2016 IL App (1st) 140053-U

FIFTH DIVISION
September 16, 2016

Nos. 1-14-0053 & 1-14-2096 (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. 13 CR 13142
	)	
RASHAWN SMITH,	)	Honorable
	)	Steven Goebel,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Gordon and Justice Reyes concurred in the judgment.

O R D E R

¶ 1 *Held:* Prison sentence of 6 years for possession of a controlled substance with intent to deliver and delivery of a controlled substance was not excessive. Both charges stand, despite involving same controlled substance, because the offenses were not simultaneous.

¶ 2 Following a 2013 jury trial, defendant Rashawn Smith was convicted of possession of a controlled substance (1 gram or more, but less than 15 grams, of heroin) with intent to deliver (PCSI) and delivery of a controlled substance (less than a gram of heroin) (DCS). The court

sentenced him to concurrent prison terms of nine and seven years for PCSI and DCS respectively. Defendant filed a motion to reconsider his sentence, and the court resentenced him to concurrent six-year prison terms. On appeal, he contends that his sentence is excessive and that one of his two convictions must be vacated. For the reasons stated below, we affirm.

¶ 3 Defendant was charged with DCS and PCSI committed on or about May 6, 2013. At the time of trial, the DCS charge alleged that defendant delivered less than a gram of heroin. (Initially alleging that he delivered 1 gram or more but less than 15 grams of heroin, it was amended without objection.) The PCSI charge alleged his possession of heroin with the intent to deliver, in the amount of 1 gram or more but less than 15 grams, and more than 3 grams.

¶ 4 At trial, Chicago police officers testified that they observed defendant holding a length of red tape with foil packets attached, hand a section of that tape to the front seat passenger of a purple vehicle in exchange for currency, and conceal the remainder of the tape under a window on the side of the house at 126 N. Kilbourn Avenue. Officers stopped the purple car. The front seat passenger, Leonard Hicks, was found to have a length of red tape with four foil packets on it, and they identified Hicks as the person who bought the red tape from defendant. The officer who observed defendant conceal the tape under the aforesaid window, and who observed that no one else approached the area in the meantime, directed another officer to that location where red tape with 22 foil packets on it was recovered. After his arrest, defendant told an officer that he had stored drugs outside a building at 4407 W. West End Avenue, hidden in a rubber mat under a piece of wood. The officer went to that building and found under a piece of wood a rubber mat concealing two plastic bags that contained 12 and 13 foil packets attached to red tape. Testing revealed that Hicks's four packets contained 0.8 grams of heroin, 15 of the 22 packets from the

Kilbourn house contained 3.2 grams of heroin, and 15 of the 25 packets from the West End building contained 3.2 grams of heroin.

¶ 5 The jury was instructed on two charges, DCS and PCSI. The DCS instructions did not specify an amount of heroin, while it was an element of PCSI in the instructions that defendant possessed 3 grams or more of heroin. During closing arguments, the State argued that the DCS charge related to Hicks's heroin while the PCSI charge related to defendant's "two stashes." After deliberations, the jury found defendant guilty of DCS and PCSI.

¶ 6 In December 2013, defendant's posttrial motion was denied, and the court proceeded immediately to sentencing.

¶ 7 The pre-sentencing investigation report (PSI) reflects that defendant received two juvenile dispositions in 2007 and 2010, each for possession of a controlled substance and possession of cannabis and each with a commitment to the Department of Corrections. Defendant had a 2011 conviction for manufacture or delivery of between 1 and 15 grams of heroin, receiving two years' probation that terminated unsatisfactorily in January 2012. He was convicted in January 2012 of escape by violating electronic monitoring and received "boot camp," and was resentenced in February 2012 to two years' imprisonment for violating "boot camp." Defendant was born in 1993 and raised by his mother, as his parents separated when he was an infant and his father was in prison. He lived with his mother and seven siblings, with whom he had a good relationship. Defendant has a young daughter who he saw every day before his arrest. He received special education in the sixth grade, attended but did not complete high school with "decent" grades, and intends to seek his GED. He admitted to never being gainfully employed, as he was supported by his family. Defendant described his physical health as good

but received psychiatric treatment in 2004 including 30 days' inpatient treatment, and was prescribed Geodon but stopped taking it about two months after outpatient treatment ended. Since age 13, he has smoked marijuana daily and drank alcohol moderately on the weekends; he has used "ecstasy" regularly since age 16. He admitted being in the Conservative Vice Lords gang from age 11 until "this year, for my daughter."

¶ 8 At sentencing, the parties had no corrections or additions to the PSI. The State argued that defendant has two prior felony convictions, including a "boot camp" violation, as well as juvenile adjudications. Noting that defendant was ineligible for probation, the State asked for a "significant" prison sentence. The defense argued that defendant is 19 years old, had some high school education, has family, and takes care of his young daughter. The defense argued that defendant's criminal record is not extensive and includes no violent offenses. Acknowledging that defendant could not receive probation, the defense asked the court for "as minimum time [in prison] as possible." Defendant chose not to personally address the court.

¶ 9 The court noted that it considered the PSI, the facts of the case, and the sentencing arguments in light of the aggravating and mitigating factors. The court found that defendant "has a fairly significant background" and that the evidence of his guilt was overwhelming including leading the police to additional heroin. The court acknowledged that defendant wants to take care of his family but "you are not any benefit to your family by selling drugs. It's not the way you take care of your family." The court sentenced defendant to nine years' imprisonment for PCSI and a concurrent seven years for DCS. Defendant immediately filed a notice of appeal.

¶ 10 Defendant also timely filed a motion to reconsider his sentence, arguing in relevant part that his sentence was excessive in light of his background. The court heard the motion in June

2014. Defendant argued that he is young, his crime was non-violent, he was unlikely to commit it again, and his imprisonment would be a hardship on his family. The State opposed the motion, arguing that these factors were duly considered in the sentencing hearing. The court resentenced defendant to concurrent six-year prison terms, making no additional express findings. Defendant timely filed a notice of appeal, and his two appeals have been consolidated here.

¶ 11 On appeal, defendant primarily contends that his six-year prison sentence is excessive.

¶ 12 PCSI of 1 gram or more, but less than 15 grams, of heroin is a Class 1 felony punishable by a prison term of 4 to 15 years, and ineligible for probation if three or more grams of heroin was delivered. 720 ILCS 570/401(c)(1); 730 ILCS 5/5-4.5-30(a), 5/5-5-3(c)(2)(D-5) (West 2014). DCS of less than one gram of heroin is a Class 2 felony punishable by a prison term of 3 to 7 years. 720 ILCS 570/401(d); 730 ILCS 5/5-4.5-35(a) (West 2014).

¶ 13 A sentence within statutory limits is reviewed for an abuse of discretion, so that we may alter a sentence only when it varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Snyder*, 2011 IL 111382, ¶ 36. The court's broad discretion means that we cannot substitute our judgment simply because we may weigh the sentencing factors differently. *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010). In imposing a sentence, the trial court balances the relevant factors including the nature of the offense, the protection of the public, and the defendant's rehabilitative potential. *People v. Abrams*, 2015 IL App (1st) 133746, ¶¶ 32-33. The trial court has a superior opportunity to evaluate and weigh a defendant's credibility, demeanor, character, mental capacity, social environment, and habits. *Snyder*, ¶ 36. The court does not need to expressly outline its reasoning for sentencing, and we presume that the court considered all mitigating factors on the record absent an affirmative

indication to the contrary other than the sentence itself. *Abrams*, ¶¶ 32-33. Because the most important sentencing factor is the seriousness of the offense, the court is not required to give greater weight to mitigating factors than to the severity of the offense, nor does the presence of mitigating factors require a minimum sentence. *Alexander* at 214; *Abrams*, ¶ 34.

¶ 14 Here, while defendant has no conviction for a violent offense, he has three prior dispositions and convictions for controlled substance offenses, including escalating from simple possession to manufacture or delivery in 2011. Moreover, on probation in 2012 for his prior controlled substance conviction, he ended up with a two-year prison sentence for first violating electronic monitoring and then in rapid succession violating "boot camp." He then committed the instant offenses in mid-2013. Against these aggravating factors, tending to indicate a lack of rehabilitative potential, defendant argues that his sentence is excessive because of his youth, history of mental illness and substance abuse, and family ties including a young child, prompting him to quit his gang. However, the trial court was apprised of these factors in the PSI and expressly acknowledged defendant's family ties. We see no evidence that the court did not give these factors due consideration, particularly when the court reduced defendant's sentence from the original nine years to six years. We conclude that the court did not abuse its considerable discretion in sentencing defendant to six years in prison, at the low end of the 4- to 15-year range for his more serious offense, PCSI.

¶ 15 Defendant also contends that his DCS conviction must be vacated because it involved the same controlled substance – heroin – as his PCSI conviction. The State responds that defendant has forfeited this claim by not raising it in the trial court. However, the issue of whether multiple convictions are allowable, such as a "one act, one crime" issue, is considered under the plain

error doctrine because it affects the integrity of the judicial process. *People v. Clark*, 2016 IL 118845, ¶ 45.

¶ 16 Section 401 of the Controlled Substances Act (720 ILCS 570/401 (West 2014)) provides that "it is unlawful for any person knowingly to manufacture or deliver, or possess with intent to manufacture or deliver, a controlled substance. *** A violation of this Act with respect to each of the controlled substances listed herein constitutes a single and separate violation of this Act."

¶ 17 In *People v. Manning*, our supreme court considered the case of a defendant arrested inside a drug store and "found to be in possession of an assortment of pharmaceutical pills and capsules, later determined to include 343.8 grams of amphetamines and 240.3 grams of barbiturates." *People v. Manning*, 71 Ill. 2d 132, 133 (1978). The *Manning* court held that, "in the absence of a statutory provision to the contrary, the simultaneous possession of more than one type of controlled substance, under the circumstances shown on this record, constituted a single offense, and only one sentence should have been imposed." *Id.* at 137.

¶ 18 As this court recently and ably explained in *People v. Pittman*, 2014 IL App (1st) 123499:

> "While *Manning* was overruled by legislative amendment, the Illinois Supreme Court has held that its reasoning remains valid. [Citation.] The legislative amendments to the Controlled Substance Act provide the express statutory provision required by *Manning* as to separate controlled substances, yet there is no such provision for simultaneous possession of the same substance. [Citations.] Accordingly, we must determine whether the possession of the 8 packets of heroin on Pittman's person and the possession of the 13 packets recovered from the boat were simultaneous within the meaning of *Manning* so as

> to constitute one act under *King*." *Pittman*, ¶ 33, citing *People v. Carter*, 213 Ill. 2d 295 (2004), and *People v. King*, 66 Ill. 2d 551 (1977).

¶ 19 The *Pittman* court went on to find two separate acts supporting two counts of conviction. The *Pittman* defendant had first discarded packets of heroin during his flight from police and then, following his arrest, told officers where he had concealed additional heroin in a nearby boat. *Pittman*, ¶¶ 4-7. Thus,

> "Pittman actually possessed the first set of packets. The drugs were on his person and fully within his control, evidenced by the fact that he was able to throw the packets. He constructively possessed the second set of packets. They were not in his immediate, personal control. Instead, Pittman's careful hiding of the drugs circumstantially evidenced his intent and capability to return later and only then exercise actual control. Therefore, Pittman committed two separate acts of possession: (1) the exercise of present, personal control over the first set of drugs and (2) the exercise of constructive control through the intent and capability to return to the second set of drugs. Furthermore, Pittman's indictment charged two separate counts of possession of a controlled substance with intent to deliver, and therefore, indicated 'that the State intended to treat the conduct of defendant as multiple acts.' " *Pittman*, ¶ 37, quoting *People v. Crespo*, 203 Ill. 2d 335, 345 (2001).

¶ 20 Before *Pittman*, this court faced a similar issue in *People v. Valen*, 183 Ill. App. 3d 571 (1989). There, a defendant challenged his convictions for DCS and PCSI of cocaine, arguing that one had to be vacated under *Manning*. However, *Valen* distinguished between "simultaneous convictions for possession of a quantity of a controlled substance with the intent to deliver and

the actual delivery of *that same quantity* of controlled substance" and the *Valen* defendant's "possess[ion of] a large quantity of cocaine over and above the quantity of cocaine that was actually delivered." (Emphasis in original.) *Valen*, at 580. *Valen* noted *Manning*'s statement that "it would not be competent to charge [a] thief with four different larcenies when [four] horses were all taken at the same time and place" (*Manning*, at 135) and held that, by analogy, the *Valen* defendant also sold one of the horses he stole and thus "committed a separate 'act' that may be recognized and punished under the law." *Valen*, at 581.

¶ 21 Here, we agree with *Pittman* that there is no statutory provision for multiple counts from the simultaneous possession of the same controlled substance. "A violation of this Act with respect to each of the controlled substances *** constitutes a *single* and separate violation of this Act." (Emphasis added.) 720 ILCS 570/401 (West 2014). The word "separate" means that each controlled substance supports a separate charge, and "single" means that each controlled substance supports only one charge. The clear intention of the legislature in light of *Manning* was that each controlled substance a defendant possesses simultaneously supports one charge.

¶ 22 Defendant argues that *Pittman* "deviated from the above-mentioned principles" that the simultaneous possession of two or more items of the same controlled substance supports only one count of conviction. However, we find no deviation: *Manning* concerned two possessions simultaneous in time and place while *Pittman* and *Valen* did not. Defendant also argues that we "should not follow *Pittman* because [defendant's] charging instrument did not distinguish between the two 'possessions' and because the simultaneous possession of the *same* type of drugs cannot support multiple convictions and sentences." (Emphasis in original.) However, the State charged defendant with, and the court instructed the jury upon, the distinct offenses of possessing

more than 3 grams of heroin with the intent to deliver (PCSI under Count 4) and actually delivering less than a gram of heroin (DCS under Count 1). In other words, the State alleged that defendant performed different acts – delivery and possession – with different amounts of heroin, as in *Valen*. As to the allegedly simultaneous possession, the heroin found at West End Avenue pursuant to defendant's post-arrest statement – as in *Pittman* – was clearly not in defendant's actual possession at either the time or place he made his delivery of heroin to Hicks and concealed heroin by the side of the Kilbourn house. We conclude that defendant's PCSI and DCS convictions are not for simultaneous heroin offenses so that both counts stand.

¶ 23 Accordingly, the judgment of the circuit court is affirmed.

¶ 24 Affirmed.