

NOTICE
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2011 IL App (4th) 100261-U

Filed 9/19/11

NO. 4-10-0261

IN THE APPELLATE COURT
OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
DUANE L. SYKES,)	No. 09CM333
Defendant-Appellant.)	
)	Honorable
)	Holly F. Clemons,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Appleton and McCullough concurred in the judgment.

ORDER

¶ 1 *Held:* The cause is remanded to the trial court because the court erroneously believed it lacked discretion to hear defendant's posttrial motion.

¶ 2 In January 2010, a jury convicted defendant, Duane L. Sykes, of misdemeanor theft (720 ILCS 5/16-1(a)(1)(A) (West 2008)). In March 2010, the trial court sentenced defendant to 150 days in jail.

¶ 3 Defendant appeals, arguing this cause should be remanded for a hearing on his posttrial motion because the trial court erroneously believed it did not have discretion to hear the motion. In the alternative, defendant contends (1) the evidence was insufficient to prove defendant committed theft beyond a reasonable doubt, and (2) reversible error occurred when a witness was permitted to narrate the contents of a video played for the jury. We remand with directions.

¶ 4

I. BACKGROUND

¶ 5

On March 10, 2009, the State charged defendant by information with misdemeanor theft (720 ILCS 5/16-1(a)(1)(A) (West 2008)), alleging defendant took less than \$300 from his employer, Bergner's department store.

¶ 6

During defendant's January 6, 2010, trial, the State presented testimony from Steven Thuney, a loss-prevention manager for Bergner's. Thuney testified he discovered a cash register in the men's department was \$100 short on December 10, 2008. As part of his investigation, Thuney reviewed both the register tape as well as a videotape from a ceiling surveillance camera. The register tape showed all the transactions on the register from the day in question. Thuney testified the surveillance camera was attached to a ceiling tile approximately 20 feet from the register area. Thuney testified to what he recalled observing on the video as follows:

"[W]hile reviewing the video at nine o'clock on the tape, I observed [defendant] at the register kind of pacing around. The store wasn't very busy. He looks at one point directly up at the camera for a moment, and then looks back down, wanders around a little bit, around the cash wrap area. Comes back to the cash register, enters what appeared to me to be his associate number to open the drawer of the register. When the drawer opened, with his left hand he removed it looked like a bill from the far left side of the terminal, cupped it in his hand, closed the terminal, removed the no sale receipt from the top of the terminal, and walked away

and his hand went into his left pocket."

Thuney testified he watched the video footage for the entire day and did not observe actions by any other employee that raised his suspicion about the missing money. Thuney identified defendant as the person he observed on the videotape.

¶ 7 Thuney explained it is impossible to open the cash register without entering an associate number. He also explained that a "no-sale" transaction is rung when an associate needs to get into the register for some reason other than performing a customer transaction, *i.e.*, to get change or check to see if change is needed. However, Thuney testified to the procedure used to get change. First, an employee needs to fill out a carbonless form to get change indicating the type of change desired, *i.e.*, the number of rolls and whether he needed pennies, quarters, or bills. Then the employee would take out the amount of money matching the amount of change he needed. After that, he would place the money and the form into a blue bank bag and call the manager, who would come get the bag and bring it back with the requested change. Thuney testified there is no other authorized purpose for an employee to take money out of the register and keep it on his person. Thuney also testified he found no copy of a change receipt filled out by defendant in the register on December 20.

¶ 8 After viewing the videotape, Thuney called defendant into the store manager's office to talk with him. When Thuney told defendant he had watched the surveillance footage and that his register was short, defendant stated he did not want to speak with Thuney and left Thuney's office.

¶ 9 The State introduced a digital video disc (DVD) copy of the original video home system (VHS) videotape into evidence without objection. The tape was then played for the jury.

¶ 10 After the video was played, the following colloquy took place:

"Q. [MISS BERGSTROM (State's Attorney)]: The quality of the video appears to be a little grainy. When you watched the video the first time on December 20th, what device were you watching it on?

A. [THUNEY:] I was watching it on the same VCR that produced the video.

Q. And at that time did it have the same quality as the DVD we've all just seen?

A. No. The quality was much better.

Q. What was different?

A. The video you saw was--had a lot of looked like electronic interference in it, and it was a little difficult to watch I guess.

Q. Uh-huh. When you watched it on the VCR, was electronic interference not present?

A. No. It was a clear picture.

Q. And you indicated that when you watched the video, you were able to see the defendant put a bill in his left hand. Were you able to clearly see that in this version of the DVD?

A. You can see it. It is a little bit more difficult based on where the interference occurs, but it is there."

¶ 11 During cross-examination, defendant's trial counsel established the jury was watching a DVD copy of the videotape and not the original VHS copy. In addition, Thuney testified he did not personally witness defendant taking money from the register and the only knowledge he had about the incident was based on what he observed in the video. Thuney also testified no money was ever recovered from defendant's person.

¶ 12 At the close of the State's case, defendant moved for a directed verdict, which the trial court denied. Defendant did not testify or present any evidence.

¶ 13 During closing argument, defendant's trial counsel again played the videotape for the jury. While the tape played, counsel called into question what the tape showed and stated the following:

"So we can see that it is nine o'clock a.m. and [defendant] is standing around, hands in [his] pockets. It is a little slow at Bergner's. He is very relaxed. Here he has gone off camera like he does later. He is going to approach the register in just a few seconds. He types in his own i.d., he is calm. He is not looking around, he is not nervous, he is not rushing. He is relaxed; he is going slow. Drawer opens, both hands--I don't know what the left is doing. I can see the right one. Okay. Takes the receipt, walks away. Nothing went into the left pocket. What happened with his left pocket? That's it."

¶ 14 On January 6, 2010, the jury convicted defendant of misdemeanor theft.

¶ 15 On March 5, 2010, defendant filed a motion for acquittal, or in the alternative, a

motion for a new trial, alleging the trial court (1) erred in denying his motion to continue trial, (2) erred in denying his motion *in limine* to preclude the State's use of his prior convictions to impeach his credibility, (3) erred in overruling his objections during the State's direct examination of Thuney, (4) erred in denying his motion for a directed verdict, (5) erred in allowing the jury to view the surveillance video during deliberations. Defendant's motion also argued the evidence was insufficient to convict him of theft. However, the court ruled it did not have the discretion to hear the motion because defendant filed his motion 57 days after defendant's January 6, 2010, conviction. Specifically, the court found the following:

"I don't believe it is discretionary at this point. The statute indicates [']shall be filed by the defendant within thirty days,['] so at this point I don't believe the court can proceed on the motion for acquittal, so at this point [the] court will then proceed to the sentencing hearing."

Thereafter, the court sentenced defendant as stated.

¶ 16 On March 8, 2010, defendant filed a motion to reconsider sentence, which the trial court denied.

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 On appeal, defendant argues this cause should be remanded for a hearing on his posttrial motion because the trial court erroneously believed it did not have discretion to hear the motion. In the alternative, defendant contends (1) the evidence was insufficient to prove he committed theft beyond a reasonable doubt, and (2) reversible error occurred when a witness

was permitted to narrate the contents of a video played for the jury.

¶ 20 On January 6, 2010, the jury convicted defendant of misdemeanor theft. On March 5, 2010, 57 days after defendant's conviction *but prior to sentencing*, defendant filed his posttrial motion. Defendant argues this cause should be remanded for a hearing on his posttrial motion because the trial court erroneously believed it did not have discretion to hear the motion.

¶ 21 Section 116-1 of the Code of Criminal Procedure of 1963 provides that a motion for a new trial "shall be filed by the defendant within 30 days following the entry of a finding or the return of a verdict." 725 ILCS 5/116-1(b) (West 2008). Although this 30-day time limitation applies to the defendant, "there is no jurisdictional bar to a trial court from entertaining a post-trial motion not timely filed within 30 days" as prescribed by the statute if the motion was filed prior to the imposition of the sentence. *People v. Talach*, 114 Ill. App. 3d 813, 818, 448 N.E.2d 638, 642 (1983) (a trial court has jurisdiction to entertain an untimely posttrial motion filed prior to sentencing).

¶ 22 The State argues the trial court did not err by denying the motion. However, the court did not rule on the merits of the motion. Instead, the court maintained it did not have the discretion to hear the motion. At the hearing on defendant's motion, the court stated the following:

"First thing I need to address is there is a motion for acquittal, or in the alternative, motion for a new trial that was placed on file this morning, March 5, 2010. Court will note that the trial in this--jury trial in this matter was on January 6, 2010, and the jury returned a verdict on January 6, 2010. Court will further note that the Code

of Criminal Procedure, 725 ILCS 5/116-1, motion for a new trial, states, and I will quote, in Subsection (b), 'A written motion for a new trial shall be filed by the defendant within thirty days following the entry of a finding or other return of a verdict. Reasonable notice of the motion shall be served upon the State.' At this juncture obviously we're outside the thirty days.

[Counsel,] anything you would like to state on that issue? I don't believe the court can address this motion. "

Defendant's counsel admitted the motion was not timely filed but did not argue the court possessed the discretion to entertain the motion. The State indicated it did not wish to be heard on the issue. The court then stated the following:

"All right. I don't believe it is discretionary at this point. The statute indicates [']shall be filed by the defendant within thirty days,['] so at this point I don't believe the court can proceed on the motion for acquittal, so at this point [the] court will then proceed to the sentencing hearing."

¶ 23 Further, the docket entry for March 5, 2010, shows, "Motion for acquittal or in the alternative for a new trial placed on file this date. Arguments heard[.] Court cannot proceed on this motion. Motion is denied."

¶ 24 In this case, the trial court had the discretion to consider defendant's posttrial motion. The court did not exercise that discretion, stating instead it lacked discretion because the motion was filed outside the statutory 30-day period. The court's statement was erroneous.

"A trial court has discretion to grant a new trial until the time of sentencing." *People v. Harper*, 347 Ill. App. 3d 499, 502, 807 N.E.2d 1001, 1003 (2004) (citing *Talach*, 114 Ill. App. 3d at 818, 448 N.E.2d at 642). We note defendant raises serious questions regarding the sufficiency of the evidence used to convict him. For example, Thuney, the State's only witness, testified the register was short \$100 at the end of the day. However, the State presented no evidence to show how much money was in defendant's register at the beginning of the day or at the beginning of defendant's shift. In fact, no record or receipt of any kind was offered into evidence. Further, Thuney testified the "five to six" other employees working on the register missing the money were not questioned about the money. Finally, the version of the security video played for the jury is very grainy. However, Thuney testified the clear version of the video, which he stated he viewed, showed defendant taking the money. We recognize our function at this point is not to pass on the strength of the evidence. Instead, we believe, as the appellate court in *Harper* did, the trial court is in the best position to evaluate the merits of defendant's posttrial motion. See *Harper*, 347 Ill. App. 3d at 503, 807 N.E.2d at 1004. Accordingly, we remand the cause to the trial court to exercise its discretion to determine whether to entertain defendant's posttrial motion.

¶ 25

III. CONCLUSION

¶ 26 For the reasons stated, we remand the cause to the trial court to exercise its discretion and determine whether to entertain defendant's posttrial motion.

¶ 27 Remanded with directions.