2016 IL App (1st) 141683-U

FOURTH DIVISION
June 23, 2016

No. 1-14-1683



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. 13 CR 18404 |
| | ) | |
| DONALD WILLIAMS, | ) | The Honorable |
| | ) | Rickey Jones, |
| Defendant-Appellant. | ) | Judge Presiding. |

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice McBride and Justice Cobbs concurred in the judgment.

**O R D E R**

¶ 1 ***Held:*** Judgment entered on defendant's conviction of possession of controlled substance affirmed over claim of entrapment.

¶ 2 Following a bench trial, defendant Donald Williams was found guilty of possession of a controlled substance (heroin), and sentenced to two years in prison. On appeal, defendant contends that the State's evidence was insufficient to rebut his affirmative defense of entrapment beyond a reasonable doubt.

¶ 3 Defendant was charged with two counts of delivery of a controlled substance (heroin), and two counts of possession of a controlled substance (heroin) with intent to deliver. The charges arose from a controlled-narcotics purchase that occurred on the west side of Chicago in the afternoon of September 4, 2013. Co-defendant Rahim Russell, who is not a party to this appeal, was also arrested and charged that day.

¶ 4 At trial, Chicago Police officer Shearer testified that, about 4 p.m., he and his colleagues were conducting a controlled narcotics purchase at the corner of Lake Street and Pulaski Road, because of the "very high" narcotics activity in that area. Officer Shearer was the undercover officer, while Officers Lepine and Wherfel were the surveillance and enforcement officers respectively.

¶ 5 Each of the officers drove separately to that location. Shearer parked his car and walked to the corner, where there was an exit for the "L" train and a bus stop. He approached defendant, who was standing at the bus stop, and asked him whether anyone had any "D out here." Shearer testified that D is street terminology for heroin.

¶ 6 Defendant responded, "Come on this way," and Officer Shearer followed him south to the mouth of a gangway at 206 North Keystone Avenue. Shearer testified that defendant called to a young black man, later identified as co-defendant Russell, who came to the mouth of the gangway. Defendant asked Officer Shearer, "What do you need?", to which Shearer replied, "three," which meant three bags of heroin. Defendant said "40," and Shearer gave defendant $40 of pre-recorded funds.

¶ 7 Defendant turned to Russell and said, "three." Russell went into the gangway, retrieved three small, green-tinted plastic bags from underneath a wastebasket or pail, took the 40 dollars from defendant, and handed defendant the three items. Defendant gave the items to Officer

Shearer, and the three men parted ways.

¶ 8 Officer Shearer walked a half block north, made eye contact with one of his surveillance units, signaled to the unit that a narcotics transaction had occurred, and returned to his car. Shearer then radioed his colleagues and gave them physical descriptions of defendant and co-defendant. Shortly thereafter, Shearer received a radio call that two individuals had been detained. He drove to where they had been detained and identified defendant.

¶ 9 During cross-examination, Officer Shearer testified that his team had no prior information that defendant was selling drugs in that area, and he had never seen or had contact with defendant before that day. He denied telling defendant that he needed drugs because he or his girlfriend was sick. Shearer denied meeting Russell at West End Avenue, or having a conversation with him prior to reaching the gangway.

¶ 10 Officer William Lepine testified that he saw Officer Shearer talking to defendant at the corner of Pulaski Road and Lake Street from his undercover surveillance vehicle, which Lepine had parked about 30 to 40 feet away. Lepine followed the duo as they walked to Keystone Avenue and saw Officer Shearer give defendant money. Lepine testified that he saw another individual, later identified as Russell, exit the gangway and engage in a hand-to-hand transaction with defendant. Defendant then turned around and participated in a hand-to-hand transaction with Shearer. Lepine testified that Shearer signaled that a drug transaction had occurred, and Officer Lepine relayed that information to his colleagues. Lepine watched defendant walk west along West End Avenue, while Russell stayed on the side of the building. About four minutes later, he saw Officer Wherfel arrest defendant.

¶ 11 Officer Wherfel testified that he arrested defendant after Officer Shearer drove by and positively identified defendant. Wherfel searched defendant and did not find any drugs or money

on his person. He found the $40 of pre-recorded funds on Russell, who was also arrested after the transaction, and more drugs were found in the gangway at Keystone Avenue.

¶ 12 The parties stipulated that a forensic chemist for the Illinois State Police Crime Lab, would testify that she tested 0.2 grams of the total 0.7 grams of substance recovered from the three bags given to Shearer, which tested positive for heroin.

¶ 13 Defendant testified that he was 49 years old, and lived in Forest Park, Illinois, with his sister and his nephew. He had been convicted of at least four drug-related crimes, and he was in treatment at the Haymarket Center for substance abuse from April 2013, until the time of his arrest. Defendant said that, on the day of his arrest, he was in treatment at Haymarket from 9 a.m. to about 4 p.m. After his treatment, he rode the Green Line "L" train from Morgan Street to the bus stop at Pulaski Road and Lake Street.

¶ 14 After defendant was waiting at the bus stop for about three minutes, Officer Shearer, who was dressed in plain clothes, walked up to him and asked him if he knew "where they had some D at," and defendant responded, "no." Defendant, who admitted that he was a heroin addict, testified that "D" meant "dope" or "heroin." Shearer rubbed his stomach, told defendant that he and his girlfriend were sick, and "came up" to defendant several times. Defendant denied knowing where to find drugs each time and told Officer Shearer that he needed to go to Haymarket to get help. Shearer agreed but asked defendant a fourth time where he could find heroin for himself and his sick girlfriend. Defendant decided to help Shearer find heroin because he believed that Shearer was sick.

¶ 15 Defendant testified that he did not know where to get heroin but he walked with Shearer to the corner of Keystone Avenue and West End Street, where he had "seen *** guys out there on the corner." Defendant did not know the four or five individuals standing at the corner.

Defendant testified that Shearer approached them, asked them if they had any heroin, and told them he was "not no police." Russell, whom defendant referred to as "Shorty," told Shearer and defendant to go to 206 Keystone Avenue. Defendant testified that Shorty told him to take Shearer's money because Shorty did not want to deal with Shearer directly. Once they reached the address, Shorty stepped into the bushes, and Shearer gave money to defendant. Defendant handed the money to Shorty, and Shorty gave defendant three bags of heroin from a garbage can, which defendant turned over to Shearer. Defendant then walked away toward the bus, but he was arrested shortly thereafter. Defendant testified that he did not get any money or drugs out of the exchange, and that he had not engaged in any prior drug operations with those individuals or been arrested with them. He also testified that he "[came] up on the west side all [his] life," and was familiar with the area.

¶ 16 The parties stipulated that, at the time of the offense, defendant was a participant in intensive outpatient treatment services at Haymarket Center and he was present in treatment on the day in question.

¶ 17 The trial court found defendant guilty of one count of the lesser-included offense of possession of a controlled substance, and not guilty of the other three counts. The trial court denied defendant's motion for a new trial.

¶ 18 At the sentencing hearing, the court stated:

> "All right. This case involves an interesting twist on the war against drugs in the city. And by these comments do I no way mean to minimize defendant's involvement.
>
> But hearing this case, the narcotics officers of the Chicago Police Department go out to the west side in a high drug neighborhood to hunt dope

dealers. And the police, just like everybody else in the neighborhood, know where the dope dealers are. They in the park selling dope, they on the street corners hollering rocks, rows, weed, all of that stuff, selling dope all over the place, it's a high narcotics area. Ain't hard for them to find them. They know where they are, the people in the neighborhood know where they are.

Instead of going to the dope spots where the dope dealers are, they go to a main thoroughfare, a business area in the community. Dope dealers might be there, too, I don't know, but they don't have any intelligence or surveillance that the defendant is a dope dealer. They didn't testify about any intelligence or surveillance that they had implicating the defendant as a dope dealer on that day or anybody else in the area where the defendant was at the bus stop, near the el station, a whole lot of people just waiting, going back and forth just waiting on the bus.

Nonetheless, they [go to] this location instead of where all the dope dealers are at and they see the defendant. Maybe he looked like a dope dealer so they go over to him, an unsuspecting dupe, and ask him, hey where the dope at? And turns out that he is an unsuspecting dupe. So not only—even more he was a drug addict, he probably know where the dope dealers dope dealing out, just like everybody else in the neighborhood, they know where the dope dealers are. And they ask him, and he saying to himself dope ain't here, we just standing there with everybody else. And they engage the defendant into going along with them in a dope deal.

All right. So does defendant know where the dope dealers are? He uses

dope. He probably lives in the neighborhood. He said he did, that was his testimony, he testified to that. So all right, I'll show you, I'll help you, he takes the cops over there where the dope dealers are, where he probably knew they were, the defendant walk him over there and help them get some dope. And he gets busted along with the dope dealer.

This is really a vexing issue, you know. And everybody he live [*sic*] with over there, he could have been a choir boy at a church, they know where the dope dealers are. * * * You come ask them and he might be the guy that's the choir boy's next door neighbor. It might be Robert Earl (phonetic). Yeah, I know, I know where you get some dope at, Robert Earl and them guys. Can you show me? He might show him, unsuspecting.

I mean it's wrong for him to do that, to show him where the dope dealers are and help him get the dope, but he could have been a choir boy, yeah, come on, I show you were Robert Earl and them are, go with them and say, hey, Robert Earl, they want some dope. He caught up just like anybody else would be. It could happen any kind of way.

* * *

You know, this is a strange twist on how we're dealing with the war on crime. Wrong for the defendant to do that, I hate to mention that, but go find the dope dealer. They didn't have any intelligence on him or anybody else at that busy stop. You know, there are other people out there, police testified to that. They can find dope dealers easy. They didn't have to ask anybody for that, go over there and find them. Everybody over there know where they at, police do, too."

¶ 19 The court sentenced defendant to two years in prison. Defendant appealed.

¶ 20 On appeal, defendant contends that the evidence at trial was insufficient to convict him of possession of a controlled substance because he raised the affirmative defense of entrapment, and the State failed to provide sufficient evidence to rebut that defense.

¶ 21 By raising the affirmative defense of entrapment, as here, defendant necessarily admits that he committed the crime of possession of a controlled substance, although due to improper inducement by the police. *People v. Rivas*, 302 Ill. App. 3d 421, 432 (1998). The defense of entrapment is governed by section 7-12 of the Criminal Code of 1961, which provides that:

> "A person is not guilty of an offense if his or her conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of that person. However, this Section is inapplicable if the person was predisposed to commit the offense and the public officer or employee, or agent of either, merely affords to that person the opportunity or facility for committing an offense." 720 ILCS 5/7-12 (West 2012).

Accordingly, a defendant invoking entrapment must present evidence that (1) the State induced or incited him to commit the crime, and (2) he was not otherwise predisposed to do so. *People v. Placek*, 184 Ill. 2d 370, 380-81 (1998). Once defendant presents even slight evidence of entrapment, the burden shifts to the State to rebut that defense beyond a reasonable doubt. *People v. Sanchez*, 388 Ill. App. 3d 467, 474 (2009).

¶ 22 Whether defendant was entrapped is a question to be resolved by the trier of fact (*Placek*, 184 Ill. 2d at 381), and the standard of review for a claim of entrapment is whether, upon viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State disproved entrapment beyond a reasonable doubt (*People v. Day*,

279 Ill. App. 3d 606, 611 (1996)).

¶ 23 The State contends, as an initial matter, that defendant failed to present sufficient evidence of entrapment, and thus failed to shift the burden. We disagree.

¶ 24 The inducement prong of the entrapment defense is met when the course of criminal conduct for which defendant was convicted originated in the mind of a government agent who arbitrarily engaged in a relationship with defendant and purposely encouraged its growth. *People v. Bonner*, 385 Ill. App. 3d 141, 145 (2008).

¶ 25 Here, Officer Shearer approached defendant, whom he did not know or suspect of engaging in criminal activity. There was uncontroverted and stipulated evidence in the record that defendant was a heroin addict, and he was waiting at the bus stop after attending his drug rehabilitation program at Haymarket. Defendant testified that Officer Shearer repeatedly asked him where he could find some "D" and that he agreed to help Shearer after initially refusing to do so. Defendant further testified that he was in rehabilitation for his addiction and would not have committed the crime but for Shearer's persistent requests. Although the court, as the trier of fact, was not required to believe him, defendant's testimony was sufficient to raise the defense of entrapment, and the burden properly shifted to the State to disprove it beyond a reasonable doubt.

¶ 26 But we also find that the evidence set forth by the State during its case-in-chief was sufficient to disprove entrapment, because it established that defendant was predisposed to committing the offense. Predisposition is established by proof that the defendant was willing and able to commit the offense without persuasion before his initial exposure to government agents. *Sanchez*, 388 Ill. App. 3d at 474. In a drug case, the factors taken into consideration include "(1) the defendant's initial reluctance or willingness to commit the crime; (2) the defendant's

familiarity with drugs; (3) the defendant's willingness to accommodate the needs of drug users; (4) the defendant's willingness to profit from the offense; (5) the defendant's current or prior drug use; (6) the defendant's participation in cutting or testing the drugs; and (7) the defendant's ready access to a supply of drugs." *People v. Glenn*, 363 Ill. App. 3d 170, 173 (2006).

¶ 27 In this case, the first factor weighs in favor of the State. Officer Shearer testified that he approached defendant at the bus stop, asked him where he could find some "D," and defendant willingly, and without further persuasion, agreed to help him. Although defendant disputed this version of events, the court, as the trier of fact, was entitled to determine the credibility of witnesses, to weigh their testimony, and to resolve any conflicts between them. *Rivas*, 302 Ill. App. 3d at 436-37. The second and fifth factors also weigh in the State's favor. Defendant was a drug addict, had used heroin before, and had been convicted of several drug offenses. Similarly, under the seventh factor, evidence showed that defendant did not have the drugs on his person, but he knew where to find heroin a few blocks away, and could readily access it.

¶ 28 Although, as defendant correctly points out, there is no evidence that he profited from the offense (the fourth factor), there is ample evidence in the record as to the third factor, as defendant was willing to accommodate Shearer's needs. He did not merely point Shearer in the direction of the drug dealer, but accompanied him for several blocks, engaged in a discussion with Russell, whom he called "Shorty," and acted as a middle man in the drug transaction. The sixth factor weighs in defendant's favor, as there was no evidence that defendant was involved in the cutting or testing of the drugs.

¶ 29 Taken together, the factors relating to predisposition largely weigh against defendant when the evidence is taken in the light most favorable to the State. We thus conclude that the State was able to rebut defendant's defense of entrapment. *People v. Alcala*, 248 Ill. App. 3d 411,

420 (1993).

¶ 30 Defendant maintains, notwithstanding this evidence, that the court's comments at sentencing that defendant was an "unsuspecting dupe" and that "anybody else" could have been caught up in the crime indicate that the court found that he was not predisposed to committing the crime. To the contrary, we observe that the trial court prefaced its comments by stating that it did not "mean to minimize defendant's involvement [in the crime]." It then noted the potential unfairness surrounding the circumstances of defendant's arrest and the tactics employed by the police, but also that it was "wrong" for defendant to help Shearer get the drugs. Taken as a whole, the court's comments at sentencing, although sympathetic to defendant, are not the same as its findings or credibility determinations. The court was not, as defendant suggests, demonstrating his dissatisfaction with the State's evidence or doubts as to defendant's guilt, but merely making observations of the circumstances surrounding the incident.

¶ 31 Defendant cites *People v. Warren*, 40 Ill. App. 3d 1008 (1976), in support of his argument that his conviction should be reversed because the trial court expressed dissatisfaction with the State's evidence. But in *Warren*, the trial court indicated that it did not believe either the defendant or the State's witnesses after closing arguments had concluded. *Id.* at 1009-11. On appeal, the court noted that, "where the trial court, after hearing the evidence, indicates continuous doubts as to [the] defendant's guilt, we have no other recourse but to hold that [the] defendant was not proved guilty beyond a reasonable doubt." *Id.* at 1011. In this case, the trial court found defendant guilty of possessing heroin and denied his motion for a new trial, which contested the sufficiency of the State's evidence. While the trial court expressed its dissatisfaction with the police's tactics at sentencing, it did not express any opinion regarding the sufficiency of the State's evidence. We disagree that the trial court's comments require reversal.

¶ 32 And to the extent the court's comments do reflect any fact-finding, they bear on the inducement prong of the entrapment defense rather than the predisposition prong. The court could have believed that defendant was "duped" into committing the offense, but still rejected the entrapment defense based on the evidence that defendant was predisposed to possessing narcotics. Accordingly, these comments do not diminish the court's ultimate finding that defendant was guilty of possession of a controlled substance.

¶ 33 Taking the evidence in the light most favorable to the State, we find that the State proved defendant guilty of possession of a controlled substance over his claim of entrapment. We affirm the judgment of the circuit court.

¶ 34 Affirmed.