2012 IL App (4th) 110284-U

Filed 9/19/12

NO. 4-11-0284

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from |
| Plaintiff-Appellee, | ) | Circuit Court of |
| v. | ) | Sangamon County |
| PHILLIP D. POGUE, | ) | No. 10CF513 |
| Defendant-Appellant. | ) | |
| | ) | Honorable |
| | ) | April Troemper, |
| | ) | Judge Presiding. |

JUSTICE APPLETON delivered the judgment of the court.
Justice Steigmann concurred in the judgment.
Justice Pope dissented.

**ORDER**

¶ 1 *Held*: (1) Where the substance of defense counsel's stipulation was not legally ineffectual but rather, was a stipulation regarding the admission of evidence tending to establish an element of the charged offense, the trial court did not err in publishing the stipulation to the jury.

¶ 2 (2) Where defendant's ineffective-assistance-of-counsel claim considers matters outside the trial record, the reviewing court is unable to discern whether defense counsel's decision to stipulate to the admission of evidence constituted trial strategy or fell below a reasonable standard of legal representation.

¶ 3 Defendant, Phillip D. Pogue, appeals his conviction of possession of a controlled substance with the intent to deliver after a jury trial on the basis that his trial counsel had entered into a stipulation that could have no legal effect because it involved a matter of law, not fact. In the alternative, defendant claims his counsel was ineffective for so stipulating. We hold the matter to which counsel stipulated was not considered a matter of law, but was an element of the offense

charged and thereby, the stipulation merely eliminated the necessity of the State proving part of its case. Because defendant's ineffective-assistance-of-counsel claim involves matters outside this record, we are unable to determine those in this proceeding. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In July 2010, the State charged defendant with possession between 15 and 100 grams of a substance containing cocaine with the intent to deliver (720 ILCS 570/401(a)(2)(A) (West 2008)). A subsequently filed information charged the same offense but reduced the amount of cocaine allegedly possessed to more than 5 but less than 15 grams (720 ILCS 570/401(c)(2) (West 2008)).

¶ 6 At the commencement of defendant's February 2011 jury trial, the State and defense counsel entered into three stipulations, which were published to the jury by the trial court. The first two stipulations concerned foundation for evidence admitted at trial and the forensic examination results of the recovered cocaine. The third stipulation stated: "The amount of cocaine present in People's Exhibit 1, and the manner in which the cocaine was packaged, are conclusive evidence of intent to deliver. Thus, if defendant knowingly possessed the cocaine in People's Exhibit, he possessed it with the intent to deliver." It is the introduction of this stipulation that defendant relies upon as grounds for his ineffective-assistance-of-counsel claim.

¶ 7 The evidence adduced at trial came from the two police officers who stopped defendant in the early morning hours of July 24, 2009. After stopping his vehicle and asking for his proof of insurance, the officers observed defendant drop something, which, to them, looked like a bag. Defendant retrieved the dropped item and attempted to place it in his mouth.

¶ 8 After subduing defendant, the officers discovered he had been successful in putting

the item in this mouth. They forced him to spit it out. It was, in fact, two plastic bags that held smaller plastic bags, alleged and proved to contain crack cocaine. As defendant had masticated the items, the number of smaller bags was difficult to count. Ultimately, the bags were sent to the State crime lab where four bags were found to contain cocaine, weighing a total of 5.8 grams. The remaining bags, having a total weight of 7.0 grams, were not tested.

¶ 9 The jury found defendant guilty. Defendant filed a posttrial motion raising various contentions of error, not including the issue raised in this appeal. In April 2011, the trial court denied defendant's motion and sentenced him to five years in prison. This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 Defendant argues his trial counsel rendered ineffective assistance when he agreed to the third stipulation, a legal conclusion rather than a statement of fact. He claims either the stipulation had no legal effect due to its nature or counsel was ineffective for so stipulating. Our supreme court has explained the difference between a stipulation of fact and one of law.

> "While stipulations of fact are always proper and binding upon the parties, a stipulation as to the legal conclusions arising from facts is inoperative. The court cannot be controlled by agreement of counsel on a related question of law. *** If we accept the conclusions contained in the stipulation then there is no question at all in the case as to whether appellants violated the statute. The parties themselves would have already determined that issue. In so far as the stipulation set forth facts as to the place and source of instruction and its nature and extent, it is, of course, binding upon the parties. But the legal

> effect of those facts in showing attendance at a private school within the contemplation of the legislature is a question of law for the decision of courts. Such matters cannot be affected by stipulation of the parties." *People v. Levisen*, 404 Ill. 566, 578-79 (1980).

See also *Dawdy v. Sample*, 178 Ill. App. 3d 118, 127 (1989) ("The parties, however, cannot bind the court by stipulating to a question of law or the legal effect of facts.").

¶ 12 In *People v. Davis*, 286 Ill. App. 3d 686 (1997), the defendant was charged with improper lane usage and operating a motor vehicle at a time when his license was revoked. The defendant stipulated to the facts on the improper lane usage and that he had driven at a time when his license was revoked for driving under the influence of alcohol (DUI). *Davis*, 286 Ill. App. 3d at 689-90. The only contested issue was whether he was guilty of a misdemeanor or a felony. The defendant claimed he was guilty of a misdemeanor offense, while the State argued his offense had been enhanced to a felony due to his prior summary suspension for DUI. *Davis*, 286 Ill. App. 3d at 689-90. The appellate court disagreed with the State, finding defendant had conceded the evidence was sufficient to convict him of the misdemeanor offense, therefore, the defendant's stipulated bench trial was tantamount to a guilty plea and the applicable admonishments were required. *Davis*, 286 Ill. App. 3d at 690.

¶ 13 While defense counsel here aggressively fought the State's charge that defendant possessed the crack cocaine, he stipulated that, if he, in fact, lost that battle, defendant was guilty of a greater class offense because if he knowingly possessed the drugs he did so with the intent to deliver them. This was a legally enforceable stipulation as it involved an element of the offense for

which defendant was charged. "The law is well established that an accused may, by stipulation, waive the necessity of proof of all or part of the case which the People have alleged against him." *People v. Polk*, 19 Ill. 2d 310, 315 (1960).

¶ 14 In *People v. Rowell*, 375 Ill. App. 3d 421, 436 (2004), Justice Steigmann noted in his special concurrence that stipulations are a matter of trial strategy within defense counsel's sound judgment except when the State's entire case is to be presented by stipulation or when the stipulation includes a statement that the evidence is sufficient to convict the defendant. Citing *People v. Campbell*, 208 Ill. 2d 203, 217 (2003) (where the supreme court held that counsel could stipulate to the admission of certain evidence unless the defendant objects or counsel's decision does not rise to the level of trial tactics and strategy), Justice Steigmann questioned whether it was actually workable to allow a defendant to object to his counsel's stipulation to evidence, which could, in effect, actually trump counsel's strategic plan. *Rowell*, 375 Ill. App. 3d at 440.

¶ 15 Here, the matter addressed by the third and problematic stipulation concerned not the guilt of the accused but, rather, the elevation of the offense from mere possession to possession with the intent to deliver. In effect, defense counsel's stipulation undercuts the issue upon which the case was tried to the jury—that is, whether defendant was in possession of the crack cocaine.

¶ 16 Given the officers testified they observed a bagged substance at defendant's feet, and thereafter extricated it from his mouth, this testimony calls into question the wisdom of defense counsel's strategy of fighting the losing argument (at the expense of losing a potential winning argument) that defendant possessed the drugs only for his personal use. The issue of whether the evidence was sufficient to prove that defendant knowingly possessed the drugs, however, was not raised on appeal, and it is therefore forfeited.

¶ 17 There may have existed a strategic reason for defense counsel to enter into the third stipulation, but, upon this record, such strategy is not discernable. The determination of such a reason is best left to a postconviction proceeding should defendant so desire. See *People v. Kunze*, 193 Ill. App. 3d 708, 725-26 (1990) ("Where, as here, consideration of matters outside of the record is required in order to adjudicate the issues presented for review, the defendant's contentions are more appropriately addressed in proceedings on a petition for post-conviction relief.")

¶ 18 III. CONCLUSION

¶ 19 For the foregoing reasons, we affirm defendant's conviction.

¶ 20 Affirmed.

¶ 21 JUSTICE POPE, dissenting:

¶ 22 Because defense counsel entered into a stipulation of law and defendant was not admonished about the legal effect of that stipulation, I must dissent. Based on the evidence adduced in this case, the third stipulation amounted to a guilty plea to possession with intent to deliver, but defendant was never addressed in open court about his lawyer's stipulation or the effect thereof. Consequently, I would reverse defendant's conviction for possession with intent to deliver, and in accordance with defendant's request, remand this matter for entry of a conviction of possession and for resentencing.

The stipulation in this case bears repeating:

> "The amount of cocaine present in People's Exhibit 1, and the manner in which the cocaine was packaged, *are conclusive evidence of intent to deliver*. Thus, if the defendant knowingly possessed the cocaine in People's Exhibit 1, he possessed it with the intent to deliver." (Emphasis added.)

¶ 23 As can be seen, the jury was told if it found defendant possessed the cocaine, then he possessed it with intent to deliver. The jury was told the weight and the manner of packaging were *conclusive* evidence of intent to deliver. In other words, if the jury found defendant possessed the drugs, it had to also find he possessed the drugs with intent to deliver.

¶ 24 Officer Castles testified she saw the Baggie fall from the area where defendant's arms were and saw him bend over to pick it up. Another officer saw defendant stick the bags of cocaine in his mouth. Officer Castles saw defendant spit out two bags from his mouth. There was no testimony to the contrary and defendant offered no evidence at the trial.

¶ 25 Thus, overwhelming evidence showed defendant possessed the drugs. The only viable defense was that the relatively small amount of drugs and the packaging were indicative of personal use only. When defense counsel stipulated to conclusive evidence of intent to deliver, he gave up the only defense available to defendant. But for the stipulation, the result may well have been different—a conviction only of simple possession.

¶ 26 Regardless of whether defense counsel was ineffective for agreeing to the stipulation, however, I believe the stipulation itself should not have been accepted by the trial court. As the majority recognizes, the parties cannot bind the trier of fact on a question of law or the legal effect of facts. This stipulation basically directed a verdict of guilty on the charge of possession with intent to deliver. As the majority points out in *Davis*, where, in a stipulation, a defendant concedes the evidence is sufficient to convict, this is tantamount to a guilty plea and admonishments are required. *Davis*, 286 Ill. App. 3d at 690. In the case *sub judice*, while the jury determined guilt or innocence of the lesser charge of possession, it was told the evidence of intent to deliver was *conclusive*. This usurped the function of the jury.

¶ 27 Accordingly I dissent.