2012 IL App (1st) 110698-U

FOURTH DIVISION
October 18, 2012

No. 1-11-0698

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. 10 C5 50600 (02)
	)	
	)	
DORVELL GOGINS,	)	The Honorable
	)	John Joseph Hynes,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Judges Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: The officers' testimony that they clearly saw defendant hand drugs to a passenger in a vehicle was not so incredible or contrary to human experience as to cast a reasonable doubt on defendant's drug conviction. Trial counsel was not ineffective for failing to file a motion to exclude evidence of defendant's suspended license or for failing to request that the court admonish the jury to disregard the State's question pertaining to the suspended license. Finally, defendant was not denied a fair trial or effective assistance of counsel where a juror made comments on the evidence during polling. This court affirmed the judgment of the trial court while correcting the fines and fees order.

¶ 2 Following a jury trial, defendant Dorvell Gogins was convicted of possession of a

controlled substance (720 ILCS 570/402(C) (West 2010)) and sentenced by the trial court to three years in prison. On appeal, defendant challenges the sufficiency of the evidence to sustain his conviction and asserts that trial counsel was ineffective for failing to file a motion to exclude evidence after the State agreed to *nolle pros* charges related to his driving with a suspended driver's license. Defendant also asserts he was denied a fair trial and effective assistance of counsel when the trial court and defense counsel failed to take further action after a juror made comments on the trial evidence during polling. Finally, defendant asserts that the court erred in calculating presentencing custody credit and certain fines and fees.

¶ 3 BACKGROUND

¶ 4 Before trial, the State nol-prossed the charges of driving with a suspended license and driving with no headlights. The State also agreed to exclude evidence of defendant's prior convictions. At trial on the remaining possession of a controlled substance count, the evidence revealed that three narcotics task force investigators were patrolling a residential area in the suburb of Burbank at approximately 10:45 p.m. on August 17, 2010, when they encountered defendant, who was driving a motor vehicle in a southbound direction on LeClaire Avenue without any headlights. Cook County Sheriff's Police Investigator Terrence O'Driscoll was driving an unmarked squad car with fellow Investigator Kevin Ellis in the front passenger seat. Oak Lawn Officer Thomas Cullane, who was in the backseat, did not testify at trial.

¶ 5 O'Driscoll and Ellis essentially testified to witnessing the same events, which consisted of them observing defendant's vehicle slowly moving from the north as the police vehicle drove on LeClaire. When the vehicles were approximately 20 feet apart, O'Driscoll put all of the police vehicle's "take down" lights on defendant's vehicle, which illuminated that vehicle to the extent that they could each see clearly inside. At this time, both O'Driscoll and Ellis observed defendant

lift a clear plastic bag above the dashboard with his left hand, reach across his body and hand the still-in-view bag to his passenger Oscar Bass, who was then observed to take the bag and move it beneath the dashboard in a so-called "furtive manner" out of view of the police. When Bass and defendant exited the vehicle, the officers saw that Bass had a clear plastic bag sticking out of his rear waistband. The officers suspected the bag contained narcotics. Subsequent testing revealed, and the parties stipulated, that the bag containing 27 smaller bags had 5.2 grams of cocaine in it. Additionally, Investigator Ellis was asked on direct examination if he had learned during the investigation that defendant's license was suspended. Defense counsel objected and the trial judge sustained the objection.

¶ 6 On cross-examination, defense counsel attempted to show that the officers were either exaggerating or lying about their version of events. Although some omissions existed in the written police report, such as Investigator O'Driscoll's failure to include any account of his and defendant's vehicle driving in the middle of the street, each officer testified that he observed the plastic bag being transferred across the vehicle from defendant to Bass. In closing argument, defense counsel strenuously argued that either his client was very unlucky, very dumb, or that the officers were lying about their observations. Despite these efforts, the jury found defendant guilty of possession of a controlled substance, and the court sentenced him to three years in prison.

¶ 7 ANALYSIS

¶ 8 On appeal, defendant asserts the evidence was insufficient to sustain his conviction for possession of a controlled substance. Where, as here, defendant challenges the sufficiency of the evidence to sustain his conviction, the question for the reviewing court 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 were demonstrated beyond a reasonable doubt. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). In addition, the trier of fact determines the witnesses' credibility, the weight given to their testimony and draws reasonable inferences from the evidence. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). We will not substitute our judgment for that of the trier of fact on these matters. See *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009). To sustain a conviction for possession of a controlled substance, the State must prove beyond a reasonable doubt that defendant had knowledge of the controlled substance and that the controlled substance was in defendant's immediate and exclusive control. 720 ILCS 570/402(C) (West 2010); *Daley v. El Flanboyan Corp.*, 321 Ill. App. 3d 68, 74 (2001). Defendant does not dispute that the elements of the offense would be satisfied if the officer's testimony were true, but rather, contends that their testimony was incredible and contrary to human experience.

¶ 9 Contrary to defendant's assertion, the evidence was sufficient to sustain his conviction for drug possession. Both Investigators O'Driscoll and Ellis testified that they actually saw defendant hand the clear plastic bag to the passenger. That defendant passed it to the passenger suggests he was trying to conceal it from the approaching law enforcement officers, which is very much in accord with human experience. *Scott*, 152 Ill. App. 3d at 871. Nevertheless, defendant argues that it is improbable that he reacted to a barrage of police lights by grabbing a bag of cocaine, essentially displaying it so that its contents fairly dangled in plain view and bringing it up to neck level before passing it to his passenger. Defendant ignores, however, that it is just as probable that defendant was startled by the police lights and reacted out of impulse with a desire to conceal the drugs; it is not contrary to human experience to make an illogical move out of fear

in a stressful situation. The fact that there may have been an alternative method to pass and conceal the drugs did not in and of itself require the jury to find that the officers' testimony was improbable. See *Siguenza-Brito*, 235 Ill. 2d at 229 (the trier of fact is not required to accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt). Similarly, the passenger's failure to completely conceal the bag of drugs on his person does not change the result. The incident happened quickly, and apparently neither defendant, nor Bass, had time to fully process their reactions while the investigators approached defendant's vehicle. Moreover, defendant argues that while it is rational for a defendant to drop drugs on the street out of a mistaken belief that in so doing he can escape liability, there would have been no reason for defendant to display the drugs to the officers in plain sight only to have Bass hide them immediately. While we agree that defendant's actions may be construed as illogical in hindsight, here, the jury as the trier of fact would be justified in concluding that defendant similarly passed the drugs in an attempt to avoid liability.

¶ 10 In reaching this determination, we are unpersuaded by defendant's reliance on *People v. Dawson*, 22 Ill. 2d 260, 265 (1961), and *People v. Warren*, 40 Ill. App. 3d 2008, 2022 (1997). In *Dawson*, the defendant police officer was alleged to have gone into a hotel office, where he was well known, and robbed a victim at gun point while displaying his badge. Immediately following this incident, the defendant allegedly returned most of the money and went into the hotel bar for a drink. *Dawson*, 22 Ill. 2d at 262. The appellate court found it incredible to believe the testimony of the two principal witnesses that a police officer of good character and reputation would identify himself, commit armed robbery in front of witnesses and then return most of the money. Additionally, the court concluded it was manifestly improbable that after the alleged crime the defendant made no attempt to flee the scene, but instead went to the hotel bar

for a drink. The court noted that such behavior "is scarcely consistent with the theory that defendant had just committed armed robbery." *Id.* In contrast, in the case *sub judice*, defendant's attempt to conceal the drugs was consistent with the theory that defendant was in possession of illegal narcotics. The officers did not testify that defendant brazenly made an incriminating display of himself and then nonchalantly exposed himself to arrest.

¶ 11 In *Warren*, the defendant was found guilty of possessing a couple one-pound bags of marijuana. *Warren*, 40 Ill. App. 3d at 1008. The State's only witness was a police officer, who testified that after stopping the defendant's vehicle for reckless driving, he witnessed the defendant sitting in the backseat with an open bag of marijuana in plain view on the floor between his feet. Subsequently, another bag of marijuana was confiscated from under the front seat. *Id.* On appeal, the court noted that the trial judge's comments demonstrated its general dissatisfaction with the State's evidence and witness' testimony. Therefore, the court held, based on the trial court's "continuous doubts as to defendant's guilt," that the State failed to prove the defendant guilty beyond a reasonable doubt. *Id.* In the instant case, however, nothing in the record suggests the jury found the State's witnesses were incredible or returned a guilty verdict despite a lack of credible evidence. Moreover, in *Warren*, the defendant made no attempt to conceal the contraband. Here, defendant did make an attempt, albeit a futile one.

¶ 12 We further find defendant's contention that the police officers were engaged in a "head-on collision course" in an attempt to "play chicken" unfounded. Both vehicles were stopped and parked before the officers exited their vehicle. In fact, the officers turned on their "take down" lights to alert defendant to their presence to avoid a collision. The jury did not find the fact that Investigator O'Driscoll failed specify the location of the cars in his police report meant that he purposefully misrepresented the events in question. Based on the foregoing, we conclude the

evidence was sufficient for the trier of fact to find defendant guilty beyond a reasonable doubt.

¶ 13 Defendant next asserts that trial counsel was ineffective because he failed to file a motion to exclude evidence related to the charge of driving without a valid driver's license, which the State agreed to *nolle-pros.* Defendant also asserts trial counsel failed to ask the court to admonish the jury to disregard the State's question pertaining to that charge after the court sustained defense counsel's objection. To show that counsel was ineffective, a defendant must demonstrate both that counsel's performance was deficient and that, as a result, the defendant was prejudiced. *People v. Bailey*, 232 Ill. 2d 285, 289 (2009) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). The failure to satisfy either prong precludes finding that counsel was ineffective. *People v. Colon*, 225 Ill. 2d 125, 135 (2007). Thus, the reviewing court is not required to consider whether trial counsel's performance was deficient before examining whether the defendant was prejudiced. *People v. Perry*, 224 Ill. 2d 312, 342 (2007). To show prejudice, a defendant must demonstrate a reasonable probability exists that but for counsel's error, the result of proceedings would have been different. *People v. Harris*, 389 Ill. App. 3d 107, 132 (2009).

¶ 14 In the instant case, defendant has failed to establish that he was prejudiced by defense counsel's alleged failure to both file a motion to exclude evidence regarding defendant's suspended license and ask that the jury be admonished to disregard the State's question pertaining to his license. At trial, counsel immediately objected to the State's question to Investigator Ellis regarding defendant's suspended license. Subsequently, the trial court immediately sustained the objection to the unanswered question. Obviously, then, the jury never heard the answer to the question. Both defense counsel and the trial court acted appropriately and cured any possible error. *People v. Terrell*, 185 Ill. 2d 467, 511 (1998) (the trial court promptly sustained

defendant's objections to the questions posed to witness, thus curing any prejudice). Furthermore, during jury instructions the trial court instructed the jury to disregard any questions to which objections were sustained. Therefore, it was unnecessary for trial counsel to ask the court to admonish the jury to disregard the State's question in conjunction with the court's ruling sustaining trial counsel's objection. *People v. Kelley*, 2012 IL App (1st) 110240, ¶ 39 ("There is a presumption that jurors follow the instructions given to the court, and we find nothing in the record to rebut that presumption.").

¶ 15 Moreover, there is no evidence to support defendant's contention that the jury latched onto the State's previous question concerning defendant's suspended license during jury deliberations. The jury posed three question for the court: (1) "why we [*sic*] cannot see the police reports;" (2) "why [*sic*] the defendant's driver's license is not admissible;" and (3) "can we ask the defendant's age[.]" Defense counsel, the prosecutor, and the trial court subsequently decided to respond: "You have all of the evidence. Continue to deliberate." There is simply no basis to suggest that this exchange prejudiced the outcome of defendant's trial. Although the jury might have sought defendant's license for an irrelevant purpose, it would be entirely speculative to presume the jury sought the license because the jury had "latched onto the prosecutor's comment" regarding the status of his driver's license. It is equally likely that the jury was inquisitive or wanted to determine defendant's age as requested in the jury's third question. See *People v. Abrego*, 371 Ill. App. 3d 987, 996 (2007) (finding it was not for the trial court "to second-guess the jurors' intentions by reading meanings into words that were not there."). In any event, the record does not show that the result of the proceedings would have been different in the absence of defense counsel's alleged deficiencies. Accordingly, defendant has failed to establish the requisite prejudice for an ineffective assistance of counsel claim.

¶ 16 Defendant next contends he was denied his right to a fair trial before an impartial jury when, during the jury polling following the verdict, "Juror A" allegedly made statements indicating her verdict was not based on the trial evidence and law. The trial court specifically asked Juror A, "[w]as this then and is this now your verdict?" to which she ultimately responded in the affirmative, but first commented, "I believe with the evidence that he is guilty because two of them in the car [*sic*], they were in the car. And when you are in the car with somebody with drugs, you are involved with drugs." Defendant seizes upon the latter portion of Juror A's response in claiming prejudice. He argues it demonstrates the juror's belief that the "mere presence of drugs in a car proved the *per se* guilt of all the occupants of that car" and thus the juror decided the case upon preconceived notions. We cannot accept defendant's narrow interpretation of the juror's statements.

¶ 17 In this case, the court presented the jury with an instruction on actual and constructive possession of drugs. Constructive possession is proven when the defendant knew the drugs were present and exercised control over them or had the capacity to exercise such control, although mere presence is insufficient to establish the offense. *People v. Moore*, 365 Ill. App. 3d 53, 60 (2006); *People v. Blue*, 343 Ill. App. 3d 927, 939 (2003). Contrary to defendant's argument, we conclude that Juror A's statement can and should be construed as an indication that she was following the court's constructive possession instruction. As stated, juries are presumed to follow the instructions given to them by the trial court. *In re Commitment of Kelley*, 2012 IL App (1st) 110240, ¶ 39. Here, Juror A first noted that defendant and Bass were both present in the car where the trial evidence showed the drugs were found. Given this observation and the fact that she specifically cited the evidence in the case, we do not believe her next statement can be viewed in a vacuum. We can thus infer that she intended to state that while one person was in

actual possession of the drugs in this case, the other was "involved" with the drugs or had knowledge and control of them. Rather than making a blanket statement of *per se* guilt, we believe the juror's response, while not the most eloquent, demonstrates her attempt to apply the law to the facts here. Indeed, we would not expect a juror, as a lay person, regurgitate the law with exact precision. In short, we do not believe the statement establishes that the juror did not base her vote on the evidence and instructions at trial, and further note that she unambiguously agreed with the verdict. See *People v. Beasley*, 384 Ill. App. 3d 1039, 1048 (2008) (polling should elicit an unequivocal response from each juror).

¶ 18 To the extent defendant found the juror's statement troubling, we conclude the onus of clarifying any claimed error fell on defendant. As the State notes, however, defendant failed to make a contemporaneous objection and also failed to cite the issue in his posttrial motion, thereby forfeiting this argument. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant does not now argue the alleged error was so prejudicial or the evidence so closely balanced that it amounted to plain error, so we need not consider it further. See *People v. Hiller*, 237 Ill. 2d 539, 545-46 (2010). Based on the foregoing, defendant's claim fails.

¶ 19 We similarly reject defendant's argument that defense counsel was ineffective for failing to object to the claimed error. As stated, we do not find the juror's statement constituted objectionable error and, even if it did, the record is insufficient to establish that defendant was prejudiced by defense counsel's failure to object. See *People v. Harris*, 206 Ill. 2d 293, 303-304 (2002) (noting that a defendant must satisfy both the performance and prejudice prongs of the *Strickland* test).

¶ 20 Finally, defendant challenges the fines and fees order, which we review *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007). The parties first agree that pursuant to our supreme

court's recent opinion in *People v. Marshall*, 242 Ill. 2d 285 (2011), defendant's DNA analysis fee (730 ILCS 5/5-4-3(j) (West 2010)) must be vacated because defendant was previously incarcerated and already provided a DNA sample. *Marshall*, 242 Ill. 2d at 303. Accordingly, we vacate the $200 DNA analysis fee.

¶ 21 Next, the parties agree that defendant was entitled to $365 of presentencing custody credit (725 ILCS 5/110-14 (West 2010)) for the 73 days he was in presentencing custody. The parties also agree that the controlled substance assessment (720 ILCS 570/411.2 (West 2010)) is a fine subject to offset. *People v. Paige*, 378 Ill. App. 3d 95, 104 (2007). Accordingly, defendant is entitled to offset the $500 with $365 of credit. For the reasons stated, we order the clerk of the circuit court to correct the fines and fees order in a manner consistent with this order.

¶ 22 CONCLUSION

¶ 23 Based on the foregoing, we affirm the judgment of the circuit court of Cook County and order that the fines and fees order be corrected.

¶ 24 Affirmed; fines and fees order modified.