2020 IL App (4th) 180043-U

NO. 4-18-0043

FILED
October 15, 2020
Carla Bender
4th District Appellate
Court, IL

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
LATEEF R. THOMAS,	)	No. 16CF1376
Defendant-Appellant.	)	
	)	Honorable
	)	Roger B. Webber,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Knecht and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the trial court did not err when it (1) denied defendant's motion to dismiss counts III and IV and (2) sentenced defendant to 20 years' imprisonment.

¶ 2 In October 2016, the State charged defendant, Lateef R. Thomas, with unlawful possession with intent to deliver a controlled substance (cocaine) (720 ILCS 570/401(a)(2)(A) (West 2014)) (count I) and unlawful possession with intent to deliver cannabis (720 ILCS 550/5(d) (West 2014)) (count II). The charges stemmed from an October 5, 2016, execution of a search warrant at defendant's residence and the discovery of cocaine and marijuana. In August 2017, the State also charged defendant with two counts of unlawful delivery of a controlled substance (cocaine) (720 ILCS 570/401(d) (West 2014)) (counts III and IV), stemming from two separate controlled buys that occurred on September 7, 2016, and September 23, 2016.

¶ 3 Following a November 2017 trial, a jury acquitted defendant of unlawful possession with intent to deliver cannabis (count II) and found him guilty of the other three counts. In January 2018, defendant filed a motion for a new trial. The trial court denied the motion. The court sentenced defendant to 20 years' imprisonment for unlawful possession with intent to deliver a controlled substance (count I), 10 years' imprisonment for unlawful delivery of a controlled substance (count III), and 10 years' imprisonment for unlawful delivery of a controlled substance (count IV), to run concurrently.

¶ 4 Defendant appeals, arguing (1) the trial court erred in denying defendant's motion to dismiss counts III and IV based on the State's inability to produce a confidential informant where defendant could have called the State's case into question had he been able to impeach the unavailable witness and (2) the court improperly considered compensation as an aggravating factor when it sentenced defendant to 20 years' imprisonment where compensation is a factor inherent in the offense of possession with intent to deliver a controlled substance. We affirm.

¶ 5 I. BACKGROUND

¶ 6 In October 2016, the State charged defendant with unlawful possession with intent to deliver a controlled substance (cocaine) (720 ILCS 570/401(a)(2)(A) (West 2014)) (count I) and unlawful possession with intent to deliver cannabis (720 ILCS 550/5(d) (West 2014)) (count II). The charges stemmed from an October 5, 2016, execution of a search warrant at defendant's residence and the discovery of cocaine and marijuana.

¶ 7 A. Pretrial Motions

¶ 8 In April 2017, defendant filed a "motion for discovery compliance" pursuant to Illinois Supreme Court Rule 412(c) (eff. July 1, 1982), requesting "the State provide the defense with the video[ ]tapes referred to in the Complaint and Affidavit for Search Warrant of the

[d]efendant's home." Defendant alleged "a video was made of a supposed drug transaction between the [d]efendant and a Jay Baker, an assumed name of a confidential source for the Champaign Police Department, who is listed in the Discovery as the first witness intended to be called." Defendant argued, "Jay Baker planted evidence in the home for the police to find on this occasion and needs to see the video made to see what it shows to exonerate the [d]efendant." Subsequently, the State filed supplemental discovery showing it provided defendant "[o]ne disc containing body cam video." The State also filed a response to defendant's "motion for discovery compliance." At a May 2017 hearing on defendant's motion, the trial court denied defendant's motion finding defendant failed to make the substantial showing required to compel disclosure of the confidential informant's identity.

¶ 9 In August 2017, the State also charged defendant with two counts of unlawful delivery of a controlled substance (cocaine) (720 ILCS 570/401(d) (West 2016)) (counts III and IV), stemming from two separate controlled buys that occurred on September 7, 2016, and September 23, 2016.

¶ 10 In October 2017, defendant filed a motion *in limine* seeking to bar the State from presenting at trial, reports and a video pertaining to the September 7, 2016, transaction, unless confidential informant Whitney Loeh testified at trial. Defendant alleged Loeh's testimony was required to establish the foundation for admission of the evidence, particularly the video made by Loeh. Defendant argued that counts III and IV were based on the September 7, 2016, transaction.

¶ 11 At a November 22, 2017, hearing on defendant's motion *in limine*, defense counsel argued for the first time that the State had an obligation under *People v. Holmes*, 135 Ill. 2d 198, 552 N.E.2d 763 (1990), to produce Loeh to testify. Defense counsel argued under the

three-prong test in *Holmes*, if the State failed to produce Loeh for impeachment, then the trial court should dismiss counts III and IV. Specifically, defense counsel stated,

> "Other issues arising from the State not producing this witness is impeachment. This is an informant who has three felony convictions, theft convictions stemming from '14, '15, and importantly, 2016 during the time of this case, so I can't cross examine this informant with regards to any promises made by the State, any arrangements made by the State, or now more importantly, did the officer make any promises or statements to the defendants [*sic*] that would have made this informant once participate in the controlled buys.
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> * * *
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> And I think what *Holmes* gets to is the court has to dismiss the charge all together if this witness can not be produced. That's what the defendant was asking the court in *Holmes* is because this informant can not be produced, the court must then dismiss the case all together, because the importance of that witness's testimony is paramount to the defendant's right to due process in this case. So the court has to weigh the three pronged test and see whether or not due process becomes an issue with regards to whether or not the defendant in the case was provided with due process. So if there was other witnesses, the case mentions in *Holmes*—where it differentiates from this case is the controlled

> buy was with an undercover officer, so okay, we don't have the informant but we still have an undercover officer who can come in and testify as to the controlled buys. We don't have that here. We have a single witness and not multiple witnesses to the allegations that the State is bringing against the defendant. So I think that what *Holmes* talks about is the only avenue the court has is that if this informant can not be produced, is to dismiss the case all together."

¶ 12 As to the foundation issue, defense counsel argued the State could not establish foundation for the video without Loeh because there was no independent corroboration of what was alleged to be depicted on the video.

¶ 13 In response to defense counsel's argument, the State suggested two distinct issues were presented. "One has to do with the State's obligation under *Holmes* to produce the informant, and the other has to do with the foundation of the video." The State argued the *Holmes* issue was outside the scope of defendant's motion *in limine* and asked the court for more time to review the case. As to the foundation issue, the State argued,

> "Originally the State only charged the search warrant execution. It did not charge the controlled buys. It became clear over the course of motions from defense first that there was going to be an argument that some friend of the defendant had left the cocaine there, and second, that the defendant knew who the controlled source was, and in light of that the State elected to formally disclose the source and charge the controlled buys. ***

> As defense counsel pointed out, this source has disappeared. We've made efforts to locate her but she is not reporting to [p]robation. Even without the video, there is strong circumstantial evidence that this offense occurred in the form of the officers following the source to this home and seeing her go in and come out with the cocaine, and no opportunity to obtain that cocaine other than in the home."

The State argued and made an offer of proof that the video of the controlled buys was admissible under the silent witness theory. The trial court deferred ruling on the motion until the following Monday, November 27, 2017, to further review the case law and the arguments of both parties.

¶ 14 On November 27, 2017, Officer Corey Phenicie, a Street Crimes Task Force officer, testified that he used Loeh as a confidential informant and that she contacted him about the two controlled buys on September 7, 2016, and September 23, 2016. Phenicie last spoke with Loeh on August 25, 2017, when he informed her that the State planned to disclose her as the confidential informant. Phenicie testified that Loeh never indicated she would not testify. Rather, in response to Phenicie informing her the State planned to disclose her identity, she responded that "She had to do what she had to do." Phenicie then described his unsuccessful efforts to locate Loeh.

¶ 15 Amanda Brewer, Douglas County Probation Officer, testified she last saw and spoke with Loeh at Loeh's mother's residence on October 17, 2017. Brewer also described her unsuccessful attempts to locate Loeh. The State informed the trial court that approximately 10 minutes prior to the hearing, Douglas County attempted to serve a subpoena on Loeh at her mother's residence.

¶ 16 The State then informed the court it would stand on its arguments made at the November 22, 2017, hearing regarding the foundation issue. Referring to *Holmes*, the State argued (1) Loeh's testimony would be relevant and material, (2) the State made a good faith effort to find Loeh, and (3) defendant could not show by clear and convincing evidence that Loeh's testimony would likely raise a reasonable doubt as to the State's case. The State maintained no amount of impeachment of Loeh would change the content of the video showing the drug transactions which the State described as the "heart of the State's case as to [counts III and IV]."

¶ 17 Defense counsel argued the video was inadmissible under the silent witness theory. As to the *Holmes* issues, defense counsel asserted the State failed to make a good faith effort to locate Loeh and defendant met his burden under the third prong of the *Holmes* test where the video was inadmissible and impeachment of Loeh was "a major component."

¶ 18 The trial court suggested and allowed defendant to amend his motion *in limine* to refer to the September 7, 2016, and the September 23, 2016, controlled buys. The court then stated:

> "As far as the *Holmes* case, I'm not sure how much direction that gives me at this point in the proceeding. I've got a written motion *in limine* that asks me to order the State to refrain from offering any such evidence in their case in chief unless they have Ms. Loeh to testify and to refrain from mentioning the details of the transaction. Nowhere in the motion do I see a request to dismiss Counts 3 and 4, and I recognize at the time of filing this motion you couldn't possibly have known whether the State was

> going to be able to relocate Ms. Loeh or not, but I think the *Holmes* case is quite unusual in the realm of criminal law because you've got a motion to dismiss apparently filed pretrial based upon a due process violation for the failure of the state to produce a confidential source or a key witness. I think it will become—the analysis from the *Holmes* case would be much, much more critical at the state of a motion for directed verdict at the close of the State's case depending on what other evidence is allowed.
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> * * *
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> So based upon the representations that [the State] has made and the presumption that [it] will produce witnesses as represented to perfect the foundation for the admissibility of the videotape. I'm going to deny the motion *in limine* at this time."

¶ 19 B. Defendant's Jury Trial

¶ 20 On November 28, 2017, defendant's jury trial commenced. We summarize only the facts necessary for the resolution of this appeal.

¶ 21 Before jury selection, defendant filed a written motion to dismiss counts III and IV. The motion to dismiss alleged the State used Loeh in the investigation that resulted in the filing of counts III and IV, which had to be dismissed because Loeh could not be located and the State was unable to produce Loeh as a witness at trial. Defense counsel argued both the State and defendant agreed that under *Holmes*, Loeh was "material and relevant." As to the second prong of the *Holmes* test, defense counsel argued the probation officer's testimony "would not

hold any weight" and "was very limited in the efforts to locate [Loeh]." Defense counsel went on to state,

> "So I do believe that, even reflecting on the *Holmes* case, the court did find that with the impeachment of the informant due to prior arrests, any agreements that could possibly have been made between the [S]tate and the informant, that the evidence was—would rise to the level of not—the [S]tate not being able to meet its burden beyond a reasonable doubt in the case. And so with—in line with *Holmes*, I would ask that this court dismiss counts three and four today."

¶ 22 In response, the trial court advised defense counsel,

> "I have not heard you address is [*sic*] headnote eight of the *Holmes* case suggests that where the [S]tate has made a good faith effort to locate the informant but cannot produce him, the defendant must affirmatively demonstrate that the informant's testimony would tend to be exculpatory and create a reasonable doubt as to the reliability of the prosecution's case either through direct exam or impeachment. I don't think I heard you address that—whether or not the informant's testimony would be exculpatory at all."

¶ 23 Defense counsel responded:

> "Well, Your Honor, it would be—it could lead to exculpatory evidence. She's the only witness to this transaction, a witness was in four—within four walls.

You don't have a case where these officers were able to visibly, visibly see the transaction and then can testify to what they observed. What we have is two people in a house with very different versions of what occurred.

The case also talks about impeachment of that witness. The informant in this case has several convictions relating to theft and other issues. We also are not able to ask this informant if any—who had cases going on at the same time as this case began if any promises or statements were made to her by any law enforcement or the state's attorney's office, so our ability to impeach this, this witness is now impeded by the fact that the state has not and cannot produce this witness.

So I would address both of those issues as it could lead to exculpatory evidence through her own testimony because we don't have any statements from her about what occurred in the residence when just these two parties were in there without any observance from law enforcement and then together with the impeachment testimony I believe we have met that burden and that the court has to dismiss counts three and four based on a—not producing that informant."

¶ 24 The court ruled:

"The testimony I heard from a police officer yesterday was that, prior to recently, he had no indication that the confidential

source or informant was not going to cooperate. In fact, I believe he testified that, when he informed her that she was going to be disclosed as a witness and would be required to testify, her response was, was nonremarkable. Something like you do what you got to do or words to that effect. He also indicated that he had attempted to call her five times, the most recent of which was last Friday, the day after Thanksgiving. I don't know that he gave any dates as to the other four attempts. And then, coupled with the efforts in contacting the probation officer, her efforts to contact the witness by interviewing the mom and going to the house, also, I believe the [S]tate has made a good faith effort.

My reading of the *Holmes* case suggests that in these facts the defendant must produce some—must affirmatively demonstrate that the informant's testimony would tend to be exculpatory and what I've heard is that we don't know what that testimony would be and a lot about the inability to impeach the informant. Impeachment is not really a factor if the informant doesn't testify and, in the *Holmes* case, there were two counts, one of which was dismissed—well, both of which were dismissed by the trial court, but one of which was reversed by the state supreme court and they found that in the one case where it was the—the case boiled down to the word of the informant against the word of the defendant because the defense could not impeach the informant, that count

had to be dismissed, but in the other case where it was the word of the police officer testifying that he received the drugs from the defendant and the defendant saying, no, it was the informant that gave you the drugs, the failure to produce the informant was not critical and that charge was—the dismissal of that charge was reversed by the court. So I think this situation, as I understand the evidence in this case, is more akin to the latter situation. We're gonna [*sic*] have testimony of police officers as to the circumstances leading up to a transaction that's alleged to have taken place in the house. The only evidence we're gonna [*sic*] to hear about the transaction itself is going to be visual evidence presented by way of a videotape, so impeachment of the defendant I don't think would do anything to weaken or discredit the [S]tate's case.

For those reasons, the motion to dismiss will be denied."

¶ 25 1. *The State's Evidence*

¶ 26 Multiple police officers testified they worked with Loeh to coordinate two controlled buys of cocaine from defendant on September 7, 2016, and September 23, 2016. Officer Phenicie testified the officers used the same procedure for both controlled buys. First, Officer Phenicie testified that on the day of the controlled buys, he met Loeh at a predetermined location. Upon arrival, an officer searched Loeh's vehicle and searched her person to locate any money or narcotics. Then police directed Loeh to make a phone call to defendant to set up the controlled buy. After Loeh made the call, an officer provided Loeh with money to purchase the

narcotics. Officer Phenicie gave Loeh a recording device that appeared to be a cellular phone to record the transaction. Officer Phenicie testified Loeh could "manipulate [the recording device] as far as how she aims it or where she points the camera. Other than that, she can't really doing [*sic*] anything with it." Officer Phenicie turned the video recording on when he gave the device to Loeh and turned the video off after the controlled buys. The State introduced video evidence of the controlled buys on September 7, 2016, and September 23, 2016. They jury only saw the video; the audio was turned off.

¶ 27 Loeh proceeded to the location of the controlled buys in her own vehicle while police officers followed her to defendant's residence at 1101 North McKinley. Other officers were stationed about a block away to watch Loeh enter and exit the house. Officers observed Loeh walk up to the residence and go inside. After the controlled buys, officers observed Loeh exit the residence and get into her vehicle. Officers followed her to a predetermined location where she provided them with two bags of suspected crack cocaine.

¶ 28 Multiple officers testified that they used the evidence gathered during the two controlled buys to secure a search warrant for defendant's residence. On October 5, 2016, five or six police officers approached defendant's residence at 1101 North McKinley. The officers knocked and announced their presence, but after hearing no response, they broke open the door with a battering ram. Officers found defendant and his children in the residence. Officers handcuffed defendant and proceeded to search his residence. Under a dresser, officers found what was determined to be a total of 16.3 grams of cocaine in both crack and powder form along with $950 in cash. Officers also found two jars containing cannabis inside a drawer in a separate dresser. In the kitchen, officers found two boxes of sandwich bags, a digital scale, and an orange pill bottle.

¶ 29 Officer Phenicie testified the Street Crimes Task Force reached out to Loeh while she was in jail about being a confidential informant. After Loeh was released from jail, she informed the task force she could provide them with information about defendant, who was an intimate acquaintance of hers at the time. Loeh agreed to participate in the undercover controlled buys with defendant. Officer Phenicie testified "[w]e don't promise [confidential informants] anything. What I—what I could tell her is that, based on the work that she would produce, if she had an outstanding case, that she would—it would be turned over to the state's attorney's office and they would make the overall decision on whether she, she got compensation on—or leniency on any case that she had." Officer Phenicie testified that Loeh received payment for participating in the two controlled buys and he gave her additional compensation after the search warrant was executed.

¶ 30 The trial court took judicial notice of Champaign County case No. 16-CF-655, entitled *People v. Whitney Loeh*. The court read to the jury part of Loeh's August 25, 2017, sentencing order. The court stated Loeh was ordered to serve 30 months' probation and read the terms and conditions including that Loeh was to obtain an alcohol and drug abuse evaluation, enroll in an inpatient substance-abuse treatment program, provide the state's attorney's office with her current contact information, and make herself available and provide accurate and complete information relating to the instant prosecution. The court told the jury the sentencing order was entered after revocation of Loeh's probation for retail theft with a prior retail theft conviction.

¶ 31 2. *The Defense*

¶ 32 Following the State's case-in-chief, defendant moved for a directed verdict and renewed his motion to dismiss counts III and IV. The trial court denied the motion, stating in relevant part:

> "With respect to counts three and four, I would suggest that the evidence is a little bit closer, but when you listen to all of the testimony, the officer's searches of the confidential source, the description of the surveillance coupled with the bits that can be seen on the video, there does appear to be an exchange of something. I think if the jury believes all of the other evidence, they could reasonably infer that that exchange was money for drugs, so the motion for directed verdict as to counts three and four and the renewed motion to dismiss those counts is also denied."

¶ 33 Defendant then called two witnesses. The first witness, Michael Costa, a friend of defendant, testified defendant frequently hosted parties at defendant's North McKinley residence. Costa testified he had known defendant for about three or four years and he had known Loeh for about a year. Costa saw Loeh at parties at 1101 North McKinley three or four times in September and early October 2016. During the parties, he observed Loeh move around the house freely and hug and kiss defendant. Tinisha Grider, defendant's next door neighbor, testified she frequently saw Loeh at defendant's residence. Grider witnessed Loeh and defendant hug, kiss, and hold hands.

¶ 34 3. *Verdict*

¶ 35 Following deliberations, the jury acquitted defendant of unlawful possession with intent to deliver cannabis (count II) and found him guilty of the other three counts.

¶ 36 C. Defendant's Motion for a New Trial and Sentencing

¶ 37 In January 2018, defendant filed a motion for a new trial. In the motion, defendant argued, in relevant part, that the trial court erred where it (1) denied defendant's November 28, 2017, motion to dismiss, (2) denied defendant's motion *in limine* regarding the testimony in counts III and IV; (3) allowed the State to introduce the video evidence made and collected by Loeh; and (4) denied defendant a fair trial by allowing admission of hearsay evidence in violation of the applicable rules of evidence and the defendant's right to confrontation, and the prosecutor's subsequent effort to utilize said inadmissible evidence to "bolster" and "corroborate" its theory of the case. The trial court denied the motion.

¶ 38 At sentencing, the trial court heard argument from both parties and a statement from defendant. The court then stated,

> "As I look through the statutory factors in aggravation and mitigation, there's no direct information that [defendant's] conduct directly caused or threatened serious harm, but we do know that cocaine does cause harm, ruins families, causes people to lose jobs and careers.
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> He received compensation for the offenses. That's the very nature of the charge that he has been found guilty of.
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> He does have a prior criminal history. [Defense counsel] points out that it is bad, although it's not nearly as bad as it looks because of all of the traffic offenses being lumped in, and he suggests that there should be a way to separate those out. Interestingly enough, on the very last page of the report,

[p]robation does just that. They indicate that the [d]efendant has been convicted of 4 felonies, 1 misdemeanor, and 22 traffic-related offenses. So, I am considering that many of those offenses are traffic-related in evaluating the prior criminal history that's before me.

There is also an aggravating factor the element of deterrence and what sentence might be appropriate to attempt to deter the [d]efendant or others similarly situated from engaging in further crimes.

Factors in mitigation, I suppose I can find that the [d]efendant did not contemplate that his conduct would cause or threaten serious harm.

I don't believe, based on the track record, that I can find the conduct was a result of circumstances that are unlikely to recur, given that he has been convicted two times previously and sentenced to the Department of Corrections for the exact same offense.

The character and attitude of the [d]efendant do [*sic*] not indicate that he is unlikely to commit another crime. In fact, what I just heard was a repeating of the protestations that, 'I'm innocent, and I didn't get a fair trial.' That doesn't strike me as someone who is looking to be rehabilitated and change their behavior to conform with the requirements of law.

I suppose it is possible that imprisonment would entail some hardship to his dependents, but I don't have any information from which I can find that it would entail excessive hardship to his dependents.

In short, what I have when I review the presentence report and the history of prior employment, or, more accurately, the lack of any significant history of prior employment, [defendant] does say that he has a long history of working in restaurants, but he informed the probation office about two prior jobs, both of which—one of which he had for four years in lawn care service and one at a pizza facility for about ten months, which he indicates that he quit so that he could focus on his case.

When I look at that, the total picture, what I see is a person who has made a choice that his primary source of income would be through dealing illegal drugs.

Criminal history indicates two times previously he'd been sent to DOC, or the Department of Corrections, for the sale of illegal drugs. As [defense counsel] pointed out, a lot of the offenses listed in the presentence report are traffic offenses; but the regular pattern of those traffic offenses and the fact that at least two of them involve DUI's, one an aggravated DUI, which ultimately also led him to be sentenced to the Department of

> Corrections, suggests to me a person that just does not have any respect for the rule of law.
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> Other factors in mitigation would include the fact that he did complete a high school diploma, and he has used prior periods of incarceration to pursue additional educational opportunities
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> There were no weapons recovered in this case, which, as [defense counsel] points out, is somewhat unusual in the drug trade."

¶ 39 The trial court sentenced defendant to 20 years' imprisonment for unlawful possession with intent to deliver a controlled substance (count I), 10 years' imprisonment for unlawful delivery of a controlled substance (count III), and 10 years' imprisonment for unlawful delivery of a controlled substance (count IV), to run concurrently. The court admonished defendant of his right to appeal. The court informed defendant if he wished to challenge "the correctness of his sentence or any aspect of today's sentencing hearing," he would need to file a motion to reconsider prior to filing his appeal.

¶ 40 This appeal followed.

¶ 41 II. ANALYSIS

¶ 42 On appeal, defendant argues (1) the trial court erred in denying his motion to dismiss counts III and IV based on the State's inability to produce a confidential informant where defendant could have called the State's case into question had he been able to impeach the unavailable witness and (2) the court improperly considered compensation as an aggravating factor when it sentenced defendant to 20 years' imprisonment where compensation is a factor

inherent in the offense of possession with intent to deliver a controlled substance. We review each issue in turn.

¶ 43 A. Counts III and IV

¶ 44 Defendant argues the trial court erred when it denied his motion to dismiss counts III and IV. Specifically, defendant argues under *Holmes*, the State's failure to produce Loeh at trial caused his inability to impeach Loeh and call into question the State's case. According to defendant, this circumstance violated his due process rights because Loeh was the sole witness to the controlled buys. The State disagrees and argues the court did not err when it denied defendant's motion to dismiss counts III and IV because defendant failed to show by "clear and convincing" evidence that impeachment of the confidential source would have created a reasonable doubt as to the State's case.

¶ 45 In *Holmes*, the Illinois Supreme Court adopted the three-part *Stumpe* test. *Holmes*, 135 Ill. 2d at 212-14 (citing *People v. Stumpe*, 80 Ill. App. 3d 158, 163, 399 N.E.2d 292, 296-97 (1979)). Under this test, when a defendant "seeks production of a governmentally employed informant, the defendant must first demonstrate the materiality and relevance of the informant's testimony." *Id.* at 212 (citing *State v. Jenkins*, 41 N.Y.2d 307, 312, 360 N.E.2d 1288, 1291 (1977)). Once the defendant meets this initial burden, "the State must produce the informant, or, if that is impossible, the State must demonstrate that it has exerted a good-faith effort to make the witness available." *Id.* (citing *Jenkins*, 41 N.Y.2d at 311-12). "Where the State has made a good-faith effort to locate the informant, but cannot produce him, the defendant must affirmatively demonstrate that the informant's testimony 'would tend to be exculpatory or would create a reasonable doubt as to the reliability of the prosecution's case either through direct examination or impeachment.' " *Id.* at 213 (citing *Jenkins*, 41 N.Y.2d at 310-11). A

"defendant can only prevail under the third prong of the *Jenkins/Stumpe* test where the defendant proves by clear and convincing evidence that the unavailable informant's testimony would raise a reasonable doubt as to the State's case." *Id.* at 214.

¶ 46 Defendant's motion to dismiss counts III and IV due to Loeh's unavailability is governed by the *Holmes* standard for determining whether due process is violated by the unavailability of an informant for trial. See *id.* at 212-14. "Whether a defendant was denied due process, and whether that denial was sufficiently prejudicial to require the dismissal of the charges, are questions of law, which are reviewed *de novo*." *People v. Stapinski*, 2015 IL 118278, ¶ 35, 40 N.E.3d 15.

¶ 47 In *Holmes*, 135 Ill. 2d at 200, the defendant was charged with two counts of unlawful delivery of cannabis. Count I alleged that, on February 25, 1986, the defendant sold cannabis to a police officer in the presence of a government informant. *Id.* Count II alleged that, on March 5, 1986, the defendant sold cannabis to the informant. *Id.* at 200-01. The informant had five convictions for theft and three convictions for possession of cannabis. *Id.* at 202. Moreover, "the State paid cash to, and promised to be lenient with, the informant in return for his services." *Id.* Employing the *Stumpe/Jenkins* test, the trial court dismissed both counts, and the appellate court affirmed. *Id.* at 204. On appeal to our supreme court, the parties agreed the informant's testimony would be material and relevant. *Id.* at 215. The *Holmes* court upheld the trial court's finding the State had made a good faith effort to locate the informant. *Id.* at 216. With respect to count I, the *Holmes* court concluded that the defendant failed to meet his burden under the third prong of the *Stumpe/Jenkins* test. *Id.* at 217-18. The court noted the State's case on count I depended on the testimony of the police officer to whom the defendant allegedly sold cannabis. *Id.* The defendant did not show how the informant would impeach the officer's

testimony. *Id.* In contrast, the court concluded that, with respect to count II, the defendant did meet his burden under the third prong. *Id.* at 219. The court reasoned as follows:

> "Apparently, the informant was the only witness to the alleged transaction and so the State's case against defendant with respect to count II depends entirely upon the credibility of the informant's version of what occurred on March 5, 1986. Defendant has demonstrated, and the State does not dispute, that the informant's version of the events that occurred on March 5, 1986, if the informant were to testify, would be subject to severe impeachment in that the informant has eight prior convictions (three of which were for drug-related offenses), and the informant was paid money and promised leniency by the State in exchange for his services. We find that such impeachment could call into question the credibility of the informant's version of what took place on March 5, 1986, and therefore could raise a reasonable doubt as to the State's case with regard to count II of the indictment." *Id.*

¶ 48 At issue here is whether defendant met his burden under the third prong of the *Holmes* test. We turn to the question of whether defendant met his burden by showing the informant's testimony " 'would tend to be exculpatory or would create a reasonable doubt as to the reliability of the prosecution's case either through direct examination or impeachment.' " See *id.* at 213 (citing *Jenkins*, 41 N.Y.2d at 310-11).

¶ 49 Here, defendant argues his case is analogous to count II in *Holmes*, where Loeh was the sole witness to the two controlled buys alleged to have occurred. Defendant argues no

police officers witnessed the alleged drug transaction inside the home and "the videos are not truly independent or persuasive and cannot be impeached." Defendant maintains (1) Loeh. who controlled the video, aimed to generate evidence against defendant for her own personal gain; (2) most of the video footage "shows nothing[,]" since the camera was on the center console of Loeh's vehicle as she drove; (3) the camera was not pointed toward Loeh, "so there is no verification that she did not produce the small quantity of drugs that she later turned over to the officer"; and (4) "the video does not clearly show an exchange of money for drugs."

¶ 50 Further, defendant asserts, similar to the defendant in count II in *Holmes*, Loeh had a criminal history (specifically, three felony theft convictions), she received compensation for her informant activity, and the State promised leniency in exchange for her participation. Defendant contends the gaps in the video, along with Loeh's criminal history, her financial gain, and receiving leniency in another case were "fertile ground for impeachment." Therefore, Loeh's testimony would raise reasonable doubt as to the State's case.

¶ 51 The State argues it introduced independent evidence, including video evidence and multiple police officers' testimony regarding the two controlled buys that could not be impeached or undermined by impeaching Loeh. The video evidence depicted the video recording of the two controlled buys. Officer Phenicie testified to starting and stopping the video recording before and after the controlled buys. Officer Phenicie also testified that Loeh could only manipulate the video camera as far as how she aimed the camera or where she pointed the camera. Moreover, even without the video evidence, the State argued there was strong circumstantial evidence related to the controlled buys where multiple officers testified to the circumstances leading up to and following the controlled buys. Specifically, officers testified to searching Loeh for money and drugs before the controlled buys. The officers also witnessed

Loeh enter and exit defendant's residence with the cocaine, with no opportunity to obtain the cocaine elsewhere.

¶ 52 Further, the State argues it provided to the jury information regarding the compensation Loeh received for her participation as a confidential informant. Officer Phenicie testified Loeh received payment for participating in both controlled buys. The State argues the record does not support defendant's assertion that Loeh received benefits from the State in a separate case for her participation. Officer Phenicie testified, "We don't promise [confidential informants] anything. What I—what I could tell her is that, based on the work that she would produce, if she had an outstanding case, that she would—it would be turned over to the state's attorney's office and they would make the overall decision on whether she, she got compensation on—or leniency on any case that she had." The trial court also informed the jury of Loeh's retail theft with a prior conviction in Champaign County case No. 16-CF-655.

¶ 53 We agree with the State and find based on the evidence this case is more analogous to count I in *Holmes*. Here, the State's case depended on the video evidence and the testimony of multiple police officers who took part in both controlled buys. Defendant fails to show how the informant would impeach the officers' testimony or the video evidence. Further, the evidence of Loeh receiving compensation for her informant work and her criminal convictions came out at trial.

¶ 54 We believe the trial court said it best when it denied the motion for directed verdict and renewed motion to dismiss counts III and IV:

> "With respect to counts three and four, I would suggest that the evidence is a little bit closer, but when you listen to all of the testimony, the officer's searches of the confidential source, the

> description of the surveillance coupled with the bits that can be seen on the video, there does appear to be an exchange of something. I think if the jury believes all of the other evidence, they could reasonably infer that that exchange was money for drugs, so the motion for directed verdict as to counts three and four and the renewed motion to dismiss those counts is also denied."

Based on the evidence presented in the record, we find defendant failed to prove by clear and convincing evidence that Loeh's testimony would raise a reasonable doubt as to the State's case. Therefore, we find the trial court did not err when it denied defendant's motion to dismiss counts III and IV.

¶ 55 B. Compensation as an Aggravating Factor at Sentencing

¶ 56 Defendant argues the trial court erred when it considered compensation as an aggravating factor in sentencing defendant to 20 years' imprisonment for unlawful possession with intent to deliver a controlled substance. Specifically, defendant argues the consideration of compensation as an aggravating factor at sentencing is improper because compensation is inherent in the offense of possession with intent to deliver a controlled substance. While defendant admits he failed to preserve this issue for appeal, he argues this court may review the issue under either prong of the plain error doctrine. See *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007). The State argues no clear or obvious error occurred because the court did not consider compensation as an aggravating factor during sentencing, rather, the court recognized compensation was a factor inherent in the offense.

¶ 57 To preserve an error for consideration on appeal, a defendant must object to the error at trial and raise the error in a posttrial motion. *People v. Sebby*, 2017 IL 119445, ¶ 48, 89

N.E.3d 675. Failure to do so constitutes forfeiture. *Id.* However, we may consider a forfeited claim where the defendant demonstrates a plain error occurred. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). To prevail under the plain error doctrine, a defendant must first demonstrate a clear and obvious error occurred. *Piatkowski*, 225 Ill. 2d at 565. If an error occurred, we will only reverse where (1) "the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error" or (2) the "error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Id.*

¶ 58 Defendant failed to file a motion to reconsider his sentence, rendering this issue forfeited. *Sebby*, 2017 IL 119445, ¶ 48. Therefore, we review this claim for plain error. Whether plain error occurred is a question of law we review *de novo*. *People v. Jones*, 2016 IL 119391, ¶ 10, 67 N.E.3d 256. We begin our plain-error analysis by first determining whether a clear and oblivious error occurred. See *Piatkowski*, 225 Ill. 2d at 565.

¶ 59 "It is well established that a factor inherent in the offense should not be considered as a factor in aggravation at sentencing." *People v. Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 22, 979 N.E.2d 1014. "There is a strong presumption that the trial court based its sentencing determination on proper legal reasoning, and a court of review should consider the record as a whole, rather than focusing on a few words or statements by the trial court." *Id.* (citing *People v. Dowding*, 388 Ill. App. 3d 936, 942-43, 904 N.E.2d 1022, 1028 (2009)).

¶ 60 "The receipt of compensation (730 ILCS 5/5-5-3.2(a)(2) (West 1998)) is inherent in offenses involving the delivery of drugs; therefore, the defendant's sentence for a delivery offense should not be increased by this statutory factor." *People v. M.I.D.*, 324 Ill. App. 3d 156, 159, 753 N.E.2d 546, 549 (2001) (citing *People v. Smith*, 198 Ill. App. 3d 695, 698, 556 N.E.2d

307, 309 (1990)). "Potential compensation, or an expectation of compensation, is inherent in possession with intent to deliver." *Id.*

¶ 61 Defendant argues the trial court improperly considered compensation as an aggravating factor in sentencing defendant to 20 years' imprisonment for unlawful possession with intent to deliver a controlled substance. Defendant based his assertion on the following two statements made by the court:

> "He received compensation for the offenses. That's the very nature of the charge that he has been found guilty of.
>
> * * *
>
> [W]hat I see is a person who has made a choice that his primary source of income would be through dealing illegal drugs."

¶ 62 Here, the record reveals the trial court improperly considered in aggravation at sentencing, the receipt of compensation, a factor inherent in defendant's crimes. The State argues the trial court's statements reflect that it recognized that compensation was inherent in the offense and not that it found that factor applied in aggravation. We disagree with the State. In discussing the statutory factors in aggravation and mitigation, the court specifically identified defendant's receipt of compensation and described receipt of compensation as "the very nature of the charge."

¶ 63 Even so, we find defendant cannot establish plain error under either prong of plain-error analysis. In sentencing defendant, the trial court discussed defendant's prior history, deterrence, and defendant's prior employment history. The evidence at sentencing was not closely balanced where defendant had been convicted of 4 felonies, 1 misdemeanor, and 22 traffic-related offenses. While the trial court acknowledged most of defendant's offenses were

traffic-related, it found, based on defendant's record, it was not unlikely that defendant would commit another crime. When looking at defendant's presentence investigation report, the court found defendant lacked any significant history of employment. While defendant reported prior employment in restaurants to his probation officer, the court found defendant's "primary source of income would be through dealing illegal drugs," recognizing defendant lacked motivation to earn a living through legitimate means.

¶ 64 Second, defendant was not deprived of a fair sentencing hearing where the trial court considered multiple factors in aggravation at sentencing. Defendant fails to show the court gave significant weight to compensation as an aggravating factor. Instead, the court relied upon defendant's criminal history, employment history, and deterrence. See *People v. Maggio*, 2017 IL App (4th) 150287, ¶ 50, 80 N.E.3d 72 (remand for resentencing is not required when the record reflects the weight placed on the improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence). Therefore, we affirm the trial court's judgment.

¶ 65 III. CONCLUSION

¶ 66 For the reasons stated, we affirm the trial court's judgment.

¶ 67 Affirmed.