2013 IL App (1st) 112380-U

THIRD DIVISION
February 27, 2013

No. 1-11-2380

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 2017
	)	
KING PERKINS,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Sterba and Hyman concurred in the judgment.

O R D E R

¶ 1 *Held*: Prosecution's evidence proved beyond a reasonable doubt that defendant was guilty of possession of heroin with intent to deliver. Defendant correctly received a three-year term of mandatory supervised release in addition to his six-year prison term for that offense.

¶ 2 In a bench trial, defendant King Peters was convicted of possession of 1 to 15 grams of heroin with intent to deliver and sentenced to a six-year prison term along with a three-year term of mandatory supervised release. On appeal, defendant contends that he was not proven guilty beyond a reasonable doubt because the State failed to show that he exercised control over the

heroin. Alternatively, defendant contends that the evidence was insufficient to prove the intent to deliver the heroin. Defendant also contends that he should have received only a two-year period of mandatory supervised release.

¶ 3 The State's evidence at trial established the following. On December 28, 2008, at approximately 1 a.m., Chicago police officers, along with a SWAT team, acting pursuant to two search warrants, conducted a search of the first-floor apartment of a building at 710 North Drake in Chicago, along with the garage of that building. Defendant was detained in the kitchen and then escorted to the dining area, where an unspecified number of occupants of the apartment had been gathered by the police. In a search of the kitchen, the police found an open bag of suspected cocaine on top of a microwave and two bundles of cash totaling $1,676 in a cabinet. In the kitchen sink, the police found two empty plastic bags which were knotted and torn, but they did not seize them because they did not appear to have any narcotics residue on them. The police also found two letters from Chase Bank, addressed to defendant at the 710 North Drake address. The letters were postmarked October 9, 2007, and January 7, 2008. As further proof that defendant resided at the apartment, the prosecution entered into the record certified copies of defendant's driver's abstract and a People's Gas invoice. These documents have not been included in the record on appeal, but in argument to the court, the prosecutor stated that the People's Gas invoice was in defendant's name and was current at the time of the search and the driver's abstract had defendant's name and address on it. In the dining room, in plain view, the police recovered a box of ammunition and a clear plastic bag containing suspected heroin. The police recovered a .45 caliber rifle loaded with eight rounds, which was lying on the floor of the rear bedroom. They also observed men's clothing in that room. The police recovered a handgun from a van parked outside of the apartment. The van was registered to someone other than defendant.

¶ 4 After defendant was taken to the dining room, he began to nod off and his eyes began to roll back in his head. When asked what was wrong, defendant said he had swallowed some "dope." When asked by an arresting police officer whether "he had swallowed any of the narcotics" defendant responded by nodding his head "yes" and verbally answered "yes." He was taken to the hospital in an ambulance. While in the ambulance he stated that he had ingested heroin. The parties stipulated that, at the hospital, defendant was diagnosed with a heroin overdose. It was also stipulated that the substance seized by the police in the kitchen was tested and found to be 150.3 grams of a substance containing cocaine. The substance seized in the dining room was tested and found to be 9.4 grams of a substance containing heroin.

¶ 5 The trial court entered a directed finding for defendant on a charge of unlawful use of a weapon by a felon, which was based upon possession of the handgun found in a van which was registered to another person. After closing arguments the court stated that it did not know if the ammunition and rifle belonged to defendant or someone else. The court found defendant not guilty of two additional counts of unlawful use of a weapon by a felon, which were based upon defendant's possession of the rifle and ammunition. The court also found defendant not guilty of a charge of being an armed habitual criminal, because that charge was also based upon defendant having possession of a firearm. The court stated that although defendant had a "nexus" to the premises and currently or previously had "some type of relationship with that address," it did not know if the cocaine belonged to him. For that reason it found defendant not guilty of possession of cocaine with intent to deliver. Finally, the court found that the prosecution had proved beyond a reasonable doubt that defendant was guilty of possession of heroin with intent to deliver. The court stated "the circumstantial evidence is strong that defendant ingested that heroin to secrete it from the police", causing an overdose. In support of defendant's intent to deliver the heroin, the

court cited the large amount of cash, "multiple drugs," and the weapons and ammunition which were recovered.

¶ 6 Because of two prior felony convictions, defendant was sentenced as a Class X offender to six years in prison and a three-year term of mandatory supervised release. This appeal ensued.

¶ 7 We first consider defendant's claim that he was not proven guilty beyond a reasonable doubt because the prosecution's evidence did not establish that he possessed the heroin found in the dining room of the apartment. Our standard of review is a familiar one: reviewing the evidence in the light most favorable to the State, could any rational trier of fact find the elements of the crime beyond a reasonable doubt. *People v. Beauchamp,* 241 Ill. 2d 1, 8 (2011). We will reverse a conviction only where the evidence is so unreasonable, improbable, or unsatisfactory that reasonable doubt of the defendant's guilt remains. *Beauchamp*, 241 Ill. 2d at 8. On questions involving the weight of the evidence or the credibility of witnesses, we cannot substitute our judgment for that of the fact finder. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009). To support a conviction for unlawful possession of a controlled substance with intent to deliver, the prosecution must prove that (1) the defendant had knowledge of the presence of the controlled substance; (2) the controlled substance was in the defendant's immediate and exclusive control; and (3) the defendant intended to sell or deliver the controlled substance. *People v. Robinson*, 167 Ill. 2d 397, 407 (1996). The fact that the defendant is living on the premises where the controlled substance is found raises an inference that the defendant had constructive control over that substance. See *People v. Scott*, 367 Ill. App. 3d 283, 286 (2006). Furthermore, possession may be joint (*People v. Embry*, 20 Ill. 2d 331, 335 (1960)), and mere access by others does not defeat a finding of constructive possession (*People v. Bui*, 381 Ill. App. 3d 397, 424 (2008)).

¶ 8 In this case, there was evidence that defendant lived in the apartment where the heroin was found. Older bank statements were found which were addressed to defendant at the North Drake location. The prosecution also introduced defendant's gas bill for the period when the heroin was found. Although the trial court did not find conclusively that defendant was living in the apartment at the time it was searched, it did find that there was sufficient evidence to connect the defendant to the apartment. But the main factor relied upon by the trial court to establish defendant's possession of the heroin was the fact that at the time of the search he was suffering an overdose from heroin he had ingested. Such usage in itself is one factor which may be used in determining a defendant's possession of drugs. *People v. Frieberg*, 147 Ill. 2d 326, 361-62 (1992). The trial court reached the permissible conclusion that the heroin came from the bag of heroin found in the dining room. There was no evidence that other heroin was found in the apartment. Defendant argues that the heroin could have belonged to one of the other people found in the apartment, but the evidence we have cited points to defendant. The fact that others had access to drugs does not rebut the trial court's inference of possession by defendant. *Bui*, 381 Ill. App. 3d at 424. Even where other people are found to be living with a defendant, courts have still found possession under appropriate circumstances. *People v. Cunningham*, 309 Ill. App. 3d 824, 826-28 (1999) (Defendant found in constructive possession of drugs found at his house even though other adults and a teenage boy also lived there and were present during the police search.); *People v. Torres*, 200 Ill. App. 3d 253, 266 (1990) (Defendant properly convicted of possession of drugs with intent to deliver, even though the drugs were found in a bedroom which she shared with her boyfriend.) Viewing all of this evidence in the light most favorable to the prosecution, we find that a rational trier of fact could have found that defendant's possession of the heroin was proven beyond a reasonable doubt. *Beauchamp*, 241 Ill. 2d at 8.

¶ 9 Defendant next contends that the prosecution failed to prove that he had the intent to deliver the heroin and therefore his conviction should be reduced to simple possession of heroin. Intent to deliver drugs is often proved by circumstantial evidence, including the presence of other items associated with drug dealing, such as police scanners, packaging for sale, guns, other drugs, and large amounts of cash. *People v. Robinson*, 167 Ill. 2d 397, 411-412 (1996). In this case, the police found a number of items supporting a finding that defendant intended to deliver or sell the heroin found in the apartment: a large quantity of another drug (150.3 grams of a substance containing cocaine); a weapon; ammunition; and a large amount of cash ($1,676). Defendant contends that we may not consider these items because the trial court did not find that defendant was in possession of them. But legally inconsistent judgments are permissible, as they may simply be the product of lenity by the judge. *People v. McCoy*, 207 Ill. 2d 352, 356-58 (2003). Thus, under the facts of this case, because the trial court concluded the evidence was insufficient to prove possession of the cocaine and the weapons beyond a reasonable doubt did not preclude it from considering the presence of the cocaine, weapon and ammunition, plus a large amount of cash as evidence of a defendant's guilt of possession of a drug with intent to deliver. *People v. Dockery*, 248 Ill. App. 3d 59, 61, 69-70 (1993) (Items supporting defendant's conviction of possession of PCP with intent to deliver included a large amount of cash and a gun, both recovered from another person in the apartment.) Here the trial court specifically cited the large amount of cash, the drugs, the rifle and ammunition which were recovered in the apartment as evidence of defendant's intent to deliver the heroin.

¶ 10 Defendant relies upon *People v. Crenshaw*, 202 Ill. App. 3d 402, 436 (1990), which held that a gun found beneath a defendant's car seat could not be used as a factor in determining the defendant's intent to deliver cocaine because the defendant was acquitted of unlawful use of a weapon. The defendant in *Crenshaw* was stopped in his vehicle after he had taken on a male

passenger at an intersection. *Crenshaw*, 202 Ill. App. 3d at 433. According to the police, the defendant got out of his car and threw to the ground a packet of what turned out to be 11.2 grams of cocaine packaged in 22 smaller bags. *Crenshaw*, 202 Ill. App. 3d at 433-34. An unidentified amount of currency was found on the defendant and a search of his car revealed a handgun under the driver's seat. *Crenshaw*, 202 Ill. App. 3d at 434. Defendant was convicted of possession of cocaine with intent to deliver but, on appeal, the court found that intent to deliver was not proven. *Crenshaw*, 202 Ill. App. 3d at 437. The court stated that the packaging and the amount of cocaine failed to establish that defendant did not possess the cocaine for personal use. *Crenshaw*, 202 Ill. App. 3d at 436. The court also noted that the record did not establish how much money was recovered from the defendant. *Crenshaw*, 202 Ill. App. 3d at 436. The *Crenshaw* court's reasoning has been criticized. *People v. Blakney*, 375 Ill. App. 3d 554, 558 (2007); *People v. Beverly* 278 Ill. App. 3d 794, 800-801 (1996); see *Robinson*, 167 Ill. 2d at 412 (listing *Crenshaw* as one of a number of cases in which there was ample evidence of intent to deliver.). In any event, the factors supporting intent to deliver in this case are much stronger than those cited by *Crenshaw*. We find that the evidence in this cause supports a finding that defendant was proven guilty of possession of heroin with intent to deliver.

¶ 11 Defendant's final contention is that the trial court erred in imposing a three-year term of mandatory supervised release (MSR), the amount required for a Class X conviction, where he was convicted of a Class 1 felony but sentenced as a Class X offender because of prior convictions. We find that defendant was properly sentenced, as we concur with the overwhelming number of cases which have determined that a Class X sentence includes the MSR period set out for one who has been convicted of a Class X offense. *People v. Brisco*, 2012 IL App (1st) 101612, ¶¶ 59-62; *People v. Lampley*, 2011 IL App (1st) 090661-B, ¶¶ 47-49; *People v.*

Allen, 409 Ill. App. 3d 1058, 1078 (2011); *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011); *People v. Anderson* 272 Ill. App. 3d 537, 541-42 (1995).

¶ 12 For the reasons set out in this order, we affirm defendant's conviction and sentence.

¶ 13 Affirmed.