

NOTICE
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2014 IL App (4th) 130880-U
NO. 4-13-0880

FILED
October 22, 2014
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.)	McLean County
GERALD WAYNE WHITE,)	No. 11CF414
Defendant-Appellant.)	
)	Honorable
)	John C. Costigan,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Pope and Turner concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) The trial court did not err in finding the verdict of not guilty of unlawful possession with intent to deliver in count II and guilty of unlawful delivery in count I are not inconsistent and contradictory verdicts.
- (2) The trial court did not err when it refused to admit into evidence the proffered testimony of defendant and in refusing to "power up" and open the memory of defendant's cellular telephone.
- (3) The trial court did not err in determining the evidence admitted at the evidentiary hearing on defendant's section 2-1401 motion was contradictory and not sufficient to rebut the State's case at trial to support relief from the judgment.
- ¶ 2 In October 2011, a jury found defendant, Gerald Wayne White, guilty of (1) unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2010) (less than 1 gram of a substance containing heroin)) and (2) unlawful possession of a controlled substance (720 ILCS 560/402(c) (West 2010) (less than 15 grams of a substance containing heroin)). In

November 2011, defendant filed a posttrial motion requesting the court set aside the jury's verdict and enter judgment of acquittal notwithstanding the verdict. In December 2011, the court denied the posttrial motion and sentenced him to concurrent terms of 20 years for unlawful delivery of a controlled substance and 5 years for possession of a controlled substance.

¶ 3 On January 13, 2013, defendant filed a section 2-1401 (735 ILCS 5/2-1401 (West 2012)) petition for relief of judgment. The trial court denied the petition in June 2013. The court later denied defendant's motion to reconsider.

¶ 4 This appeal followed.

¶ 5 I. BACKGROUND

¶ 6 In May 2011, a McLean County grand jury returned three bills of indictment charging defendant with (1) unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2010) (less than 1 gram of a substance containing heroin)), (2) unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(d)(i) (West 2010) (less than 1 gram of a substance containing heroin)), and (3) unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2010) (less than 15 grams of a substance containing heroin)).

¶ 7 At an October 11, 2011 jury trial, Lora Lindoerfer testified she was an employee at a Denny's restaurant in Bloomington, Illinois, in May 2011. On May 16, 2011, she stole \$40 from a drawer in the office of the restaurant for purchasing heroin. She admitted she was an addict at that time and knew she was caught on the security camera but did not care because she was an addict.

¶ 8 On May 17, 2011, Lindoerfer used heroin. Bloomington police officers came to her home to question her about the theft at Denny's. The search of her home uncovered heroin.

She was arrested for theft and heroin possession. Bloomington police detective Edward Shumaker met with Lindoerfer to obtain her cooperation in identifying her heroin dealer. She agreed to participate in a controlled buy, and identified defendant as her heroin dealer. She gave Detective Shumaker the phone number she used to contact defendant.

¶ 9 Detective Shumaker transported Lindoerfer back to her home so she could change into her Denny's uniform. Detective Shumaker did not observe Lindoerfer change. Lindoerfer testified she was searched after she was initially arrested but not after she changed into her Denny's uniform.

¶ 10 Detective Shumaker and Sergeant Brian Brown of the Bloomington police department transported Lindoerfer to a parking lot near Denny's. Lindoerfer sent a text message to the number she identified as belonging to defendant. After a reply, Lindoerfer called defendant and told him she had \$100 and needed "two 50s." She explained a "50" was .20 grams of heroin. She asked defendant to come to Denny's. He explained he could not come to Denny's and instructed her to call Chad Boitnott to give her a ride to defendant's house. Lindoerfer called Boitnott and he agreed to give her a ride. Detective Shumaker provided Lindoerfer with \$100 and gas money to give to Boitnott. Then he dropped Lindoerfer off in the parking lot behind Denny's.

¶ 11 Boitnott arrived to pick up Lindoerfer in a white truck. Defendant was outside his house when they arrived and he approached the driver's side of the truck. The driver's window was open and Lindoerfer leaned over the center console and gave defendant the \$100 provided by Detective Shumaker. Defendant placed two foil packets in Lindoerfer's hand. Defendant went back inside his house and Boitnott drove Lindoerfer back to Denny's, where he left her in

the parking lot of a nearby cigarette store and drove off. After Boitnott drove off, Lindoerfer entered Detective Shumaker's vehicle and gave the foil packets to Detective Shumaker. At trial, Lindoerfer identified the foil packets placed into evidence as the packets defendant gave to her.

¶ 12 Detective Shumaker testified when he first met with Lindoerfer on the morning of May 17, 2011, she seemed to have a hangover but he did not think she was high on heroin. Detective Shumaker testified he searched Lindoerfer's pockets, shoes, socks and waistband after she changed into her Denny's uniform. He admitted he limited his search of her person as she was female and there was a possibility she could have hidden heroin in a place he did not search. Prior to the controlled buy, Detective Shumaker made a photocopy of the cash he provided Lindoerfer.

¶ 13 Sergeant Brown, Officer Kenneth Bays, and Detective Kevin Raisbeck of the Bloomington police department each testified they acted as members of the surveillance team. They wore plain clothes and drove undercover vehicles. Their testimony established a continuous "eyes on" chain of surveillance. Detective Raisbeck saw Boitnott's white truck stop in the street in front of defendant's house. He saw defendant walk up to the driver's side window. He could clearly see the faces of Lindoerfer and Boitnott in the truck. Detective Raisbeck saw Lindoerfer lean to the driver's side and exchange something with defendant. Detective Shumaker saw the white truck return to the parking lot near Denny's. Lindoerfer then handed him two folded foil packets containing heroin.

¶ 14 Shortly after his interaction with Lindoerfer, defendant drove away from his house in a Chevy Blazer. Officer Brice Stanfield of the Bloomington police department initiated a traffic stop of the Blazer. Officer Stanfield placed defendant in handcuffs and defendant

dropped a cellular phone (cell phone) on the ground. Officer Stanfield picked up the cell phone and placed it on the dashboard of his squad car. Detective Raisbeck arrived and took custody of the cell phone. Detective Raisbeck used his own phone to call the number Lindoerfer used and defendant's cell phone rang, showing Detective Raisbeck's number as the source of the incoming call.

¶ 15 Detective Raisbeck searched defendant's pockets and located \$220 in cash. The serial numbers on some of the bills found in defendant's pocket matched those of the photocopied bills. At the police station, Detective Shumaker searched defendant and discovered four folded foil packets in his jacket pocket. The State and defense stipulated they contained heroin. At trial, Detective Shumaker identified both the foil packets Lindoerfer gave him and the foil packets found in defendant's jacket. The jury examined all the foil packets.

¶ 16 Detective Shumaker interviewed defendant at the police station. Defendant denied selling drugs although he admitted using heroin. He admitted knowing Boitnott and Lindoerfer. He claimed he sold his car, which explained the cash in his pocket. Defendant claimed the jacket he was wearing was not his and the heroin was not his. A video recording of the interview was played to the jury.

¶ 17 Defendant presented no evidence and the jury found him guilty of (1) unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2010)) and (2) unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2010)). The jury acquitted defendant of unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(d)(i) (West 2010)).

¶ 18 In November 2011, defendant filed a posttrial motion asking to set aside the jury's

verdict and enter judgment of acquittal notwithstanding the verdict. Defendant asserted Lindoerfer was not a credible witness because she was under the influence of heroin during the controlled buy and had a motive to lie. In December 2011, following a hearing, the court denied defendant's posttrial motion and sentenced him to 20 years' imprisonment for unlawful delivery of a controlled substance and 5 years' imprisonment for unlawful possession of a controlled substance.

¶ 19 On December 20, 2011, defendant filed a motion to reconsider sentence. A hearing was held on the motion on January 4, 2012, and the trial court denied the motion. Notice of appeal was filed on February 2, 2012. Two issues were raised on appeal: the State presented insufficient evidence to prove defendant guilty of unlawful delivery of a controlled substance and the trial court erred by denying defendant's motion *in limine* to redact portions of the video-recorded interview of defendant. Defendant's original appeal was decided on August 13, 2013 (People v. White, No. 4-12-0108 (Aug. 13, 2013) (unpublished order under Supreme Court Rule 23)), and this court affirmed.

¶ 20 While the appeal was pending, defendant filed a petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)) on January 3, 2013. The issues raised in the petition are (1) the verdicts on count I (guilty of unlawful delivery of a controlled substance) and count II (not guilty of unlawful possession of a controlled substance with the intent to deliver) of the indictment are inconsistent and (2) evidentiary facts rebutting the trial court's judgment in the form of testimony from Boitnott and defendant were unavailable at trial.

¶ 21 After a hearing, the trial court denied defendant's motion for a new trial based on

his petition for relief of judgment on June 4, 2013. This appeal followed.

¶ 22

II. ANALYSIS

¶ 23

A. Inconsistent and Contradictory Verdicts

¶ 24

Defendant claims his acquittal on count II, unlawful possession with intent to deliver a controlled substance (720 ILCS 570/401(d)(i) (West 2010)), and conviction on count I, unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2010)), are inconsistent as unlawful possession with intent to deliver a controlled substance is an included offense of unlawful delivery of a controlled substance. See *People v. Coleman*, 391 Ill. App. 3d 963, 976-77, 909 N.E.2d 952, 964-65 (2009).

¶ 25

A claim of two verdicts being legally inconsistent presents a question of law subject to *de novo* review. *People v. Price*, 221 Ill. 2d 182, 189, 850 N.E.2d 199, 202 (2006).

¶ 26

Defendant argues because unlawful possession with intent to deliver is an included offense, it is the equivalent of an essential element of the greater offense, unlawful delivery of a controlled substance, and, as such, must be found to exist in order for the greater offense to have been proved. By finding defendant had no intent to deliver a controlled substance but finding him guilty of delivering a controlled substance, the jury has found an essential element of the offense to both exist and not exist. Defendant argues legally inconsistent verdicts were delivered. See *Id.* at 188, 850 N.E.2d at 202. He claims a not guilty on the included offense necessarily eliminates the finding of guilt on the greater offense. Defendant argues he is entitled to a new trial on all counts. See *People v. Spears*, 112 Ill. 2d 396, 407, 493 N.E.2d 1030, 1035 (1986).

¶ 27

Our supreme court has held "defendants in Illinois can no longer challenge

convictions on the sole basis that they are legally inconsistent with acquittals on other charges." *People v. Jones*, 207 Ill. 2d 122, 133-34, 797 N.E.2d 640, 647 (2003). Therefore, defendant's acquittal on the included offense would not negate or eliminate the verdict of guilty on count I, unlawful delivery of a controlled substance.

¶ 28 As noted by the State, the verdicts were not logically inconsistent. While defendant points out the indictment for each offense, as well as the jury verdict forms, used the language "less than one (1) gram of a substance containing heroin" and did not differentiate further the heroin being referred to, the State argued throughout the case the heroin used to support intent to deliver was that contained in the foil packets found in defendant's jacket pocket while the heroin supporting the delivery charge was that actually sold to Lindoerfer. No bill of particulars was used in this case and defendant did not ask for one. Defendant could be found guilty of delivery of a controlled substance and not guilty of intent to deliver a controlled substance. The verdicts were not inconsistent because two different sources of heroin were being referred to in the different counts. The two verdicts here were not inconsistent.

¶ 29 B. Refusal To Admit Testimony of Defendant and To "Power Up" and Open Memory of His Cell Phone

¶ 30 Defendant argues the trial court abused its discretion when it refused to admit his proffered testimony and to "power up" his cell phone and open the memory function contained therein at the hearing on his section 2-1401 petition.

¶ 31 The standard of review on an evidentiary ruling in section 2-1401 petition hearing is whether the trial court abused its discretion. *People v. Sanchez*, 131 Ill. 2d 417, 420, 546 N.E.2d 574, 576 (1989).

¶ 32 Defendant's section 2-1401 petition alleged he had newly discovered evidence

and tried to present his testimony and that of Boitnott to support a different theory of what occurred on the day of the drug sale to Lindoerfer. Boitnott did not testify at defendant's trial. He was to be called as a defense witness but he exercised his right not to incriminate himself under the fifth amendment. He was yet to be sentenced after pleading guilty to charges arising from this same occurrence. Defendant did not testify at trial after the trial court ruled three of his prior convictions, all involving drug offenses, could be used by the State in rebuttal if he testified. Defendant now claims, while the prior offenses ruling was part of his reasoning for not testifying, the fact Boitnott's testimony would not be included at trial to back up his testimony was the bigger factor in him deciding not to testify. With Boitnott's testimony corroborating his own version of the events occurring on May 17, 2011, defendant was now willing to testify.

¶ 33 The trial court found both defendant's proposed testimony and that of Boitnott was available at the time of trial and not newly discovered. Defendant argues the trial court should have used a broader definition of newly discovered evidence, including evidence which was unobtainable by him (Boitnott's testimony) and undeliverable (his own testimony), to allow him to have both his testimony, and that of Boitnott, admitted into evidence at a section 2-1401 hearing.

¶ 34 "[I]t is not the purpose of section 2-1401 to provide litigants with a fresh opportunity to do what they should have done in the prior proceeding." *In re Marriage of O'Brien*, 247 Ill. App. 3d 745, 750, 617 N.E.2d 873, 876 (1993). Defendant could have chosen to testify at trial. Postjudgment relief is limited to matters relating to evidence that did not appear in the record at trial and was discovered after trial was completed. *People v. Burrows*, 172 Ill. 2d 169, 187, 665 N.E.2d 1319, 1327-28 (1996). Defendant has given us no reason to

enlarge the scope of newly discovered evidence to include evidence existing and known to defendant at the time of trial but arguably "unobtainable" or "undeliverable." Further, defendant's own testimony was not "undeliverable" because it was his own decision not to testify.

¶ 35 As for the cellular telephone, defendant argues the memory on his cell phone would show there was no call from Lindoerfer on May 17, 2011. He argues the trial court at his section 2-1401 hearing abused its discretion when it failed to honor his request to "power up" and examine the memory in his cell phone, which was admitted as an exhibit at his trial. The court noted the cell phone was available at trial and the issue could have been raised there. The court found nothing on the cell phone could constitute newly discovered evidence not available at trial.

¶ 36 The State's pretrial discovery compliance pursuant to Illinois Supreme Court Rule 412(a)(v) (eff. Mar. 1, 2001) identified a "cellular phone" as part of its physical evidence. Defendant made no discovery request prior to trial to examine the tangible object, cell phone, obtained from or belonging to him.

¶ 37 At the section 2-1401 petition hearing, the trial court viewed the request to examine the cell phone as essentially a discovery request. The court has broad discretion in ruling on discovery matters. *Shapo v. Tires 'N Tracks, Inc.*, 336 Ill. App. 3d 387, 395, 782 N.E.2d 813, 820 (2002). Posttrial discovery should only be allowed in limited circumstances. *Id.* at 398, 782 N.E.2d at 823.

¶ 38 In this case, the cell phone was not newly discovered evidence because it had been admitted into evidence at trial. The defense was simply seeking an opportunity to do what

should have done before or during trial as far as examining the cell phone. The trial court did not abuse its discretion in refusing postjudgment discovery the defense could have obtained by seeking to examine the cell phone's memory prior to judgment.

¶ 39 C. Sufficiency of Evidence on Section 2-1401 Petition

¶ 40 Defendant argues the evidence at trial barely supported proof of a "controlled buy" from him and the evidence he presented at his section 2-1401 petition hearing, Boitnott's testimony and his own, did more than suggest mere contradiction of the State's theory of the case but showed he was not proved guilty beyond a reasonable doubt.

¶ 41 Defendant's testimony has already been found not to be newly discovered evidence and cannot be considered in the section 2-1401 petition. As for Boitnott's testimony, postjudgment testimony of a codefendant who did not testify at trial has been found to be newly discovered evidence. See *People v. Mostad*, 101 Ill. 2d 128, 134-35, 461 N.E.2d 398, 402 (1984). However, Boitnott was not a codefendant and defendant has made no argument to explain why he should be considered to be one. Boitnott testified the police arrested him after he dropped off Lindoerfer following their meeting with defendant and when they did so, they found a foil packet of heroin on the floorboard of Boitnott's truck. Boitnott was charged with possession of this heroin. Thus, Boitnott was charged with criminal conduct unrelated to the transaction involving defendant and Lindoerfer.

¶ 42 Because Boitnott was not a codefendant, defendant's trial counsel should have been able to elicit testimony regarding facts Boitnott later provided in an affidavit and testified to at the section 2-1401 petition hearing. No attempt was made to ask him questions as he simply asserted his right not to incriminate himself prior to any questions being asked of him. Defense

counsel did not object to this manner of proceeding. Because defense counsel did not ask questions of Boitnott at trial, we do not know if Boitnott would have asserted his fifth amendment rights in response to every question. We cannot find Boitnott's testimony was not available at trial and we cannot find it to be newly discovered evidence.

¶ 43 The standard of review for a ruling on a section 2-1401 petition is whether the trial court abused its discretion. *Sanchez*, 131 Ill. 2d at 420, 546 N.E.2d at 576-77. No abuse of discretion occurred here.

¶ 44 Boitnott's testimony, even if it were admitted, was not sufficiently conclusive to probably change the result on retrial. At the section 2-1401 hearing, Boitnott testified defendant "came up to the truck" and Lindoerfer handed him money. Boitnott initially stated Lindoerfer handed the money directly to defendant but later stated Lindoerfer handed him the money and he gave it to defendant. Boitnott also claimed Lindoerfer had aluminum foil in her hand when Boitnott pulled up at defendant's house. Boitnott denied defendant gave anything to him or Lindoerfer or defendant deposited anything into the truck.

¶ 45 On cross-examination, Boitnott admitted he spoke with Detective Shumaker after his arrest but stated he could not recall telling the detective that Lindoerfer "bought something off of" defendant and she paid defendant \$100 for "dope." Boitnott identified himself on a video recording and agreed it was a fair and accurate depiction of his interview with Detective Shumaker.

¶ 46 In his interview with Detective Shumaker, defendant claimed the money found on him was from the sale of his car. He insisted the \$300 in his pocket was from the sale of his car despite the fact \$100 of it was marked bills from the buy with Lindoerfer.

¶ 47 The trial court ruled Boitnott's testimony would not probably change the result of the trial. It found as follows: (1) defendant had the "buy money" on his person when arrested a short time after the purchase; (2) foils of heroin were found in defendant's coat pocket matching the foils of heroine Lindoerfer said defendant sold her; and (3) Boitnott's affidavit and testimony was contradicted by an earlier statement he gave to the detectives in this case. Thus, Boitnott's testimony, while some of it is contradictory to that of Lindoerfer, is not conclusive on the subject because he gave a previous statement contradicting himself. The trial court did not abuse its discretion in finding Boitnott's testimony was not so conclusive it would probably change the result on retrial.

¶ 48 III. CONCLUSION

¶ 49 We affirm the trial court's judgment. As part of our judgment, we award the State its \$75 statutory assessment against defendant as costs of this appeal.

¶ 50 Affirmed.