (finding that the State Police operations charge is a "fine," concluding, "we find that the State Police Operations Assistance fee does not reimburse the State for costs incurred in defendant's prosecution"); *People v. Smith*, 2013 IL App (2d) 120691, ¶¶ 21, 22 (awarding the defendant presentence custody credit for the court system fee, noting, "the assessment is not intended or geared to compensate the State (or the county) for the cost of prosecuting a defendant" and it "is not explicitly tied to, and bears no inherent relationship to, the actual expenses involved in prosecuting the defendant"). Therefore, defendant is entitled to $5 per day of presentence custody credit toward the $15 State Police operations and the $50 court system assessments.

¶ 33 Defendant argues that the $190 felony complaint filing fee, the $15 automation fee, and the $15 document storage fee are fines that should be offset by his presentence custody credit. He claims that these charges do not reimburse the clerk's office or the State for costs to prosecute defendant in this case. The State maintains that these assessments are fees. We agree with the State.

¶ 34 In *People v. Tolliver*, 363 Ill. App. 3d 94, 97 (2006), this court concluded that these assessments are fees because they "are compensatory and a collateral consequence" of the defendant's conviction. *Tolliver*, 363 Ill. App. 3d at 97. Defendant asserts that *Tolliver* is not persuasive and contrary to our supreme court's decision in *People v. Graves*, 235 Ill. 2d 244, 250 (2009), which was issued after *Tolliver*, and stated that, to determine whether a charge is a fee or fine, "the most important factor is whether the charge seeks to compensate the state for any costs incurred as the result of prosecuting the defendant." *Graves*, 235 Ill. 2d at 250; *Jones*, 223 Ill. 2d at 600. Defendant argues that *Graves* "clarified" that a charge is not a fee "simply because it

compensates the State or the court system for general costs of litigation," but is only a fee if it reimburses the State for a costs incurred as a result of defendant's prosecution.

¶ 35 We disagree with defendant. The court in *Tolliver* explained that a "fine" is "pecuniary punishment" and a "fee" is "a charge for labor or services, and is a collateral consequence of the conviction which is not punitive, but instead, compensatory in nature." *Tolliver*, 363 Ill. App. 3d at 97. It then concluded that the automation, document storage, and felony complaint filing fees were "compensatory," *i.e.* "a charge for labor or services," or costs incurred to prosecute the defendant, and a "collateral consequence" of the defendant's conviction and therefore fees. Thus, as this court found in *People v. Brown*, 2017 IL App (1st) 142877, ¶ 81, *Tolliver* is consistent with *Graves* because it "used the same framework as was set forth in *Graves* for determining whether a charge is a fee or fine." Accordingly, following *Brown*, we conclude that *Tolliver* is consistent with *Graves* and therefore that the document storage, automation, and felony complaint filing assessments are fees. *Brown*, 2017 IL App (1st) 142877, ¶ 81; *Tolliver*, 363 Ill. App. 3d at 97. Thus, defendant is not entitled to presentence custody credit to be applied against the felony complaint filing, automation, and document storage fees.

¶ 36 Defendant next argues that the $25 court services (sheriff) charge is a fine because "security guards are not aligned with either the prosecution or the defense," they "provide a neutral service" to benefit everyone, and the charge does not compensate the State for the costs incurred as a result of defendant's prosecution. We disagree.

¶ 37 To prosecute defendant, court security services were necessarily utilized throughout the course of his prosecution and the court proceedings. Thus, the court services (sheriff) charge was "compensatory" and a "collateral consequence" of defendant's conviction. *Tolliver*, 363 Ill. App.

3d at 97 (concluding that the sheriff's court services fee was "compensatory and a collateral consequence" of the defendant's conviction). Therefore, the $25 court services (sheriff's) assessment is a fee, and defendant is not entitled to presentence custody credit to be applied against this charge. See *People v. Heller*, 2017 IL App (4th) 140658, ¶ 74 (concluding that the sheriff's court services charge is a fee).

¶ 38 Finally, defendant contends, and the State concedes, that, even though the fines, fees, and costs order provides that a total of $1079 was assessed against him, the correct total amount imposed against him was $1059. From our review of the fines, fees, and costs order, it appears that the initial total that defendant owed, prior to any credit being offset, was $1059. However, given our determination on the credit and fees defendant challenged on appeal, the total on the order will necessarily be recalculated. From our calculation, after subtracting the erroneously assessed $110 misdemeanor, business, or petty offense complaint filing fee and $5 electronic citation fee, the total assessed fines and fees is $944. Applying the *per diem* credit reduces this total to $329.

¶ 39 For the reasons explained above, we affirm defendant's conviction, and we remand to the circuit court with instructions to correct the fines, fees, and costs order to vacate the $110 misdemeanor, business, or petty offense complaint filing fee and the $5 electronic citation fee and to award defendant $5 per day of presentence custody credit toward the $15 State Police operations and the $50 court system assessments. The judgment of the circuit court is affirmed in all other respects.

¶ 40 Affirmed in part; remanded with directions.