

No. 1-13-0047

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 CR 14627
)	
LAMAR DANIELS,)	Honorable
)	Thaddeus L. Wilson,
Defendant-Appellant.)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Gordon and Justice Palmer concurred in the judgment.

O R D E R

¶ 1 **Held:** We affirm the trial court's judgment because (1) the State proved defendant guilty of possession of a controlled substance where the evidence sufficiently established defendant had actual possession of the heroin officers recovered, and (2) the court did not err by denying defendant's motion to reconsider sentence because the court knew of defendant's health issues when it sentenced him to six years in prison.

¶ 2 Following an August 2012 bench trial, defendant, Lemar Daniels, was convicted of possession of a controlled substance and sentenced to six years in prison. On appeal, defendant

asserts (1) the State failed to prove him guilty beyond a reasonable doubt and (2) the trial court erred by denying his motion to reconsider sentence. We affirm.

¶ 3 In August 2010, the State charged defendant by information with possession of a controlled substance with intent to deliver (720 ILCS 570/401(c)(1) (West 2010)). At trial, Chicago police officer Kathleen McKenna testified she was conducting a narcotics surveillance from inside the main floor of an unoccupied building at 1229 South Karlov on July 21, 2010. McKenna's partner, Officer Joseph Tuman, sat in an unmarked vehicle nearby. From an unobstructed vantage point 50 to 60 feet away, McKenna saw defendant accept money from an individual. He then walked to a downspout located in the gangway of a building at 1234 South Karlov. The downspout was approximately 125 or 130 feet from McKenna. After retrieving an orange chip bag from the downspout, defendant took an item or items out of the bag, put the bag back in the downspout, and gave the item or items to the individual who had given him money. McKenna could not see the items, describing them as "[s]mall enough to be concealed" within defendant's hand.

¶ 4 According to McKenna, about one to two minutes later, she saw defendant receive money from another individual on the street, relocate to the downspout, retrieve the chip bag, take items out from the chip bag, and give those items to the individual. When a third person approached defendant and gave him money two to three minutes later, defendant again walked to the downspout, retrieved an item from the chip bag, and gave the item to the third person. Each time defendant bent down to retrieve items from the chip bag in the drain spout, McKenna had a "left rear view" of him and could not see what his body was blocking as he bent down. However, McKenna could see defendant "manipulating an orange bag, taking items out of an orange chip bag."

¶ 5 After observing the third exchange, McKenna radioed Tuman, abandoned her surveillance spot by exiting through the rear of the building, and met up with Tuman a block away. She and Tuman drove around the block, exited their car, and detained defendant in front of 1229 South Karlov. From the time she broke surveillance until the time she and Tuman reached the 1200 block of South Karlov, approximately one minute elapsed. After detaining defendant, McKenna recovered the only orange Cheetos chip bag in the downspout that defendant had been utilizing. She did not search the downspout for other items that looked like a Cheetos bag. Inside the bag, McKenna found four individual, blue-tinted, zip-locked packets with Superman logos on them, each containing a white powder she suspected to be heroin. She placed the Cheetos bag and its contents in her pants' pocket. Tuman searched defendant and recovered money, which he left on defendant until they arrived at the police station. At the station, Tuman recovered \$130 from defendant, consisting of one \$50 bill, three \$20 bills, a \$10 bill, a \$5 bill, and five \$1 bills. Tuman inventoried the money and the chip bag and its contents. McKenna did not recover drugs from defendant.

¶ 6 McKenna acknowledged that, based on having made at least 1,000 narcotics arrests, she had "certain preconceptions" when she was conducting surveillance, explaining she knew the Karlov block was "hot" for selling drugs. She made no attempt to stop any of the three individuals who gave defendant money and she did not know whether any of them had any contact with the Cheetos bag during the period of time when she left her surveillance and arrived on South Karlov. All three individuals were black males, although McKenna did not include that information in her police report. She did not see anyone else go near the downspout, did not see any other Cheetos bags in the downspout or that area, and "honestly didn't pay any attention" to whether other Cheetos bags were on the block.

¶ 7 The parties stipulated that Linda Rayford, a forensic chemist at the Illinois State Police Crime Lab, would testify the contents of the four zip-lock bags tested positive for heroin and weighed 1.3 grams.

¶ 8 On this evidence, the trial court found defendant guilty of the lesser-included offense of possession of a controlled substance (720 ILCS 570/402(c) (West 2010)). The court stated that although in the brief period of time McKenna lost sight of the Cheetos bag somebody could "conceivably have been in concurrent or joint possession" of the bag, that did not mean defendant lacked possession of the bag and its contents.

¶ 9 In September 2012, the trial court denied defendant's motion for a new trial. In October 2012, defendant's sentencing hearing commenced. In aggravation, the State noted defendant had seven prior felony convictions and was subject to an extended-term sentence. In mitigation, defense counsel asserted that defendant, who was 47 years old, suffered from a gunshot wound that forced him to wear a brace and caused him to limp. Throughout the pendency of his case, defendant underwent nine surgeries. Counsel described defendant's health as "very fragile," and asked the trial court not to impose an extended-term sentence. Defendant's presentence investigation report (PSI) also contained information about the condition of defendant's health, indicating that in March 1983, defendant was shot during a robbery attempt and sustained a spinal cord injury, which resulted in a six-month hospitalization and left him with a permanent weakness requiring him to wear a brace on his left leg. The PSI also stated that in October 2011, defendant had multiple operations to repair a hernia condition.

¶ 10 The trial court sentenced defendant to six years in prison. In pronouncing defendant's sentence, the court stated it had considered, among other things, the PSI and the evidence in aggravation and mitigation. In November 2012, defendant filed a motion to reconsider sentence,

asserting he was "extremely ill" and had "undergone six surgeries for a severe hernia" while the case was pending. At a hearing on defendant's motion, defense counsel also noted defendant's six hernia operations. The court denied defendant's motion to reconsider sentence. This appeal followed.

¶ 11 On appeal, defendant first asserts the State failed to prove him guilty beyond a reasonable doubt because the evidence did not show he had actual or constructive possession of the heroin found in the chip bag by the downspout. In particular, defendant relies on McKenna's testimony that she could not clearly see all of his actions, she failed to investigate the area for other chip bags and debris, and she possessed "preconceptions" while conducting surveillance based on her background of having worked on other drug cases. We disagree with defendant and find the evidence established defendant's actual possession of the heroin.

¶ 12 When a defendant challenges his conviction based on insufficient evidence, this court must determine whether, when viewing the evidence in the light most favorable to the prosecution, "any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime." *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). In doing so, our function is not to retry the defendant. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). We will not substitute our judgment for that of the trier of fact on issues relating to the weight of the evidence or witness credibility, and we will reverse only where "the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *Brown*, 2013 IL 114196, ¶ 48. The testimony of a single witness, if positive and credible, is sufficient to convict a defendant. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009).

¶ 13 Here, the trial court found defendant guilty of possession of a controlled substance. 720 ILCS 570/402(c) (West 2010). The "deciding question" in reviewing a conviction for possession of a controlled substance is whether the defendant had knowledge and possession of the drugs. *People v. Givens*, 237 Ill. 2d 311, 334-35 (2010). Possession may be constructive or actual. *Id.* at 335. Constructive possession is shown where a defendant has the "intent and capability to maintain control and dominion" over a controlled substance. *People v. Frieberg*, 147 Ill. 2d 326, 361 (1992). Actual possession exists when a defendant "exercises immediate and exclusive dominion or control over the illicit material." *Givens*, 237 Ill. 2d at 335. Actual possession does not require personal touching of the contraband. *People v. Schmalz*, 194 Ill. 2d 75, 82 (2000).

¶ 14 Here, a reasonable trier of fact could find that defendant had actual possession of the heroin based on McKenna's testimony. McKenna was conducting narcotics surveillance at the Karlov block because the area was known as "hot" for selling drugs. Although she said she had certain "preconceptions" about what she was witnessing, McKenna also observed defendant engage in behavior that could have led a person lacking "preconceptions" to believe defendant was engaged in a drug transaction. Specifically, McKenna saw defendant on three occasions receive money from individuals, walk to a drain spout, remove an orange bag from the drain spout, take an item or items from the orange bag, and give the item or items to the individuals who had just paid him. From her viewpoint 125 to 130 feet away, McKenna could not see what defendant's body was blocking when he bent down by the downspout; however, she could see him "manipulating an orange bag" and taking items out of that bag. McKenna also could not see what the items were that defendant exchanged but could observe that they were small enough to be concealed within defendant's hand. Moreover, McKenna did not see anyone else near the spout or see other chip bags on the property where the spout was located. When McKenna

recovered the only Cheetos bag in the downspout, she found four packets inside containing heroin. McKenna did not recover any drugs on defendant but her partner did recover \$130 from defendant.

¶ 15 We are guided by this court's decision in *People v. Carodine*, 374 Ill. App. 3d 16 (2007). In *Carodine*, an officer was conducting surveillance when he saw the defendant speak to an unknown male who gave defendant money. *Id.* at 18. After taking the money, the defendant went to the basement entrance of a building, reached into a dryer vent protruding from the exterior of the building, removed a bag from which he removed a small item, and placed the bag back in the vent. *Id.* at 18-19. The defendant then gave the item to the individual. *Id.* at 19. Thereafter, the officer broke surveillance, went to the vent, reached inside, and recovered the bag, inside of which were 9 small bags of folded tinfoil containing a white powdery substance and 17 small bags containing a white rock-like substance. *Id.* The officer and his partner testified two to three minutes elapsed between the time they broke surveillance and recovered the narcotics and during this time, neither officer maintained a visual on the dryer vent. *Id.* The trial court found the defendant guilty of possession of heroin and cocaine. *Id.* at 21. On appeal, this court affirmed the defendant's conviction, reasoning (1) it was highly unlikely that somebody tampered with the brown paper bag in the two to three minutes that the officers lost sight of the vent, and (2) a trier of fact could have found defendant guilty of actual possession because he exercised "present and personal dominion" over the drugs by hiding them in a brown paper bag. *Id.* at 25-26.

¶ 16 As in *Carodine*, here, a rational trier of fact could have found defendant exercised "present and personal dominion" over the heroin recovered from the chip bag based on McKenna's testimony that she witnessed defendant "fumbling" with a chip bag and removing an

item or items from that bag. Moreover, based on *Carodine*, we find unpersuasive defendant's contention that a reasonable doubt of his guilt exists because the officers failed to interview any of the three men that gave him money. It was unlikely that in the short time McKenna could not see the downspout, one of those three men altered the contents of the chip bag. See *Carodine*, 374 Ill. App. 3d at 25 (concluding it was "highly unlikely that anyone tampered with the brown paper bag in the two to three minutes that the officers lost sight of the dryer vent."). In addition, as found by the trial court, even assuming another person may have obtained possession of the bag, concurrent or joint possession of contraband does not defeat defendant's guilt. See *Givens*, 237 Ill. 2d at 335 (the rule that possession must be exclusive does not mean that possession may not be joint.). Based on the foregoing, a rational trier of fact could have found defendant guilty beyond a reasonable doubt.

¶ 17 Defendant next contends the trial court erred by denying his motion to reconsider sentence. Specifically, defendant asserts his case should be remanded for the trial court to reconsider his sentence given his medical challenges. We disagree.

¶ 18 A trial court has broad discretion in imposing a sentence, and its sentencing decisions are entitled to great deference. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). Such deference is given because the trial court is generally in a better position than a reviewing court to determine an appropriate sentence based on its opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). Thus, we will not alter a defendant's sentence on review absent an abuse of discretion. *Alexander*, 238 Ill. 2d at 212. "A sentence will be deemed an abuse of discretion where the sentence 'is greatly at variance with the spirit and purpose of the

law, or manifestly disproportionate to the nature of the offense.' " *Id.* at 212 (quoting *Stacey*, 193 Ill. 2d at 210).

¶ 19 Here, the trial court found defendant guilty of possession of a controlled substance, a Class 4 felony ordinarily carrying a possible prison sentence of between one and three years. 720 ILCS 570/402(c) (West 2010); 730 ILCS 5/5-4.5-45(a) (West 2010). However, defendant's prior felony convictions made him eligible for an extended-term sentence of up to six years. 730 ILCS 5/5-4.5-45(a), 5-5-3.2(b)(1), 5-8-2(a) (West 2010). The court sentenced defendant to six years in prison.

¶ 20 Contrary to defendant's contention that his case should be remanded for a new sentencing hearing for the trial court to consider his medical problems, the record establishes the court knew of defendant's health condition both at the time of sentencing and when it denied his motion to reconsider sentence. Notably, the PSI, which the court explicitly stated it considered, contained information concerning defendant's surgeries and gunshot-wound-related medical problems, and defense counsel pointed out defendant's health issues at the sentencing hearing. See *People v. Perkins*, 408 Ill. App. 3d 757, 763 (2011) ("Where mitigating evidence is presented to the trial court during the sentencing hearing, we presume that the trial court considered it, absent some indication, other than the sentence itself, to the contrary."). Furthermore, defendant again presented his health issues to the court in a motion to reconsider sentence and at the hearing on his post-sentencing motion, but the court denied his motion.

¶ 21 Defendant's reliance on *People v. Smith*, 258 Ill. App. 3d 633 (1994) is misplaced because it is clearly distinguishable. In *Smith*, this court remanded the defendant's case for further review of his sentence because the defendant was diagnosed with cancer *after* the trial court had imposed her sentence. *Smith*, 258 Ill. App. 3d at 645. Unlike the present case, the

Smith defendant's medical condition was unknown to the judge at the time of sentencing. Here, the trial court had the opportunity to consider defendant's medical problems at sentencing and again when it denied his motion to reconsider sentence. After weighing the evidence in mitigation and aggravation, however, the court determined a six-year sentence to be appropriate. Accordingly, we find no abuse of discretion and reject defendant's contention that his case should be remanded for reconsideration of his sentence given his medical challenges.

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

¶ 23 Affirmed.