2017 IL App (1st) 152517-U

No. 1-15-2517

December 26, 2017

Second 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 9147
	)	
TERRY JOHNSON,	)	Honorable
	)	Mauricio Araujo,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Pucinski and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient to prove defendant guilty of possession of a controlled substance with intent to deliver. The evidence was insufficient to prove that defendant committed delivery of a controlled substance within 1,000 feet of a church and possession of a controlled substance with intent to deliver within 1,000 feet of a church. Defendant is entitled to a correction of the mittimus to reflect the correct number of days he spent in presentence custody. Remanded for resentencing.

¶ 2 Following a bench trial, defendant Terry Johnson was found guilty of delivery of a controlled substance (heroin), delivery of a controlled substance (heroin) within 1,000 feet of a

church, possession of a controlled substance (heroin) with intent to deliver and possession of a controlled substance (heroin) with intent to deliver within 1,000 feet of a church. The court merged the convictions and sentenced defendant to two concurrent terms of eight years in prison. On appeal, defendant contends that the State did not prove beyond a reasonable doubt that he committed either possession of a controlled substance with intent to deliver offense. He also contends that the State did not prove beyond a reasonable doubt that he delivered, or possessed with intent to deliver, the heroin within 1,000 feet of a church. Defendant lastly argues that the mittimus does not accurately reflect the total number of days he spent in presentence custody. We affirm in part, reverse in part, remand for resentencing, and order correction of the mittimus.

¶ 3 At trial, Chicago police officer Ugarte testified that he had been a police officer for 10 years, made over 100 narcotics related arrests, and had participated in over 60 undercover officer purchase operations. At about 7:15 p.m. on May 9, 2014, he was working on foot patrol as an undercover "buy officer" in a narcotics purchase operation at about 3115 West Warren Boulevard, in Chicago. Defendant approached Ugarte and had a conversation with him. Ugarte asked defendant if he was "good with D," a street term for heroin. Defendant told Ugarte to "go wait over by the church." Ugarte walked to the corner of Warren and Albany Street and waited for defendant "by the church." Ugarte believed the name of the church was "The New Greater St. John's Church" and testified that he knew it was a church because "[i]t looked like a church" and "[it] has the church's name on it."

¶ 4 Less than 10 minutes later, defendant returned, Ugarte walked with defendant, and defendant asked Ugarte, "how many do [you] want[?]" Ugarte responded, "something like three"

and defendant gave him three bags of white powder, suspect heroin. Ugarte gave defendant $30 in prerecorded funds.

¶ 5 On cross-examination, Ugarte testified that, before his conversation with defendant, he spoke with another man at "California and Sacramento" who directed him two blocks away to Madison Street and Albany.

¶ 6 Chicago police officer William Lepine testified that he had been a police officer for over 12 years and worked on "hundreds" of undercover narcotics purchase missions. At about 7:15 p.m. on May 9, 2014, Lepine was a surveillance officer on the same undercover narcotics purchase team as Ugarte. He saw Ugarte walking eastbound on Madison, towards Albany with an "unknown person." Ugarte walked to a building at Madison and Albany and stopped. Defendant came out of the building and approached Ugarte. Ugarte and defendant had a brief conversation, defendant went back inside the building, and Ugarte walked northbound on Albany towards Warren. Lepine pulled his vehicle on the north side of Warren. About one minute later, defendant walked towards Ugarte and they engaged "in a hand to hand transaction." Lepine testified that the area on Warren was "mostly residential" and there was a "church" on the southwest corner. Lepine could tell it was a church from the "stained glass windows" and the "sign."

¶ 7 Chicago police officer Joseph Papke testified that he had been a police officer for nine years and participated in a "couple hundred" "buy-bust" missions. On May 9, 2014, Papke was an enforcement officer on the team with Ugarte and Lepine. At about 7:15 p.m., Lepine told him to go to the area of Warren and Albany. There, Papke detained defendant and Ugarte drove by and identified defendant as the individual who sold Ugarte the suspect heroin. Papke then placed

defendant into custody and searched him. From inside defendant's left pants pocket, Papke recovered $30 in prerecorded 1505 funds and $2 in United States currency. He transported defendant to the police station, where he performed another search of defendant. From defendant's waistband, Papke recovered a magnetic key box containing "seven small Ziploc baggies with star logos, containing a white powder substance, suspect heroin."

¶ 8 Cook County investigator Mary Sarna testified that she measured the distance from "3115 West Warren," which was "the start of the address" to "3101 West Warren," which was "the Church." The distance between these two locations was 41 feet.

¶ 9 The State entered a stipulation that Christine Benak, a forensic chemist, would have testified that she performed tests on the three bags of powder that Ugante recovered and on the seven bags of powder that Papke recovered, the items tested positive for the presence of heroin, the weight of the three bags was 1.3 grams, and the weight of the seven bags was 3.02 grams.

¶ 10 Following argument, the trial court found defendant guilty of delivery of between 1 and 15 grams of heroin within 1,000 feet of a church and possession of heroin with intent to deliver within 1,000 feet of a church, in the same amount (720 ILCS 570/401(c)(1) (West 2014); 720 ILCS 570/407(b)(1) (West 2014)). It also found him guilty of delivery of between 1 and 15 grams of heroin and possession of heroin with intent to deliver, in the same amount (720 ILCS 570/401(c)(1) (West 2014). The court denied defendant's motion for a new trial. It merged the two delivery of heroin counts and the two possession of heroin with intent to deliver counts and sentenced defendant as a Class X offender to two concurrent terms of eight years in prison. The court stated that defendant would receive 403 days of presentence custody credit.

¶ 11 Defendant contends on appeal that the State did not prove him guilty of possession of a controlled substance with intent to deliver within 1,000 feet of a church or of the lesser-included offense of possession of a controlled substance with intent to deliver because the State "almost exclusively" relied on the evidence that defendant delivered the 1.3 grams of heroin to Ugarte to prove that he intended to deliver the 3.02 grams of heroin, or seven bags, that were recovered from him. He asserts that there was no evidence to show that he engaged in conduct demonstrating his intent to deliver the seven bags of heroin and a court cannot infer that intent solely because he engaged in one prior delivery transaction.

¶ 12 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). In a bench trial, as here, it is the trial court's responsibility to "determine the credibility of witnesses, to weigh evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence." *People v. Daheya*, 2013 IL App (1st) 122333, ¶ 62. When presented with a sufficiency of the evidence challenge, we will not retry a defendant (*People v. Davis*, 2016 IL App (1st) 142414, ¶ 10) and will only reverse a conviction if the "evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt" (*People v. Branch*, 2014 IL App (1st) 120932, ¶ 9).

¶ 13 To prove defendant guilty of possession of a controlled substance with intent to deliver, the State had to prove that (1) he had knowledge of the presence of the heroin, (2) the heroin was in his immediate possession or control, and (3) he intended to deliver the heroin. 720 ILCS 570/401(c) (West 2014); see *Branch*, 2014 IL App (1st) 120932, ¶ 10. Defendant challenges the

evidence with respect to the third element, arguing the State failed to prove that he intended to deliver the 3.02 grams that the police recovered from him after he was arrested.[1]

¶ 14 The element of intent to deliver is generally established by circumstantial evidence, as direct evidence of intent to deliver is rare. *People v. Robinson*, 167 Ill. 2d 397, 408 (1995). Courts have considered many factors as probative of intent to deliver, such as whether the quantity of the controlled substance found in a defendant's possession is too large to be considered as being 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, these are just examples of factors that are probative of intent to deliver. *People v. Bush*, 214 Ill. 2d 318, 327 (2005). Whether there was sufficient evidence to prove intent to deliver "must be determined on a case-by-case basis" and "there is no hard and fast rule to be applied in every case." *Robinson*, 167 Ill. 2d at 412-14. "[W]hen only a small amount of drugs is found, in order to establish the intent to deliver, the minimum evidence a reviewing court needs to affirm a conviction is that the drugs were packaged for sale, and at least one additional factor tending to show intent to deliver." *People v. Blakney*, 375 Ill. App. 3d 554, 559 (2007).

¶ 15 After viewing the evidence as a whole and in the light most favorable to the State, the circumstantial evidence was sufficient for a rational trier of fact to conclude that defendant possessed the 3.02 grams of heroin, which was recovered from him after he was arrested, with intent to deliver it.

[1] We will address defendant's challenge to the enhancement element of the offense, that he committed the offense within 1,000 feet of a church, separately.

¶ 16 Defendant's drug transaction with Ugarte, which occurred before he was arrested and in which he sold three bags of heroin in exchange for $30, supports the inference that he intended to deliver the other seven bags of heroin subsequently found on him. Defendant approached Ugarte, who asked defendant if he was "good with D," a term for heroin. Defendant told Ugarte to "wait over by the church." Less than 10 minutes later, defendant walked to Ugarte and asked him, "how many do [you] want[?]"It is a reasonable inference that the defendant was prepared to sell Ugarte more than three bags because he asked Ugarte how many he wanted and had seven other ziplock bags of heroin ready in his waistband. These facts support the inference that defendant had the intent to deliver the other seven bags, or 3.02 grams, of heroin that he possessed. See *People v. Bush*, 214 Ill. 2d 318, 327-28 (2005) (where the defendant was observed delivering items from a brown paper bag, she was convicted of possession of the cocaine that was later found in that brown paper bag, and the supreme court concluded that the facts "easily support an inference that defendant intended to deliver the remaining contents of the brown paper bag").

¶ 17 Furthermore, the fact that the 3.02 grams of white powder heroin were individually packaged in seven separate bags supports the inference that defendant intended to deliver these individual bags, as he had delivered the 1.3 grams of white powder heroin in separate bags to Ugarte, rather than personally consume them. See *People v. Green*, 256 Ill. App. 3d 496, 501 (1993) (the manner in which contraband is packaged is a factor supporting the inference of intent to deliver). In addition, the police did not recover any drug paraphernalia such as pipes or other smoking devices from defendant. See *People v. Williams*, 358 Ill. App. 3d 1098, 1103 (2005) (affirming the defendant's conviction for unlawful possession of a controlled substance with intent to deliver where, among other factors, no drug paraphernalia associated with the

defendant's personal use of the substance was recovered). Viewed as a whole and in the light most favorable to the State, the evidence was sufficient for a rational trier of fact to conclude that defendant possessed the 3.02 grams of heroin found on him after he was arrested with intent to deliver it.

¶ 18 Defendant also contends that the State did not prove that he committed delivery of heroin within 1,000 feet of a church or possession of heroin with intent to deliver within 1,000 feet of a church because it did not prove that the "church" building was "actually operating as a church" at the time of the offense. He requests that we reverse his convictions and remand for resentencing on the lesser-included offenses that did not include the enhancement.

¶ 19 Defendant does not claim he did not deliver the 1.3 grams of heroin and, as held above, the evidence supports that he possessed the 3.02 grams of heroin with intent to deliver. These Class 1 felonies (720 ILCS 570/401(c)(1) (West 2014)) are enhanced to Class X felonies if the violations occur "within 1,000 feet of," as relevant here, "a church" "used primarily for religious worship." 720 ILCS 570/407(b)(1) (West 2014). To prove this enhancement, the State had to prove that the building was "used primarily for religious worship" on the date of the offense. *People v. Sims*, 2014 IL App (4th) 130568, ¶106.

¶ 20 We find that the State did not prove beyond a reasonable doubt that defendant committed delivery of heroin and possession of a controlled substance with intent to deliver heroin within 1,000 feet of a church because it did not prove that the church was operating as a place of religious worship on the date of the offense.

¶ 21 The State did not present testimony from anyone with personal knowledge to establish that the building was operating as a place of worship on the date of the offense. Instead, the State

relied on testimony from Ugarte and Lepine to establish the enhancement. Ugarte testified that defendant told him to wait "by the church," he "believed" the name was "The New Greater St. John's Church," and he knew it was a church because "[i]t looked like a church" and "it has the church's name on it." Lepine testified that there was a "church" on the southwest corner, and he knew it was a church because of the "stained glass windows" and "sign."

¶ 22 But, Ugarte and Lepine never testified that the building functioned primarily as a place of worship on the date of the offense. Also, Ugarte's testimony that "it has the church's name on it" was in the present tense, and thus could have referred to the time of trial and not to the date of the offense. See *People v. Cadena*, 2013 IL App (2d) 120285, ¶¶ 6, 16 (finding that the officer's testimony that a church "is an active church" was in the present tense without "temporal context" and could have referred to the time of trial and not the date of the offenses).

¶ 23 There was no evidence presented that the officers had personal knowledge of the area so it could be inferred that they had personal knowledge of the "church" and that it was active as a place of religious worship on the date of the offense. Although Ugarte and Lepine had been Chicago police officers for, respectively, 10 and 12 years, and had extensive backgrounds in narcotics related undercover purchase operations, neither officer testified that he was familiar with the church area, regularly patrolled it, or had knowledge of it based on his experience with undercover narcotics purchase operations. See *People v. Fickes*, 2017 IL App (5th) 140300, ¶¶ 3, 23 (reversing conviction for aggravated participation in methamphetamine manufacturing, where "there was no direct testimony from the two officers that they were familiar with the area in question on the date of the offense" demonstrating the offense was committed within 1,000 feet of a place of worship); see *People v. Boykin*, 2013 IL App (1st) 112696, ¶ 15 (reversing

conviction for unlawful delivery of a controlled substance within 1,000 feet of a school, where "[t]he officers did not testify that they lived in the area or that they regularly patrolled the neighborhood, so as to allow an inference that they had personal knowledge as to whether the school was in operation on the date of the offense.").

¶ 24 The State points out that, in addition to the officers' testimony about the appearance and name of the church, defendant himself referred to the building as a "church" and "used it as a landmark for customers to meet him to complete narcotic transactions." The State therefore argues that a rational trier of fact could conclude that the building was used primarily for religious worship on the date of the offense. However, there was no evidence that defendant had personal knowledge of the area or building and "a building that once housed a church might still be referred to, by people in the locality, by the name of the former—or generically as the 'church'—even if it no longer functioned primarily as one" at the time of the offense. *Fickes*, 2017 IL App (5th) 140300, ¶ 24. Thus, we are unpersuaded by the State's argument.

¶ 25 Therefore, we cannot find that the officers' use of the term "church" or identification of the building as a "church," was sufficient evidence to allow a rational trier of fact to draw an inference that the building was functioning primarily as a place of worship on the date of the offense. See *Fickes*, 2017 IL App (5th) 140300, ¶ 24 ("[a]s a matter of both logic and common sense, there is no inherent rational connection between a witness's mere use of the term 'church' at trial and the fact that the 'church' was or was not functioning primarily as a place of worship on a particular date prior to trial").

¶ 26 The officers' testimony about the appearance and physical structures of the building was similarly insufficient to support this determination. Ugarte testified "it looked like a church" and

"it has the church's name on it." Lepine testified that he knew it was the church because of the "stained glass windows" and "sign." However, "it is common sense that churches and other entities cease to operate while their physical structures and signs can remain unchanged." (Internal quotation marks omitted.) *Fickes*, 2017 IL App (5th) 140300, ¶ 24. Thus, we are unpersuaded by the State's assertion that the officers' testimony describing the physical structures and appearance of the building supports the finding that it was operating as a church on the date of the offense.

¶ 27 Accordingly, because the State failed to present testimony from anyone with personal knowledge that the church was active on the date of the offense, it did not prove the enhancement element beyond a reasonable doubt. S*ee Boykin*, 2013 IL App (1st) 112696, ¶¶ 14-17 (the defendant's conviction for unlawful delivery within 1,000 feet of a school reversed where the State did not present sufficient evidence to show the police officers had personal knowledge of the operation of the school on the date of the offense); see *Cadena*, 2013 IL App (2d) 120285, ¶ 18 ("because the State failed to present evidence from anyone demonstrating personal knowledge as to whether the church was operating as such on the dates of the offenses, *no* rational trier of fact could have found the enhancement beyond a reasonable doubt." (Emphasis in original.)).

¶ 28 Citing *People v. Foster*, 354 Ill. App. 3d 564, 568 (2004), the State asserts that a rational trier of fact could have inferred that the building functioned primarily as a place of worship based on Ugarte's testimony that a sign labeled it as "The New Greater St. John's Church." We find *Foster* distinguishable. In *Foster*, the parties stipulated to the distance between the location of the narcotics transaction and the "New Hope Church." *Foster*, 354 Ill. App. 3d at 566. The

court held that "a rational trier of fact could have inferred that New Hope Church was a church used primarily for religious worship based on its name." *Id* at 568. Unlike in *Foster*, here there was no stipulation about the church's name from which a rational trier of fact could have inferred that, based on the name used in the stipulation, the building was operating as a church used primarily for religious worship on the date of the offense. See *Fickes*, 2017 IL App (5th) 140300, ¶¶ 21, 25 (distinguishing *Foster* on this basis). Therefore, because there was no stipulation in this case, we will not follow *Foster*.

¶ 29 The State did not present sufficient evidence to prove beyond a reasonable doubt that "The New Greater St. John's Church" was functioning primarily as a place of worship on the date of the offense. Thus, we reverse defendant's convictions for delivery of a controlled substance within 1,000 feet of a church and for possession of a controlled substance with intent to deliver within 1,000 feet of a church. We affirm defendant's convictions for the lesser-included offenses of delivery of a controlled substance and for possession of a controlled substance with intent to deliver and remand for resentencing on these convictions.

¶ 30 Finally, defendant contends, and the State concedes, that he is entitled to 437 days of presentence custody credit but the mittimus only shows that he received 403 days. Defendant requests that we direct the clerk of the circuit court to correct the mittimus.

¶ 31 A defendant is entitled to credit for each day spent in presentence custody. 730 ILCS 5/5-4.5-100(b) (West 2014). The date that the mittimus is issued and sentence commences is not calculated in the presentence custody credit. *People v. Williams*, 239 Ill. 2d 503, 509-10 (2011). Here, defendant was arrested on May 9, 2014, and sentenced on July 20, 2015, a total of 437 days. The mittimus, however, only reflects that defendant spent 403 days in presentence custody.

We therefore order the clerk of the circuit court on remand to correct the mittimus to show the correct number of days, 437, that defendant spent in presentence custody.

¶ 32 Reversed in part and affirmed in part; cause remanded.