2012 IL App (1st) 100480-U

SIXTH DIVISION
May 25, 2012

No. 1-10-0480

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. 09 CR 2695
	)	
CLARENCE WILLIAMS,	)	Honorable
	)	Michael J. Howlett, Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice R.E. Gordon and Justice Garcia concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant procedurally defaulted and affirmatively waived his right to appeal the admission of the stipulated testimony of the State's witness, a forensic chemist, where defendant did not object to the stipulation at trial or in his posttrial motion, and assisted in the admission of the testimony by agreeing to the stipulation.

¶ 2 Following a bench trial, defendant Clarence Williams was found guilty of possession of between 15 and 100 grams of cocaine, a Class X felony. The trial court sentenced defendant to the minimum term of six years' incarceration. On appeal, defendant does not contest that he possessed cocaine. Instead, defendant challenges the stipulation that established the weight of the cocaine, arguing that he should be sentenced as a Class 4 offender for possession of a lesser amount under section 402(c) of the Illinois Controlled Substances Act (720 ILCS 570/402(c)

(West 2010)).

¶ 3 Defendant was arrested during the course of police surveillance on his apartment. While defendant was in custody, police obtained and then executed a search warrant for his apartment. During the search, police recovered several documents establishing defendant's residency at the apartment, $279 in cash, and two clear plastic bags of suspected cocaine, divided into 184 individual baggies.

¶ 4 The crux of defendant's appeal surrounds whether the State proved beyond a reasonable doubt that he possessed between 15 and 100 grams of cocaine, pursuant to section 402(a)(2)(a) of the Illinois Controlled Substances Act (720 ILCS 570/402(a)(2)(a) (West 2010)), where defendant contends the plastic baggies containing suspected cocaine were not individually tested and defendant failed to object to the parties' stipulation that the recovered 105 baggies contained 15.3 grams of cocaine.

¶ 5 During its case in chief, the State offered to stipulate to the testimony of Peter Anzalone, a forensic chemist at the Illinois State Police Crime Lab. The trial court then asked defendant whether he was willing to stipulate to the scientific testimony contained in the stipulation, and defendant responded affirmatively. According to the stipulation, if Anzalone were called to the stand, he would testify that he received 184 packets of suspected cocaine, containing inventory number 11547908. Anzalone is qualified to testify as an expert in the area of forensic chemistry, and all equipment used was tested, calibrated and functioning properly when the suspected cocaine was tested. Anzalone performed tests commonly accepted in forensic chemistry. After testing 105 of the 184 packets, Anzalone concluded within a reasonable degree of scientific certainty that 105 packets tested positive for cocaine, and that the actual weight of the tested packets was 15.3 grams. The parties further stipulated that a proper chain of custody was maintained at all times.

¶ 6 Defense counsel argued that an estimated total weight of 26.7 grams should be removed

from the stipulation because Anzalone did not actually weigh the 184 total packets. The trial court agreed and struck the estimate from the stipulation. Defense counsel then stated that he had no objection to the actual weight, 15.3 grams. Defendant again agreed to the stipulation and the trial court received it into evidence.

¶ 7 Throughout the trial, defense counsel's theory was that the State did not prove that defendant possessed the recovered cocaine. The trial court rejected the defense and found defendant guilty of possession of 15 to 100 grams of cocaine. Defendant's written motion for a new trial and his counsel's subsequent oral argument before the court contended that the State failed to prove him guilty beyond a reasonable doubt and that the trial court erred in allowing purported hearsay documents into evidence. Defense counsel did not object to the admission of the stipulation into evidence, nor to the stipulated weight and composition of the recovered narcotics. He also did not object to the chemist's testing procedures. The trial court denied defendant's motion for a new trial.

¶ 8 On appeal, defendant contends solely that the stipulation did not explain whether the contents of the 105 packets were tested separately or commingled during testing and, as a result, there was no evidence that defendant possessed more than 15 grams of cocaine. Thus, defendant requests that this court reduce his conviction to possession of a lesser amount of cocaine under section 402(c) and remand for sentencing as a Class 4 offender. The State responds that while defendant presents his appeal as a challenge to the sufficiency of the evidence, it is more accurately a challenge to whether a proper foundation was laid for admission of the stipulation, which is an evidentiary issue subject to waiver if not preserved by defendant's objecting at trial and raising the issue in a posttrial motion. The instant appeal is the first time defendant argues the impropriety of the stipulation's admission.

¶ 9 To prove a defendant guilty of unlawful possession of a controlled substance, the State must prove that the defendant had knowledge of the presence of the controlled substance, and

that the defendant had immediate and exclusive possession or control of the narcotics. *People v. Woods*, 214 Ill. 2d 455, 466 (2005). To sustain the conviction, the State must prove that the material recovered from the defendant and which forms the basis of the charge is, in fact, a controlled substance. *Id.* The weight of the controlled substance is an essential element of a possession charge where there is a lesser included offense for possessing a smaller amount. *People v. Hill*, 169 Ill. App. 3d 901, 911 (1988). As a reviewing court, we must examine evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

¶ 10 Generally, a defendant is precluded from attacking or otherwise contradicting any facts to which he stipulated. *Woods*, 214 Ill. 2d at 469. "A stipulation is conclusive as to all matters necessarily included in it," and "[n]o proof of stipulated facts is necessary, since the stipulation is substituted for proof and dispenses with the need for evidence." *Id.*

¶ 11 Defendant attempts to characterize his challenge to the weight and composition of the recovered substance as an attack on the sufficiency of the evidence. However, his challenge is more properly characterized as an argument for lack of a proper foundation to admit Anzalone's testimony as an expert forensic chemist. *Id.* at 469-71; see also *People v. Durgan*, 346 Ill. App. 3d 1121, 1130-31 (2004). In *Durgan*, the appellate court rejected the defendant's attempt to couch his foundational argument that the chemist's stipulated testimony did not show what tests were performed on the suspected narcotics in a sufficiency of the evidence claim. *Id.* at 1130. The court explained that since the expert testified to the identity of the controlled substance, the challenge is actually to the failure to lay a proper foundation for the proof of that element, which goes to the determination of admissibility, and not to the sufficiency of the evidence. *Id.*; see also *People v. DeLuna*, 334 Ill. App. 3d 1, 20 (2002); *People v. Besz*, 345 Ill. App. 3d 50, 54-55 (2003); and *People v. Hill*, 345 Ill. App. 3d 620, 631-32 (2003).

¶ 12 The leading case on this waiver issue is *Woods*, 214 Ill. 2d at 463-64. In *Woods*, the

defendant appealed his conviction for possession of a controlled substance by arguing that the State failed to prove his guilt beyond a reasonable doubt because the State failed to establish a sufficient chain of custody for the recovered narcotics. *Id.* at 458. The parties stipulated to the expert testimony of the State's witness, a forensic chemist, who testified to the weight, composition and chain of custody of the controlled substance. *Id.* at 461. The defendant argued for the first time on appeal that the chain of custody was deficient, arguing a sufficiency of the evidence claim rather than admissibility of the evidence. *Id.* at 462-63. Our supreme court rejected the defendant's argument, concluding that a challenge to the chain of custody for evidence is a claim for lack of adequate foundation, an evidentiary issue that is subject to waiver on review, if not preserved by objecting at trial and raising the issue again in a posttrial motion. *Id.* at 471. The court held that the defendant procedurally defaulted his challenge to the chain of custody. *Id.* at 473. The court also held that the defendant affirmatively waived the issue by stipulating to the testimony of the chemist. *Id.* at 473-75.

¶ 13 As in *Woods*, defendant's claim that Anzalone's stipulated testimony did not specify his testing procedures has been procedurally defaulted. Defendant failed to challenge the admission of Anzalone's stipulated testimony at trial and posttrial. He cannot bring this issue for the first time on appeal. Defendant also affirmatively waived his challenge when he took part in offering it into evidence by agreeing to stipulate to Anzalone's testimony. See *Woods*, 214 Ill. 2d at 474; see also *People v. Miller*, 218 Ill. App. 3d 668, 671-73 (1990) (the appellate court declined to scrutinize the testing procedure employed by the State's forensic chemist where the State and defense stipulated to the State's forensic chemist as an expert, and to the weight and the chemist's analysis of the cocaine, and the parties never addressed the issue at trial aside from the stipulated testimony).

¶ 14 The record reveals the parties intended to stipulate to Anzalone's testimony in a brief manner to remove any dispute regarding the chemical composition and the chain of custody of

the recovered substance. See *People v. Muhammad*, 398 Ill. App. 3d 1013, 1015-16 (2010) (concluding that the parties intended to remove the chain of custody issue from the case, and because defense counsel did not challenge the chain of custody or that the substance recovered was cocaine during the trial or posttrial during the motion for a new trial, the defendant waived the issue on appeal). Here, had defendant objected to the stipulation at trial when the State offered it into evidence, the State would have had the opportunity to place Anzalone on the stand to testify to the tests performed.

¶ 15 Additionally, "a defendant forfeits any issues as to the impropriety of the evidence if he procures, invites, or acquiesces in the admission of that evidence." *Woods*, 214 Ill. 2d at 475. Here, it appears from the record that defendant's trial counsel chose to forego challenging the stipulation and instead decided to focus on the theory that the State could not prove beyond a reasonable doubt that defendant possessed the recovered narcotics. *Id*. This theory resonated throughout the trial, defense counsel's closing argument, the written posttrial motion for a new trial and the oral argument in support of the written motion. Defendant did not challenge the weight, composition or testing of the substance throughout the trial proceedings. The only challenge defense trial counsel raised regarding the stipulation was that the estimated total of 26.7 grams should be removed because Anzalone did not actually weigh the 184 total packets. The estimate was stricken after defendant's objection. Similar to this court's conclusion in *Woods*, it is reasonable to conclude that the parties intended to remove from the case the issue of the identity and weight of the recovered substance. *Id.*; see also *People v. Williams*, 200 Ill. App. 3d 503, 516 (1990) (concluding that in the context of the record, it was the parties' intention to remove the issue of the weight and composition of suspected narcotics from the case when they stipulated to unrebutted and undisputed expert testimony).

¶ 16 Defendant also argues that he was denied effective assistance of counsel. To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove both that: (1) his counsel's

performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) he was prejudiced by the deficient performance. *People v. Perry*, 224 Ill. 2d 312, 341 (2007) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). Because a defendant must establish both prongs of an ineffective assistance of counsel claim, it is appropriate to proceed directly to the prejudice prong without addressing counsel's performance. *People v. Coleman*, 391 Ill. App. 3d 963, 974 (2009) (citing *Strickland*, 466 U.S. at 697). In *Coleman*, this court observed that, in cases like the one at bar, it is often impossible for a defendant to prove prejudice without adducing evidence that is outside the record. *Coleman*, 391 Ill. App. 3d at 975. In *Coleman*, the defendant claimed that a police officer improperly commingled 15 smaller bags of suspected cocaine into a single evidence bag. The parties had stipulated that the contents of the larger bag were over 900 grams of cocaine, but defendant argued on appeal that counsel was ineffective for entering into the stipulation. This court held that to prove prejudice the defendant would have to establish a reasonable probability that the State would not have called the chemist to testify or that, if called, he could not have opined that the substance tested was cocaine. *Id.* The *Coleman* court concluded that the defendant's remedy, if any, lay in a postconviction proceeding. *Id.*

¶ 17 Here, we reach a similar conclusion. It is reasonable to presume that, absent the stipulation, the State would have called Anzalone. See *Coleman*, 391 Ill. App. 3d at 975. In order to establish that he was prejudiced by defense counsel's strategic decision to accept the State's stipulation, defendant would have to establish, through Anzalone's testimony or otherwise, that the cocaine had been commingled prior to testing at the laboratory. There is no evidence in the record to support such a conclusion. Defendant's remedy for ineffective assistance, if any, is cognizable in a postconviction proceeding. Accordingly, we decline to consider the merits of this claim. *Id.*

¶ 18 We also reject defendant's argument that plain error occurred. The plain error doctrine

allows a reviewing court to consider unpreserved error when a clear or obvious error occurred and (1) the evidence is closely balanced; or (2) the error is "so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565, (2007); see also *Woods*, 214 Ill. 2d at 471-72. In reviewing a plain error contention, this court first determines whether error occurred at all. See *People v. Bannister*, 232 Ill. 2d 52, 65 (2008); and *People v. Brant*, 394 Ill. App. 3d 663, 677 (2009). Because there was no evidence in the record of error, there can be no plain error.

¶ 19 In light of the stipulation to the weight, composition, and testing procedures of the cocaine and defendant's failure to object to the stipulation during trial and posttrial, we conclude that defendant procedurally defaulted and affirmatively waived the instant issue on appeal. We affirm the judgment of the trial court.

¶ 20 Affirmed.