No. 2011 IL App (1st) 091145-U

FIFTH DIVISION
August 26, 2011

No. 1-09-1145

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. 07 CR 2657
	)	
LARRY STEWART,	)	The Honorable
	)	Rickey Jones,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Joseph Gordon and Howse concurred in the judgment.

ORDER

HELD: Defendant's conviction affirmed where police officer's surveillance of his actions during narcotics transactions constituted probable cause for his warrantless arrest; however, defendant's fine and fees order must be amended to vacate Court Systems Fee because he was not convicted under Illinois Vehicle Code, as well as DNA Identification Fee because he had already submitted a DNA sample pursuant to a prior felony conviction; and, upon concession by State, defendant's mittimus must be corrected to reflect proper crime for which he was convicted.

¶ 1 Following a jury trial, defendant Larry Stewart (defendant) was convicted of possession of a controlled substance (more than one gram but less than 15 grams of heroin) with intent to deliver and sentenced to seven years' imprisonment. In addition, the trial court imposed costs,

fines, and fees in the amount of $1,520. On appeal, defendant asks that we grant his motion to quash arrest and suppress evidence based on the arresting officer's alleged lack of probable cause. Moreover, defendant requests this court to reduce the monetary judgment against him, including a $5 Court Systems Fee and a $200 DNA Identification Systems Fee, as well as amend the mittimus to correctly reflect that he was convicted of possession with intent to deliver more than one gram but less than 15 grams of heroin, and not manufacture or delivery. For the following reasons, we affirm defendant's conviction, amend his fines and fees order, and correct the mittimus.

¶ 2 BACKGROUND

¶ 3 At a pretrial hearing on the motion to quash arrest and suppress evidence, Officer Alejandro Lagunas of the Chicago Police Department testified that he was monitoring the area near the intersection of Monroe Street and Kilbourn Avenue, on January 4, 2007 at approximately 11:20 a.m. Officer Lagunas observed defendant from a location about 15 feet above the ground and about 60 to 75 feet from the corner of Monroe and Kilbourn for roughly 12 minutes using binoculars. Officer Lagunas stated that he witnessed defendant, on three separate occasions, retrieve a small item from a potato chip bag in his right coat pocket, which he then handed to different individuals, two men and one woman, in exchange for money.

¶ 4 Officer Lagunas further testified that during the investigation, he saw another man, later identified as Floyd Rush, walk back and forth across the sidewalk with defendant and engage in conversation with defendant. Although he could not hear the discussion between Rush and defendant, Officer Lagunas testified that he heard Rush yell, "blows, blows" several times at

passing vehicles and pedestrians. According to Officer Lagunas, the term "blows" is street slang for heroin and the area surrounding the intersection of Monroe Street and Kilbourn Avenue is a designated high narcotics area.

¶ 5 While Officer Lagunas averred that he could not see, due to his distance, what the small items defendant took from the chip bag in his pocket and handed to the three individuals were, he testified that he was clearly able to see that they were not potato chips. Moreover, he stated that such bags are a common way of storing narcotics for sale. After defendant conducted the third trade, Officer Lagunas believed he had witnessed a series of narcotics transactions. At that point, he broke surveillance, notified the rest of his team, and approached defendant. Officer Lagunas announced his office and told defendant that he was free to leave. When defendant did not leave, Officer Lagunas detained him and performed a field interview during which Officer Lagunas recovered drugs from the potato chip bag located in defendant's coat pocket. Defendant was then placed into custody.

¶ 6 Following the presentation of evidence, defendant argued to the trial court that he felt he was not free to leave after being approached by a police officer and that Officer Lagunas, as he testified, did not see what, exactly, was being exchanged between defendant and the individuals that approached him on the sidewalk. The State responded that Officer Lagunas was familiar with the area surrounding Monroe Street and Kilbourn Avenue, knew it to be a high narcotics area, and observed defendant's co-arrestee, Floyd Rush, yell, "blows, blows," several times during the 12 minute surveillance immediately preceding their detention. The State argued that given Officer Lagunas' prior experience and knowledge as a law enforcement officer, the use of

a potato chip bag as a container for narcotics is common. The trial court determined that the testimony submitted by Officer Lagunas was credible and sufficient to establish probable cause to place defendant into custody and, consequently, denied defendant's motion to quash arrest and suppress evidence.

¶ 7 Defendant filed a motion to reconsider the trial court's denial. The court heard arguments and contemplated the evidence, concluding, "[t]he ruling was correct. The motion to reconsider is denied."

¶ 8 At trial, Officer Lagunas again testified to the surveillance conducted and the resulting arrest of defendant. On the day of the incident, Officer Lagunas saw defendant approached by three different people on three separate occasions. Each person tendered an amount of money to defendant, which he placed in his pocket. Defendant then reached into his pocket and handed the person a small item from the chip bag that the person accepted. As the person walked away, defendant put the chip bag back into his pocket. Believing these transactions involved the sale of narcotics, Officer Lagunas approached defendant, recovered drugs from defendant's pocket, and placed defendant into custody. Officer Lagunas identified People's Exhibits 1 through 4, including a number of photographs of the scene specifying the location of the parties involved as well as the potato chip bag collected from defendant and the contents therein.

¶ 9 Officer Carlos Sanchez also recounted his involvement in the arrest of defendant. While Officer Lagunas arrested defendant, Officer Sanchez placed Rush into custody. At the police station, Officer Sanchez performed a custodial search of defendant whereby he recovered $91 from defendant's right pants pocket.

¶ 10 Officer Baneond Chinchilla testified that he received the items recovered on defendant from Officer Lagunas, including the potato chip bag with smaller bags containing tin foil packets comprised of suspect heroin. Moreover, Officer Chinchilla obtained the $91 collected from defendant from Officer Sanchez. According to Officer Chinchilla, he followed ordinary inventory procedure and characterized the evidence with unique inventory numbers.

¶ 11 Finally, Dorie Lewis, a forensic scientist employed by the Illinois State Police Forensic Science Center at Chicago, testified that she performed two tests on the suspect narcotics found on defendant's person at the time of his arrest. Upon evaluating 8 of the 12 items recovered from defendant, weighing 1.2 grams, Lewis confirmed the presence of heroin.

¶ 12 Following the close of trial, the jury returned a guilty verdict.

¶ 13 Defendant's motion for a new trial was denied. He was sentenced to seven years' incarceration in the Illinois Department of Corrections. His motion to reconsider his sentence was also rejected. From this order, defendant now appeals.

¶ 14 ANALYSIS

¶ 15 I. Probable Cause

¶ 16 On appeal, defendant first argues that the trial court erroneously denied his motion to quash arrest and suppress evidence because the arresting officer, Officer Lagunas, lacked probable cause to arrest him without a warrant. We disagree.

¶ 17 This Court applies a two-part standard of review when assessing a trial court's suppression finding. *People v. Oliver*, 236 Ill. 2d 448, 454 (2010); *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006). Great deference is given to the trial court's factual determinations

regarding probable cause, and we will reverse them only if they are against the manifest weight of the evidence. *Oliver*, 236 Ill. 2d at 454. However, the trial court's ultimate decision whether to grant or deny a defendant's motion to suppress is reviewed *de novo*. *Oliver*, 236 Ill. 2d at 454; *Luedemann*, 222 Ill. 2d at 542.

¶ 18 Probable cause constitutes knowledge of sufficient articulable facts at the time of the encounter to create a reasonable suspicion that the person in question has committed, or is about to commit, a crime. *People v. Love*, 199 Ill. 2d 269, 275 (2002). Consequently, probable cause to arrest arises when the totality of the circumstances known to the officer at the time of the arrest would lead a reasonable, objective person, in the position of the officer, to deduce that a crime has been committed and that the defendant was the person who committed the crime. *People v. Harris*, 352 Ill. App. 3d 63, 66 (2004). Although mere suspicion is not enough to justify a warrantless arrest, the evidence relied upon by the arresting officer does not have to be sufficient to prove guilt beyond a reasonable doubt. *People v. Wear*, 229 Ill. 2d 545, 564 (2008); *People v. Rodriguez-Chavez*, 405 Ill. App. 3d 872, 876 (2010) ("the existence of possible innocent explanations for the individual circumstances or even for the totality of the circumstances does not necessarily negate probable cause"). This determination is found according to the surrounding circumstances combined with the police officer's factual knowledge and prior law enforcement experience. See, *e.g.*, *Harris*, 352 Ill. App. 3d at 67-68 (police officer's observation of defendant's conduct and prior experience in monitoring narcotic activity led to probable cause arrest); *People v. Ortiz*, 355 Ill. App. 3d 1056, 1064-1065 (2005) (probable cause to arrest established through police officer's examination of the defendant

during narcotics surveillance and previous law enforcement experience). It is governed by common sense and practicality, and not by technical, hard-line legal directives. *People v. Lundy*, 334 Ill. App. 3d 819, 831 (2002). Above all, the burden of showing a lack of probable cause rests with the defendant. *People v. Ramsey*, 362 Ill. App. 3d 610, 614 (2005).

¶ 19 When viewing the totality of the circumstances surrounding the present matter, it is apparent that Officer Lagunas possessed sufficient probable cause to search and arrest defendant. On the day of the incident, Officer Lagunas conducted surveillance in the vicinity of Monroe Street and Kilbourn Avenue, which he testified is a known high narcotics area. That morning, from just 60 to 75 feet away in an elevated position and using binoculars, he observed defendant directly participate in three separate transactions whereby defendant tendered a small item from a potato chip bag in his right coat pocket to each individual who approached him on the street and gave him money. This pattern repeated itself three times and lasted for 12 minutes. Even though Officer Lagunas averred he could not see exactly what defendant handed to the three individuals, he affirmatively testified that potato chip bags are commonly used as receptacles for narcotics, according to his experience as a law enforcement officer. Additionally, during his surveillance, Officer Lagunas witnessed Floyd Rush yell "blows, blows" several times, walk back and forth with defendant on the sidewalk, and occasionally engage in a dialogue with him. As Officer Lagunas testified, the term "blows" denotes the street sale of heroin. See, *e.g.*, *People v. Fountain*, 408 Ill. App. 3d 33, 34 (2011) (officer understood "blows" to mean heroin). At that point, and based upon all of these circumstances, Officer Lagunas believed he had witnessed the defendant participate in sales of illegal narcotics. He broke surveillance, radioed

his fellow officers, and approached defendant, whereupon he searched him and found narcotics on his person in the potato chip bag in his coat pocket.

¶ 20 Finally, defendant argues that probable cause cannot exist here because Officer Lagunas did not see the item exchanged between defendant and the individuals who approached him on the street. However, such an argument cannot stand. To the contrary, our case law has held that probable cause in drug cases is not conditioned on prior visual classification of a narcotic substance. *People v. Rucker*, 346 Ill. App. 3d 873, 889 (2003); *Love*, 199 Ill. 2d at 280. Here, while Officer Lagunas stated that he could not see exactly what was traded for the individuals' money, he saw, on three separate occasions, a pattern whereby defendant reached into his coat pocket to retrieve a small item from a potato chip bag, which, according to Officer Lagunas' experience and testimony, serves as a common container for drugs. Further, based on his prior knowledge and experience as a police officer involved in numerous drug surveillance operations, as well as the totality of the circumstances pertaining to this matter, Officer Lagunas reasonably believed that the item exchanged was not a mere potato chip, but an illegal narcotic.

¶ 21 Based on all this, we find that the record demonstrates that Officer Lagunas was equipped with sufficient probable cause to carry out the arrest of defendant for possession of a controlled substance with intent to deliver.

¶ 22 We note for the record that defendant relies on *People v. Holliday*, 318 Ill. App. 3d 106 (2001), and *People v. Love*, 199 Ill. 2d 269 (2002) in support of his proposition that there was no probable cause. However, given the analysis of this court, the facts of those cases are distinguishable from those of the present matter.

¶ 23 In *Holliday*, two law enforcement officers in an unmarked police car traveled past an alley in which the defendant was present. Although their visual lasted only one to two seconds, one of the officers said that he had witnessed a drug transaction taking place there. While conducting a search pursuant to the defendant's consent, one of the officers performed a "crotch check" and felt an object he believed to be a parcel of crack cocaine in the defendant's pants. At trial, the officer testified that he could not adequately identify the object exchanged between the defendant and another individual in the alley prior to the defendant's arrest. In spite of all this, the trial court denied the defendant's motion to quash arrest and suppress the narcotics evidence. However, on appeal, the *Holliday* court found that the officer lacked probable cause to search the defendant's crotch for drugs. The defendant's motion to suppress should have been granted, said the reviewing court, as the officer's search of the defendant's genital region was unreasonable and prohibited by the Fourth Amendment based upon its invasiveness and the officer's insufficient observations regarding a possible drug transaction. *Holliday*, 318 Ill. App. 3d at 108-13 (although officer's observations arguably supported his reasonable suspicion of a drug transaction, "those observations were insufficient to establish probable cause").

¶ 24 Defendant argues that like the arresting officer in *Holliday*, Officer Lagunas lacked probable cause to take him into custody because Officer Lagunas could not adequately describe the items exchanged. However, *Holliday* does not control our examination of the present case. While the officers in that case witnessed what they believed to be a drug transaction based on a visual that lasted only one or two seconds from a moving vehicle, here, Officer Lagunas watched defendant for approximately 12 minutes from a stationary, elevated position while using

binoculars. Furthermore, Officer Lagunas was conducting surveillance in a known high narcotics area, whereas the officers in *Holliday* were merely passing the entryway of an alley in a car, and not participating in an investigation. In addition, during the surveillance at issue here, Officer Lagunas observed defendant engage in three separate transactions in which defendant traded a small item from a potato chip bag, a common narcotics receptacle, for money, and defendant was accompanied by another man yelling out street terms for heroin. Upon these facts, the instant case is demonstrably distinguishable from *Holliday* and, thus, does not merit the same outcome.

¶ 25 Moreover, defendant's reliance on *Love* is wholly misplaced, as that case actually affirmed a finding of probable cause. In *Love*, two police officers were conducting narcotics surveillance at around 1:50 a.m. in a residential neighborhood. The officers witnessed an individual approach a man on a bicycle and hand him some money. The man on the bicycle directed the individual toward the defendant, who then removed an item from her mouth and handed it to the individual. The officers approached and detained the defendant. The defendant was asked to spit out what was in her mouth, since the officers were having trouble understanding her garbled speech; the defendant produced rock cocaine. While the trial court denied the defendant's motion to suppress, the reviewing court reversed its ruling and, accordingly, the defendant's conviction. *Love*, 199 Ill. 2d at 271-77. However, our state supreme court reversed the reviewing court and reinstated the defendant's conviction. Citing the officers' observations of a trade of money for objects originating from the defendant's mouth, as well as the defendant's garbled response to the officers' questions, the *Love* court held that "the

totality of the circumstances" clearly amounted to probable cause for her arrest. *Love*, 199 Ill. 2d at 280.

¶ 26 Defendant insists that the officers' suspicion in *Love* ripened into sufficient probable cause only after questioning that defendant and demanding that she spit out what was in her mouth. Accordingly, defendant maintains that Officer Lagunas lacked probable cause to arrest him, since his actions were "far less suspicious." However, defendant's assertion is incorrect. Contrary to defendant's claim, the basis for the Court's holding in *Love*, finding probable cause, was not simply the officers' suspicion upon the defendant's garbled response, but first and foremost, their observations of a trade of money for receipt of an item spit from the defendant's mouth. In addition, we find that the totality of the circumstances in this case, just as the totality of circumstances in *Love*, led Officer Lagunas to the reasonable conclusion that defendant was concealing drugs in his coat pocket. Officer Lagunas, using police surveillance techniques, observed three separate transactions whereby individuals tendered money to defendant in return for a small item recovered from a potato chip bag located on defendant's person. Furthermore, Floyd Rush, with whom defendant engaged in periodic conversation and movement on the sidewalk, yelled "blows, blows," a term indicating the sale of heroin, several times. As Officer Lagunas testified, and as his law enforcement experience provided, potato chip bags are commonly used to conceal narcotics. Moreover, Officer Lagunas stated that the object tendered by defendant did not resemble a potato chip. Certainly, it is difficult to imagine a person purchasing a single potato chip from someone on the street. From all this, we find that defendant's case is quite similar to *Love* and, therefore, merits the same outcome.

¶ 27 Given the totality of the circumstances, Officer Lagunas possessed sufficient probable cause to arrest defendant pursuant to his observations of him during the conducted surveillance. As such, we agree with the finding of the trial court and affirm defendant's conviction of possession of a controlled substance with intent to deliver.

¶ 28 II. Fines and Fees

¶ 29 Defendant next contends that the trial court erroneously imposed two fees against him, namely, a Court Systems Fee and a DNA Identification Systems Fee. He claims that the two fees must be vacated and that his fines and fees must be amended.

¶ 30 Regarding the $5 Court Systems Fee, defendant's fines and fees order states that he was charged and convicted pursuant to 55 ILCS 5/5-1101(a) (West 2008). However, this provision expressly deals with only violations of the Illinois Vehicle Code. In the present case, defendant was charged with and convicted of possession of heroin with intent to deliver, and not with any violation related to the Illinois Vehicle Code. The State concedes defendant's request to decrease the assessment. As this court concurs, we hereby vacate the $5 Court Systems Fee. See, *e.g., People v. Price*, 375 Ill. App. 3d 684, 698 (2007).

¶ 31 Next, defendant argues that the trial court improperly assessed him a $200 State DNA Identification Systems Fee. His DNA was already registered, since he submitted a sample pursuant to a prior felony conviction in 2000; therefore, defendant contends, he should not be required to pay another fee for a duplicate course of action.

¶ 32 According to the Illinois Code of Corrections, "any person *** convicted or found guilty of any offense classified as a felony under Illinois law *** [is] required to submit specimens of

blood, saliva, or tissue to the Illinois Department of State Police" for analysis and categorization into genetic marker grouping. 730 ILCS 5/5-4-3(a) (West 2008). This includes the imposition of a $200 analysis fee. 730 ILCS 5/5-4-3(j) (West 2008).

¶ 33 Recent analysis conducted by the Illinois Supreme Court provides the framework of our evaluation. In *People v. Marshall*, 242 Ill. 2d 285 (2011), the Court considered the very question presented by defendant in this case. The defendant in *Marshall* was convicted of first degree murder and sentenced to a prison term of 33 years. On appeal, the defendant claimed that the trial court lacked the authority to order him to submit a DNA sample or pay the accompanying $200 fee, since his DNA was already on file pursuant to a prior felony conviction. *Marshall*, 242 Ill. 2d 285 at 290. After a careful analysis of the statute, the Court determined that the trial court was without the ability to compel the defendant to submit a DNA sample and pay the corresponding fee. *Marshall*, 242 Ill. 2d 285 at 303. The *Marshall* Court held that "section 5-4-3 authorizes a trial court to order the taking, analysis and indexing of a qualifying offender's DNA, and the payment of the analysis fee only where that defendant is not currently registered in the DNA database." *Marshall*, 242 Ill. 2d 285 at 303. Consequently, the Illinois Supreme Court reversed the appellate court's judgment and vacated the portion of the trial court's order demanding the defendant tender an extra DNA sample and requiring him to pay the $200 DNA Identification Systems Fee. *Marshall*, 242 Ill. 2d at 303; see, *e.g., People v. Rigsby*, 405 Ill. App. 3d 916, 919 (2010) ("A one-time submission into the police DNA database is sufficient to satisfy the purpose of the statute in creating a database of the genetic identities of recidivist criminal offenders. * * * Moreover, since the analysis fee is intended to cover the costs of the

DNA analysis, and only one analysis is necessary per qualifying offender, then by extension only one analysis fee is necessary as well"); *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009) ("Once a defendant has submitted a DNA sample, requiring additional samples would serve no purpose").

¶ 34 In the present case, defendant submitted a DNA sample and a corresponding $200 DNA Identification Systems Fee following a prior felony conviction in 2000. As defendant is currently registered in the DNA database, and in light of recent Illinois case law, we vacate the monetary decree of the trial court and adjust the defendant's fines and fees assessment accordingly.

¶ 35 III. Mittimus

¶ 36 Lastly, defendant asks this court to amend the mittimus. Currently, defendant's mittimus reflects that he was convicted of manufacture or delivery or heroin. However, the record in this cause certifies that defendant was not convicted of manufacture or delivery, but, rather, possession of a controlled substance with intent to deliver more than 1 gram but less than 15 grams of heroin. The State agrees with defendant's contention that the mittimus should be adjusted. This court must amend the mittimus to imitate the judgment of the trial court. See, *e.g., People v. Johnson*, 372 Ill. App. 3d 772, 783-84 (2007) (defendant's mittimus amended to mirror conviction for possession with intent to deliver heroin); *People v. Brown*, 255 Ill. App. 3d 425, 438-439 (1993). In this case, to remedy the inaccurate information contained therein, the mittimus should assert defendant's violation of 720 ILCS 570/401(c)(1) (West 2008). We, therefore, amend the mittimus to reflect defendant's conviction of possession with intent to

deliver. See *People v. Davis*, 303 Ill. App. 3d 684, 688 (1999) (pursuant to Illinois Supreme Court Rule 615, reviewing court may correct mittimus at any time, without remanding cause to trial court).

¶ 37 CONCLUSION

¶ 38 Accordingly, for all the foregoing reasons, we affirm defendant's conviction, modify his fines and fees order by vacating the $5 Court Systems Fee and the $200 DNA Identification Systems Fee, and correct his mittimus.

¶ 39 Affirmed, fines and fees order amended, and mittimus corrected.