THIRD DIVISION
April 8, 2015

Nos. 1-12-3318 and 1-12-3565
(CONSOLIDATED)

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 CR 16697
	)	
WILLESTER COOK,	)	Honorable
	)	Lawrence E. Flood,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PUCINSKI delivered the judgment of the court.
Justices Hyman and Mason concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Affirmed defendant's convictions for possessions of cocaine and cannabis with intent to deliver over defendant's contention that counsel was ineffective; fines and fees order corrected to reflect credit against fines for time spent in presentence custody.

¶ 2 Following a bench trial, defendant Willester Cook was found guilty of possession of cocaine with intent to deliver and possession of cannabis with intent to deliver in an amount greater than 30 and less than 500 grams. He was sentenced to concurrent terms of six and two years' imprisonment, respectively. On appeal, he contends that his trial counsel was ineffective,

and requests this court to vacate his fines and fees order.

¶ 3 At trial, Chicago police officer Vincent Stiner testified that at 7:30 p.m. on August 15, 2010, he executed a search warrant at 1433 North Lotus Avenue in Chicago. When he arrived there, he observed that the door was open to the first floor apartment. He announced his office several times, and that he had a search warrant, then entered the apartment. The front door opened into the dining room area, and the officer observed defendant down the hallway in the kitchen. Defendant looked in the officer's direction and attempted to flee out the back door. Officer Stiner told him numerous times, "[s]top, police." Defendant eventually stopped, and the officer detained him, and told him he was there on a search warrant. Officer Varchetto was also present and told Officer Stiner that the area was "positive," which meant there were narcotics inside the apartment. Officer Stiner looked in the kitchen and observed on the kitchen counter a white plate containing what he believed was "cooked" crack cocaine. The officer explained that the cocaine was wet, so he believed it was just prepared to be later packaged and sold. Officer Stiner also saw a pot of boiling water. The officer noted that when he first saw defendant in the kitchen, he was a few feet away from the plate of cocaine.

¶ 4 Officer Stiner testified that he placed defendant in custody, and Officer Sang searched him, and found on him one plastic bag containing a large white rock substance. Officer Stiner believed this substance to be crack cocaine. After reading defendant his rights, Officer Stiner asked defendant if there were any more narcotics in the apartment. Defendant said, "yes," directed the officers to a couch, and told them to pick up a certain cushion. The officer found inside this cushion a scale, and a large plastic bag with other plastic bags all containing a crushed

green leafy substance, which the officer believed was cannabis.

¶ 5 Officer Stiner further testified that he found in the bedroom right off the kitchen proofs of residency for defendant. The officer explained that he found a collection agency letter, two tickets and a bond slip with defendant's name and the Lotus address on them. All of the documents, except for the collection agency letter, contain defendant's name with the suffix Jr.

¶ 6 Officer Stiner further testified that the apartment contained two bedrooms. The officer noted that there was another man inside the apartment in the bedroom closer to the front door, but that he was not focused on him, and did not see him.

¶ 7 Chicago police officer Anthony Varchetto testified that when he gained entry to the first floor apartment at the Lotus address, he observed defendant in the kitchen running to the back door. Officer Varchetto testified that he observed in the kitchen suspect cocaine along with narcotics paraphernalia, which included plastic bags, a scale, a pot of boiling water, and drying cocaine. Officer Varchetto testified that another man was found in the apartment, but that he did not know his name.

¶ 8 The parties stipulated that defendant's address is 1433 North Lotus Avenue, and his name is Willester Cook. The parties also entered a written stipulation that forensic chemist Cathy Regan received one bag with four bags of plant material, and performed tests commonly accepted in the area of forensic chemistry for ascertaining the presence of a controlled substance on the items described. After performing the test on the content of the items recovered, her opinion, within a reasonable degree of scientific certainty, is that the contents of the tested items were positive for the presence of cannabis and the actual weight of the items was 208.3 grams,

and that the total estimated weight of the items was 270.6 grams. The parties further stipulated that the cocaine recovered on the plate weighed 22.4 grams, and that the cocaine found on defendant weighed 28.1 grams.

¶ 9 At the close of evidence, the court found defendant guilty of possession of cocaine with intent to deliver, and possession of cannabis with the intent to deliver in an amount greater than 30 and less than 500 grams The court stated that defendant was found in the kitchen where there were items consistent with the distribution of cocaine. Defendant was searched and found to have additional cocaine on him. He then directed police to the living room where there were more narcotics. The total amount of cannabis recovered was 208 grams. The total amount of cocaine recovered was 22.4 grams from the counter and 28.1 grams from defendant's person. The court noted that the officers recovered proof of residency for defendant in the apartment, and although another man was found in the apartment, no other information concerning him was presented at trial. The court stated that defendant was found in close proximity to the narcotics in the kitchen and that his proof of residency was recovered in the apartment. The court thus found that defendant was in constructive possession of the cocaine found on the plate in the kitchen. The court further noted that the amount of narcotics found showed defendant's intent to deliver.

¶ 10 Defendant filed a motion for a new trial. At the proceeding on that motion, counsel argued that defendant's father, who had the same name, resided at the Lotus apartment with defendant. The court then noted that it did not recall this evidence, and continued the matter to review the transcript. After reviewing the transcript, the court noted that there was no evidence that defendant's father resided at the apartment and had the same name, and that defendant

acknowledged proof of residency at trial. Counsel responded that defendant lived at the apartment. The court then denied the motion for a new trial, noting that there was sufficient evidence for its findings.

¶ 11 At the sentencing proceeding, defendant's father testified that his name was Willester Cook, Sr., and that he resided at the Lotus address by himself. The court then sentenced defendant to two years' imprisonment for possession of cannabis with intent to deliver and six years' imprisonment for possession of cocaine with intent to deliver. The court also assessed defendant $3,464 in fines and fees, but noted it would be "zeroed out by the time that he serves."

¶ 12 As an initial matter, we observe that defendant filed two notices of appeal in this case. He first filed a notice of appeal on October 26, 2012, (No. 1-12-3318) from the conviction entered on July 30, 2012. He then filed a notice of appeal on November 16, 2012, (No. 1-12-3565). We observe that since appeal No. 1-12-3318 was filed within 30 days of the sentence entered on October 3, 2012, we find it timely filed. Ill. S. Ct. R. 606(b) (eff. Feb. 6, 2013). We, accordingly, have jurisdiction over appeal No. 1-12-3318. However, the notice of appeal in case No. 1-12-3565 was untimely filed where it was filed more than 30 days after the sentencing order of October 3, 2012, and we, accordingly, dismiss it. Ill. S. Ct. R. 606(b) (eff. Feb. 6, 2013).

¶ 13 Turning to the merits of the appeal in appeal No. 1-12-3318, defendant first contends that he was denied effective assistance of trial counsel. He asserts that counsel was ineffective for failing to call his father to testify that he resided alone at the Lotus address and had the same name as defendant, and stipulating to the State's evidence of proof of defendant's residency at the Lotus address. He asserts that his father's testimony would have contradicted the State's proof of

residence, and corroborated his defense that the State could not prove his constructive possession of the drugs found in the apartment, and that an older man was inside the apartment at the time the warrant was executed.

¶ 14 Under the two-prong test for examining a claim of ineffective assistance of counsel, defendant must establish that his attorney's performance fell below an objective standard of reasonableness, and that but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail, defendant must satisfy both prongs of the *Strickland* test, and if this court concludes that defendant did not suffer prejudice, we need not decide whether counsel's performance was deficient. *People v. Harris*, 206 Ill. 2d 293, 304 (2002).

¶ 15 Based on the record before us, we find that the father's testimony would not have established that defendant did not have constructive possession of the narcotics. Constructive possession exists where defendant has the intent and capability to maintain dominion and control over the controlled substance, but not immediate personal control over it. *People v. Frieberg*, 147 Ill. 2d 326, 361 (1992). Proof that defendant knew the narcotics were present and exercised control over them establishes constructive possession (*People v. Moore*, 365 Ill. App. 3d 53, 60 (2006)), and habitation in a premises where narcotics are discovered has also been found sufficient evidence of control (*People v. Cunningham*, 309 Ill. App. 3d 824, 828 (1999)).

¶ 16 Here, the record shows that defendant was found in the kitchen a few feet away from where the cocaine was drying on a plate after being recently "cooked," and when defendant saw police, he tried to flee. Defendant clearly knew the cocaine was present in the kitchen. *Moore*,

365 Ill. App. 3d at 60. In addition, his proof of residency was established by the documents recovered from a bedroom in the apartment which contained his name, with the label Jr. and listed the Lotus address as his home. Although defendant's father testified at the sentencing hearing that he resided alone at the premises, he also testified that he was Willester Cook, Sr. Accordingly, the documentation found in the home did not belong to him, but, rather, his son, defendant, and defendant, therefore, cannot establish that he was prejudiced by counsel's decision to stipulate to the proof of residency. In addition, there is no reasonable probability that the testimony of defendant's father would have changed the outcome of the trial where the evidence overwhelmingly established that defendant knew the narcotics were on the premises and had control over the premises where his name was on the proofs of residency found in the apartment. *Cunningham*, 309 Ill. App. 3d at 828; *Moore*, 365 Ill. App. 3d at 60. Defendant thus cannot establish that his counsel was ineffective for failing to call his father to testify at trial and stipulating to his proof of residency. *Harris*, 206 Ill. 2d 293, 304 (2002). Moreover, the decisions of what witnesses to call to testify and what stipulations to enter are generally matters of trial strategy, and defendant has not shown that counsel's decisions were so unsound that he completely failed to conduct any meaningful adversarial testing. *People v. Phillips*, 217 Ill. 2d 270, 286 (2005); *People v. Leeper*, 317 Ill. App. 3d 475, 482 (2000).

¶ 17 Defendant next contends that counsel was ineffective for stipulating to the forensic chemist's testimony as to the weight of the cannabis, an essential element of the offense of possession of cannabis with the intent to deliver in an amount greater than 30 and less than 500 grams. He asserts that the proffered testimony indicates that the chemist improperly commingled

the four bags of cannabis prior to testing, and therefore, the State could not prove the weight of the cannabis. He also asserts that the recovered cannabis was not sufficiently homogenous to allow such commingling, citing *People v. Clinton*, 397 Ill. App. 3d 215, 220-21 (2009).

¶ 18 Defendant's claim is based on conjecture and surmise, which defendant cannot rely on to justify his claim of incompetent representation. *People v. Clarke*, 391 Ill. App. 3d 596, 614 (2009). There is no evidence that the chemist comingled the four bags of cannabis prior to testing, and that the recovered cannabis was not sufficiently homogenous. The chemist's listing of actual and estimated weights does not demonstrate that the bags were comingled, and we will not presume that the chemist followed improper procedure. *People v. Fountain*, 2011 IL App (1st) 083459-B, ¶30. Moreover, we find that the recovered cannabis was sufficiently homogenous to allow for random testing where the police testified that the suspect cannabis was a green leafy substance, and the stipulation provided that the cannabis recovered was a plant material. *People v. Jones*, 174 Ill. 2d 427, 429 (1996).

¶ 19 We find defendant's reliance on *Clinton* misplaced. In *Clinton*, the chemist combined 6 of 13 packets of the recovered suspect heroin, which was a white powdery substance, into one mixture before weighing and then testing, and the reviewing court concluded that the State thus failed to prove defendant guilty beyond a reasonable doubt of possession with intent to deliver more than 1 gram but less than 15 grams of heroin. *Clinton*, 397 Ill. App. 3d at 219, 222-23. Here, as explained, there is no evidence that the recovered cannabis was commingled before being weighed and tested.

¶ 20 We are also aware of the recent decision in *People v .Coleman*, 2015 IL App (4th)

131045, but find it distinguishable. In *Coleman*, the stipulation provided that the white powder in State's Exhibit no. 2, which consisted of 15 separate packets, was 926 grams of cocaine. *Coleman*, 2015 IL App (4th) 131045, ¶71. The Fourth District held that where the police report "hint[ed]" that the recovered drugs were comingled, and the recovered suspect cocaine consisted of white powder which could have been a look-alike substance for cocaine, counsel was ineffective for failing to investigate whether the 15 recovered packets of suspect cocaine were individually tested and for entering into the stipulation. *Coleman*, 2015 IL App (4th) 131045, ¶¶26, 70- 78, 83. In *People v. Taylor*, 237 Ill. 2d 68, 76-77 (2010), the supreme court specifically declined to engage in inferences or speculations to support defendant's argument, and we decline to do so here where there is no indication of any commingling, and there was a sufficiently homogenous recovered substance. *Jones*, 174 Ill. 2d at 429. Accordingly, defendant cannot establish ineffective assistance of counsel for stipulating to the weight of the recovered cannabis.

¶ 21 Finally, defendant contends that this court should vacate the fines and fees order based on the trial court's oral ruling that his fines and fees would be zeroed out. In the alternative, he requests this court to remand the matter to the trial court with directions to issue a corrected fines and fees order awarding him credit toward his fines based on time he spent in presentence custody.

¶ 22 The fines and fees assessed against defendant were mandatory. This court has no authority to vacate these mandatory fines which we can only reimpose if imposed by the circuit clerk instead of the circuit court. *People v. Higgins*, 2014 IL App (2d) 120888, ¶24. Furthermore, the trial court only indicated its belief that the presentence custody credit would zero out the

fines and fees. The court did not order that it do so.

¶ 23 That said, we find that defendant is entitled to $785 in presentence incarceration credit for the 157 days he spent in custody prior to sentencing. 725 ILCS 5/110-14(a) (West 2014). We, therefore, order that the $785 in presentence custody credit be applied toward the $3035 in fines imposed. *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995).

¶ 24 In light of the foregoing, we affirm the judgment of the circuit court of Cook County in appeal No. 1-12-3318 and modify the fines and fees order as indicated, and dismiss appeal No. 1-12-3565 for lack of jurisdiction.

¶ 25 No. 1-12-3318, Affirmed.

¶ 26 No. 1-12-3565, Dismissed.