2014 IL App (1st) 122329-U

FIFTH DIVISION
March 31, 2014

No. 1-12-2329

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	No. 10 CR 12695
	)	
OSCAR DELGADO,	)	Honorable
	)	Diane Cannon,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Justice Taylor concurred in the judgment.
Presiding Justice Gordon dissented.

ORDER

¶1 *Held*: The State proved beyond a reasonable doubt that defendant was guilty of possession of a controlled substance with intent to deliver and possession of cannabis. Defendant did not establish a claim of ineffective assistance of counsel where defendant did not establish that he was prejudiced by counsel's alleged deficient performance. Defendant's mittimus is ordered to be corrected.

¶2 Following a bench trial, defendant Oscar Delgado was found guilty of possession of cannabis and possession of a controlled substance with intent to deliver and was sentenced to concurrent terms of three and nine years imprisonment. On appeal, defendant contends that: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) he received ineffective

assistance of counsel; and that (3) his mittimus should be amended. For the reasons that follow, we affirm.

¶3 Defendant was arrested and charged by indictment with one count of possession of between 30 and 500 grams of cannabis with intent to deliver and possession of between 100 and 400 grams of cocaine with intent to deliver. The following evidence was presented at defendant's trial.

¶4 Chicago police officer Frank Bochnak testified that he was on duty at 10:15 p.m. on June 17, 2010. Officer Bochnak was working with Sergeant Johnson, Officers Rosa Elizondo and Kevin Kosinski and nine other Chicago police officers to execute search warrants for the first and second floors of a building located at 1919 South Morgan Street in Chicago, Illinois. Officer Bochnak was acting as the recovering agent and Officer Kosinski was acting as the evidence officer. The Chicago SWAT team was also present and participating in the execution of the search warrants because it was deemed a high-risk entry.

¶5 Officer Bochnak explained that 1919 South Morgan was a two-flat building with a basement apartment. Inside the front door of the building there was a vestibule and a common hallway that led to the first floor apartment and a staircase that led to the second-floor apartment. Officer Bochnak testified that the first floor apartment did not have an entrance door separate from the door that led to the outside. The officer explained that there was a door frame leading into the first floor apartment but no door on that frame. There was a door at the top of the stairs that led into the second floor apartment, but that door was open when the Officer Bochnak enterd the building. The second floor apartment was not accessible from inside the first floor apartment. Defendant's brother, Arturo, lived in the basement apartment. The layout of the first and second floor apartment was substantially the same.

¶6 Officer Bochnak testified he and the other officers entered the building after the SWAT team entered the building, secured the premises and handcuffed the occupants. The officer explained that in order to secure the building, SWAT had to go the second floor to ensure that nobody was hiding there. When Officer Bochnak entered the building, he observed four individuals detained in the first floor apartment dining room. Those four individuals were defendant, defendant's brother, defendant's girlfriend and defendant's friend. The officers then proceeded to search the building.

¶7 Officer Bochnak testified that he was the recovering agent during the search, meaning that if another officer found anything, Bochnak would photograph and recover the item and bring it to Officer Kosinski, who received and inventoried all of the evidence. Officer Bochnak went to the second floor of the building, which he described as being in "disarray" and having "stuff everywhere" such that there was "no way anyone [could] be living upstairs there." The officer was then alerted by Officer Elizondo that she had found a clear, plastic item wrapped in black tape containing a white substance, suspect cocaine, on the windowsill directly behind the door to the second floor apartment. Officer Bochnak was also alerted that in a cooler in the front room of the second floor of the building Sergeant Johnson found a large freezer bag containing 13 knotted bags, each containing a green, leafy substance, suspect cannabis. The cocaine and cannabis were found approximately 10 feet apart.

¶8 Officer Bochnak photographed and recovered the evidence and brought it to Officer Kosinski on the first floor of the building. As Officer Bochnak was walking toward Officer Kosinski while carrying the recovered items in his hands, he passed within a couple of feet of defendant. As the officer did so, defendant said, "that's my sh**." Officer Kosinski was the only other officer present at this time. The officer also testified that proof of residency was also found

in the rear bedroom of the second floor apartment. Specifically, officers recovered a 1989 notice from the Board of Elections Commissioners addressed to defendant at 1919 South Morgan, a 1988 letter from the Cook County Hospital addressed to defendant at 1919 South Morgan and a letter from an inmate at Stateville postmarked in 1986 addressed to defendant at 1919 South Morgan. No other proof of residency for any other individual was found on either the first or second floor of the building. No proof of residency was found on the first floor. Officer Bochnak also explained that the mailbox on 1919 South Morgan read "Oscar Delgado" and "Big O." The officer testified that defendant's nickname is "Big O."[1]

¶9 Officer Bochnak was also alerted that another officer found a plastic bag containing a green leafy substance and four plastic bags with Superman logos on them also containing a green leafy substance in what was determined to be defendant's bedroom on the first floor. A .22 caliber pistol and $184 of United States currency were also found in defendant's bedroom.

¶10 On cross-examination, Officer Bochnak testified that defendant's brother lived in the basement apartment of the two-flat building. The officer also testified that there were two bedrooms on the first floor of the building and that there were clothes in each bedroom. Defendant lived in the front bedroom, which was across from the dining room.[2] The officer did not know who, if anyone, was living in the other first-floor bedroom. Officer Bochnak testified that he did not know if he would characterize the second floor as being a "storage area," but that there was "stuff everywhere" that had "been there for a long time."

¶11 Chicago police officer Rosa Elizondo testified that she assisted in the execution of the search warrants at 1919 South Morgan. She essentially reiterated Officer Bochnak's testimony that she searched the second floor of the building and found the suspect cocaine on a windowsill

[1] It is unclear from the State's pictures whether the mailbox is labeled "Delgado" or "Oscar Delgado."
[2] Defendant does not dispute that he lived in the front bedroom on the first floor.

behind the door leading into the second floor. The officer found the bag of narcotics fairly quickly because it was just one or two feet away from the top of the stairs. Further, the outside of the bags of narcotics appeared fairly clean and not dusty, as if they had been placed there recently. To Officer Elizondo's knowledge, the package of cocaine was never processed for fingerprints or DNA. Officer Elizondo also testified regarding Officer Bochnak photographing the bags of cannabis found by Sergeant Johnson in the front room of the second floor. Officer Elizondo testified that it did not appear as if anyone lived on the second floor, which she described as being hard to walk through and "[v]ery dusty, lots and lots of items all on the floor." There was a bedframe in the kitchen and "a lot of stuff piled on each other." Officer Elizondo also testified that there was no door leading to the first floor apartment. She also testified that if a person was in the first floor apartment, he or she would have direct access to the stairs in order to access the second floor apartment.

¶12 The parties then stipulated that: (1) defendant listed his address on his driver's license as 1919 South Morgan and that "one of those driver's license expirations was back in 1997"; (2) defendant registered two vehicles through the Department of Motor Vehicles listing the address of 1919 South Morgan; (3) Officer Kosinski received and inventoried one plastic bag wrapped in tape containing suspect cocaine and one freezer bag containing 13 knotted plastic bags containing suspect cannabis; and that (4) Tiffany Neal, a forensic chemist with the Illinois State Police crime lab, received the inventoried evidence and determined that the first package weighed 125.1 grams and tested positive for cocaine and, after testing 2 of the 13 baggies, determined that they weighed 56.3 grams and tested positive for cannabis and that all 13 baggies weighed a total of 366.2 grams. The State then rested its case.

¶13 Defendant moved for an acquittal on the bases that there was no evidence connecting

defendant to the narcotics recovered on the second floor, that three other adults had access to the second floor and that defendant could have been referring to anything when he said, "that's my sh**." The State responded that defendant was the only person who commented when Officer Bochnak walked past with the narcotics in his hands, that defendant admitted ownership of the drugs with that comment, that defendant's proof of residency and name on the mailbox also connected him to the drugs; that a gun, currency and additional cannabis were found in defendant's bedroom and that the amount of drugs recovered, along with the gun and currency, showed indicia of defendant's intent to deliver. The trial court denied the motion and made the following comments on the evidence presented by the State and the credibility of the witnesses:

> "Viewing the evidence in the light most favorable to the State, the Court finds that the testimony of the officers was clear and credible. Their observations upon executing the search warrants at 1919 South Morgan, they were in possession of two warrants, one for the first floor, one for the second floor. The second floor contained several proofs of residence for the defendant, along with 366 grams of cannabis packaged in 13 packets, one package of cocaine weighing 127 grams.
>
> On the first floor United States currency was recovered, $184, as well as a small amount of cannabis in three separate packets.
>
> The State asked the officer, could you go upstairs, did you have access to the second floor from the first floor? Yes.
>
> More importantly, in this case, anyone from the second floor could walk into the first floor. I don't know who would have a home without a front door on it. And they did have a front door. It was one home. Upstairs for garbage and drugs, downstairs for basketball.

> The State has met its burden of proof, based on the residence, proof of residence recovered from the second floor, the motor vehicle registration since 1997 with defendant's name to that residence, the fact there was one door to the residence which was outside, once you got in, one home belonging to the defendant.
>
> He admitted the drugs were his. That statement alone absolutely would not be enough. His proof of residence and a lack of a door to prevent the people other than himself from entering the first floor, the State has met its burden."

¶14 Defendant rested without presenting any evidence. Following closing arguments, the trial court found defendant guilty of possession of a controlled substance with intent to deliver and guilty of possession of cannabis. The court stated that it gave defendant the "benefit of the doubt" in finding him guilty only of possession of cannabis, observing that "[m]aybe he just smoked marijuana, and you keep your extra upstairs."

¶15 Defendant subsequently filed a motion for a new trial. At the hearing on that motion, defense counsel argued that the police officers unexpectedly and incorrectly testified that there was no front entry door to the first floor apartment at the time the search warrant was executed. Defense counsel said there was no mention of the absence of a front door in the discovery tendered by the State. Counsel further stated that after trial, defendant's relatives told him that there was an entry door to the first floor apartment and that counsel told those relatives to take pictures of the door. Defense counsel also stated that those relatives were present at the hearing on the motion for a new trial and counsel requested that the relatives be allowed to testify regarding the existence of the door and that it was present on the day the police executed the search warrants. Defense counsel also asked the court to consider the photographs of the entry door to the first floor apartment. The State responded that any evidence regarding a door to the

first floor apartment could and should have been presented at trial and that any new pictures or testimony regarding such a door was irrelevant given that the police credibly testified that there was no door when the search warrants were executed.

¶16 The trial court denied defendant's motion and did not allow his family members to testify. The court explained that their testimony was not newly discovered evidence given that the family members lived with defendant and were present during his trial. The court also found that the pictures of the door taken by defendant's family two or three years later were not relevant as to how the residence appeared on the date the search warrants were executed. The court stated that "there was no door there," "no one lived upstairs" and that the officers' clear and unimpeached testimony established that it was "one residence, two floors."

¶17 The trial court then sentenced defendant to nine years' imprisonment for possession of a controlled substance with intent to deliver and to a concurrent term of three years' imprisonment for possession of cannabis.

¶18 Defense counsel filed a motion to reconsider the denial of defendant's motion for a new trial. Attached to that motion was one affidavit signed by Monica Parra, Mario Delgado and John Delgado. The affidavit stated that Monica and Mario lived in the first floor apartment of 1919 South Morgan on June 17, 2010, and that John Delgado was a visitor in the apartment on that date. The affidavit further stated that there was an entry door to the first floor apartment when the search warrant was executed on June 17, 2010. Attached to the motion were four pictures purporting to show an entry door to the first floor apartment. The trial court denied defendant's motion, stating that the evidence was available to the defense, that defendant's family was present at trial and that the pictures introduced at trial showed no door to the first floor apartment. This appeal followed.

¶19 Defendant first contends that the State failed to prove beyond a reasonable doubt that he was guilty of both possession of a controlled substance with intent to deliver and possession of cannabis. Specifically, defendant contends that the State failed to prove that defendant either had constructive possession of the narcotics recovered on the second floor of 1919 South Morgan or that he knew that such narcotics existed on that floor. Defendant also claims that the State failed to prove that he intended to deliver the cocaine. We disagree.

¶20 When reviewing a challenge to the sufficiency of the evidence, the relevant question is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004). The trier of fact is responsible for assessing the credibility of the witnesses, weighing the testimony, and drawing reasonable inferences from the evidence. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). A criminal conviction will not be set aside on appeal unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt. *People v. Cox*, 195 Ill. 2d 378, 387 (2001).

¶21 In order to sustain defendant's conviction for possession of cannabis and possession of a controlled substance with intent to deliver, the State was required to prove that: (1) defendant had knowledge of the presence of the narcotics; and that (2) the narcotics were in defendant’s immediate possession or control. *People v. Robinson*, 167 Ill. 2d 397, 407 (1995); *People v. Thomas*, 261 Ill. App. 3d 366, 369 (1994). To sustain defendant's conviction for possession of a controlled substance, the State was also required to prove that defendant intended to deliver the narcotics. *Robinson*, 167 Ill. 2d at 407.

¶22 The elements of knowledge and possession are rarely susceptible to direct proof and are instead usually established by circumstantial evidence. *People v. Bui*, 381 Ill. App. 3d 397, 419

(2008); *People v. Feazell*, 248 Ill. App. 3d 538, 545 (1993). Where, as here, a defendant is not found in actual possession, the State must prove constructive possession. *People v. Spencer*, 2012 IL App (1 st) 102094, ¶ 17. To support a finding of constructive possession, the State must prove that the defendant knew the contraband was present and that it was in defendant's immediate and exclusive control. *Feazell*, 248 Ill. App. 3d at 545. Knowledge may be proved by evidence of acts, statements or conduct of the defendant, as well as the surrounding circumstances, which supports the inference that he knew of the existence of narcotics at the place they were found. *Bui*, 381 Ill. App. 3d at 419; *People v. Nwosu*, 289 Ill. App. 3d 487, 494 (1997). Control is established when a person has the intent and capability to maintain control and dominion over an item, even if he or she lacks personal present dominion. *Spencer*, 2012 IL App (1st) at ¶ 17. Moreover, where narcotics are found on premises that are under defendant's control, it may be inferred that he had the requisite knowledge and possession, absent other facts and circumstances which might create a reasonable doubt as to defendant's guilt. *Bui*, 381 Ill. App. 3d at 419. Constructive possession may be proved by showing that defendant controlled the premises where the contraband was found. *Feazell*, 248 Ill. App. 3d at 545. Habitation in the premises where contraband is discovered is sufficient to evidence of control to constitute construction possession. *People v. Lawton*, 253 Ill. App. 3d 144, 147 (1993); *Spencer*, 2012 IL App (1st) at ¶ 17. Proof of residency is relevant to show that defendant lived on the premises and therefore controlled them. *Id*. Finally, knowledge and possession are questions of fact to be resolved by the trier of fact, whose findings should not be disturbed upon review unless the evidence is so unbelievable, improbable, or palpably contrary to the verdict that it creates a reasonable doubt of guilt. *People v. Luckett*, 273 Ill. App. 3d 1023, 1033 (1995).

¶23 In this case, the evidence established that defendant lived at 1919 South Morgan and that

the two-flat building was being used as one residence by defendant. The police officers testified that there was no entrance door to the first floor of the building other than the door leading outside. Once inside the building, there was a staircase leading up to the second floor. Defendant's bedroom was located on the first floor of the building. Although nobody slept on the second floor, defendant had access to the second floor. Numerous proof of his residency items were found on the second floor. There was only one mailbox for the building and it listed only defendant's name and nickname and did not differentiate between apartments. The proof of residency items on which defendant listed his address as 1919 South Morgan also did not differentiate between the first and second floors of the building.

¶24 Considering this evidence in the light most favorable to the State, a rational trier of fact could have concluded that defendant had control over the premises where the narcotics were found. This gives rise to a reasonable inference that defendant had knowledge and possession of the recovered narcotics. This inference is *strongly supported* by the fact that defendant admitted the drugs were his when Officer Bochnak walked past him carrying the cocaine and cannabis found on the second floor and defendant said, "that's my sh**." Whether defendant had knowledge and possession of the narcotics were questions of fact for the trial court (*Luckett*, 273 Ill. App. 3d at 1033), and in this case the trial court found that the State had proved these elements beyond a reasonable doubt. When viewed in the light most favorable to the State, the evidence described above supports the trial court's determination and is not so improbable or unsatisfactory that it creates a reasonable doubt as to defendant's guilt.

¶25 Defendant nevertheless argues that the State failed to establish that defendant had immediate and exclusive control over the second floor of the building. He essentially claims that the first and second floors of the building were separate apartments and that there was no

evidence that defendant lived on the second floor. However, it is the trier of fact's role to draw inferences from the evidence and it may rely on reasonable inferences to determine knowledge and possession. *People v. Smith*, 191 Ill. 2d 408, 413 (2000). Here, the trial court heard all of the evidence regarding the layout of the first and second floors of the building and the conditions on each floor and the court reasonably concluded that the building was being used as one residence. Moreover, defendant cites no authority establishing that the State was required to prove that he lived or slept on the second floor, as stated above, the issue is whether defendant exercised control over the area in which the narcotics were found. See *Bui*, 381 Ill. App. 3d at 419. The fact that nobody lived on the second floor supports a reasonable inference that defendant exercised control over that floor, particularly given the proofs of residency that were addressed to defendant and not to anybody else. Similarly, the fact that defendant's driver's license and vehicle registrations do not list an apartment number supports a reasonable inference that defendant treated the first and second floors of the building as one residence over which he exercised immediate and exclusive control.

¶26 Defendant claims that the relevancy of the mail addressed to him that was found on the second floor is diminished because those letters were approximately 14 years old. However, we believe that the age of the letters was simply a factor to be considered by the trial court when it assigned weight to those letters. Further, considering that those were the only letters found on the second floor and that there no letters addressed to anyone else found on the second floor, the trial court's decision to assign weight to those letters as establishing proof of residence was certainly reasonable.

¶27 Defendant also argues that little weight can be assigned to the mailbox on the building because it only said "Delgado" without indicating defendant's first name and because one of

defendant's brothers lived in the basement apartment. Defendant also argues that there was no evidence connecting him to the nickname "Big O." However, the mailbox was but one of many pieces of circumstantial evidence that together established defendant's knowledge and possession of the narcotics. Moreover, Officer Bochnak testified that defendant's nickname was "Big O." Further, "it is well settled that mere access to an area by others is insufficient to defeat a charge of constructive possession." *Bui*, 381 Ill. App. 3d at 424. Moreover, "[a] showing of joint control of premises does not *per se* create reasonable doubt." *People v. Janis*, 240 Ill. App. 3d 805, 818 (1992).

¶28 Defendant further claims that, contrary to the trial court's findings, none of the photographs introduced at trial showed that there was no entry door to the first floor apartment. However, it is unclear whether those pictures actually show the existence or absence of such an entry door and, regardless, both officers testified that there was no entry door to the first floor apartment. The trial court could have reasonably relied upon this testimony, which it did and found credible, to conclude that there was so such entry door.

¶29 Defendant also claims that his statement "that's my sh**" could have been referring "to anything," including the gun, currency and cannabis found in his bedroom. However, defendant did not make that statement when the police recovered the gun, currency and cannabis in his room. Instead, Office Bochnak testified that defendant made that statement when the officer walked past defendant carrying the cocaine and cannabis found on the second floor. The trial court, as the finder of fact, is not required to disregard inferences which flow normally from the evidence. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). Here, considering the circumstances under which defendant made this statement, the trial court could have reasonably concluded that he was referring to the narcotics found on the second floor of the building.

¶30 Finally, defendant claims that the State failed to prove that he intended to deliver the cocaine found on the second floor. Defendant asserts that there was no evidence of intent apart from the amount of cocaine recovered.

¶31 Direct evidence of intent to deliver is rare and therefore this element is usually proved by circumstantial evidence. *Robinson*, 167 Ill. 2d at 408. A reasonable inference of intent to deliver arises when the amount of narcotics recovered is too large to be viewed as being for personal consumption. *Id*. The quantity of controlled substance alone can be sufficient to prove intent beyond a reasonable doubt. *Id*. at 410. The presence of a weapon or large amounts of cash is probative of intent to deliver. *Id*. at 408. The State need not adduce expert testimony as to whether the amount of narcotics recovered was too large for personal consumption in order to prove intent beyond a reasonable doubt. See, *e.g.*, *People v. Contreras*, 327 Ill. App. 3d 405, 409 (2002) (finding that one plastic bag of 458 grams of cocaine, with no expert testimony that the amount was too much for personal consumption, was sufficient to prove the defendant intended to deliver the narcotics).

¶32 In this case, the parties stipulated that the police recovered 125.1 grams of cocaine from the second floor of 1919 South Morgan. The trial court, as the finder of fact, could have reasonably concluded that this amount of cocaine was too large for personal consumption and that it established defendant's intent to deliver the narcotics. See *Contreras*, 327 Ill. App. 3d at 409. Additionally, although the State was not required to provide additional evidence of intent, we note that the presence of the gun in defendant's bedroom supports the conclusion that defendant intended to deliver the cocaine. See *Robinson*, 167 Ill. 2d at 408. We also reject defendant's claim that the amount of cocaine was insufficient to support an inference of intent where defendant possessed a greater amount of cannabis which the trial court found was only for

his personal use. The amount of cannabis recovered would support an inference of intent. See, *e.g.*, *People v. Rhodes*, 386 Ill. App. 3d 649, 654 (2008) (officer testified that 36 grams of cannabis was inconsistent with mere personal use). However, the trial court's comments in finding defendant guilty of only possession of cannabis reflect that the court gave defendant the benefit of the doubt with respect to the cannabis and that the court's verdicts on both charges simply reflected a compromise. Additionally, there is no evidence in the record that the amount of cannabis and cocaine should be treated similarly and in fact it is reasonable to evaluate that issue differently based on different substances. Regardless of the above, the only issue is whether defendant intended to deliver the cocaine and whether the amount of cocaine recovered was in excess of what would be considered for personal use. The trial court could have reasonably found that the 125.1 grams of cocaine was not for personal use and that such an amount established defendant's intent to deliver. Therefore, we conclude that the State proved the element of intent with respect to the charge of possession of a controlled substance with intent to deliver beyond a reasonable doubt.

¶33 Defendant next contends that he received ineffective assistance of counsel. Specifically, defendant claims that his counsel failed to investigate and present three known witnesses who were present at trial and whose testimony would have contradicted the testimony of the police officers and created a reasonable doubt as to defendant's guilt. Defendant asserts that his counsel should have interviewed the police before trial to learn that those officers would testify that there was no separate door to the first floor apartment. He also asserts that this counsel should have interviewed Monica Parra and Mario and John Delgado to learn that they saw such a door and that counsel should have called these individuals as witnesses at trial.

¶34 Claims of ineffective assistance of counsel are resolved by the test set forth in *Strickland*

v. Washington, 466 U.S. 668 (1984). Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced defendant. *Id*. at 687. To demonstrate performance deficiency, defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 162 (2001). A "strong presumption" exists that the challenged action or inaction of counsel was a matter of sound trial strategy and a defendant can overcome that presumption only by showing that counsel's decision was "so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances, would pursue such a strategy." *People v. Jones*, 2012 IL App (2d) 110346, ¶ 82. To demonstrate sufficient prejudice, "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Put another way, defendant must show that "counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *People v. Evans*, 209 Ill. 2d 194, 220 (2004). Defendant must satisfy both prongs of this test in order to prove ineffective assistance of counsel. *Strickland*, 466 U.S. at 687.

¶35 Initially, we note that it is unclear from the record whether counsel interviewed the police officers that executed the search warrants or the other individuals present at 1919 South Morgan when the warrants were executed. There is no indication in the affidavit submitted by Parra and Mario and John Delgado that defendant counsel did not interview them. As a reviewing court, we will not presume that defense counsel was incompetent but, instead, that counsel's performance was reasonable and professional. *People v. Manning*, 241 Ill. 2d 319, 334 (2011). Additionally, defense counsel could have interviewed the police officers and still not learned

about the entry door to the first apartment because prosecution witnesses are not obligated to discuss the facts of the case with defense counsel prior to trial. *People v. Williams*, 131 Ill. App. 3d 597, 609 (1985). Although defendant claims that his counsel should have interviewed the witnesses and learned about the entry door, defendant was present in court when the officers testified that there was no entry door and yet counsel represented to the court that he did not learn about the existence of such a door until defendant's family members told him about it after trial. Defendant does not explain whether he told his attorney about the door either before or during trial.

¶36 Regardless, we find that defendant ineffective assistance of counsel claim fails because he has failed to establish that he was prejudiced by counsel's performance. Defendant has not shown that the result of his trial would have been different had counsel called the three individuals to testify about the entry door to the first floor apartment. First, the trial court found the officers' testimony that no such door existed credible and it is certainly possible that the court would have questioned the bias of defendant's family members testifying that there was an entry door. Moreover, in posttrial proceedings, defense counsel stated that the lack of an entry door was "a very critical fact" in finding defendant guilty and the trial court responded that "it was one of the factors I considered." We find that defendant has placed an inordinate amount of importance on the existence of a first floor door in light of the fact that the evidence established that there was a second floor door which supplies the same inference that defendant attempts to establish, that being the existence of a door implies separate living spaces. With or without a entry door, defendant would have still been found guilty. The trial court found that the building was one residence even though there was a door to the second floor apartment. This conclusion is supported by all of the other evidence set forth above, which would not have been diminished

if counsel had called the three individuals to testify. That evidence included defendant's statement "that's my sh**," the proof of residency documents found on the second floor, the fact that no mail addressed to anyone other than defendant was found on the second floor, the mailbox listing defendant on the front of the building, the fact that defendant did not differentiate between the first and second floor on the mailbox, his driver's license or vehicle registration, and the fact that a handgun and cannabis were found in defendant's first floor bedroom. Defendant has not shown that considering all of the evidence presented, the result of his trial would have been different had defense counsel interviewed the officers and called the three individuals as witnesses at trial. Accordingly, defendant has not established that he received ineffective assistance of counsel.

¶37 In the alternative, defendant claims that we should remand this case to the circuit court for an inquiry pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), to determine whether defendant received ineffective assistance of counsel and that this court should order the circuit court to appoint new counsel for defendant to argue this claim. Defendant's contention is again based upon counsel's alleged failure to interview the police and learn about their testimony that there was no separate entry door to the first floor apartment and counsel's alleged failure to interview and present as witnesses the three individuals found in 1919 South Morgan the day the search warrants were executed.

¶38 Pursuant to *Krankel*, when a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court must conduct some type of preliminary inquiry into the factual basis to determine if they show possible neglect of the case warranting appointment of new counsel. *People v. Patrick*, 2011 IL 111666, ¶ 43. Our supreme court has held that "to raise an ineffective assistance of counsel claim, a pro se defendant is not required to do any more than

bring his or her claim to the trial court's attention." *People v. Moore*, 207 Ill.2d 68, 79 (2003). A trial court may conduct a preliminary investigation by: (1) questioning trial counsel about the facts and circumstances surrounding defendant's allegations; (2) requesting more specific information from defendant; or (3) relying on its own knowledge of defense counsel's performance at trial and the insufficiency of defendant's allegations on their face. *Id*. at 78–79. If, after a preliminary investigation into the allegations, the court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the motion. *Moore*, 207 Ill. 2d at 78. However, if the allegations show possible neglect of the case, the trial court should appoint new counsel to argue defendant's ineffective assistance claims. *Id*. "[T]he operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into defendant's *pro se* allegations of ineffective assistance of counsel." *Id*.

¶39 The State initially responds that *Krankel* does not apply to defendants represented by private counsel, as was defendant in this case. The State also asserts that defendant waived this issue because he did not make any *pro se* posttrial allegations of ineffectiveness of counsel. On this point, defendant responds that the trial court should have *sua sponte* conducted a *Krankel* hearing because trial cournel's ineffectiveness was "readily apparent" from the record, relying upon *People v. Williams*, 224 Ill. App. 3d 517 (1992).

¶40 We recognize that the question of whether *Krankel* applies to a defendant who is represented by private counsel is unsettled. See, *e.g.*, *People v. Pecoraro*, 144 Ill. 2d 1, 14-15 (1991); *People v. Taylor*, 237 Ill. 2d 68, 78 (2010); *People v. Johnson*, 227 Ill. App. 3d 800, 810 (1992); *People v. Wesley*, 2013 IL App (1st) ¶12. However, we need not resolve this issue or whether defendant has waived his *Krankel* claim because we conclude that it is unnecessary to

remand the case to the trial court for a *Krankel* inquiry. The purpose of a *Krankel* inquiry is to determine whether defendant received ineffective assistance of counsel. We have already concluded above that defendant did not receive ineffective assistance of counsel because he has not shown that, but for counsel's alleged errors, the result of his trial would have been different. Defendant's *Krankel* claim is again directed to issue of the witnesses who would allegedly testify about the existence of a separate door leading into the first floor apartment. Given our above conclusion that defendant would have still been found guilty even if these witnesses had testified, we find no reason to remand the case for a *Krankel* inquiry as to whether defense counsel was ineffective for failing to investigate and call these witnesses.

¶41 Defendant's final contention is that his mittimus should be corrected to reflect defendant's conviction for possession of a controlled substance with intent to deliver rather than manufacturing or delivery of a controlled substance.[3] Defendant was charged by indictment with, among other things, possession of a controlled substance with intent to deliver under section 570 of the Illinois Controlled Substances Act. See 720 ILCS 570/401(a)(2)(B) (West 2010). We therefore order the mittimus to be corrected to accurately reflect the offense of which he was convicted, *i.e.*, possession of a controlled substance with intent to deliver. See *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995) (the appellate court has the authority to directly order the clerk of the circuit court to make the necessary corrections to a mittimus).

¶42 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County and order the mittimus corrected as indicated.

¶43 Affirmed; mittimus corrected.

¶44 Presiding Justice Gordon, dissenting.

[3] While the State objects to a correction to defendant's mittimus in this case, it has taken a contrary position on this very same issue in other cases before this court. See, *e.g.*, *People v. Hill*, 408 Ill. App. 3d 23, 32 (2011). We would hope that going forward the State would take a more consistent position on this issue.

¶45 I must respectfully dissent to the issue that 125.1 grams of cocaine by itself proves beyond a reasonable doubt that this amount is in excess of what would be considered for personal use.

¶46 Defendant claims that the State failed to prove beyond a reasonable doubt that he intended to distribute the 125.1 grams of cocaine found in his possession. The State presented no testimony by the police officers who testified, or by anyone else, that 125.1 grams is an amount which is more than what a user would possess for personal use.

¶47 As the majority correctly observes, the issue is whether the State proved, beyond a reasonable doubt, that this amount of cocaine was in excess of what would be considered for personal use.

¶48 In support of its conclusion that the trial court could conclude on its own, without any evidence, that this amount was for distribution, as opposed to simple possession, the majority cites one case, *People v. Contreras*, 327 Ill. App. 3d 405, 409 (2002). However, *Contreras* involved 458 grams of cocaine, which is almost four times the amount in the case at bar.

¶49 It would have been so easy for the State to satisfy its burden on this one point. Any one of the officers could have testified to his or her professional experience with drug interdiction and then could have testified, if he or she believed it to be true, that this was an amount that far exceeded an amount that a user would possess in his or her home for personal use. However, the State did not bother to take this small step. As a result, that is not in the record in this appeal before us. I do not believe that our courts should be in the business of drawing the line between quantities of drugs that are considered for sale and those used for personal use. The burden is on the State to present expert testimony to guide us and when the State fails to do so, the State has not sustained its burden of proof.

¶50 Thus, I must respectfully dissent, and I would find the defendant guilty of possession only and remand this case for resentencing under the narrow facts of this case.