2011 IL App (1st) 091106-U

SIXTH DIVISION
November 10, 2011

No. 1-09-1106

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 18592
	)	
ISAIAH McCLAIN,	)	Honorable
	)	John T. Doody, Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE GARCIA delivered the judgment of the court.
Presiding Justice R. E. Gordon and Justice Cahill concurred in the judgment.

O R D E R

¶ 1 *Held*: (1) Where defendant was found with drugs packaged for sale on his person, along with $200 in cash, and he told the police of more drugs hidden behind a garage and packaged in an identical manner, using a street term for narcotics packaged for sale, the evidence was sufficient to sustain a conviction of possession of a controlled substance with intent to deliver; (2) where defendant was previously convicted of a felony and submitted a DNA sample, the $200 DNA analysis fee was improperly assessed; and (3) where the mittimus did not reflect the court's oral pronouncement of defendant's convictions, the mittimus is corrected.

¶ 2 Following a bench trial, defendant Isaiah McClain was convicted of possession of heroin with intent to deliver and sentenced as a Class X offender to six years in prison. On appeal, defendant contends that (1) the State failed to prove that defendant had an intent to deliver beyond a reasonable doubt, (2) the $200 DNA analysis fee was improperly assessed, and (3) the mittimus must be amended to reflect the proper offenses of which defendant was convicted. We affirm defendant's conviction, vacate the contested fee, and modify the mittimus.

¶ 3 At trial, the two arresting officers, Officer Reykjalin and Officer McGovern, testified to substantially the same events. Around 6:20 p.m. on September 1, 2008, the officers were driving in the vicinity of 4244 West Carroll Avenue when they saw defendant walking through a vacant lot looking at his hands. McGovern was driving. Reykjalin saw a "golf-ball sized clear object containing blue and shiny objects" in defendant's left hand, then observed defendant remove a piece of the object and discard it in the lot. Defendant then looked in the direction of the car and immediately placed the object in the belt loop of his jeans. McGovern curbed the car and defendant approached. The object in defendant's belt loop was a clear plastic bag containing blue tinted Ziploc baggies with red Superman logos on them. Inside the blue baggies were tinfoil packets. Reykjalin recovered the clear plastic bag and found the tinfoil packets contained suspect heroin. Reykjalin arrested defendant and recovered $200 on his person during a custodial search. After defendant was placed in the backseat of the car and read his *Miranda* rights, he said, "I haven't been to the joint in a minute, and I can't go back. Listen, I have two more jabs behind the garage right there. Please, Officers, don't send me back to the joint." Both officers testified that a "jab" was a street term used by drug dealers to describe

narcotics packaged for sale, usually a larger package that contains smaller individual packets of narcotics. Defendant directed the officers to the alley behind the garage at 4246 West Carroll. Defendant gave McGovern verbal directions to where the drugs were hidden and McGovern recovered a large clear plastic bag that contained two smaller clear plastic bags. Each smaller clear plastic bag contained 13 mini Ziploc baggies tinted blue with a Superman logo on them. Inside each blue baggy was a tinfoil packet. The packaging was identical to that recovered from defendant. Reykjalin had been a police officer for 10 years and had observed narcotics packaged for sale "[h]undreds of times." McGovern had been a police officer for just under 10 years and had observed narcotics packaged that way "thousands of times." Both officers testified that, based on their experience, the narcotics were packaged for sale. The officers admitted that no one else was in the vicinity when defendant was arrested and they observed no hand-to-hand transactions.

¶ 4 The parties stipulated that, of the 39 total tinfoil packets that were recovered, 34 were tested. Twenty-one of the twenty-six tinfoil packets recovered from the garage tested positive for the presence of 3.13 grams of heroin. The contents of the 13 packets recovered from defendant's person were also tested and contained 1.99 grams of heroin.

¶ 5 Defendant testified that around 6:20 p.m. on September 1, 2008, he was walking on Carroll Avenue toward his house when a squad car pulled up next to him. Reykjalin was driving. The officers asked defendant to come to the car. McGovern told defendant they were looking for robbery suspects and asked defendant to look at some pictures. Then McGovern "jumped out and grabbed" defendant, and put him in handcuffs. The officers searched defendant

then put him into the backseat of the squad car. Defendant did not have drugs or $200 in cash on him when he was arrested. The officers then drove to the alley and "found some drugs" that did not belong to defendant. Defendant never told the officers they could find two more jabs behind the garage. The officers asked defendant who was the owner of the drugs and defendant responded he did not. Defendant testified he was never told why he was arrested. The police never showed defendant any drugs.

¶ 6 The court found defendant guilty of two counts of possession of heroin with the intent to deliver, specifically finding that the officers' testimony was credible. Defendant's motion for a new trial was denied. The court sentenced defendant as a Class X offender based on his criminal history and defendant received two concurrent six-year prison terms.

¶ 7 Defendant first contends that the State did not have sufficient evidence to find him guilty of possession with intent to deliver. Defendant challenges only the sufficiency of the State's evidence as to intent to deliver, and asks that we reduce his conviction to simple possession.

¶ 8 The standard of review on a challenge to the sufficiency of the evidence 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. Siguenza-Brito,* 235 Ill. 2d 213, 224 (2009). When considering a challenge to the sufficiency of the evidence, it is not the function of the reviewing court to retry the defendant; it is for the trier of fact to determine the credibility of witnesses, weigh the evidence, draw reasonable inferences, and resolve any conflicts in the evidence. *Siguenza-Brito,* 235 Ill. 2d at

228. Additionally, the trier of fact need not be convinced of a defendant's guilt as to each link of the chain of circumstances, but rather only by the totality of the evidence. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). A reviewing court will not reverse a conviction unless the evidence is so unreasonable, improbable, or unsatisfactory that reasonable doubt remains of the defendant's guilt. *Id*.

¶ 9 Intent is generally proven by circumstantial evidence, as direct evidence of intent is rare. *People v. Robinson*, 167 Ill. 2d 397, 408 (1995). Several factors have been considered as probative of intent to deliver, including whether the quantity of the controlled substance is too large for personal consumption; the purity of the drug confiscated; possession of a weapon; possession of large amounts of cash; possession of police scanners, beepers, or cellular telephones; possession of drug paraphernalia; and the manner in which the drugs are packaged. *Id*. However, these factors are not exhaustive: " '[I]n light of the numerous types of controlled substances and the infinite number of potential factual scenarios in these cases, there is no hard and fast rule to be applied in every case.' " *People v. Bush*, 214 Ill. 2d 318, 327 (2005) (quoting *Robinson*, 167 Ill. 2d at 414). The question of the sufficiency of the evidence to prove intent to deliver is decided on a case-by-case basis. *Robinson*, 167 Ill. 2d at 412-13.

¶ 10 Here, the evidence was sufficient to prove defendant had intent to deliver the heroin. We will defer to the court's finding that the officers' testimony was credible. The officers recovered a total of 39 tinfoil packets during the course of defendant's arrest. They saw defendant carrying a clear plastic bag inside of which were 13 smaller Ziploc baggies with tinfoil packets of heroin. Then defendant directed the officers to two more bags containing an

additional 26 tinfoil packets that were packaged in the same manner as those recovered from defendant's person. Thirty-four of the packets were tested and contained 5.12 grams of heroin. Though there was no testimony as to whether the amount of heroin recovered was inconsistent with personal consumption, when a small amount of narcotics is recovered, "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 an intent to deliver." *People v. Blakney*, 375 Ill. App. 3d 554, 558 (2007). Both officers testified that in their experience, the heroin was packaged for sale. Furthermore, defendant directed the officers to two more "jabs" that were hidden behind a garage in an alley. The officers testified that a "jab" is a term used by drug dealers to describe narcotics that are packaged to be sold, usually a larger plastic bag with small bags of drugs within. Finally, defendant had $200 on his person when he was arrested, an amount consistent with engaging in the sale of narcotics. Taking all the evidence in the light most favorable to the State, we find it was not so unreasonable, improbable, or unsatisfactory to conclude that reasonable doubt of defendant's guilt remains.

¶ 11 Defendant argues that though the officers testified that "jab" is a street term used by drug dealers to describe narcotics that are packaged to be sold, defendant just as likely could have used the term as a drug purchaser who bought the drugs in that manner because even "law-abiding citizens know drug slang." Defendant also argues that he may have stored the "jabs" behind the garage for personal consumption.

¶ 12 To the extent the defendant argues that other inferences could have been drawn from the evidence, that is an argument to be made to the trier of fact. We do not engage in

assessing which inference should have been drawn by the trier of fact. *Siguenza-Brito*, 235 Ill. 2d at 224. We merely determine whether the inference drawn by the trier of fact consistent with the finding of guilty was supported by the evidence. The trial court reasonably concluded that defendant referred to the additional drugs as "jabs," who must have hid them behind the garage to know of their location, because he was engaged in the sale of drugs. Under these circumstances, there is little question that a rational trier of fact could have found defendant guilty beyond a reasonable doubt of possession with intent to deliver.

¶ 13 Defendant next contends, and the State correctly agrees, that the $200 DNA analysis fee was improperly assessed because he previously submitted a DNA sample. Our supreme court has interpreted the statutory provision that provides of the assessment of the DNA fee as permitting only a single such assessment. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). The record shows that defendant was convicted of a felony possession of a controlled substance on September 9, 2003. Defendant also points to a State Police DNA Indexing Laboratory Report, of which we may take judicial notice (*People v. Jimerson*, 404 Ill. App. 3d 621, 634 (2010)), that shows, based on the 2003 conviction, defendant submitted a DNA sample for analysis in 2004 and a profile was subsequently obtained. Under the holding in *Marshall*, the trial court erred in imposing the $200 DNA analysis fee because that fee has been assessed previously. *Marshall*, 242 Ill. 2d at 302; see also *People v. Leach*, No. 1-09-0339, slip op. at 14-15 (May 31, 2011) (finding that in order to vacate a DNA charge under *Marshall*, a defendant need only show that he was convicted of a felony after the DNA requirement went into effect on January 1, 1998). The $200 DNA analysis fee is vacated, pursuant to Supreme Court Rule

615(b)(2) (eff. Aug. 1, 1987).

¶ 14 Next, defendant asserts and the State correctly agrees that the mittimus must be corrected to conform to the trial court's oral pronouncement. We direct the clerk of the circuit court to correct the mittimus to reflect that defendant was convicted of two counts of possession of 1 to 15 grams of heroin, a Class 1 felony. See *People v. McCray*, 273 Ill. App. 3d 396 (1995) (remand not required for correction of the mittimus).

¶ 15 For the foregoing reasons, we affirm defendant's convictions and sentence, vacate the $200 DNA analysis fee, and correct the mittimus.

¶ 16 Affirmed in part; vacated in part; mittimus corrected.