2017 IL App (1st) 141504-U

No. 1-14-1504

Order filed June 23, 2017

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 13930
	)	
DEMETRIUS GALLOWAY,	)	Honorable
	)	Carol M. Howard,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Gordon and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for possession of cannabis is affirmed where a police officer's testimony that defendant dropped cannabis on the ground in full view of the officer was not so improbable, unconvincing, or contrary to human experience that it created a reasonable doubt of defendant's guilt. The trial court's order assessing fines, fees, and costs is modified.

¶ 2 Following a bench trial, defendant Demetrius Galloway was convicted of possession of cannabis and sentenced to three years' imprisonment. The trial court also imposed $974 in fines, fees, and costs. Defendant appeals, arguing that the State failed to prove beyond a reasonable

doubt that he possessed cannabis because the police officer's "dropsy" testimony was unbelievable and contrary to human experience. He also challenges the trial court's assessment of certain fines and fees. For the reasons set forth herein, we affirm the judgment of the trial court and correct the court's order assessing fines, fees, and costs.

¶ 3 Defendant was charged with possession of more than 30 grams but less than 500 grams of cannabis. 720 ILCS 550/4(d) (West 2012). On March 6, 2014, defendant waived his right to a jury trial, and the case proceeded to a bench trial.

¶ 4 Officer Patrick Kelly testified that, on June 29, 2013, he and Officers Hanrahan and Staunton were on routine patrol in the area of 947 North Hamlin Avenue when he observed an individual, whom he identified in court as defendant, "concealing something behind his right side." Hanrahan stopped the unmarked police cruiser 10 to 15 feet from defendant, and Kelly, from the front passenger seat, asked defendant to approach the vehicle. As defendant walked toward the cruiser, Kelly observed defendant, from a distance of less than 10 feet, drop "sandwich" bags "from his back right side." Kelly testified that there were no objects in between him and defendant. After defendant dropped the items and Kelly began to exit the police cruiser, defendant fled the scene.

¶ 5 Kelly recovered three knotted sandwich bags from the ground. Each of the bags contained a number of smaller, sealed bags, which contained a green, leafy substance that he believed to be cannabis. After recovering the bags, Kelly joined his partners in the pursuit of defendant. Staunton eventually caught defendant and placed him into custody. The officers transported defendant to a police station, where the recovered bags were inventoried by Staunton.

¶ 6 On cross-examination, Kelly acknowledged that a police report, generated by another officer, indicated that defendant had been speaking with another individual at the time that the officers first observed him and stopped the police cruiser. Kelly stated that he did not see defendant speaking with another individual.

¶ 7 The parties stipulated that, if Officer Patrick Staunton were called as a witness, he would testify that he inventoried the bags pursuant to Chicago Police Department inventory procedures. The parties also stipulated that, if called as a witness, forensic chemist Melissa McCann would testify that the three knotted plastic bags contained 78 smaller ziplock bags, which contained a total of 30.7 grams of cannabis.

¶ 8 The trial court denied defendant's motion for a directed finding, and, after argument, found him guilty of possession of cannabis. In announcing its decision, the court noted that Officer Kelly was "clear" in his testimony that defendant dropped the cannabis and, when he did so, no other person was in the area. After a sentencing hearing, the trial court sentenced defendant to 3 years' imprisonment and imposed $974 of fines, fees, and costs.

¶ 9 Defendant appeals, arguing that the State failed to prove beyond a reasonable doubt that he possessed cannabis because Officer Kelly's testimony that he dropped bags of marijuana in plain view of the officers was unbelievable and contrary to human experience.

¶ 10 When a defendant challenges the sufficiency of the evidence, a reviewing court must determine whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Wilkerson*, 2016 IL App (1st) 151913, ¶ 64. This means that we must draw all reasonable inferences from the record in favor of the prosecution, and that " '[w]e will not

reverse a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt.' " *People v. Lloyd*, 2013 IL 113510, ¶ 42 (quoting *People v. Collins*, 214 Ill. 2d 206, 217 (2005)). In reviewing a trial court's decision, we must give proper deference to the trier of fact who observed the witnesses testify, because it was in the " 'superior position to assess the credibility of witnesses, resolve inconsistencies, determine the weight to assign the testimony, and draw reasonable inferences therefrom.' " *People v. Phillips*, 2015 IL App (1st) 131147, ¶ 16 (quoting *People v. Vaughn*, 2011 IL App (1st) 092834, ¶ 24).

¶ 11 Where, as here, a defendant is found to possess more than 30 grams of cannabis, but less than 500 grams, and the defendant has previously been convicted of this offense, the defendant is guilty of a Class 3 felony. 720 ILCS 550/4(d) (West 2012). In order to sustain defendant's conviction for possession of cannabis, the State had to prove beyond a reasonable doubt that he had knowledge of the presence of the cannabis and that he had the cannabis in his immediate and exclusive possession or control. *People v. Schmalz*, 194 Ill. 2d 75, 82 (2000); 720 ILCS 550/4 (West 2012).

¶ 12 The element of possession may be shown by actual or constructive possession. *People v. Givens*, 237 Ill. 2d 311, 335 (2010). Actual possession does not require present personal touching of the illicit material, but, rather, is "the exercise by the defendant of present personal dominion over the illicit material." *Givens*, 237 Ill. 2d at 343. This court has held that " '[t]he act of dominion may be that defendant had the contraband on his person, that he tried to conceal it, or that he was seen throwing it away.' " *People v. Evans*, 2015 IL App (1st) 130991, ¶26 (quoting *People v. Ray*, 232 Ill.App.3d 459, 461, (1992)). "Where possession has been shown, an

inference of guilty knowledge can be drawn from the surrounding facts and circumstances." *Schmalz*, 194 Ill.2d at 81. It is the role of the trier of fact to resolve the factual question of knowledge and possession or control. *Id.*

¶ 13 After viewing the evidence in the light most favorable to the State, we find that a rational trier of fact could have concluded that defendant possessed the cannabis recovered by the police. Officer Kelly testified that he instructed defendant to approach the police cruiser and, as defendant walked toward the vehicle, he dropped sandwich bags from his "back right side." Officer Kelly stated that there was nothing obstructing his view of defendant, who was approximately 10 feet away from the officers. Kelly stated that there was no other person near defendant when he dropped the bags. The parties stipulated that the bags contained a total of 30.7 grams of cannabis. This evidence was sufficient to prove beyond a reasonable doubt that defendant knowingly possessed the bags of cannabis. See *Evans*, 2015 IL App (1st) 130991, ¶ 27.

¶ 14 Defendant nevertheless argues that Officer Kelly's testimony was improbable because the allegation that he dropped bags of marijuana behind his back while walking toward police runs contrary to common sense and human experience. He argues that this testimony is a classic example of "dropsy" testimony. See *People v. Ash*, 346 Ill. App. 3d 809, 816 (2004) ("A 'dropsy case' is one in which a police officer, to avoid the exclusion of evidence on fourth-amendment grounds, falsely testifies that the defendant dropped the narcotics in plain view (as opposed to the officer's discovering the narcotics in an illegal search)"). He also cites numerous law review articles and federal cases alleging that police often resort to perjury to avoid exclusion of evidence.

¶ 15 We note, initially, that defendant's contentions are essentially asking this court to reweigh the evidence presented at trial and substitute our judgment for that of the trial court. This we cannot do. As mentioned, the "determination of the weight to be given to witnesses' testimony, their credibility, and the reasonable inferences to be drawn from the evidence are the responsibility of the fact finder," which heard the testimony and observed the witnesses. See *Phillips*, 2015 IL App (1st) 131147, ¶ 16.

¶ 16 This aside, we do not believe that it is "improbable or contrary to human experience" for a criminal to attempt to dispose of contraband after becoming aware of police presence. Indeed, Illinois courts frequently deal with such scenarios. See *People v. Comage*, 241 Ill. 2d 139, 142 (2011) (where the defendant threw a crack pipe over a fence while being chased by police); *People v. Pigrenet*, 26 Ill. 2d 224, 225 (1963) (where the defendant dropped foil-wrapped packages of heroin to the ground after being approached by police); *Evans*, 2015 IL (1st) 130991, ¶ 8 (where the defendant threw a bag containing cannabis into a room and shut the door after police ordered him to show his hands and approach the officers); *In re M.F.*, 315 Ill. App. 3d 641,643-44 (2000) (where the defendant threw bags of cocaine off of a roof landing, in plain view of police who told him to remain still). As these cases demonstrate, it is not rare, or even uncommon, for a defendant to attempt to conceal or dispose of evidence while in view of police officers.

¶ 17 In reaching this conclusion, we find defendant's reliance on outside sources, which suggest that police perjury is widespread, unpersuasive. Even if we were to accept as true the proposition that police officers have been known to lie on the stand to avoid the exclusion of evidence, it does not automatically follow that the testimony Officer Kelly was unreliable. See

People v. Moore, 2013 IL App (1st) 110793, ¶¶ 11-12, *vactated on other grounds*, 378 Ill. Dec. 743 (2014) (declining to reject an officer's testimony in the face of similar claims of "dropsy" testimony).

¶ 18 We are likewise unpersuaded by defendant's argument that Officer Kelly's testimony was particularly suspect because he testified that defendant was alone when he first observed him, but, on cross-examination, acknowledged that a police report recounting defendant's arrest references another, unknown person, who was with defendant when the officers arrived in the area. This alleged inconsistency was fully explored at trial when the court allowed defense counsel to cross-examine Officer Kelly on this point. Although Officer Kelly's credibility may have been affected by this inconsistency, it was the responsibility of the trier of fact, in this case the judge, to determine the officer's credibility, the weight to be given to his testimony and to resolve any inconsistencies and conflicts in the evidence. Based on its ruling, and oral pronouncements, the court found Officer Kelly's testimony credible and expressly resolved this inconsistency in favor of the State by noting that "[Officer Kelly] didn't remember another person being near [defendant], but he was clear that at the point that the defendant dropped the items, no one was standing there and that the items were released from the defendant's hand." (H-30) In doing so, the court was not required to disregard the inferences that flow from the evidence or search out all possible explanations consistent with a defendant's innocence and raise them to a level of reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶71 (citing *People v. Wheeler*, 226 Ill. 2d 92,117 (2007)).We will not substitute our judgment for that of the trier of fact on these matters. As mentioned, this court will reverse a defendant's conviction only when

the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt. *Lloyd*, 2013 IL 113510, ¶ 42. This is not one of those cases.

¶ 19 Defendant next challenges the trial court's assessment of certain fines and fees. However, he first contends that the court's fines, fees, and costs order contains a mathematical error.

¶ 20 In setting forth this argument, defendant acknowledges that he did not challenge the fines and fees order in a post-sentencing motion. See *People v. Thompson*, 238 Ill. 2d 598, 611 (2010) ("To preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion"). However, the State does not argue forfeiture, and has therefore forfeited the claim that the issues raised by defendant are forfeited. *See People v. Whitfield*, 228 Ill. 2d 502, 509 (2007) (the State may forfeit the claim that an issue defendant raises is forfeited if the State does not argue forfeiture on appeal). Further, our supreme court has held that claims for monetary credit under section 110-14 "may be raised at any time during court proceedings" (*People v. Caballero*, 228 Ill. 2d 79, 88 (2008)), and we may modify a fines and fees order without remanding the case to the trial court pursuant to Illinois Supreme Court Rule 615(b)(1). See *People v. Bryant*, 2016 IL App (1st) 140421, ¶ 22.

¶ 21 We review the propriety of a trial court's imposition of fines and fees *de novo*. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 60. A defendant incarcerated on a bailable offense who does not supply bail and against whom a fine is levied is allowed a credit of $5 for each day of presentence incarceration. 725 ILCS 5/110-14(a) (West 2012). "The credit for presentence incarceration can only reduce fines, not fees." *People v. Jones*, 223 Ill. 2d 569, 599 (2006). A "fine" is punitive in nature and is imposed as part of a sentence on a person convicted of a criminal offense. *People v. Graves*, 235 Ill. 2d 244, 250 (2009). A "fee" is a charge that seeks to

recoup expenses incurred by the State in prosecuting the defendant. *Id*. The legislature's label for a charge is strong evidence of whether the charge is a fee or a fine, but the most important factor is whether the charge seeks to compensate the state for any costs incurred as the result of prosecuting the defendant. *Id*.

¶ 22 Defendant first argues, the State concedes, and we agree that the fines and fees order contains a mathematical error. The order indicates that defendant was initially assessed $974 of fines, fees, and costs. The order assessed $550 of fines, to which $575 of defendant's presentence credit was applied (115 days of presentence custody, multiplied by $5 per day credit amounts to a total of $575). However, the order indicates that defendant still owes $474 in fees. This is an error, as defendant has $424 of fees remaining ($974 - $550 of offset fines = $424). We also note that defendant has $25 of presentence custody credit remaining.

¶ 23 Having determined that the order should indicate that defendant had $424 of outstanding fees, we address the remainder of defendant's claims. Defendant next contends, the State concedes, and we agree that the $5 Electronic Citation fee (720 ILCS 105/27.3e (West 2012)) was erroneously assessed against him. The statute authorizing this fee dictates that it shall be paid by a defendant "in any traffic, misdemeanor, municipal ordinance, or conservation case upon a judgment of guilty or grant of supervision." *Id*. As defendant was convicted of a felony offense, this fee was erroneously assessed against him. Accordingly, we vacate the $5 Electronic Citation fee. *See People v. Brown*, 2017 IL App (1st) 142877, ¶ 68 (vacating an Electronic Citation fee where defendant was convicted of a felony.)

¶ 24 Defendant next contends that certain "fees" assessed against him operate as fines and, therefore, should be offset by his remaining presentence credit. Defendant contends, and the

State agrees, that he has $25 of presentence credit remaining after his $575 credit was used to offset $550 of fines. He further argues that the $15 State Police Operations fee (705 ILCS 105/27.3a(6) (West 2012)), $50 Court System fee (55 ILCS 5/5-1101(c) (West 2012)), $2 Public Defender Records Automation fee (55 ILCS 5/3-4012 (West 2012)), $2 State's Attorney Records Automation fee (55 ILCS 5/4-2002.1(c) (West 2012)), and $10 Probation and Court Services Operations fee (705 ILCS 105/27.3a(1.1) (West 2012)) operate as fines and should be subject to offset by his presentence incarceration credit.

¶ 25 The State concedes that the $15 State Police Operations fee (705 ILCS 105/27.3a(6) (West 2012)), $50 Court System fee (55 ILCS 5/5-1101(c) (West 2012)) operate as fines and should be offset by defendant's presentence credit. This court has previously determined that these "fees" operate as fines. *People v. Moore*, 2014 IL App (1st) 112592-B, ¶ 46 (State Police Operations fee operates as a fine); *People v. Bingham*, 2017 IL App (1st) 143150, ¶ 40 (Court System fee operates as a fine that is offset by presentence credit). However, as defendant only has $25 of presentence credit remaining, only the $15 State Police Operations fee is completely offset; the $50 Court system is reduced by defendant's remaining $10 of presentence custody credit.

¶ 26 The State argues and, in his reply brief, defendant concedes that because his presentence custody credit is exhausted after applying it to the $15 State Police Operations fee and the $50 Court System fee, his remaining claims for presentence credit are moot and we need not address them. We agree with the parties, and decline to address the remainder of defendant's claims. See *In re Hernandez*, 239 Ill. 2d 195, 201(2010) ("An appeal is moot when intervening events have rendered it impossible for the reviewing court to grant effectual relief to the complaining party").

¶ 27 For the foregoing reasons, we vacate the $5 Electronic Citation fee assessed against defendant. We find that the $15 State Police Operations fee and $50 Court System fee operate as fines and are eligible to be offset by defendant's presentence credit. Taking into account the mathematical error in the fines in fees order, we order the clerk of circuit court, pursuant to Illinois Supreme Court Rule 615(b)(1), to correct the and fines and fees order to indicate that defendant has $394 in outstanding assessments.

¶ 28 For the reasons stated, we affirm the judgment of the circuit court of Cook County in all other respects.

¶ 29 Affirmed as modified.