

No. 1-11-0520

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 15327
	)	
DONYEA HENDREE,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE ROCHFORD delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Karnezis concurred in the judgment.

**ORDER**

¶ 1 *Held:* The State did not fail to prove defendant guilty beyond a reasonable doubt, where passing the last point of purchase is only one method of proving the requisite intent for retail theft. Defendant was entitled to elect sentencing as a misdemeanor rather than as a felony under the revised version of the statute which came into effect while defendant's case was pending in the circuit court. Sentence vacated and cause remanded for resentencing.

¶ 2 Following a bench trial defendant, Donyea Hendree, was found guilty of felony retail theft and sentenced to three years' imprisonment. On appeal, defendant contends: (1) the State failed to prove him guilty of retail theft where he dropped the allegedly stolen merchandise inside the store 15 feet from an exit in an area that had other merchandise available for purchase and, before he passed the last point of purchase; (2) that he was entitled to elect sentencing under an amended version of 720 ILCS 5/16A-4 (West 2010) (the retail theft statute) that would have reduced his conviction to a misdemeanor; and (3) the trial court erroneously imposed certain fines and fees. We

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find the evidence proved defendant guilty of retail theft beyond a reasonable doubt, but vacate defendant's sentence, and remand for resentencing.

¶ 3 At trial, the State presented the testimony of Anatloie Gavrioliouk, a loss prevention officer employed by a Dominick's grocery store (Dominick's), located at 1340 South Canal Street, Chicago, which sells various types of retail merchandise. Mr. Gavrioliouk testified that on August 13, 2010, he was on duty in his office monitoring video surveillance cameras. At approximately 2 p.m., Mr. Gavrioliouk noticed defendant in the general merchandise area of Dominick's talking on a cellular telephone and carrying a brown bag. Mr. Gavrioliouk noticed defendant because he was carrying his own bag and was looking at "high theft items." Mr. Gavrioliouk testified that the store has two exits, one on the east side of the store and one on the west side of the store. The store's cash registers are located only near the exit on the west side of the store. Defendant walked to the café area on the east side of the store. Defendant remained there for approximately five minutes, then returned to the merchandise aisle with a shopping basket. There, he took boxes of Prilosec from the shelf and placed them in his basket. Mr. Gavrioliouk left his office and approached defendant. As Mr. Gavrioliouk was approaching, defendant took the boxes of Prilosec and transferred them to the bag. Mr. Gavrioliouk then described his encounter with defendant as follows:

"Then we were both walking toward the exit. I started to walk a little faster. I got to the exit before him. Then we made eye contact and he dropped the brown bag. That's when he came to me. I identified myself. I told him he has to come with me. I escorted him to the office. And then I recovered the bag. The bag was like 10 or 15 feet behind him, but it was [past] the last point of purchase."

Mr. Gavrioliouk asked defendant whether he left something behind as they walked past the bag, and defendant said "no."

¶ 4 Mr. Gavrioliouk took a photograph of the merchandise in defendant's bag. The bag contained 10 boxes of Prilosec and Mr. Gavrioliouk determined their value to be \$222.80. Mr. Gavrioliouk also

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identified a DVD he prepared from the surveillance camera recordings.

¶ 5 On cross-examination, Mr. Gavrioliouk admitted that in the area where he stopped defendant there were flowers for sale and a café. Mr. Gavrioliouk also admitted there was a cash register in the café and, that "at the point where [he] stopped [defendant], someone could turn around and still be [] in the store."

¶ 6 The State presented the testimony of a police officer who inventoried the photograph of the Prilosec, a receipt showing a value of \$222.80, and the DVD. The State then rested. Defendant rested without presenting evidence.

¶ 7 Defendant argued Mr. Gavrioliouk was impeached and not credible, and that "any intent [defendant] might have had at the point when he was in the store, it was abandoned before he reached the last point of payment." The State argued defendant was beyond the last point of payment, and that his intent to deprive the retail establishment of its merchandise could be presumed.

¶ 8 The trial court agreed with the State concluding:

"I also note, based on direct and circumstantial evidence, a point that the State then argued that the defendant then dropped those items and state to the officer that he didn't do anything. It's my belief that the defendant had no intention to pay for those items. That he was not just milling about that café area to buy a cup of coffee or any other type of merchandise offered for sale. The defendant was, in fact, [past] the last point of sale and was, in fact, attempting to leave the store with those items."

The trial court found defendant guilty of retail theft.

¶ 9 Defendant filed a posttrial motion arguing, *inter alia*, that the State had failed to prove him guilty beyond a reasonable doubt and that, at best, the State only proved defendant guilty of attempted retail theft. The trial court denied the motion, and on January 24, 2011, following a hearing, sentenced defendant to three years' imprisonment having treated the conviction as a Class 3 felony. Defendant filed a timely appeal.

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¶ 10 On January 24, 2012, defendant filed an emergency motion for immediate release on appeal bond, arguing that because of a change in the retail theft statute, taking effect on January 1, 2011, before he was sentenced, he should have been convicted and sentenced to misdemeanor retail theft. This court granted defendant's motion on January 30, 2012.

¶ 11 Defendant first argues that the State failed to prove him guilty beyond a reasonable doubt. When a defendant challenges the sufficiency of the evidence, it is not the function of this court to retry the defendant. *People v. Malone*, 2012 IL App (1st) 110517, ¶ 26. Rather, the relevant inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "Under this standard, the trier of fact remains responsible for determining the credibility of the witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence." *Malone*, 2012 IL App (1st) 110517, ¶ 26 (citing *People v. Ross*, 229 Ill. 2d 255, 272 (2008)).

¶ 12 The key to our analysis of this case is an examination of essential elements of the offense of retail theft. Retail theft consists of three elements: (1) a defendant knowingly took possession of, carried away, transferred, or caused to be carried away or transferred, any merchandise; (2) the merchandise was displayed, held, stored, or offered for sale in a retail mercantile; and (3) defendant intended to retain such merchandise or, intended to deprive the merchant permanently of the possession, use, or benefit of such merchandise without paying the full retail value of such merchandise. *People v. Rucker*, 294 Ill. App. 3d 218, 226 (1998) (citing 720 ILCS 5/16A-3(a) (West 1994)).

¶ 13 During the trial, a great deal of attention was given to the "last known station for payment" by the court, the parties, and the State's primary witness. Indeed the Criminal Code of 1961 (Code)

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has long contained a presumption<sup>1</sup> that a person who removes concealed merchandise beyond the last known station for payment has done so with the intent to commit retail theft. See 720 ILCS 5/16A-4 (West 2010). Defendant highlights language from *People v. Steele*, 156 Ill. App. 3d 508 (1987) to support his contention that the offense of retail theft is not complete until a defendant has passed the "last known station for payment." *Id.* at 512. Defendant argues that because the State failed to prove he had passed the last point of payment, it failed to prove he committed retail theft. We disagree.

¶ 14 In *Steele* it was recognized that the "last known payment station" presumption was simply a response to the practical difficulties of proving intent, holding:

"Thus, under the literal terms of the statute, one could commit retail theft by merely picking up an item in a retail store with the intention of taking it, even if he changed his mind almost immediately and replaced the item. In practical terms, such an offense could seldom, if ever, be prosecuted because of the impossibility of proving the defendant's intent. Section 16A-4 attempts to alleviate the difficulty of proof in all retail theft cases by providing a reasonable point beyond which a defendant is presumed to have intended to steal the merchandise." *Id.* at 511-12.

"The element of intent, however, may be established without the presumption [created by passing the last known point of payment], as intent may be inferred by surrounding circumstances and may be proved by circumstantial evidence." *People v. Taylor*, 344 Ill. App. 3d 929, 936 (2003).

¶ 15 In the case before us, the trial court found both that defendant had the requisite intent and, that he was beyond the last point of purchase. Admittedly, the facts in this case do leave some room

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<sup>1</sup>In *People v. Taylor*, 344 Ill. App. 3d 929 (2003), this court held that because section 16A-4 of the statute created a mandatory presumption, it unconstitutionally relieved the State of its burden of proving intent. *Id.* at 936. This court further held that section 16A-4 was severable from the remainder of the statute. *Id.* The legislature has since amended the retail theft statute to provide for a "permissive inference" of intent. See 720 ILCS 5/16-25 (West 2012). The constitutionality of the inference or presumption is not at issue in this appeal.

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for argument regarding the issue of whether defendant had passed the last point of payment when he dropped the merchandise. For example, although there were no cash registers on the east end of the store, there were flowers for sale and a café with a cash register in that area. Fortunately we need not determine precisely where the last point of purchase was because, although that is one way to establish intent, it is by no means the only way. See *People v. DePaolo*, 317 Ill. App. 3d 301, 307 (2000) ("[N]othing in *Steele* indicated that moving merchandise beyond the last known payment station was the only means of establishing that the offense of retail theft had been completed.") Here, defendant had an unusually large amount of "high theft" items in his possession. He concealed those items in a bag he had brought into the store. He was walking toward an exit where there were no cash registers available to pay for the purchase of these types of goods. Defendant dropped the bag upon making eye contact with Mr. Gavrioliouk and denied knowledge of the bag when questioned about it. We cannot hold that given the totality of the circumstances and considering them in the light most favorable to the prosecution, no rational trier of fact could find defendant had the requisite intent for retail theft.

¶ 16 Defendant next contends he was entitled to elect to accept the benefit of an amendment to the retail theft statute which increased the value at which offenses would be deemed a felony, rather than a misdemeanor. We agree with defendant.

¶ 17 Under the 2010 version of the retail theft statute, theft of merchandise worth more than \$150 was a felony, while theft of merchandise worth less than that amount was a misdemeanor. 720 ILCS 5/16A-10 (West 2010). The 2011 version of the retail theft statute raised that threshold for felony retail theft to \$300. 720 ILCS 5/16A-10 (West 2011). Plaintiff was shown to have taken merchandise with a value less than \$300.

¶ 18 It has long been established that when the legislature changes a criminal statute, a criminal defendant has the right to elect to be sentenced under the statute in effect at the time of the offense, or the statute in effect at the time of sentencing. See *People v. Hollins*, 51 Ill. 2d 68, 71 (1972). The

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legislature has codified this right in section 4 of the Statute on Statutes. 5 ILCS 70/4 (West 2010) ("If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect.") The State acknowledges defendant had the right to elect to be sentenced under the revised statute which increased the threshold for felony prosecution. Accordingly, we hold defendant had a right to elect to be sentenced under either the 2010 or 2011 statute.

¶ 19 The State argues that although defendant had a right to elect to be sentenced under either the 2010 or 2011 statute, we should not vacate his felony sentence because the State *could have* charged him with a Class 4 felony under either statute based on his criminal history, rather than the value of the merchandise. The State asserts that defendant's three-year sentence is within the sentencing range for a Class 4 felony. The State acknowledges, however, that it did not give defendant notice of an intent to charge the offense as a felony based on prior convictions in the charging instrument as required by Section 16A-10(2) of the Code (720 ILCS 5/16A-10(2) (West 2010)). We do not find the State's argument persuasive. The issue is whether defendant may elect to be sentenced under the amended statute for the charge actually brought against him, and for which he was tried—retail theft of merchandise with a value greater than \$150.

¶ 20 Defendant argues that remand for resentencing is unnecessary because he has already served a term in excess of the maximum allowed for a Class A misdemeanor. However, the case upon which defendant relies, *People v. Osborn*, 111 Ill. App. 3d 1078 (1983), is inapposite. There, the defendant was sentenced to a concurrent term on a more serious offense and modifying his sentence to a misdemeanor would not change the total amount of time he would serve in prison. *Id.* at 1085. Here, although defendant has served more than the maximum time allowed for a Class A misdemeanor and would be entitled to immediate release if again sentenced to imprisonment, there is no basis from which we could determine the actual sentence the trial court would impose. Defendant also argues that various fines and fees assessed against him, were in error. We have little

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doubt defendant will elect to be sentenced for a misdemeanor under the revised statute. If he so elects, some or all of the fines and fees for which he has been assessed will need to be modified, and the errors he raises on appeal will most likely become moot. For example, defendant argues on appeal he was improperly ordered to submit a DNA sample and pay an analysis fee. However, the sample and fee are required only following a felony conviction. See 730 ILCS 5/5-4-3(a) (West 2010). Although defendant does not raise the issue in his brief, we observe that he was assessed a \$60 State's Attorney fee for a felony conviction while the corresponding fee for a misdemeanor conviction is \$20 or \$30. See 55 ILCS 5/4-2002.1(a) (West 2010). Therefore, we vacate defendant's sentence and remand this matter to the trial court so defendant may elect under which statute he wishes to be sentenced, the trial court may then impose an appropriate sentence, and a revised fines and fees order may be prepared.

¶ 21 For the foregoing reasons, we affirm the finding that defendant was guilty of retail theft, vacate defendant's sentence, and remand this matter for resentencing in accordance with defendant's election of the statute under which he prefers to be sentenced.

¶ 22 Affirmed in part and vacated in part; cause remanded.