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2014 IL App (3d) 120596-U

Order filed July 14, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-12-0596
	)	Circuit No. 11-CF-639
DONATO PEREZ,	)	
Defendant-Appellant.	)	Honorable Clark E. Erickson, Judge, Presiding.

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JUSTICE WRIGHT delivered the judgment of the court.  
Presiding Justice Lytton and Justice Carter concurred in the judgment.

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**ORDER**

¶ 1 *Held:* (1) The jury was properly instructed on possession; (2) there was no error in allowing testimony that defendant was the target of the investigation; (3) the evidence was sufficient to prove beyond a reasonable doubt defendant constructively possessed the drugs; (4) the trial court did not err in granting the State's request for an extension of defendant's statutory speedy trial term; and (5) there was no abuse of discretion in sentencing defendant to 25 years' imprisonment.

¶ 2 Following a jury trial, defendant, Donato Perez, was convicted of unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2)(B) (West 2010)) and

unlawful possession of cannabis with intent to deliver (720 ILCS 550/5(d) (West 2010)). He was sentenced to concurrent terms of 25 and 10 years' imprisonment, respectively. Defendant appeals, arguing the evidence did not establish guilt beyond a reasonable doubt. In addition, defendant contends the trial court improperly instructed the jury, allowed hearsay testimony, denied defendant's request for a speedy trial, and imposed an excessive sentence. We affirm.

¶ 3

### FACTS

¶ 4

On November 27, 2011, defendant was arrested and placed in custody following the execution of a search warrant at 445 N. Washington Avenue, Kankakee, Illinois. On November 29, 2011, defendant was charged by information with unlawful possession with intent to deliver 100 grams or more but less than 400 grams of cocaine (720 ILCS 570/401(a)(2)(B) (West 2010)) and unlawful possession with intent to deliver more than 30 grams but less than 500 grams of cannabis (720 ILCS 550/5(d) (West 2010)). On the same date, defendant filed a speedy trial demand. On December 16, 2011, defendant was indicted for the same charges.

¶ 5

On January 13, 2012, the State filed a motion to compel defendant to submit a buccal swab for deoxyribonucleic acid (DNA) analysis on a handgun and black zipper bag containing cocaine. On January 19, 2012, the trial court granted the motion. On February 23, 2012, the State filed a motion to continue the trial to obtain DNA testing results for two of its exhibits. The motion stated that on January 17, 2012, the crime lab had collected DNA material to compare to defendant's DNA sample. The lab was working on the analysis, but needed two to three weeks to complete the testing and another four to five weeks to comply with the Illinois Supreme Court Rule 417 disclosures.

¶ 6

On February 28, 2012, the trial court held a hearing on the State's motion. The State informed the court that it submitted a handgun and a black zipper bag to the crime lab for DNA

analysis on December 13, 2011. The State noted it requested defendant's buccal swab to speed up the DNA analysis, despite the fact that the lab did not process and collect DNA material from the physical exhibits until January 17, 2012.

¶ 7 The court found that the evidence submitted to the crime lab for DNA analysis was material and that the State exercised due diligence in obtaining the testing results. It granted the State a 48-day continuance to obtain the DNA evidence. Defendant renewed his demand for a speedy trial.

¶ 8 The cause proceeded to a jury trial on May 14, 2012. The evidence indicated that on November 27, 2011, the police obtained a warrant to search 445 N. Washington Avenue, Kankakee, Illinois. Around midnight, defendant exited the residence at that location and drove away in a Lexus with Anthony Kendricks and D'Lorne Young. The police stopped the Lexus to detain defendant while the search warrant was executed.

¶ 9 Upon entering the residence, the police encountered Francisco Perez sleeping on the couch near the front door, Myra Perez, Sandra Valerio, and five small children. Valerio was the mother of defendant's two children.<sup>1</sup>

¶ 10 The police searched the common areas of the home and located sandwich bags, a digital scale, and a plastic bag inside the kitchen freezer containing 23.6 grams of cannabis. In the kitchen cabinet, the police located a plastic bag containing 20.9 grams of cocaine and a loaded nine-millimeter handgun. Following a canine search, the police located a Spider-Man backpack in a hallway closet. The backpack contained two FoodSaver bags, which contained eight plastic bags of cannabis totaling 221.1 grams.

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<sup>1</sup> Myra was later arrested due to an outstanding warrant and because an officer witnessed her drop a crumpled dollar bill containing suspected cocaine on to the floor.

¶ 11 When the officers searched the master bedroom, they located \$2,000 and a black zipper bag, containing five plastic bags of cocaine totaling 139.6 grams. The police also recovered defendant's social security card and three prescription bottles from the master bedroom. The medication bottles listed defendant's name and the address as 445 N. Washington Avenue, Kankakee, Illinois. Two of the bottles contained pills, which were dated October and November 2011. Additionally, the police found an identification card bearing defendant's name, but listing a different address. Men's jeans were found in the master bedroom closet and pictures of defendant were found throughout the house.

¶ 12 Kankakee police officer, Joseph English, testified he executed the search warrant at the residence with Deputy Director Chris Kidwell, Agent Michael Herscher, and Agent Paul Berge. Prior to executing the search warrant, Kidwell set up surveillance at the residence while English, Herscher, and Berge waited. The State asked English what he was waiting for, and defense counsel objected. Following a sidebar, the trial court overruled the objection. English testified they were waiting for defendant, the target of their investigation, to exit the residence. When defendant exited, English pursued the Lexus and initiated a traffic stop. Defendant was detained and advised that the police had a search warrant for 445 N. Washington Avenue, Kankakee, Illinois. English told defendant he could breach the door, but asked defendant if he had a key to the residence. Defendant told him the key to the residence was on the key ring for the Lexus and identified the key. The police used that key to enter the residence.

¶ 13 Defense counsel asked English how he determined who resided at the residence to be searched. English responded that a confidential informant told him defendant lived at that address and had narcotics inside the home. English also testified he had seen defendant at the residence numerous times while on patrol in the area.

¶ 14 Kidwell testified he set up surveillance at the residence in anticipation of executing a search warrant. Kidwell wanted to detain defendant outside the residence because it would be safer for the three agents executing the search warrant. Kidwell testified the amount of drugs located in the residence and the lack of drug paraphernalia inside the household was consistent with the practices of a drug dealer. The cocaine found in the bedroom had five separate bags, which indicated it was recently purchased or was prepared to be broken down and sold. The cannabis located in the freezer and the hallway closet was not consistent with personal use. Kidwell testified the digital scale would be used by a dealer to weigh the product before selling it. According to Kidwell, drug dealers often have handguns to protect themselves and their assets.

¶ 15 Forensic scientists with the Illinois State Police testified defendant's fingerprint matched a latent print from the plastic bag containing cannabis found in the hallway closet. Additionally, DNA material was collected from the black zipper bag containing cocaine found in the master bedroom. The DNA had a mixture of at least three people, but one major male profile was identified and matched defendant.

¶ 16 Young testified he drove his Lexus to the residence that day to visit Myra. He explained that although he was married, he was also dating Myra. The key ring had a key to the residence, which Young received from Myra. According to Young, defendant arrived after Young in defendant's Crown Victoria. After defendant visited with his children, defendant wanted a ride home and asked to drive the Lexus. Young complied. Young testified he would see defendant at the residence a couple days each week and indicated defendant had unlimited access to the house.

¶ 17 Vanessa Perez testified she was defendant's wife for approximately three years. Vanessa testified defendant had two children under the age of two with Valerio, but that she and defendant lived in Bradley, Illinois. On the date of the search, defendant left the house to drop off his Crown Victoria with Valerio so she could take the children to the doctor the following day. Vanessa testified defendant took medication for an overactive thyroid.

¶ 18 At the jury instructions conference, the State submitted Illinois Pattern Jury Instructions, Criminal, No. 4.16 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 4.16), on constructive possession. Defendant objected to the second paragraph of the instruction. Defendant argued shared possession was not an issue in the case, but admitted the defense would argue Francisco may have possessed the contraband. The trial court allowed the paragraph on shared possession over defendant's objection.

¶ 19 At the close of all the evidence, the jury found defendant guilty of unlawful possession of a controlled substance with intent to deliver and unlawful possession of cannabis with intent to deliver. Defendant filed a motion for new trial. On July 12, 2012, the trial court denied the motion and proceeded to sentencing.

¶ 20 Defendant's presentence investigation report (PSI) revealed that between 1993 and 1996 he had several juvenile adjudications for burglary, theft, attempted theft, criminal damage to a motor vehicle, knowing damage to property, possession of burglary tools, and unlawful use of a weapon. Following defendant's release from the Juvenile Department of Corrections, he had adult convictions for aggravated battery with a weapon in 1999, tampering with a motor vehicle in 2000, aggravated battery of a peace officer in 2000, and aggravated battery with a firearm in 2001. Defendant's PSI also revealed he was 1 of 10 children, his parents were never married, and his father left when he was nine years old. Attached to the PSI was defendant's

psychological evaluation from 1993, which was imposed as a condition of probation when he was 13 years old. The report stated defendant had been in trouble since he was 10 years old, had a hard time following rules, and had little motivation. The doctor noted defendant lacked control of his impulses and opined that if defendant became angry, he would likely act in an aggressive and violent manner with little thought of the consequences. It was opined that prison and counseling would have little impact on defendant's behavior.

¶ 21 Before sentencing defendant, the trial court stated it had considered the evidence at trial, the PSI, arguments of counsel, and defendant's potential for rehabilitation. The court stated defendant was 31 years old and had been in the criminal system for approximately 20 years. The court said defendant's behavior was likely influenced by the fact that he did not have an ideal childhood, but said defendant had to accept responsibility for his actions. The court referenced defendant's evaluation from 1993 and his criminal record since then, noting defendant's sentence was necessary for the protection of the public. The court sentenced defendant to concurrent terms of 25 and 10 years' imprisonment. Defendant made an oral motion to reconsider the sentence, which the trial court denied. Defendant appeals.

¶ 22

## ANALYSIS

¶ 23

### I. Reasonable Doubt

¶ 24

Defendant argues the State failed to prove beyond a reasonable doubt that he possessed illegal drugs. When a defendant challenges the sufficiency of the evidence, we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056, ¶ 31; *People v. Collins*, 106 Ill. 2d 237, 261 (1985).

¶ 25 Under this standard, the reviewing court must construe all reasonable inferences in favor of the State. *People v. Givens*, 237 Ill. 2d 311, 334 (2010). It is not this court's function to retry a defendant who challenges the sufficiency of the evidence. *People v. Ross*, 229 Ill. 2d 255, 272 (2008).

¶ 26 To prove a defendant guilty of possession of illegal drugs, the State must prove defendant had knowledge of the presence of the drugs and defendant had the drugs in his immediate and exclusive possession or control. *People v. Schmalz*, 194 Ill. 2d 75, 81-82 (2000); *People v. Gallagher*, 193 Ill. App. 3d 566, 569 (1990). Possession may be actual or constructive. *Givens*, 237 Ill. 2d at 335; *Gallagher*, 193 Ill. App. 3d at 569. Constructive possession may be established by showing defendant had control over the premises where the contraband was found, which in turn gives rise to an inference of knowledge and possession. *People v. Williams*, 98 Ill. App. 3d 844, 847 (1981). Whether a defendant had knowledge and possession are questions of fact to be resolved by the jury, and its findings will not be disturbed on review unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of defendant's guilt. *Givens*, 237 Ill. 2d at 334.

¶ 27 Viewing the evidence in the light most favorable to the State, we conclude the jury could have found beyond a reasonable doubt defendant possessed at least 100 grams of cocaine and more than 30 grams of cannabis. Defendant was found exiting the residence where his two children lived at around midnight on the night of the search. Defendant often visited his children and had unlimited access to the residence. Defendant was able to identify the key to the residence on the key ring of the Lexus he was driving. In the master bedroom, the police found defendant's prescriptions, social security card, and identification card. In the same room, the police located a bag containing 139.6 grams of cocaine with defendant's DNA on it.

Defendant's fingerprint was also found on a bag in the hallway closet that contained 221.1 grams of cannabis. This evidence was sufficient for the jury to reasonably infer defendant's constructive possession over these drugs, and we cannot say the evidence was so improbable or unsatisfactory that it created a reasonable doubt of defendant's guilt. See *Givens*, 237 Ill. 2d 311.

¶ 28 II. Jury Instruction

¶ 29 Defendant next argues the trial court erred when it instructed the jury on joint, but constructive possession, because there was no issue regarding whether multiple people may have simultaneously exercised possession over the contraband found in the house.

¶ 30 The purpose of a jury instruction is to provide the jury with the accurate legal principles applicable to the evidence so the jury may reach a correct conclusion according to the law and the evidence. *People v. Bannister*, 232 Ill. 2d 52, 81 (2008). There must be some evidence in the record to justify an instruction, and it is within the trial court's discretion to decide whether the evidence in the record raises a particular issue and whether an instruction on that issue should be given. *People v. Mohr*, 228 Ill. 2d 53, 65 (2008).

¶ 31 In the instant case, the jury was instructed as follows:

“Possession may be actual or constructive. A person has actual possession when he has immediate and exclusive control over a thing. A person has constructive possession when he lacks actual possession of a thing but he has both the power and the intention to exercise control over a thing either directly or through another person.

If two or more persons share the immediate and exclusive control or share the intention and the power to exercise control over a thing, then each person has possession.” IPI Criminal No. 4.16.

¶ 32 Here, several people were found inside the house at the time the home was searched. Defendant's personal belongings were found in a bedroom dresser with drugs discovered nearby. In addition to the drugs found in this bedroom, other illegal drugs were found throughout the house in various common areas accessible to the occupants of the home. Thus, it was not unreasonable to inform the jury that defendant's possession based on his control over the premises was not undermined by proof that others had access to the drugs. See *People v. Williams*, 98 Ill. App. 3d at 849 (1981) (“When the relationship of others to the contraband is sufficiently close to constitute possession, the result is not vindication of the defendant, but rather a situation of joint possession.”).

¶ 33 Additionally, defense counsel suggested to the jury that other people in the house may have possessed the drugs. In closing arguments, counsel stated Francisco was found close to the kitchen where the drugs and handgun were located. As such, we find the trial court could reasonably have found sufficient evidence to support an instruction on joint or simultaneous possession of the contraband by multiple persons who were frequently present at various times in the same household.

¶ 34 III. Hearsay

¶ 35 Defendant next argues the trial court erred when it allowed English to testify that defendant was the target of the investigation. Specifically, defendant contends this statement was a conclusion drawn from hearsay evidence offered by a confidential informant.

¶ 36 Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted and is generally inadmissible due to its lack of reliability. *People v. Caffey*, 205 Ill. 2d 52, 88 (2001). Evidentiary rulings regarding hearsay are reviewed under an abuse of discretion standard. *Id.* at 89.

¶ 37 In this case, English testified he was waiting for defendant, the target of their investigation, to exit the residence before they executed the search warrant. We find this testimony was not hearsay. English had personal knowledge defendant was the subject of the investigation because he submitted the search warrant establishing probable cause. See *People v. Was*, 22 Ill. App. 3d 859, 863 (1974) (finding hearsay where a witness has no personal knowledge of the facts, such that his knowledge is derived entirely from information given by another). The substance of the informant's information, which was hearsay, was not revealed until defense counsel's cross-examination of English. See *People v. Harvey*, 211 Ill. 2d 368, 386 (2004) (stating that a defendant is barred from claiming error in the admission of improper evidence where the admission was procured or invited by defendant).

¶ 38 Furthermore, even if the statement was hearsay, it was harmless to defendant. See *People v. Stechly*, 225 Ill. 2d 246, 304 (2007) (stating that an error is harmless when it appears beyond a reasonable doubt that the error did not contribute to the verdict obtained). Even without English's testimony that defendant was the target of the investigation, the jury would have inferred this because the evidence revealed that after defendant exited the residence, the vehicle he was driving was stopped prior to the officer's entry into the home, and the authorities detained defendant while the search warrant of the household was completed. Therefore, we find no error in allowing testimony that defendant was the subject of the police investigation.

¶ 39 IV. Speedy Trial

¶ 40 Defendant next argues the trial court erred by extending his speedy trial term for DNA testing because the testing results were not material to the case.

¶ 41 A defendant in Illinois has both a constitutional and statutory right to a speedy trial. Ill. Const. 1970, art. I, § 8; 725 ILCS 5/103-5(a) (West 2010); *People v. Crane*, 195 Ill. 2d 42, 48

(2001). Defendant asserts a violation of his statutory right to a speedy trial. Under section 103-5(a) of the Code of Criminal Procedure of 1963 (Code), a defendant in custody must be tried within 120 days from the date he was taken into custody. 725 ILCS 5/103-5(a) (West 2010). However, pursuant to section 103-5(c) of the Code, the State may petition the trial court for up to a 120-day extension of the term to obtain DNA test results. 725 ILCS 5/103-5(c) (West 2010). To obtain this extension, the State must show it has been unable to obtain the results of DNA testing that is material to its case and there are reasonable grounds for the court to believe it will be able to obtain the results at a later date. *Id.* The decision whether to grant a speedy trial term extension is within the trial court's discretion, which will not be disturbed absent a clear showing of abuse. *People v. Terry*, 312 Ill. App. 3d 984, 990 (2000).

¶ 42 The evidence the State was awaiting DNA testing results on was the handgun found in the kitchen and the black zipper bag containing 139.6 grams of cocaine found in the master bedroom. Defendant argues the testing results were not material because regardless of the results, the State would argue defendant constructively possessed these items. We agree that the State would have argued this. However, this does not change the fact that if the results showed defendant's DNA on both of these items, it would tend to establish the State's allegation that defendant possessed the items. Therefore, we conclude the testing results were material, and the court did not abuse its discretion by granting the State a 48-day extension.

¶ 43 V. Excessive Sentence

¶ 44 Finally, defendant contends the trial court abused its discretion by sentencing him to 25 years' imprisonment because it relied too heavily on his physiological evaluation from 1993 and did not account for the nonviolent nature of the offenses and his difficult childhood.

¶ 45 The determination and imposition of a sentence involves considerable judicial discretion, and we will not reverse a trial court's sentence unless we find that the court abused its discretion. *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010). A trial court is in a far better position than an appellate court to fashion an appropriate sentence, based upon firsthand consideration of factors such as defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Streit*, 142 Ill. 2d 13, 19 (1991). Therefore, we will not substitute our judgment for that of the trial court just because we may have balanced the sentencing factors differently. *Alexander*, 239 Ill. 2d at 213.

¶ 46 Unlawful possession with intent to deliver 100 grams or more but less than 400 grams of cocaine (720 ILCS 570/401(a)(2)(B) (West 2010)) is a Class X felony with a sentencing range of 9 to 40 years' imprisonment. 720 ILCS 570/401(a)(2)(B) (West 2010). A sentence which falls within the statutory range does not constitute an abuse of discretion unless the sentence is manifestly disproportionate to the nature of the offense. *People v. Jackson*, 375 Ill. App. 3d 796, 800 (2007). The trial court sentenced defendant to 25 years' imprisonment, well within the prescribed statutory range.

¶ 47 In reviewing the trial court's sentencing determination, we find the court used defendant's physiological evaluation as a factor when evaluating defendant's rehabilitative potential. Additionally, the court reviewed defendant's criminal history since that evaluation to determine whether he posed a threat to the public. We find these to be proper sentencing factors. See *People v. Garibay*, 366 Ill. App. 3d 1103, 1109 (2006) (stating that in sentencing, the court should consider the nature of the crime, the protection of the public, deterrence, punishment, and defendant's rehabilitative potential). Additionally, the court was presented with and considered the mitigating evidence relating to defendant's difficult childhood. Accordingly, we will not

substitute our judgment for that of the trial court merely because we might have weighed the factors differently. See *Alexander*, 239 Ill. 2d at 213; see also *People v. Shaw*, 351 Ill. App. 3d 1087, 1095 (2004) (trial court was not required to give greater weight to mitigating factors than to the circumstances of the offense). Therefore, we find the trial court did not abuse its discretion in sentencing defendant in this case.

¶ 48

#### CONCLUSION

¶ 49

The judgment of the circuit court of Kankakee County is affirmed.

¶ 50

Affirmed.