SIXTH DIVISION
September 28, 2012

No. 1-11-0247

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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 15455
	)	
CHRISTOPHER MAHONE,	)	Honorable
	)	John T. Doody,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice LAMPKIN and Justice GARCIA concurred in the judgment.

O R D E R

¶ 1 *Held*: 1) Defendant waived review of chemist's testing methodology establishing weight of drugs where defendant stipulated to the testimony at trial and failed to raise the issue in his post-trial motion, and 2) trial court properly sentenced defendant to three-year term of mandatory supervised release (MSR).

¶ 2 Following a bench trial, defendant Christopher Mahone was convicted of possession of between 1 and 15 grams of a controlled substance (cocaine) with intent to deliver and sentenced as a Class X offender to the minimum term of six years in prison. On appeal, defendant contends that the stipulated testimony of a chemist failed to prove the weight of the recovered cocaine

beyond a reasonable doubt. Defendant also contends that his period of mandatory supervised release (MSR) should be adjusted. He finally correctly contends the DNA analysis charge should be vacated and his mittimus should be corrected. We vacate the DNA charge, correct defendant's mittimus and otherwise affirm.

¶ 3 Defendant was arrested by Chicago police around noon on July 19, 2009, after undercover officers observed him participating in what they believed to be illegal drug sales in the vicinity of 16th and Springfield in Chicago. The officers on three occasions observed defendant removing a small item from a balled up napkin which he kept underneath a nearby staircase and then handing the item to three respective individuals in exchange for money. After detaining defendant, the officers recovered a napkin containing 25 ziplock baggies of suspected crack cocaine from underneath the staircase. One of the officers inventoried the napkin and baggies under number 11732337 and heat-sealed the items into an envelope for delivery to the Illinois State police crime lab.

¶ 4 The State offered and defense counsel agreed to a stipulation which included, in relevant part:

> "[I]f Daniel Beerman, B-E-E-R-M-A-N, a forensic chemist with the Illinois State Police crime lab were called to testify he would state that he received inventory number 11732337 from a heat sealed condition from the Chicago Police Department.
>
> Further, chemist Daniel Beerman would state that***all equipment used was tested, calibrated and functioning properly when the items were tested. The chemist would state that he performed tested [*sic*] commonly accepted in the area of forensic chemistry for ascertaining the presence of controlled substance on

> the inventory. That after performing tests on the contents of 12 of the 25 items recovered in the chemist's expert opinion within a reasonable degree of scientific certainty the contents of the tested items tested positive for the presence of cocaine in the amount of 1.2 grams."

¶ 5 Defense counsel presented no witnesses, but argued in closing that testimony from the police officers was not credible, and, as a result, "[a]nybody could have had control" of the recovered drugs.

¶ 6 The court found the testimony from the officers to be credible, and convicted defendant of possession of between 1 and 15 grams of a controlled substance with the intent to deliver.

¶ 7 In a motion for a new trial, defendant argued, *inter alia*, that "defendant denies having possession" of the drugs and that the State failed to prove his possession of the drugs beyond a reasonable doubt. The motion for a new trial did not include a challenge to the weight of the drugs or the chemist's methodology. The court denied defendant's motion.

¶ 8 Though the instant offense was a Class 1 felony, the court reviewed defendant's prior convictions before sentencing him as a Class X offender to six years' imprisonment, to be followed by three years of MSR.

¶ 9 On appeal, defendant first contends that the stipulation of chemist Beerman's testimony introduced at trial did not prove whether Beerman separately tested each of the 12 bags and thus the State failed to prove beyond a reasonable doubt that he possessed more than 1 gram of cocaine. The State responds, *inter alia*, that defendant mischaracterizes the issue as one of sufficiency of the evidence and, by failing to object at trial and in a post-trial motion, has waived review of the issue. We agree with the State.

¶ 10 Ordinarily, a defendant must both object to an alleged error at trial and specifically raise the issue again in a post-trial motion to preserve it for our review. *People v. Woods*, 214 Ill. 2d 455, 470 (2005), citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). As defendant correctly observes, however, challenges to the sufficiency of evidence are not subject to this waiver rule. *Woods*, 214 Ill. 2d at 470.

¶ 11 This issue is waived and defendant's arguments to the contrary have been soundly rejected by the supreme court as improper challenges to stipulated evidence for the first time on appeal. See *People v. Woods*, 214 Ill. 2d 455, 474-75 (2005); *People v. Bush*, 214 Ill. 2d 318, 332-33 (2005); see also *People v. Carodine*, 374 Ill. App. 3d 16, 26-28 (2007); *People v. Echavarria*, 362 Ill. App. 3d 599, 606 (2005).

¶ 12 Quite simply, defendant was charged with possessing 1 to 15 grams of cocaine with the intent to deliver. 720 ILCS 570/401(c)(2) (West 2008). On appeal, defendant does not dispute he possessed the contraband, that it was determined to be cocaine, or that he intended to deliver it to buyers. Defendant only asserts that the State failed to prove the weight element of the charge because the stipulated testimony of the chemist did not indicate that he had separately tested and analyzed the substances taken from each of the 12 tested bags for the presence of cocaine. This assertion is not a challenge to the sufficiency of the evidence but, rather, is a forfeited attempt to dispute the truth of the stipulation.

¶ 13 Defendant stipulated that the chemist performed "tests on the contents of 12" of the recovered items and determined the weight of the cocaine to be 1.2 grams. Thus, the weight element of the charge (1 to 15 grams) was satisfied by stipulation. The stipulation itself is the conclusive proof. *Woods*, 214 Ill. 2d at 459. "A defendant forfeits any issue as to the impropriety of the evidence if he procures, invites, or acquiesces in the admission of the evidence." *Woods*, 214 Ill. 2d at 475. Any objection defendant may have had regarding the testing procedures should

have been made at trial where "the State would have been afforded the opportunity to remedy the matter at the trial level." *Woods*, 214 Ill. 2d at 475. Here, defendant agreed to stipulate that the weight of the cocaine was 1.2 grams and, therefore, cannot contest the content of the stipulation for the first time on appeal. In fact, the stipulation accords with defendant's strategy at trial and posttrial to question the reliability of the police testimony and to deny possession of the cocaine.

¶ 14 Defendant next contends that the trial court improperly applied the three-year period of MSR associated with Class X felonies, instead of the two-year period of MSR associated with the underlying offense of either a Class 1, or in the alternative, Class 2 felony. We disagree.

¶ 15 When a defendant qualifies for Class X sentencing because of his background but was actually convicted of a lesser-class offense, the three-year Class X MSR period is necessarily imposed. *People v. Brisco*, 2012 IL App (1st) 101612, ¶60. Defendant acknowledges that this court has rejected his position in numerous prior decisions. See, *e.g.*, *People v. Lampley*, 2011 IL App 090661-B, ¶49 ; *People v. Rutledge*, 409 Ill. App. 3d. 22, 26 (2011). We adhere to our precedent.

¶ 16 Defendant next contends, and the State correctly concedes, that we must vacate the $200 DNA analysis fee because defendant had previously submitted a DNA sample for analysis as a result of a prior conviction. *People v. Marshall*, 242 Ill. 2d 285 (2011).

¶ 17 Defendant finally contends, and the State rightly concurs, that defendant's mittimus improperly reflects the name of his offense and should be corrected to state possession of between 1 and 15 grams of a controlled substance with intent to deliver. *People v. Lattimore*, 2011 IL App (1st) 093238, ¶109.

¶ 18 For the foregoing reasons, we vacate the $200 DNA fee, correct defendant's mittimus and affirm the judgment in all other respects.

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