2011 IL App (1st) 101489-U

FIRST DIVISION
December 30, 2011

No. 1-10-1489

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 9114 (02)
	)	
JOSE SANTIAGO,	)	Honorable
	)	Rosemary Higgins-Clark,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ *1* *HELD:* Defendant's conviction for possession of a controlled substance is affirmed. The court did not err in denying defendant's motion to quash arrest and suppress evidence and his motion for a continuance. $5 court system fee, $25 traffic court supervision fee, $20 serious traffic violation fee and $200 DNA analysis fee were improperly assessed and are hereby vacated. Order imposing those fees is modified to that effect.

¶ 2 Following a bench trial, the trial court found defendant Jose Santiago guilty of possession of a controlled substance in violation of section 402(c) of the Illinois Controlled Substances Act (the Act) (720 ILCS 570/402(c) (West 2010)) and sentenced

him to one year of incarceration. Defendant appeals, arguing the court erred in (1) denying his motion to quash arrest and suppress evidence; (2) denying his motion for a continuance to obtain witness' testimony; and (3) imposing a $5 court system fee, $25 traffic court supervision fee, $20 serious traffic violation fees and $200 DNA analysis fee. We affirm the judgment of the circuit court as modified.

¶ 3 Background

¶ 4 In April 2008, police officers arrested defendant and charged him with possession of a controlled substance. The case went to a bench trial. Defendant filed a pretrial motion to quash his arrest and suppress evidence. During the hearing on the motion, Officer Paris George testified that he was a plain clothes officer assigned to the 15th District tactical unit. On the morning of April 23, 2008, he was at the police station watching a computer video feed from a pod camera located in the 600 block of North Leamington Street. He was watching what he suspected were narcotics transactions. He watched a man, later identified as Willie Lomack, collect United States currency from motorists who stopped at Lomack's location at 631 North Leamington, go into a gangway near 631 North Leamington, come out and hand the motorists something. Officer George testified he had been a police officer for 20 years and had seen "thousands" of similar type transactions during his service. He had an opportunity to make arrests and recover items from individuals involved in those transactions and, in over 1,000 cases, he had recovered narcotics.

¶ 5 Officer George testified that around noon on April 23, 2008, he and his partner

were driving an unmarked police car with municipal plates southbound on North Leamington Street, a one-way northbound residential street. As he drove, Officer George saw defendant seated in a sports utility vehicle (SUV) parked in front of 631 North Leamington. Defendant was alone in the SUV, which faced northbound in the proper direction of traffic. Lomack was standing outside the SUV on the passenger side of the car. Officer George stated he observed Lomack generate another transaction. From 30 feet away, as Officer George was approaching in his squad car, he saw Lomack exit the gangway from 631 N. Leamington and "immediately" walk to the open front passenger window of the SUV. Officer George saw defendant hand United States currency to Lomack through the open window. In return, Lomack handed defendant an unknown object. Officer George did not see what the object was. Based on his experience, Officer George believed Lomack was delivering narcotics to defendant.

¶ 6 Officer George testified that he stopped his car in the middle of the street, over far enough that defendant could not drive away. He drew his weapon and pointed it at defendant, who was still seated in the SUV with his hands where Officer George could not see them. Officer George testified he drew his weapon because he could not see defendant's hands and, based on his years of training and experience as a police officer, feared for his and his partner's safety. He stated "[Defendant] was in a vehicle, and it is a narcotics location, and a lot of times with narcotics there is a gun somewhere." Officer George ordered defendant to show his hands. Defendant lifted his hands and Officer George saw one hand was closed in a fist and the other hand was

open. Officer George ordered defendant to keep his hands where the officer could see them, opened the door to the SUV and ordered defendant to exit the vehicle. He ordered defendant to open his hand. Officer George saw six blue and clear plastic bags containing tin foil packets in defendant's hand. Subsequent investigation revealed that the packets contained heroin. After he recovered the narcotics, Officer George handcuffed defendant, arrested him and read him his rights. Officer George had never seen defendant before that day. He did not have a warrant to arrest or search defendant that day. There was no vehicular traffic between Officer George and defendant that obstructed his view of the SUV, the lighting conditions were sunny and Officer George could clearly see through "the front windshield" the handoff between Lomack and defendant.

¶ 7 The court found Officer George had "ample probable cause" to tell defendant to raise his hands based on the officer's earlier observations of Lomack selling narcotics on a regular basis, his observation of defendant making a similar "buy," the location of the transaction and the potential danger. It noted that the fact that defendant raised his hands with one fist closed corroborated that the officer had witnessed a "buy." The court denied defendant's motion to quash arrest and suppress evidence.

¶ 8 The court heard the case over two days, first on November 10, 2009, and then on April 15, 2010. The five-month period between the two hearing dates was the result of continuances the court granted defendant in order that defendant obtain the presence of Lomack as a witness at trial. Lomack never appeared in court. On April 15, 2010,

the court refused to give defendant an additional continuance and ordered the trial to continue.

¶ 9 At trial, Officer George testified to essentially the same facts as stated above, but added some additional detail. He testified he and his partner were on Leamington on their way to pick up two officers conducting surveillance in the area and not to confront Lomack, who he had watched three hours earlier on the pod camera. Between the time Officer George first noticed defendant sitting in his red SUV and when he stopped in front of him, there was nothing obstructing his view of defendant, no cars between them and no other people within 30 to 40 feet of defendant besides Officer George, his partner and Lomack. Officer George had not seen Lomack first go into the gangway nor throw anything into defendant's car.

¶ 10 Officer George testified that, when defendant opened his fist as ordered, Officer George saw "six blue and clear pieces of tape each containing a foil packet that was commonly used in packaging for street sale of narcotics. Specifically heroin." Officer George was "very familiar" with the way narcotics are packaged because he had been a tactical officer for over 20 years. He testified that he drove defendant to the police station in his squad car and, during the drive, defendant told Officer George and his partner that defendant "was buying the blows [heroin] for a friend." Defendant had $42 on him. Lomack, who was also arrested, had $44 in currency on him. The parties stipulated to the chain of custody of the recovered packets and that they contained 1.2 grams of heroin. Officer George testified that the value placed by the Chicago Police

Department on the heroin was $90. He stated this was an inflated value and different than what the heroin was worth on the street, which was $10 per packet.

¶ 11 Defendant testified that on April 23, 2008, he and his friend Derral Moore were slated to do tuckpointing work for his brother-in-law Hector Alvarez, a police detective. They had already done two days of work at Alvarez's house. They were supposed to start that morning around 10:00 or 11:00 a.m. Defendant had known Moore for 30 years. He was to pick him up at 619 North Laramie. Defendant drove to that address and beeped his horn but Moore did not come out of the house. Defendant spoke to Hildegar Jackson, Moore's aunt. After speaking to her, defendant went to the neighborhood candy store, an illegal storefront selling candy and loose cigarettes on the 600 block of North Leamington. Leamington is the first block east of Laramie. He spoke to Moore by phone and Moore told him he was at the candy store.

¶ 12 Defendant testified he drove northbound on Leamington to the candy store. He pulled over to speak with three or four men standing in front of the store on the east side of the street. He did not know them. He asked whether Moore was there. Then, "next thing" he knew, one of the men standing by the car, Lomack, "threw some items into [his] car. And the police came up." He had never seen Lomack before. Lomack had started walking toward defendant's car "right away" when defendant pulled over and rolled down his passenger side window. Defendant testified Lomack threw the items into his car "when the police, all of a sudden there was a squad car, ** an undercover car, coming in fast approaching [his] vehicle and then all of a sudden [he] saw the

vehicle coming, [he] looked *** to the right and that's when [he] saw Lomack throwing the items in [his] car." The police car was coming the wrong way down the one-way street, heading southbound on Leamington. He noticed the police car when it was approximately a quarter block away from him because he could hear the engine roaring. He did not know what Lomack threw into the car but whatever it was landed on the passenger seat. When he looked down, he saw it was "a couple packs of like duct tape." He did not pick them up.

¶ 13 Defendant testified Officer George had "a gun to [his] face yelling at him to get out of the car," which he did. Officer George told him to keep his hands in sight, which he did, with open palms. He had heard Officer George testify that one of his palms was clenched but he did not have a clenched palm. He did not have drugs in his hand. He did not give money to Lomack. After he got out of the car, he was handcuffed. Officer George drove defendant's vehicle to the police station. Defendant was taken to the police station in the back of a squad car by Officer George's partner and another police officer. He did not tell any police officer that he was there buying drugs for a friend. He had $42 in his pocket. There had been parked vehicles in front of where he pulled over.

¶ 14 Derral Moore testified that he was a tuckpointer and had grown up with defendant. He had worked with defendant the day before defendant's arrest, as well as several other days, tuckpointing defendant's brother-in-law's house. Defendant's brother-in-law was a policeman named Hector. Moore testified that he worked with defendant any time defendant had a "side job." He and defendant were supposed to do

more tuckpointing at Hector's on April 23, 2008. Defendant was to pick Moore up at Moore's house, as he had done on previous days, and drive to Hector's house. Defendant drove "a red truck, Ford escape."

¶ 15 Moore testified he lived at 619 North Laramie, one block west of Leamington. Defendant was to pick him up at "11ish" but Moore left his house and went through the alley behind his house to 620 North Leamington to buy cigarettes. A woman named Gladis Hoston owned the house at 620 North Leamington and ran a candy store there. Moore had known Gladis's daughter Debra since grammar school. Moore used the back door to the candy store. He was at the store approximately 15 minutes, then went home. Defendant never arrived to pick him up. He never saw defendant that day.

¶ 16 Debra Hoston testified that she was living at 622 North Leamington, next door to her mother's house at 620 North Leamington, on April 23, 2008. She had grown up with Moore and knew he lived on North Laramie, in a house across the alley from her mother's house. She knew defendant because he used to work for Moore's grandmother and Debra did errands for her. She had know him for approximately one year.

¶ 17 At 11:55 a.m. on April 23, Debra was looking out of her third-floor attic bedroom window. She was waiting for her son to bring her grandson. She saw a man come out of the yard of a vacant house on the East side of Leamington, across the street from her. She did not know the man's name but had seen him on Leamington "all the time." Debra testified that she saw the man come out of the yard, walk straight to a red sports

utility vehicle (SUV) parked across the street from her and toss something into the SUV. She looked down the street and saw the police coming as the man tossed "it" in the SUV. Debra had not seen the red SUV arrive. It was already parked when she looked out the window. When she first saw the SUV, she knew it was defendant in it.

¶ 18 Debra stated Leamington is a one-way north-bound street. The SUV was facing north, with the driver's side of the car closest to her. She identified defendant as the only person in the SUV. The man she saw standing was on the passenger side of the SUV. He did not hand something to the occupant of the car. Rather, he walked up to the SUV and threw "it" into the passenger side window of the SUV with his right hand. When his hand made the tossing motion, it was already inside the SUV. From her position " a few feet up," she could see the half of the passenger seat closest to the passenger door. She could also see through the "back driver's window." She saw the item land on the passenger seat. She did not see what was tossed. She did not see defendant hand the man anything.

¶ 19 Debra testified the SUV driver was just 'sitting there" and "didn't do anything." She stated the police officers' blue and white vehicle approached in the direction of travel, coming northbound on Leamington, and came up in front of the SUV. The officers "pulled up to the SUV and grabbed the man out –they pulled a gun on [defendant]" and "grabbed the other guy *** from the passenger side of the car and arrested both of them." Debra withdrew at that point. She did not go outside and talk to the police.

¶ 20 The parties stipulated that Hector Alvarez would testify that he was an Area 5 police detective and defendant's brother-in-law. Defendant and Moore were expected to come to his house on April 23, 2008, to finish tuckpointing. They had been there on prior days between 9:00 a.m. and 10:00 a.m. He waited for them to arrive until 11:00 a.m.; they did not come so he left.

¶ 21 After closing arguments, the court found defendant guilty of class four possession of a controlled substance, noting that it found Officer George credible. On May 11, 2010, the court denied defendant's oral posttrial motion that the State did not prove him guilty beyond a reasonable doubt, again stating that it found Officer George credible and believable. It sentenced defendant to one year incarceration. Defendant timely appealed.

¶ 22 Analysis

¶ 23 1. Motion to Quash Arrest and Suppress Evidence

¶ 24 Defendant argues the trial court erred in denying his motion to quash arrest and suppress evidence. Defendant asserts Officer George's conduct in blocking defendant's car and pointing a gun at him was wholly unnecessary in light of the circumstances of the stop and elevated the brief detention into a full-blown arrest; Officer George lacked probable cause to arrest defendant when he pointed his weapon at defendant based on generalized safety concerns; the arrest and search incident to the arrest were unlawful; and the motion to suppress should have been granted.

¶ 25 Defendant argues, in the alternative, that, if the detention is found to be a *Terry*

stop, Officer George lacked a reasonable basis to believe defendant was armed and dangerous to justify a protective search if he was not under arrest at the time of the search; Officer George's search of his closed hand was improper because Officer George failed to provide an articulable basis for believing that defendant was armed and dangerous; and the motion to suppress the evidence and statement obtained as a direct result of the arrest should have been granted. He argues that, because the illegally obtained evidence was the sole evidence of defendant's possession of a controlled substance, his conviction should be reversed outright.

¶ 26 The Fourth Amendment of the United States Constitution protects against unreasonable search and seizure. *People v. Jones*, 215 Ill. 2d 261, 268 (2005). Generally, reasonableness under the fourth amendment requires a warrant supported by probable cause. *Jones*, 215 Ill. 2d at 268. If a trial court finds that a warrantless arrest was based on probable cause, then the arrest is deemed lawful. *People v. Tisler*, 103 Ill. 2d 226, 237 (1984). When reviewing a trial court's decision regarding a motion to quash arrest and suppress evidence, we must accord great deference to the trial court's factual findings and credibility assessments, and will reverse those findings only if they are against the manifest weight of the evidence. *People v. Sorenson*, 196 Ill. 2d 425, 431 (2001). However, we review *de novo* the ultimate finding with respect to probable cause or reasonable suspicion. *People v. Arnold,* 349 Ill. App. 3d 668, 672 (2004).

¶ 27 Probable cause does not require proof beyond a reasonable doubt but does

require more than mere suspicion. *People v. Kidd*, 175 Ill. 2d 1, 22 (1996). Defendant has the ultimate burden of proving lack of probable cause throughout the hearing. *People v. Ross*, 60 Ill. App. 3d 857, 861 (1978). Whether probable cause exists is to be determined upon examination of the totality of the circumstances. *People v. Turner*, 240 Ill. App. 3d 340, 356 (1992). Probable cause to arrest exists when the totality of the facts and circumstances within the officer's knowledge would lead a man of reasonable caution to believe that an offense has been committed and the person apprehended has committed the offense. *Illinois v. Gates*, 462 U.S. 213 (1983). While the mere suspicion by an officer that the suspect is committing or has committed a crime is insufficient to establish probable cause, proof beyond a reasonable doubt is unnecessary. *People v. Sims,* 192 Ill. 2d 592, 614-15 (2000). A determination of probable cause is governed by commonsense, practical considerations, and not by technical legal rules. *People v. Mitchell*, 45 Ill. 2d 148, 153-54 (1970).

¶ 28 In deciding whether probable cause exists, a police officer "may rely on training and experience to draw inferences and make deductions that might well elude an untrained person." *Jones*, 215 Ill. 2d at 274. In deciding whether probable cause exists, the court must examine the events leading up to the warrantless search or seizure and view them from the standpoint of an objectively reasonable law enforcement officer. *Jones*, 215 Ill. 2d at 274-75. A full search incident to a lawful arrest requires no additional justification, *e.g.*, the police fearing for their safety. *People v. Wolsk*, 118 Ill. App. 3d 112, 118-119 (1983).

¶ 29 Putting aside the question of whether Officer George actually did place defendant under arrest when he pointed his gun at him and told him to exit his car, Officer George had ample probable cause to arrest defendant and search him. At the police station earlier that day, Officer George had watched on a video feed as Lomack went back and forth between an alley on North Leamington and assorted motorists who pulled up to where he stood. Officer George saw that, in each transaction, Lomack handed the motorist an unidentifiable object in exchange for United States currency. Officer George was an experienced police officer, a 22-year veteran of the tactical unit who had observed numerous narcotics transactions. He knew from his experience that Lomack was probably selling narcotics.

¶ 30 Later that day, as Officer George and his partner were driving down North Leamington in the vicinity of where he had seen Lomack selling narcotics, he saw defendant sitting in a car, defendant roll down his window and hand United States currency to Lomack and Lomack hand something to defendant, just as he had observed Lomack do with the other motorists some three hours earlier. He observed the exchange in sunny daylight, from 30 feet away, and said he could see the exchange through the front windshield. There was nothing obstructing his view of the exchange. The trial court found Officer George credible and, having reviewed the record, we conclude that this finding is not against the manifest weight of the evidence. See *Sorenson*, 196 Ill. 2d at 431.

¶ 31 Although Officer George did not see the actual narcotic substance that Lomack

gave defendant, he saw defendant hand Lomack money and had a reasonable basis to assume, based on his experience and previous observations of Lomack, that narcotics were involved in the exchange. This was not a single street transaction but rather the latest in a series of transactions conducted between Lomack and assorted motorists. Officer George saw defendant engage in the same type of exchange with Lomack that he had previously determined to be the exchange of narcotics. Officer George had a reasonable basis to believe a crime had been committed during the exchange between Lomack and defendant. Accordingly, Officer George had ample probable cause to arrest defendant, a participant in that illegal exchange, and to search him for evidence of the crime.

¶ 32 Further, Officer George did not overreact when he pointed his gun at defendant and told him to exit the car. Based on Officer George's experience with other narcotics transactions, he had reason to suspect that defendant, a participant in a narcotics transaction, was armed, especially when defendant kept his hands out of Officer George's sight. It could be that defendant was keeping them there to hide the narcotics he had received from Lomack but it was also possible under the circumstances that defendant was holding a weapon. The court did not err in denying defendant's motion to quash arrest and suppress evidence. Given this determination, we need not address defendant's other arguments addressed to this issue.

¶ 33 2. Motion for Continuance

¶ 34 Defendant argues the court abused its discretion when it denied his request for a

continuance to obtain subpoenaed witness Willie Lomack's testimony. Defendant arguably forfeited this issue because he did not include it in his posttrial motion. *People v. Jackson*, 321 Ill. App. 3d 498, 508 (2001) (rev'd on other grounds by *People v. Jackson*, 292 Ill. 2d 361 (2002)). Even if we did consider the merits of his argument, we would not reverse the circuit court.

¶ 35 The decision on whether to grant a continuance in order to secure a witness lies within the sound discretion of the trial court. *People v. Carini*, 357 Ill. App. 3d 103, 117 (2005). We will not reverse such a decision unless the court abused that discretion. *Carini*, 357 Ill. App. 3d at 117. In reviewing whether the court abused its discretion in denying defendant's motion for a continuance in order to secure Lomack's presence as a witness, we must consider whether (1) defendant demonstrated a diligent effort to have Lomack present, (2) Lomack's testimony was material and might have affected the outcome of the case and (3) defendant was prejudiced in his right to a fair trial by the denial. *Carini*, 357 Ill. App. 3d at 117. It is not an abuse of discretion for the trial court to deny a motion for continuance to obtain service on or the presence of a witness if "there is no reasonable expectation that the witness will be available in the foreseeable future." *People v. Ruiz*, 342 Ill. App. 3d 750, 761 (2003) (quoting *People v. Watts*, 195 Ill. App. 3d 899, 917 (1990)).

¶ 36 On November 10, 2009, the first day of the bench trial, the court granted defendant a continuance until December 8, 2009, in order that a writ be issued for Lomack to appear as a witness. Defendant had requested that Lomack be made

available but Lomack was in the penitentiary, had not been made available and was necessary to defendant's case. On December 8, 2009, defendant asked for another continuance to obtain Lomack's presence in court as a witness. As verified by the State, Lomack was unavailable because he was on "medical furlough" from prison for approximately six weeks. The court granted a continuance until February 3, 2010.

¶ 37 On February 3, 2010, defendant again requested a continuance in order to obtain Lomack's presence. Lomack, who had pled guilty, had been released on parole on approximately January 19, 2010, and the State had not been able to serve the writ on him. Defense counsel had twice gone to Lomack's last known address to try to subpoena him but was unsuccessful. The court questioned the likelihood of Lomack actually coming in and asked counsel whether he had spoken to him. Defense counsel had not spoken to Lomack between December 8, 2009, and January 19. The court gave defendant "a very short date *** to locate him, a week." The court stated that it would grant an additional continuance if defense counsel was able to get further information from Lomack's parole officer indicating Lomack would be able to come in and testify, but counsel would "have to give [the court] the basis for that date." The court granted until February 9, 2010, "to locate addresses for Lomack, and then we will reset it if you're able to."

¶ 38 On February 9, 2010, defense counsel informed the court that he had left two phone messages for Lomack's parole officer but had not heard back. The court stated that, since counsel had "some information that could lead [him] to at least subpoenaing"

Lomack, it would give him "one last date to accomplish that. That will be final." Defense counsel responded that he understood. He asked for additional time under the understanding that, when the hearing resumed, he would have Lomack in court. The court granted a continuance of the bench trial until March 18, 2010, stating "witness Lomack must be in court or subpoenaed March 18."

¶ 39 On March 18, 2010, defense counsel informed the court that although he did serve Lomack with a subpoena, Lomack chose not to come to court. Counsel had served a subpoena on the Department of Corrections, thus obtaining Lomack's address. He then served a subpoena on Lomack at that address. Lomack was in a wheelchair. Lomack told counsel he would come to court but he did not. Counsel told the court defendant did not want to conclude the trial until he had a chance to call Lomack. The court responded that "you know where he is, You have him under subpoena. I'm not sitting here waiting for him to show up. This can't go on forever." The court suggested counsel prepare a motion for rule to show cause why Lomack should not be held in contempt and present it the next day. On March 19, 2010, the court granted defense counsel's request for a rule to show cause and for an arrest warrant for Lomack. It continued the trial until March 23, 2010, telling defendant he had to bring Lomack in on that day.

¶ 40 On March 23, 2010, defense counsel informed the court that Lomack had been informed that there was a warrant for his arrest and he should appear in court but he did not come. Counsel told the court he would "reach out" to Lomack that day, "if I have to

drive over to his house and tell him that this is very important that he come here." The court continued the bench trial until April 15, 2010, with the understanding that, Lomack or not, the trial would be completed on that date. On April 15, 2010, defense counsel informed the court he had not heard from Lomack. The court denied defendant any further continuances and ordered him to continue with the case, which he did. Looking to the three relevant factors, we find the court did not abuse its discretion in denying defendant's April 15, 2010, motion for a continuance in order to obtain Lomack's presence as a witness.

¶ 41 Defendant was not diligent in seeking Lomack's presence in court. Putting aside the two continuances granted because Lomack was incarcerated and/or on medical furlough and thus genuinely unavailable, defendant received four additional continuances to give him time to get Lomack into court to testify. From February 2, 2010, to April 15, 2010, defendant had approximately 10 weeks in which to bring Lomack in. He failed to do so. It took defendant quite a while to determine that Lomack was no longer incarcerated. It then took him a month to obtain Lomack's address and serve him with a subpoena. When it became clear that Lomack did not want to come to court, defense counsel delayed speaking with Lomack directly. Lastly, when Lomack failed to appear in court on March 18, 2010, defendant was still not able to bring Lomack in, despite issuance of an arrest warrant and defense counsel's assurance to the court that he would "reach out" to Lomack, if he had "to drive over to his house" himself. The court gave defendant more than ample time to bring Lomack in to testify or

to obtain his testimony by some other means. Defendant failed to do so. Lomack clearly did not want to come in to testify and there is ample basis for the court to find there was no reasonable expectation that Lomack would be available in the foreseeable future. The court's April 15, 2010, denial of defendant's motion for a continuance was not an abuse of discretion.

¶ 42 Further, although Lomack's testimony was arguably material because he pled guilty to selling defendant the heroin, there is nothing to show that his testimony might affect the outcome of the case. Defendant made no offer of proof regarding what Lomack's testimony would be. Although Lomack could be presumed to testify regarding how defendant came into possession of the heroin, there was no way for the trial court or this court to know whether Lomack actually would corroborate defendant's version of events as defendant asserts. Given that Lomack pled guilty, it is entirely possible that he would corroborate Officer George's version of the events instead. The court had no basis for determining whether Lomack's testimony would have affected the outcome of the trial and that a continuance was, therefore necessary. See *Jackson*, 321 Ill.App. 3d at 508 (rev'd on other grounds by *People v. Jackson*, 292 Ill. 2d 361 (2002)). Neither do we. For the same reason, without some showing of what Lomack's testimony would be, neither we nor the trial court could determine whether defendant's right to a fair trial was prejudiced. The court did not abuse its discretion in denying defendant's April 15, 2010, motion for a continuance in order to bring in Lomack as a witness.

¶ 43 3. Fees Assessed

¶ 44 Defendant argues and the State correctly concedes that the court erred in assessing the following fees: $5 court system fee, $25 traffic court supervision fee, $20 serious traffic violation fee and $200 DNA analysis fee. The court system fee, traffic court supervision fee and serious traffic violation fee are to be imposed on defendants who have violated the Illinois Vehicle Code (625 ILCS 5/1-100 *et seq.* (West 2010)) or similar provisions in county and municipal ordinances. 55 ILCS 5/5-1101(a) (West 2010); 625 ILCS 5/16-104(d) (West 2010). Defendant's conviction was for possession of a controlled substance under the Illinois Criminal Code, not a violation of the Illinois Vehicle Code or any similar provision, and he is, therefore, not subject to the contested fees. See *People v. Anthony*, 2011 IL App (1st) 091528-B at ¶ 25, 2011 WL 5457184 (November 07, 2011).

¶ 45 The DNA analysis fee is imposed on any defendant convicted of a felony in order that the defendant's DNA sample be obtained and analyzed and the information maintained in a State Police database. 730 ILCS 5/5-4-3(j) (West 2010). A defendant who is already registered in the DNA database is not required to resubmit a DNA sample or pay the fee. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). Defendant is already registered in the DNA database as a result of a prior conviction. Therefore, he cannot be assessed the DNA analysis fee again.

¶ 46 For the reasons stated above, we vacate the assessments for the $5 court system fee, $25 traffic court supervision fee, $20 serious traffic violation fee and $200 DNA analysis fee and modify the May 11, 2010, order assessing those fees accordingly.

We affirm on the remaining issues raised herein.

¶ 47 Affirmed as modified.