

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).

2018 IL App (4th) 160137-U

NO. 4-16-0137

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

September 27, 2018
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
TROI M. McCURDY,
Defendant-Appellant.

) Appeal from the
) Circuit Court of
) Sangamon County
) No. 15CF553
)
) Honorable
) Leslie J. Graves,
) Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Steigmann and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court (1) modified the trial court’s judgment by reducing defendant’s conviction to a Class C misdemeanor for possession of not more than 2.5 grams of cannabis; (2) concluded it lacked jurisdiction to consider the propriety of certain assessments imposed by the circuit clerk; and (3) directed any presentence incarceration credit be applied to all eligible fines.

¶ 2 In July 2015, the State charged defendant, Troi M. McCurdy, with (1) manufacture or delivery of more than 500 grams but not more than 2000 grams of a substance containing cannabis (720 ILCS 550/5(e) (West 2014)) (count I), and (2) possession of more than 500 grams but not more than 2000 grams of a substance containing cannabis (720 ILCS 550/4(e) (West 2014)) (count II). In November 2015, a jury found defendant guilty of possession of more than 500 grams but not more than 2000 grams of cannabis, that is, count II. In February 2016, the trial court sentenced defendant to a term of three years and six months’ imprisonment.

¶ 3 Defendant appeals, arguing (1) the State failed to prove him guilty beyond a reasonable doubt of a felony charge of possession of cannabis, (2) the circuit clerk improperly imposed certain fines, and (3) he was entitled to a \$5 per day presentence incarceration credit toward all properly assessed fines and fees. For the following we reasons, we affirm the trial court’s judgment as modified and direct any available presentence incarceration credit be applied to all eligible fines.

¶ 4 I. BACKGROUND

¶ 5 In July 2015, the State charged defendant with one count of manufacture or delivery of more than 500 grams but not more than 2000 grams of a substance containing cannabis (720 ILCS 550/5(e) (West 2014)), and one count of possession of more than 500 grams but not more than 2000 grams of a substance containing cannabis (720 ILCS 550/4(e) (West 2014)).

¶ 6 A. Jury Trial

¶ 7 In November 2015, the matter proceeded to a jury trial. We summarize only the evidence necessary to resolve this appeal.

¶ 8 1. *Evan Delude*

¶ 9 On February 27, 2015, Evan Delude, an officer with the Springfield police department, was on neighborhood patrol duty. Shortly after 6 p.m., Officer Delude observed an orange Dodge CLT parked on the side of the road near the corner of north 11th Street and Phillips Street. Although the vehicle was parked, the engine was running, and Officer Delude could see the illuminated taillights as he passed the vehicle. Officer Delude testified he knew the occupants of the vehicle from prior interactions, and he knew the driver, Daran Williams, and the passenger, defendant, had suspended driver’s licenses.

¶ 10 Officer Delude testified he made a U-turn, stopped his marked squad car behind the orange Dodge, and activated his emergency lights. As Delude started to get out of his squad car, the driver exited the orange Dodge and rapidly approached the officer. As he approached Officer Delude, Williams said, “what the fuck is up,” and raised his hands. Officer Delude advised Williams to return to his vehicle and informed him that he should not be driving on a suspended license.

¶ 11 During Officer Delude’s exchange with the driver, defendant stepped out of the passenger side of the vehicle. Delude addressed defendant, stating, “Troi, get back in the vehicle.” At that point, defendant began to “fast-walk eastbound across 11th Street.” Officer Delude ordered defendant to stop, and defendant immediately began to sprint southeast. At the same time, the driver took off running in the opposite direction. Officer Delude decided to chase defendant rather than Williams. In explaining his decision, Officer Delude testified, “Because my belief, if someone was concealing contraband, possibly drugs or weapons, that they would probably not approach the officer. So as Troi began to run from me, I believed he was probably the one in some sort of possession of contraband.”

¶ 12 According to Officer Delude, he apprehended defendant in the back yard of a house on 12th Street. As Delude rounded the corner of the house, he observed defendant emptying money from his pockets and attempting to conceal the money by kicking snow over it. Officer Delude testified he ordered defendant to get on the ground, and defendant again began to run. Defendant attempted to jump over a fence, but he tripped and landed on his stomach, concealing his right hand. Officer Delude pulled his firearm, held defendant at gunpoint, and ordered defendant to put his hands behind his back. Defendant complied, and Officer Delude placed him under arrest and escorted him to another responding officer’s vehicle.

¶ 13 After placing defendant in the other officer's vehicle, Delude recovered the items defendant threw in the snow. According to Delude, he recovered defendant's wallet and \$660 in cash. Officer Delude testified an additional \$200 was recovered from defendant's person.

¶ 14 Following defendant's arrest, Delude returned to the orange Dodge and began his search by looking around the vehicle to see if there was any contraband in plain view. In the backseat of the vehicle, Delude saw a shopping bag with two large, clear Ziploc bags containing what he believed to be marijuana. On the passenger seat floorboard, Delude saw another shopping bag with a Ziploc bag filled with raw cannabis. According to Delude, this bag would have been between defendant's legs when he was seated in the vehicle. Delude did not find rolling papers, other means of smoking marijuana, or devices used to prepare cannabis for smoking, such as a grinder. According to Delude, one cellular telephone was recovered from defendant's person, and no scales or firearms were recovered from defendant or the vehicle.

¶ 15 The three Ziploc bags of suspected cannabis were booked into evidence, combined, and sent to the State Police for testing. Delude testified he did not weigh the individual bags before he combined the contents. According to Delude, the combined contents weighed approximately 2 pounds, 10 ounces. The State introduced into evidence People's exhibit No. 4, which was a photograph Delude took of the combined marijuana. The photograph depicted some loose marijuana as well as two compressed bricks of marijuana. The State introduced People's exhibit No. 1 into evidence, which Delude identified as an evidence bag containing the combined marijuana recovered from the vehicle.

¶ 16 *2. Peter Anzalone*

¶ 17 Peter Anzalone, a forensic scientist specializing in drug chemistry, testified he worked for the Illinois State Police analyzing evidence for the presence of controlled substances

and cannabis. Anzalone identified People's exhibit No. 1 as plant material he analyzed.

Anzalone testified he first removed the plant material from the evidence bag and determined the material weighed 1053 grams. According to Anzalone, he took a small, representative sample approximately the size of a quarter and performed a microscopic examination. The microscopic examination was positive for cystolithic hairs and fine covering hairs, indicating the presence of cannabis. Anzalone then performed the Duquenois-Levine test, a chemical color test, which was positive for cannabis.

¶ 18 B. Verdict and Sentence

¶ 19 Following deliberation, the jury found defendant guilty of possession of more than 500 grams but not more than 2000 grams of cannabis and acquitted him of the manufacture or delivery count.

¶ 20 In February 2016, the trial court sentenced defendant to a term of three years and six months' imprisonment on count II, possession. The court properly imposed various fines, as reflected in a written order regarding fines and fees. The circuit clerk imposed the following additional assessments: (1) a \$50 court-systems assessment, (2) a \$10 child-advocacy assessment, (3) a \$15 "ISP OP" assistance fund assessment, (4) \$5 drug-court fee, and (5) a \$100 victims-assistance assessment.

¶ 21 This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 On appeal, defendant argues (1) the State failed to prove him guilty beyond a reasonable doubt of a felony charge of possession of cannabis, (2) the circuit clerk improperly imposed certain fines, and (3) he was entitled to a \$5-per-day presentence-incarceration credit toward all properly assessed creditable fines and fees. We address these arguments in turn.

¶ 24

A. Sufficiency of the Evidence

¶ 25 Defendant contends the State failed to prove he knowingly possessed more than 500 grams of marijuana because Officer Delude combined the contents of the three bags before they were separately weighed or tested. Accordingly, defendant asks this court to reverse his Class 3 felony conviction (720 ILCS 550/4(e) (West 2014)) and reduce his conviction to Class C misdemeanor for possession of not more than 2.5 grams of cannabis (720 ILCS 550/4(a) (West 2014)). The State appears to concede the commingling of the three bags prevented the State from proving beyond a reasonable doubt that defendant possessed more than 500 grams of cannabis. Instead, the State argues it proved defendant possessed at least 30 grams of marijuana. According to the State, the testing showed that at least one of the three bags contained marijuana, and the testimony established the three bags had roughly the same amount of marijuana. Because the total weight of the three bags was 1053 grams, the State argues it proved defendant possessed at least 30 grams of marijuana. Defendant had a prior Class C misdemeanor conviction for possession of marijuana; thus, the State contends his conviction should be reduced to a Class 3 felony under section 4(d) of the Cannabis Control Act (720 ILCS 550/4(d) (West 2014)).

¶ 26 When reviewing the sufficiency of the evidence, this court must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278, 818 N.E.2d 304, 307 (2004). We reverse a criminal conviction only where “the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant’s guilt.” *People v. Givens*, 237 Ill. 2d 311, 334, 934 N.E.2d 470, 484 (2010). The State bears the burden of proving the essential elements of a crime beyond

a reasonable doubt, and it “may not leave to conjecture or assumption essential elements of the crime.” *People v. Laubscher*, 183 Ill. 2d 330, 335-36, 701 N.E.2d 489, 491 (1998).

¶ 27 “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. Jones*, 174 Ill. 2d 427, 428-29, 675 N.E.2d 99, 100 (1996). Random testing of samples to infer the makeup of the whole substance is permissible when the samples are sufficiently homogenous. *Id.* at 429. “However, if separate bags or containers of substance are seized, a sample from each bag or container must be tested in order to prove that it contains an illegal drug.” *People v. Harden*, 2011 IL App (1st) 092309, ¶ 40, 952 N.E.2d 132. To conclude a remaining untested package also contains a controlled substance is speculation or conjecture. *Id.* “For the same reasons, commingling the contents of the packages before testing also renders the test results insufficient to support the weight element beyond a reasonable doubt.” *Id.*

¶ 28 In this case, Officer Delude testified he did not individually test or weigh the three bags of suspected marijuana recovered from the vehicle. Nothing in the record indicates the contents of the three bags were field tested. Delude further testified that he combined the contents of the three bags and took a photograph. The photograph depicted some loose marijuana as well as two compressed bricks of marijuana. Officer Delude then put the combined contents into a paper evidence bag to be sent for testing. Anzalone, the forensic chemist, testified he received the plant material in a single evidence bag and tested a small, representative sample, which was positive for cannabis. According to Anzalone, the total weight of the plant material was 1053 grams.

¶ 29 The evidence clearly establishes the three bags were not separately weighed or tested before the contents were combined. Because the contents were combined before testing, it is impossible to determine what identifiable and measurable amount of marijuana was in the vehicle. See *Jones*, 174 Ill. 2d at 429; *People v. Clinton*, 397 Ill. App. 3d 215, 223-24, 922 N.E.2d 1118, 1126-27 (2009). We have no way of knowing whether all three bags contained marijuana or whether only one bag contained marijuana, and we may not speculate that each of the bags contained marijuana. *Jones*, 174 Ill. 2d at 430 (“Whether the untested packets in the instant case may have contained cocaine or mere look-alike substances is pure conjecture.”); *Clinton*, 397 Ill. App. 3d at 223 (the State failed to prove the defendant possessed more than one gram of heroin where the chemist did not weigh or test individual packets containing suspected heroin before he combined six packets and tested the combined contents).

¶ 30 The State argues it proved defendant knowingly possessed at least 30 grams of marijuana because the testing showed that at least one of the three bags contained marijuana and the testimony established the three bags had roughly the same amount of marijuana. We disagree. Delude testified he found a “large amount” of suspected marijuana inside two large Ziploc bags in the backseat and one gallon-sized Ziploc bag “filled” with suspected marijuana on the passenger floor board. However, Delude did not weigh the individual bags or testify as to the weight of the individual bags.

¶ 31 The State’s reliance on the photograph Delude took of the combined contents of the bags does not support its position. The photograph shows two compressed bricks of suspected marijuana and some loose suspected marijuana. There was no testimony regarding which bag the contents of the photograph came from or whether the bag (or bags) containing the compressed bricks also contained loose cannabis. We note the dense compressed bricks would

also be heavier than the same volume of loose marijuana. Delude's testimony and the photograph of the combined substances are insufficient to support the conclusion that each bag contained more than 30 grams. Therefore, we reject the State's argument that it proved, beyond a reasonable doubt, that defendant knowingly possessed at least 30 grams of cannabis.

¶ 32 For these reasons, we conclude the evidence was insufficient to prove beyond a reasonable doubt that defendant possessed more than 500 grams of a substance containing cannabis. Accordingly, we modify the trial court's judgment and reduce defendant's conviction to a Class C misdemeanor based on possession of not more than 2.5 grams of cannabis (720 ILCS 550/4(a) (West 2014)).

¶ 33 B. Fines and Fees

¶ 34 Defendant contends the circuit clerk improperly imposed (1) a \$50 court-systems assessment, (2) a \$10 child-advocacy assessment, (3) a \$15 "ISP OP" assistance fund assessment, (4) \$5 drug-court fee, and (5) a \$100 victims-assistance assessment. The State concedes the circuit clerk lacked the authority to enter these assessments.

¶ 35 Following oral argument, we granted defendant's motion to cite adverse authority and consider this claim in light of *People v. Vara*, 2018 IL 121823. In *Vara*, the Illinois Supreme Court recently held appellate courts lack "jurisdiction to review the clerk's recording of mandatory fines that were not included as part of the circuit court's final judgment." *Id.* ¶ 23. The *Vara* court noted that, while an appellate court has jurisdiction to review a trial court's final judgment, there is no jurisdiction to review the circuit clerk's imposition of a fine that was not included in the trial court's final judgment. *Id.* Here, as in *Vara*, the challenged assessments do not appear in the court's final judgment. Accordingly, we conclude we lack jurisdiction and decline to address this issue.

¶ 36

C. Presentence Incarceration Credit

¶ 37 Finally, defendant contends \$1200 in presentence incarceration credit was not applied to one eligible creditable fine (the \$100 trauma center fund fine). The State concedes any available credit should be applied to the \$100 trauma center fund fine. As this fine was properly imposed by the circuit court, we conclude we have jurisdiction to address this issue.

¶ 38 The trauma center fund fine is not subject to a reduction for time served when a person is convicted of driving under the influence. 730 ILCS 5/5-9-1(c-5) (West 2014). No such limitation applies when a person is convicted of possession or delivery of cannabis. 730 ILCS 5/5-9-1.1(b) (West 2014). Accordingly, we accept the State's concession and order any available credit be applied to the \$100 trauma center fund fine.

¶ 39

III. CONCLUSION

¶ 40 For the reasons stated, we affirm the trial court's judgment as modified and direct any available presentence incarceration credit be applied to all eligible creditable fines.

¶ 41

Affirmed as modified.