2017 IL App (1st) 143548-U

No. 1-14-3548

Order filed March 31, 2017

First Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 22091
	)	
TREMONT BREWER,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Connors and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient to support defendant's conviction for possession of a controlled substance where a police officer testified that he observed defendant drop bags of narcotics and kick them beneath a parked van after seeing the officer. Defendant's claim of ineffective assistance of counsel also fails because defense counsel's cross-examination at trial was not deficient and, even it if were, defendant has not shown prejudice.

¶ 2 Following a bench trial, defendant Tremont Brewer was convicted of possession of between 10 and 30 grams of cannabis (720 ILCS 550/4(c) (West 2012)). This was elevated to a

Class 4 felony due to Mr. Brewer's prior conviction for the manufacture and delivery of a controlled substance. Mr. Brewer was sentenced to 18 months in prison and assessed $1,099 in various fines and fees. On appeal, Mr. Brewer contends that the State did not prove his guilt beyond a reasonable doubt because the testimony of a police officer—that he saw Mr. Brewer drop bags containing cannabis on the ground as he approached Mr. Brewer—was not credible. Mr. Brewer also asserts that his trial counsel was ineffective for failing to impeach the officer with testimony that the officer offered at Mr. Brewer's preliminary hearing. Mr. Brewer further argues that the State incorrectly imposed a $5 electronic citation fee. For the following reasons, we modify the fines and fees order and affirm the judgment of the trial court in all other respects.

¶ 3 BACKGROUND

¶ 4 Mr. Brewer was charged with one count of possession of between 10 and 30 grams of cannabis and one count of possession with intent to deliver. He was convicted only of simple possession. Because he contests the sufficiency of the evidence, we will review it in some detail.

¶ 5 Chicago police officer Matthew Scanlan testified that he had been a police officer for 9 and 1/2 years and was familiar with hand-to-hand narcotics transactions and the packaging of narcotics for distribution. At about 11:50 p.m. on August 23, 2013, Officer Scanlan, his partner, and a sergeant were "on routine patrol looking for narcotics activity" in the area of 838 North Leamington Avenue in Chicago, traveling north on Leamington in an unmarked vehicle. Officer Scanlan, who was dressed in plain clothes and wore his police star on a chain in front of his vest, was in the car's passenger seat.

¶ 6 When Officer Scanlan first observed Mr. Brewer, Mr. Brewer was standing next to the sliding door of a van parked on the east side of the street. The officer testified that Mr. Brewer was "up about 10 feet away and we were closing." Four people were inside the van, and the

engine was running. Officer Scanlan testified that Mr. Brewer "looked in our direction and then stepped forward to try and conceal himself[.] He tried to use the van to conceal himself."

¶ 7 After seeing that action by Mr. Brewer, Officer Scanlan exited the car and approached the van on foot. The officer testified: "As I came around the back end of the minivan, the defendant looked in my direction and then with his right hand he dropped three clear plastic knotted bags to the ground in between the curb and the vehicle and attempted to kick it [*sic*] underneath the vehicle." According to the officer, Mr. Brewer stepped down from the curb and used his foot to push the bags under the van.

¶ 8 Officer Scanlan then approached Mr. Brewer and looked in the area where he had dropped the items. The officer stated that he could see the edges of the bags and recovered seven "clear plastic Ziploc bags each containing a green leafy substance" suspected to be cannabis from under the van and also recovered the three clear plastic knotted bags that he saw Mr. Brewer drop to the ground. Those three bags each contained several individual bags. The seven bags were closer to the curb than the three knotted bags. The officer stated that he believed those bags to be packaged narcotics for sale. A custodial search of Mr. Brewer revealed he was carrying $172 in cash.

¶ 9 On cross-examination, Officer Scanlan testified as follows:

> "Q. So now when you first saw [Mr.] Brewer, he was standing on the east sidewalk of Leamington apparently talking to the occupants of the stopped van, right?
>
> A. Correct.
>
> Q. And the van door was open?
>
> A. Correct.

Q. Could you hear what was being said?

A. No.

Q. And you first made observation of [Mr.] Brewer when you were 10 feet away from him?

A. Approximately.

Q. At that moment when [Mr.] Brewer was standing on the sidewalk, did he have anything in his hands?

A. I couldn't tell.

Q. Did you ever see him reach in his pocket?

A. No.

Q. Now, you say you couldn't tell, but you testified at a preliminary hearing in the past[,] haven't you?

A. Yes.

Q. And you're saying today that he walked off the sidewalk and he got closer to the van?

A. Correct.

Q. When he got to the side of the van, was he holding anything?

A. When he stepped forward towards the van?

Q. Yes.

A. I couldn't tell.

Q. Well, you were still in your vehicle then, right?

A. I was still in my vehicle, right?

Q. You couldn't see his hands; could you?

A. No, I couldn't.

Q. Well, when he. [*sic*] Stood one foot away from the passenger side of the van you could see his hands then, couldn't you?

A. When I was in the vehicle or out of the vehicle?

Q. Yes. When your [*sic*] in your vehicle.

A. When I was in the vehicle, no.

Q. You testified at a preliminary hearing in this case on November 13th of 2013, *** correct?

A. Correct.

Q. You were asked questions and you gave answers about the events of August 23rd of 2013?

A. Yes.

Q. Were you asked these questions and did you give these answers *** at that preliminary hearing?

'QUESTION: How close to the parked van was he?

ANSWER: By you?

QUESTION: How close?

ANSWER: One feet [*sic*] away from me.

QUESTION: At the moment you saw him standing there, could you see him holding something?

ANSWER: No.' Correct?"

¶ 10 Officer Scanlan agreed that the preliminary hearing testimony was "correct" and then added, "If that's what it says." The State objected, and the court sustained the State's objection. Defense counsel asked Officer Scanlan if he was then testifying that Mr. Brewer "could have been holding something" and the officer "couldn't see his hands." The trial court sustained the State's objection, stating the officer "said he couldn't see."

¶ 11 Continuing the cross-examination, defense counsel asked Officer Scanlan "when was it that you saw something" in Mr. Brewer's hands. The officer responded, "When I exited my vehicle and I came from the south part of his -- south of the parked vehicle." Officer Scanlan stated that, when he stood four feet from Mr. Brewer, Mr. Brewer had something in his hand and dropped it as soon as he saw the officer. The officer said he saw a number of clear plastic knotted bags in Mr. Brewer's right hand. The officer did not see any money being exchanged.

¶ 12 On recross-examination, the officer said that Mr. Brewer had the bags in his hand for "one or two seconds" before he looked in the officer's direction and dropped them. Officer Scanlan said that the first time he saw Mr. Brewer holding the bags was when he got out of his vehicle and walked toward the van. The officer also said that he lost sight of Mr. Brewer for "two seconds" while approaching the van.

¶ 13 The parties stipulated to the chain of custody of the recovered property, which totaled 30 smaller individual bags. The contents of 15 of the bags tested positive for cannabis, and the total weight of the cannabis recovered from all of the bags was 22.9 grams. The State introduced into evidence a certified copy of Mr. Brewer's previous conviction for possession of a controlled substance with intent to deliver in case No. 06 CR 0083102.

¶ 14 The defense moved for a directed verdict, which the trial court granted as to the count of possession with intent to deliver. After closing arguments, the trial court found Mr. Brewer

guilty of possession of cannabis, stating: "When [Mr. Brewer] kicks the items or attempts to kick the items under the car, I think there's an indication that [Mr. Brewer] is doing more then [*sic*] just dropping the items." The trial court denied Mr. Brewer's posttrial motion and sentenced him to 18 months in prison.

¶ 15 JURISDICTION

¶ 16 Mr. Brewer was sentenced on September 25, 2014, and he timely filed his notice of appeal on October 14, 2014. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case (Ill. S. Ct. Rs. 603, 606 (eff. Feb. 6, 2013)).

¶ 17 ANALYSIS

¶ 18 A. Sufficiency of the Evidence

¶ 19 On appeal, Mr. Brewer's first argument is that the State failed to prove him guilty of possession of cannabis beyond a reasonable doubt because Officer Scanlan's testimony that he saw Mr. Brewer drop bags of cannabis as the officer approached "runs counter to basic human experience" and simply cannot be believed. The State responds that it presented sufficient evidence that Mr. Brewer had immediate and exclusive control of the cannabis that he attempted to hide under the van.

¶ 20 Where, as here, a defendant challenges the sufficiency of the evidence, a reviewing court must determine whether, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the required elements of the crime beyond a reasonable doubt. *People v. Bradford*, 2016 IL 118674, ¶ 12. It is the responsibility of the trier of fact, which was the trial judge in this bench trial, to resolve conflicts in the testimony, weigh the evidence, and

draw reasonable inferences from the facts. See *id*. Therefore, a reviewing court will not substitute its judgment for that of the trier of fact on questions that involve the weight of the evidence or the credibility of witnesses, and a conviction will not be overturned unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt as to the defendant's guilt. *Id*.

¶ 21 To convict Mr. Brewer of the possession of cannabis in this case, the State was required to prove beyond a reasonable doubt that he knowingly possessed the contraband recovered by the police. 720 ILCS 550/4 (West 2012). The element of possession may be shown by either actual or constructive possession by the defendant. *People v. Givens*, 237 Ill. 2d 311, 335 (2010). "Actual possession is the exercise by the defendant of present personal dominion over the illicit material and exists when a person exercises immediate and exclusive dominion or control over the illicit material, but does not require present personal touching of the illicit material." *Id*. Actual possession over the material exists where the defendant displays "some form of dominion" over the contraband, such as trying to conceal or discard it. *People v. Johnson*, 2013 IL App (4th) 120162, ¶ 24 (quoting *People v. Scott*, 2012 IL App (4th) 100304, ¶ 19).

¶ 22 Here, Officer Scanlan testified that he first saw Mr. Brewer standing near the open door of a parked van. When Mr. Brewer looked in the officer's direction, Mr. Brewer tried to hide behind the van's door. As the officer approached the van, he saw Mr. Brewer drop the three bags of cannabis to the ground and kick them under the van. By that testimony, the State established Mr. Brewer's actual possession of the narcotics.

¶ 23 Mr. Brewer contends that the officer's account "runs contrary to common sense and human experience." Mr. Brewer argues that it is illogical that he would have, as the officer testified, dropped contraband to the ground when the officer was approaching, especially given

that he had a prior narcotics conviction. He refers to various studies and law review articles discussing "dropsy" cases in which police officers have falsely testified that the defendant dropped contraband in the officer's plain view. See, *e.g.*, *People v. Ash*, 346 Ill. App. 3d 809, 816-18 (2004). Mr. Brewer argues that it is "more plausible" in this case that "the police illegally searched him and found contraband."

¶ 24 The trial court in this case heard the testimony of the witnesses and determined their credibility, and this court cannot substitute its judgment for the trier of fact on those issues. See *People v. Cooper*, 194 Ill. 2d 419, 431 (2000). The facts, as testified to by Officer Scanlan, do not "run counter to basic human experience." It is not outside the realm of possibility that a defendant holding narcotics would try to rid himself of the contraband when an encounter with police appears imminent. Our supreme court has recognized that "[f]ar from being contrary to human experience, cases which have come to this court show it to be a common behavior for individuals having narcotics on their person to attempt to dispose of them when suddenly confronted by authorities." *People v. Henderson*, 33 Ill. 2d 225, 229 (1965) (and cases cited therein). Considering the evidence in the light most favorable to the prosecution, as we are required to do, the version of events testified to by the officer is not so unlikely as to defy belief. Accordingly, Mr. Brewer's arguments on this point are rejected.

¶ 25 B. Ineffective Assistance of Counsel

¶ 26 Mr. Brewer next contends on appeal that his trial counsel was ineffective for failing to perfect the attempted impeachment of Officer Scanlan with his prior testimony at Mr. Brewer's preliminary hearing. The State responds that there were no proper grounds for the officer's impeachment because his preliminary hearing and trial testimony were not inconsistent and that,

even if there was a deficiency in the cross-examination, Mr. Brewer cannot demonstrate prejudice.

¶ 27 A claim of ineffective assistance of counsel is considered under the two-prong test set out in *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant must show that his trial counsel's performance was deficient because it fell below an objective standard of reasonableness and also must establish that he was prejudiced by counsel's performance. *Id*. at 687. "When assessing the importance of the failure to impeach for purposes of a *Strickland* claim, '[t]he value of the potentially impeaching material must be placed in perspective.' " *People v. Brown*, 371 Ill. App. 3d 972, 978 (2007) (quoting *People v. Jimerson*, 127 Ill. 2d 12, 33 (1989)).

¶ 28 Mr. Brewer argues that Officer Scanlan's testimony at the preliminary examination was that Mr. Brewer was not holding anything when the officer was about a foot away from Mr. Brewer. Mr. Brewer claims that the preliminary examination testimony was therefore inconsistent with the officer's testimony at trial that, when he was four feet away from Mr. Brewer, he did see something in Mr. Brewer's hands. Mr. Brewer argues that counsel could have impeached Officer Scanlan's trial testimony by asking if the officer saw anything in Mr. Brewer's hands when the officer was outside of his vehicle and standing a foot away from Mr. Brewer. But defense counsel instead asked the officer whether he observed anything in Mr. Brewer's hands when the officer was seated inside of his vehicle and Mr. Brewer was a foot away from the van.

¶ 29 The testimony both at trial and at the preliminary examination was unclear as to what, exactly, Officer Scanlan observed at what time. The preliminary hearing testimony is not included in the record, but in the portion that was quoted in the trial testimony, defense counsel asked Officer Scanlan, "At the moment you saw him standing there, could you see him holding

something?" and the officer responded, "No." In the lead-up to that question, the officer was asked "How close?" and responded "One feet [*sic*] away from me." It is not clear in these quotes from the preliminary hearing testimony whether "[o]ne feet [*sic*]" was the distance between Mr. Brewer and the officer or between Mr. Brewer and the parked van. It is also unclear whether Officer Scanlan did not see Mr. Brewer "holding something" because he saw Mr. Brewer with empty hands or simply because he could not see Mr. Brewer's hands at all.

¶ 30 Even if we read the preliminary examination testimony the way Mr. Brewer asks us to—that the officer observed that Mr. Brewer's hands were empty when the officer was one foot away from him—this testimony is not inconsistent with Officer Scanlan's overall account that, as the officer approached the van, Mr. Brewer dropped the bags of marijuana to the ground. The officer testified at trial that he saw Mr. Brewer holding the bags when he was four feet away. By the time the officer stood a foot away from the van, Mr. Brewer might not have been holding the bags any longer because, according to the officer's testimony, Mr. Brewer dropped the bags and attempted to conceal them under the vehicle. Because there was no clear inconsistency, there was no failure on the part of defense counsel to perfect impeachment.

¶ 31 Moreover, Mr. Brewer has not demonstrated that he suffered prejudice from his trial counsel's allegedly deficient cross-examination. While Officer Scanlan was the only witness, even if defense counsel had established some inconsistency as to when Office Scanlan did and did not observe anything in Mr. Brewer's hands, considering the testimony as a whole, we cannot say this would have "creat[ed] a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *People v. Brown*, 371 Ill. App. 3d 972, 977 (2007).

¶ 32 C. Fines and Fees

¶ 33 Mr. Brewer asserts, and the State correctly concedes, that the $5 electronic citation fee was incorrectly imposed because it only applies to a defendant in "any traffic, misdemeanor, municipal ordinance or conservation case." 705 ILCS 27.3e (West 2012). Because none of those categories apply here, the $5 fee must be vacated. We can modify the circuit court's order without remanding the case, pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999). See *People v. Bryant*, 2016 IL App (1st) 140421, ¶ 22.

¶ 34 CONCLUSION

¶ 35 Accordingly, pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the clerk of the circuit court to correct the fines and fees order to reflect a total amount due of $1,094, as reduced from the original total of $1,099. The judgment of the circuit court is affirmed in all other respects.

¶ 36 Affirmed; fines and fees order corrected.