2018 IL App (1st) 153602-U
Order filed: June 29, 2018

FIRST DISTRICT
FIFTH DIVISION

No. 1-15-3602

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MARK DOUGHERTY, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. Nos. 11 CR 3417 11 CR 3418 Honorable Charles P. Burns, Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Reyes and Justice Hall concurred in the judgment.

O R D E R

¶ 1 *Held*: We affirmed defendant's conviction for possession with intent to deliver 5 or more grams, but less than 15 grams, of methamphetamine; we reduced his conviction for possession with intent to deliver 15 or more, but less than 100 grams, of methamphetamine to the lesser-included offense of possession with intent to deliver an amount of less than 5 grams of methamphetamine; and we vacated his sentence and remanded this cause for resentencing.

¶ 2 Following a jury trial *in absentia*, defendant-appellant, Mark Dougherty was found guilty

of possession with intent to deliver 15 or more, but less than 100 grams, of methamphetamine (count I), a Class X felony (720 ILCS 646/55(a)(1), (2)(C) (West 2010)); and 5 or more grams, but less than 15 grams, of methamphetamine (count II), a Class 1 felony (720 ILCS 646/55(a)(1), (2)(B) (West 2010)). After merging count II into count I, the court sentenced him to 16 years' imprisonment.

¶ 3 On appeal, defendant contends that the State did not prove him guilty beyond a reasonable doubt of possession with intent to deliver 15 or more, but less than 100 grams, of methamphetamine (count I) where its forensic scientist combined the contents of the two bags of suspect narcotics prior to testing for the presence of methamphetamine. Defendant also contends that, in light of certain mitigating factors, the trial court abused its discretion by sentencing him to 16 years' imprisonment. For the following reasons, we: affirm defendant's conviction on count II; reduce defendant's conviction on count I to the lesser-included offense of possession with intent to deliver an amount of less than 5 grams of methamphetamine; vacate his sentence and remand for resentencing.

¶ 4 After Chicago police officers executed a search warrant at defendant's residence, he was charged with two counts of possession with intent to deliver methamphetamine. The counts differed only as to the amount of methamphetamine possessed by defendant. Count I alleged that he possessed 15 or more, but less than 100 grams, of methamphetamine, a Class X felony (720 ILCS 646/55(a)(1), (2)(C) (West 2010)). Count II alleged that he possessed 5 or more, but less than 15 grams, of methamphetamine, a Class 1 felony (720 ILCS 646/55(a)(1), (2)(B) (West 2010)).

¶ 5 At trial a Cook County Assistant State's Attorney (ASA), Daniel Hanichak, testified that when defendant was arraigned on these charges, the circuit court admonished him that his failure to appear at future court dates could result in his being tried and sentenced *in absentia*. ASA, Alexandra Molesky, testified that defendant failed to appear in court on May 25, 2012, a scheduled court date, and the trial court issued a warrant for his arrest.

¶ 6 Chicago police officer, Michael Killeen, testified that, at approximately 2 p.m. on February 11, 2010, he was a member of a team of officers who executed a search warrant at an apartment located at 6745 North Clark Street, Apartment 4-S, in Chicago (the apartment). Officer Killeen, along with 15 other officers, rode an elevator to the fourth floor. Officer Killeen exited the elevator at the fourth floor behind Officer David Baez. Upon exiting the elevator, he saw a man, later identified as defendant, standing in the doorway to the apartment, holding a white envelope. Officer Killeen announced his office and that he was executing a search warrant. Officer Baez recovered the envelope in defendant's hand and opened it in the presence of Officer Killeen. The envelope held "a clear plastic bag containing a crushed glass-like substance," which Officer Killeen "believed to be crystal meth," a street term for methamphetamine.

¶ 7 Defendant was taken into custody and the officers executed the search warrant of the apartment. After walking through each room of the apartment, the officers determined that no one, other than defendant, was present. Inside a master bedroom, Officer Killeen observed three large safes in a closet. The safes were locked, so Officer Killeen asked defendant for the combinations. After the officer obtained the combinations from defendant, he opened the safes and recovered two large bags containing "a clear crushed glass-like substance" suspected to be

methamphetamine; $14,000 in United States currency; a large clear plastic bag containing several clear plastic baggies which, according to the officer, were commonly used to distribute narcotics; a scale; and a glass paraphernalia pipe wrapped in bubble wrap. Also recovered from the safes were an expired Illinois insurance card listing defendant's name and the address of the apartment, and a sheet of paper containing names and numbers which, the officer believed, was a "narcotics ledger."

¶ 8 Chicago police officer, Vaselios Roumbos, testified that, on February 10, 2011, he was a member of the team of officers executing a search warrant at the apartment assigned to perimeter security. When the area surrounding the apartment was secured, Officer Roumbos proceeded to the apartment. After the apartment was searched, Officer Killeen provided Officer Roumbos with the evidence recovered from the apartment, and it was inventoried by him. The State introduced into evidence photographs of the suspect methamphetamine recovered from the two bags found inside the safes.

¶ 9 Forensic chemist, Francis Manieson, of the Illinois State Police Crime Laboratory, testified that, on February 22, 2011, he analyzed the contents of the plastic bags recovered from the safes by the officers. Mr. Manieson identified State's exhibit number 11 as evidence he received and analyzed in this case. He explained that the inventory sheet indicated that State's exhibit number 11 contained two bags of crystals, which was consistent with what he had received. Mr. Manieson weighed "the sample" and the packaging together and determined the gross weight to be 18.783 grams. Mr. Manieson then "empt[ied] out the content of the packaging into an Illinois State Police bag," weighed the now-empty packaging, and determined that the

packaging weighed 2.343 grams. He subtracted the packaging weight (2.343) from the gross weight (18.783) and calculated a net weight of 16.440 grams. Mr. Manieson then performed two tests to identify the contents of the exhibit. He performed a preliminary gas chromatography test, which indicated the possible presence of methamphetamine. Mr. Manieson then performed a confirmatory Fourier transform infrared spectroscopy test, which showed a positive presence of methamphetamine. Based on his analysis, Mr. Manieson concluded that the contents of State's exhibit number 11 tested positive for the presence of methamphetamine.

¶ 10 Mr. Manieson also identified State's exhibit number 2 as evidence he had received and analyzed in this case. The inventory sheet indicated that State's exhibit number 2 contained one bag of crystals, which was consistent with what Mr. Manieson had received. Mr. Manieson noted that State's exhibit number 2 also contained a white envelope. The contents of the bag of crystals weighed 14.144 grams. After he performed a preliminary and confirmatory test, the sample tested positive for the presence of methamphetamine. As a result of this testing, Mr. Manieson opined that State's exhibit number 2 contained the presence of methamphetamine.

¶ 11 During closing argument, the State asked the jury to find defendant guilty of both counts of possession with intent to deliver methamphetamine: one count based on his actual possession of the 14.144 grams of methamphetamine in the envelope that he possessed when officers arrived; and one count based on his constructive possession of 16.440 grams of methamphetamine found in the two bags recovered from inside the safe.

¶ 12 The jury found defendant guilty of both counts of possession with intent to deliver: 15 or more, but less than 100 grams, of methamphetamine (count I); and 5 or more grams, but less than

15 grams, of methamphetamine (count II). Prior to imposing a sentence, the trial court merged the finding of guilty on count II into the finding of guilty on count I and, on March 24, 2015, sentenced defendant, *in absentia*, to 20 years' imprisonment.

¶ 13 Three weeks later, defendant was taken into custody. On April 8, 2015, his counsel filed a motion to reconsider the sentence. On September 18, 2015, counsel filed an amended motion seeking a new trial alleging a *Brady* violation based on the fact that new information was available regarding two police officers involved in the case who had been stripped of their police powers while the case was pending. The court denied the motion for a new trial as it "[did not] see how this evidence would have been relevant" because those officers were not essential to the case and did not testify against defendant. The court, however, ordered a presentence investigation report and set defendant's motion to reconsider sentence for hearing.

¶ 14 At the hearing on defendant's motion to reconsider, defendant's 3 sisters and 93 year old mother testified on his behalf noting his education at the University of Minnesota, his career in broadcast journalism, his record of involvement in the communities in which he had lived, and his strong family support. They explained that, other than this matter, defendant had never committed a crime and that, after defendant lost his job and his home, he began using drugs.

¶ 15 In allocution, defendant detailed his lifelong activism on behalf of social justice causes. He informed the court that he self-medicated after he lost his job and his condominium was repossessed. He pointed out that he did not have a criminal record prior to this offense. He also stated that his absence during trial was not intended to disrespect the court, but because he was afraid of going to prison and wanted to spend time with his elderly mother.

¶ 16 The court granted defendant's motion to reconsider this sentence. After considering the evidence in mitigation and aggravation, the court resentenced defendant to 16 years' imprisonment. Defendant filed a motion to reconsider that sentence, which the court denied. Defendant has appealed.

¶ 17 On appeal, defendant does not challenge the finding of guilty on possession with intent to deliver 5 or more grams, but less than 15 grams, of methamphetamine (count II), based on his possession of the methamphetamine found in the envelope he was holding. Defendant also does not dispute that he possessed methamphetamine and intended to deliver it. Rather, he argues that the State failed to prove him guilty beyond a reasonable doubt of possession with intent to deliver 15 or more grams, but less than 100 grams, of methamphetamine (count I) where Mr. Manieson's testimony indicated that he combined the contents of the two bags of suspect narcotics recovered from the safe into one sample prior to testing that sample for the presence of methamphetamine.

¶ 18 When a defendant challenges the sufficiency of the evidence, the standard of review 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. Campbell*, 146 Ill. 2d 363, 374-75 (1982). The reviewing court may not substitute its judgment for the trier of fact. *Id.* at 375, 389. "The weight to be given the witnesses' testimony, the credibility of the witnesses, resolution of inconsistencies and conflicts in the evidence, and reasonable inferences to be drawn from the testimony are the responsibility of the trier of fact." *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). We will reverse a conviction only where the

evidence is so unreasonable, improbable, or unsatisfactory, as to justify a reasonable doubt of the defendant's guilt. *People v. Smith*, 185 Ill.2d 532, 542 (1999).

¶ 19 Defendant was found guilty of possession with intent to deliver 15 or more grams, but less than 100 grams, of methamphetamine under count I. 720 ILCS 646/55(a)(1), (2)(C) (West 2010). When a defendant is charged with possession of a specific amount of an illegal drug with intent to deliver, and there is a lesser-included offense of possession of a smaller amount, then the weight of the seized drug is an essential element of the crime and must be proved beyond a reasonable doubt. *People v. Williams*, 267 Ill. App. 3d 870, 879 (1994). A chemist, however, generally need not test every sample seized in order to render an opinion as to the makeup of the substance of the whole. *People v. Maiden*, 210 Ill. App. 3d 390, 398 (1991). Rather, random testing is permissible when the seized samples are sufficiently homogenous so that one may infer, beyond a reasonable doubt, that the untested samples contain the same substance as those that are conclusively tested. *People v. Hill*, 169 Ill. App. 3d 901, 912 (1998). "However, when such samples are not sufficiently homogenous, a portion from each container or sample must be tested in order to determine the contents of each container or sample." *People v. Jones*, 174 Ill. 2d 427, 429 (1996); *People v. Coleman*, 391 Ill. App. 3d 963, 972 (2009) (white powder is not of sufficient homogeneity and the substance in each container should be tested in order to determine its identity).

¶ 20 State's exhibit number 11 contained two bags of glass-like crystals. When Mr. Manieson received the two bags, he weighed the two bags together, including the packaging, and calculated a gross weight. He then emptied the contents of the two bags into "an Illinois State Police

evidence bag." Mr. Manieson weighed the empty packaging, subtracted the weight of the package from the gross weight, and found a net weight of the contents of the bags. He then tested the contents of those bags. The record indicates that Mr. Manieson performed a preliminary and a confirmatory test on State's exhibit number 11, which showed the presence of methamphetamine. As such, the record suggests that Mr. Manieson combined the contents of the two bags into "an" evidence bag and then tested the now-combined contents of the bags for the presence of methamphetamine. Based on this testimony, a reasonable trier of fact cannot determine whether the contents of each of those bags tested positive for the presence of methamphetamine. See *People v. Clinton*, 397 Ill. App. 3d 215, 223 (2009); *Coleman*, 391 Ill. App. 3d at 972 (the State cannot evade the requirement to test a sample from each container by combining the contents of several containers into one container and then testing a sample therefrom).

¶ 21 It is the State's responsibility to produce evidence to demonstrate, beyond a reasonable doubt, that defendant possessed with intent to deliver 15 or more grams of methamphetamine based on the two bags of a glass-like substance found inside the safes in his apartment. As our supreme court in *Jones* reasoned, we cannot speculate that each of the containers held methamphetamine. See *Jones*, 174 Ill. 2d at 430. Rather, the evidence must show the presence of methamphetamine in each container. *Id*. ("While it is not difficult to speculate, as did the trial judge, that the remaining three packets may have contained cocaine, such a finding must be based on evidence and not upon guess, speculation, or conjecture."). Accordingly, the State failed to prove defendant guilty, beyond a reasonable doubt, of possession with intent to deliver

15 or more, but less than 100 grams, of methamphetamine as charged in count I.

¶ 22 In reaching this conclusion, we decline the State's invitation to find that the glass-like substance in question was sufficiently homogenous such that the chemist need not test the contents of each bag. See *United States v. Chavez-Alvarez*, 594 F. 3d 1062, 1064 (8th Cir. 2010) (dimethyl sulfone, a dietary supplement for horses which is used to prepare methamphetamine before distribution, is similar in appearance and texture to methamphetamine). As mentioned, we cannot speculate that both of the bags contained methamphetamine where the evidence did not show the presence of methamphetamine in each bag.

¶ 23 Although the State failed to prove possession with intent to deliver more than 15 grams of methamphetamine, it did sufficiently establish that defendant possessed some amount of methamphetamine. While "an accused cannot be convicted of a crime with which he has not been charged, he 'may be convicted of an offense not expressly included in the charging instrument if that offense is a "lesser included offense" of the offense expressly charged.' " *People v. Williams*, 267 Ill. App. 3d 870, 880 (1994) (quoting *People v. Jones*, 149 Ill. 2d 288, 292 (1992)). Furthermore, a reviewing court may reduce the degree of the offense for which the defendant was convicted. See Ill. S. Ct. R. 615(b)(3). Possession with intent to deliver 15 or more, but less than 100 grams, of methamphetamine is a Class X felony (720 ILCS 646/55(a)(1), (2)(C) (West 2010)), but possession with intent to deliver any amount less than 5 grams is a Class 2 felony (720 ILCS 646/55(a)(1), (2)(A) (West 2010)). The sentencing range for a Class X felony is not less than 6 years and not more than 30 years (730 ILCS 5/4.5-25(a) (West 2010)), while a Class 2 felony carries a sentencing range of not less than 3 years and not more than seven

years (730 ILCS 5/4.5-35(a) (West 2010)). Therefore, we reduce defendant's conviction for possession with intent to deliver 15 or more, but less than 100 grams, of methamphetamine under count I, a Class X felony (720 ILCS 646/55(a)(1), (2)(C) (West 2010)), to a finding of guilty for the lesser-included offense of possession with intent to deliver an amount of less than 5 grams of methamphetamine, a Class 2 felony (720 ILCS 646/55(a)(1), (2)(A) (West 2010)).

¶ 24 In sum, we: affirm defendant’s conviction for possession with intent to deliver 5 or more grams, but less than 15 grams, of methamphetamine (count II); pursuant to our authority under Ill. S. Ct. R. 615(b), we reduce his conviction for possession with intent to deliver 15 or more, but less than 100 grams, of methamphetamine (count I) to the lesser-included offense of possession with intent to deliver an amount of less than 5 grams of methamphetamine; and we vacate his sentence and remand for resentencing.

¶ 25 Affirmed as modified in part; vacated in part; cause remanded.