2013 IL App (4th) 110693-U

NO. 4-11-0693

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 8, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
CAPRECIO D. PATTERSON,	)	No. 10CF240
Defendant-Appellant.	)	
	)	Honorable
	)	Mark A. Fellheimer,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Steigmann and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Trial court did not abuse its discretion when it denied defendant's motion for continuance filed on the day of trial; and (2) defendant forfeited his *Apprendi* argument regarding his street-value fine.

¶ 2 Defendant, Caprecio D. Patterson, appeals his conviction following a jury trial on seven counts of drug-related charges. On appeal, defendant contends (1) the trial court abused its discretion when it denied his emergency motion for a continuance filed on the first day of trial, and (2) the $916 mandatory street-value fine must be vacated because its imposition violates the rules set forth in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). For the following reasons, we affirm defendant's convictions and sentence.

¶ 3 I. BACKGROUND

¶ 4 In September 2010, the State filed a seven-count information, charging defendant

with unlawful possession with intent to deliver a controlled substance (less than 15 grams heroin, subsequent offense) (720 ILCS 570/401(c)(1) (West 2010)) (count I); unlawful possession of a controlled substance (hydrochodone, alprazolam and dextro-propoxyphene, all subsequent offenses) (720 ILCS 570/402(c) (West 2010)) (counts II, III, and IV respectively); and unlawful delivery of a controlled substance (less that 1 gram heroin, all subsequent offenses) (720 ILCS 570/401(d)(1) (West 2010)) (counts V, VI, and VII). Because the issues raised by defendant on appeal are limited to two matters, the trial court's denial of defendant's motion to continue and the street-value fine, and because the parties are familiar with the facts of the case, we limit our discussion of the facts to those matters necessary to an understanding of the issues on appeal.

¶ 5 On April 25, 2011, the first day of trial, defendant filed an "Emergency Motion to Continue." The motion alleged defendant believed Mary Davis to be an essential witness, he had only recently been notified she was unavailable, and she "may represent one of [defendant's] only witnesses to testify on his behalf." Attached to the motion was a letter from Mary Davis, dated March 25, 2011, purporting to set forth her testimony to the effect defendant lived with her in Streator between February 20 and September 15, 2010. No affidavit was attached to the motion as required by statute. See 725 ILCS 5/114-4(a) (West 2010). The trial court also noted on April 5, 2011, at the pretrial, both sides announced they were ready for trial. After questioning defense counsel, the court learned the following. Defense counsel last had contact with Davis one to two weeks prior to the April 5 pretrial. Counsel knew as far back as October 2010 Davis might be a witness for the defense. Defense counsel never issued a subpoena for Davis.

¶ 6 Counsel had learned from a friend of Davis's she left the state to "take care of some business or otherwise be with the father of one of her children." According to the friend,

Davis said she would be back in July or August. Counsel expected Davis to testify defendant was living with her in Streator, he had most of his possessions in Streator, he was there a majority of nights during the week, he paid rent there and "they have kids there."

¶ 7 The three controlled buys that resulted in the charges here took place in Dwight, Illinois, on September 7, 13, and 16, 2010. During the execution of a search warrant in Dwight following the third controlled buy, defendant was found inside the residence and an insurance bill addressed to defendant at the Dwight address was found in a drawer in the Dwight residence. Cash, heroin, and other property were recovered during the search of the Dwight premises. Defense counsel wanted to use Davis's testimony to establish defendant lived in Streator, not Dwight, apparently to raise doubt the cash and drugs in the Dwight residence were connected to him. Davis's letter said defendant was at their Streator residence daily—except when he was not there. Davis opined when defendant was not there, he was working in Chicago "scraping" [*sic*] metal. Davis further offered defendant would sometimes stay at his mother's house when he was working late. Davis did not disclose the basis for her knowledge of defendant's whereabouts when he was not at the Streator residence.

¶ 8 The trial court noted the following. Davis was known to the defense from the start of the case, no subpoena was ever issued for her, her letter to counsel did not provide any reason for her unavailability, and she did not claim to be ill or to have been in an accident. The court also found the issue of where defendant was living to be a collateral aspect of any defense to be offered. With that, the court denied the emergency motion to continue.

¶ 9 The trial proceeded. A brief summary of the pertinent evidence follows.

¶ 10 Ryan Carter, a 25-year old Livingston County resident with a significant criminal

history, testified he contacted the Dwight police department on September 7, 2010, to provide information about the drug trade in Dwight. He was then thoroughly searched by Inspector Mike Nolan of the Dwight police department and provided with $60 so he could engage in a controlled buy at 104 1/2 South Franklin in Dwight. Nicole Watts lived at that location.

¶ 11 Upon Carter's arrival, Watts opened the door. When Carter entered, defendant was standing in the house and asked Carter what he needed. Carter gave the $60 buy money to defendant for four bags of heroin. The price of the heroin was $50, but Carter had a $20 debt from a prior transaction and applied $10 to that debt. Watts, who was in the back of the house when Carter gave defendant the money, brought four bags of heroin to Carter in the living room.

¶ 12 Carter returned to where Inspector Nolan was waiting for him and handed over the heroin. The following Monday, September 13, Carter performed another controlled buy at Watts' residence, again receiving four bags of heroin for $60, with $10 going to pay the remainder of Carter's debt. Watts answered the door, took the money and walked back to a bedroom in the apartment while Carter waited in the living room. Carter could hear defendant talking with Watts in the bedroom. Watts then brought the four bags of heroin out to Carter. Carter then met up with Inspector Nolan and turned over the heroin.

¶ 13 A third controlled buy took place on September 16. Carter gave Watts $60 and asked for five bags of heroin since he no longer owed a debt. He heard defendant's voice coming from down a hallway asking Watts who was there. Watts went down the hallway and came back with five bags of heroin, which she sold to Carter for $60. As before, Carter met up with Nolan and handed over the heroin.

¶ 14 Inspector Nolan testified about the procedures used with the controlled buys and

to the surveillance the police kept on Carter throughout the process. Prior to the third controlled buy, Nolan had obtained a search warrant for Watts' residence. Consequently, within 15 minutes of the September 16 transaction, police executed the search warrant.

¶ 15 Defendant, Watts, and a small child were the only people in the residence. Police searched defendant and found $1,094 cash in his pocket. Police recovered 52 small bags of heroin, later determined to weigh 5.1 grams and another 11 bags of heroin weighing 0.6 grams. Over $4,000 in cash was recovered from a men's tennis shoe in the bedroom. Included in that money were the three recorded $20 bills from the first buy. The prerecorded buy money from the transaction just prior to execution of the search warrant was found in the inner pocket of a men's green vest in the bedroom closet.

¶ 16 The jury found defendant guilty of all seven counts.

¶ 17 At sentencing, the State requested a street-value fine of $916. Defense counsel did not object. The basis for the street-value fine was the amount paid per bag of $12 (actually, the amount was between $12 to $12.50, but the State, for ease of calculation, used $12 per bag). There were 76 bags of heroin, 13 from the controlled buys and 63 found pursuant to the search warrant.

¶ 18 Defendant was sentenced to terms of imprisonment as follows: count I, 22 years; counts II-IV, 6 years each; and counts V-VII, 14 years; all to be served concurrently.

¶ 19 Defendant filed a motion to reconsider his sentence, but he did not raise any issue concerning the street-value fine. The trial court denied this motion. Defendant had also filed a motion for a new trial, wherein he preserved the issue of the court's denial of his emergency motion to continue the trial. The court also denied this motion.

¶ 20 This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 A. Trial Court's Denial of Emergency Motion to Continue

¶ 23 The granting or denial of a motion to continue lies in the sound discretion of the trial court. *People v. Bramlett*, 276 Ill. App. 3d 201, 205, 658 N.E.2d 510, 513 (1995). Thus, we review the court's decision to deny a motion to continue under the abuse of discretion standard.

¶ 24 Here, on the day of trial, defendant filed an emergency motion to continue based on the unavailability of a witness, Davis. Apparently Davis had been living with defendant for a period of time between February 20 and September 15, 2010. Her letter to counsel disclosed defendant at times worked in Chicago. It seems reasonable to conclude Davis did not accompany defendant to work. Her letter further discloses defendant would be away overnight at times, but then stayed at his mother's residence in Chicago. The letter does not disclose the basis of her knowledge. Further, apparently defendant no longer lived with Davis after September 15. The search warrant was executed in Dwight on September 16, and defendant was in the Dwight residence at that time.

¶ 25 In addition, Davis provided no reason for her unavailability and no indication if or when she would ever be available to testify. Further, defendant was aware of her potential testimony but failed to subpoena her.

¶ 26 We review the denial of the motion to continue using the following factors: (1) was defendant diligent in attempting to secure the witness for trial; (2) has defendant shown the testimony is material and might affect the jury's verdict; and (3) whether the failure to grant the continuance would prejudice defendant. *Bramlett*, 276 Ill. App. 3d at 205, 658 N.E.2d at 513.

¶ 27 Here, defendant did not subpoena Davis. Further, her testimony would not have affected the jury's verdict because defendant was actually found in the residence in Dwight at the time the police executed the search warrant. There was no credible information showing Davis would ever be available to testify. The trial court did not abuse its discretion when it denied defendant's motion for a continuance.

¶ 28 B. Street-Value Fine and *Apprendi*

¶ 29 Defendant next argues the $916 street-value fine assessed against defendant pursuant to section 5-9-1.1(a) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-9-1.1(a) (West 2008)) must be vacated because this subsection of the Unified Code violates the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Section 5-9-1.l(a) states:

> "When a person has been adjudged guilty of a drug related offense involving possession or delivery of cannabis or possession or delivery of a controlled substance, other than methamphetamine, as defined in the Cannabis Control Act, as amended, or the Illinois Controlled Substances Act, as amended, in addition to any other penalty imposed, a fine shall be levied by the court at not less than the full street value of the cannabis or controlled substances seized.
>
> 'Street value' shall be determined by the court on the basis of testimony of law enforcement personnel and the defendant as to the amount seized and such testimony as may be required by the court as to the current street value of the cannabis or controlled

substance seized." 730 ILCS 5/5-9-1.1(a) (West 2010) (text of section as amended by Pub. Act 94-550, Pub. Act 96-132, Pub. Act 96-402, and Pub. Act 96-1234.

¶ 30 Defendant bases his argument on the United States Supreme Court's recent decision in *Southern Union Co. v. United States*, 567 U.S. __, 132 S. Ct. 2344 (2012). In *Southern Union*, the Supreme Court decided its holdings in *Apprendi* and *Blakely v. Washington*, 542 U.S. 296 (2004), applied to "sentences of criminal fines." *Southern Union Co.*, 567 U.S. at 132 S. Ct. at 2348-49. Thus, *Apprendi* prohibits a defendant's maximum fine to be enhanced beyond what is allowed pursuant to the factual findings of the trier of fact or the admissions of the defendant. *Southern Union Co.*, 567 U.S. at 132 S. Ct. at 2352.

¶ 31 Pursuant to *Southern Union*, defendant argues he should not have to pay the street-value fine assessed against him because section 5-9-1.1(a) violates *Apprendi* and is, therefore, unconstitutional. Defendant contends a sentencing court, in setting a street-value fine, must make factual determinations about the weight and value of the substances seized. In doing so, in defendant's view, a judge usurps the role of the jury.

¶ 32 The State argues defendant forfeited this argument because he did not raise the issue in the trial court. The Illinois Supreme Court has stated an *Apprendi* violation "does not necessarily invalidate a defendant's sentence." *People v. Nitz*, 219 Ill. 2d 400, 409, 848 N.E.2d 982, 989 (2006). According to our supreme court, "when a defendant has failed to object to an error, plain-error analysis applies." *Nitz*, 219 Ill. 2d at 410, 848 N.E.2d at 989. In *People v. Herron*, 215 Ill. 2d 167, 186-87, 830 N.E.2d 467, 479-80 (2005), our supreme court summarized the plain-error analysis as follows:

> "[T]he plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. In the first instance, the defendant must prove 'prejudicial error.' That is, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. The State, of course, can respond by arguing that the evidence was not closely balanced, but rather strongly weighted against the defendant. In the second instance, the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. [Citation.] Prejudice to the defendant is presumed because of the importance of the right involved, '*regardless* of the strength of the evidence.' (Emphasis in original.) [Citation.] In both instances, the burden of persuasion remains with the defendant."

¶ 33 Defendant contends the evidence was not overwhelming with respect to the street value of the drugs, and thus the *Apprendi* violation affected the fairness, integrity or public reputation of judicial proceedings. It is true no witness testified to the street value of a gram of heroin. However, there were actual sales of bags of heroin on three separate occasions. These

arms-length transactions provide more than a sufficient basis for determining the street value of the heroin.

¶ 34 Here, defendant failed to preserve any error by objecting to the imposition of the street-value fine as violative of the *Apprendi* rule. There was evidence in the record supporting the amount of the fine imposed. Thus the evidence was not so closely balanced that the error alone severely threatened to tip the scales of justice against the defendant. Further, where as here, defendant faced a possibility of over $1 million in discretionary fines based on the verdicts of the jury, we cannot find that any error associated with a $916 street-value challenged the integrity of the judicial process. Consequently, if error occurred, it was forfeited and we will not recognize it.

¶ 35 III. CONCLUSION

¶ 36 For the foregoing reasons, we affirm the trial court's judgment. Because the State successfully defended a portion of the criminal judgment, we grant the State its $50 statutory assessment against defendant as costs of this appeal. See *People v. Smith*, 133 Ill. App. 3d 613, 620, 479 N.E.2d 328, 333 (1985) (citing *People v. Nicholls*, 71 Ill. 2d 166, 178, 374 N.E.2d 194, 199 (1978)).

¶ 37 Affirmed.