2017 IL App (1st) 143888U

No. 1-14-3888

Third Division

May 10, 2017

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. 14 CR 10407
	)	
JEROME MOREHEAD,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant affirmatively waived his claim for review by stipulating to the forensic scientist's testimony. The evidence was sufficient to prove defendant guilty beyond a reasonable doubt of the offense of delivery of 1 gram or more but less than 15 grams of heroin. The fines, fees and costs order is modified.

¶ 2 Following a bench trial, defendant Jerome Morehead was convicted of delivery of a controlled substance and, based on his criminal history, sentenced to a Class X term of seven

years in prison.[1] On appeal, defendant contends that the State did not prove him guilty of delivery of more than 1 gram but less than 15 grams of heroin beyond a reasonable doubt where the stipulated testimony of the State's forensic expert did not establish that she individually tested the contents of each of the three bags of suspect heroin at issue. Defendant also challenges the assessed fines and fees. For the reasons below, we affirm defendant's conviction but order modification of the fines, fees, and costs order.

¶ 3 Defendant's conviction arose from an incident that took place on May 13, 2014. At trial, Chicago police officer Vincent Francone testified that, at about 7:11 p.m. on the day in question, he and his partner, Officer Michael Mulcahy, were on patrol in an unmarked car near 1254 South Sawyer Avenue, in Chicago, when Officer Francone saw defendant "rushing" out of a building to a minivan parked outside. Defendant opened the rear passenger side door of the minivan and got into it.

¶ 4 The officers drove to the minivan and stopped behind it. Officer Francone ran alongside the minivan and looked into the rear passenger side door, which was open. He saw defendant sitting in the rear seat directly behind the front passenger seat. Codefendant Adrienne L. Booker-Brown was sitting in the front passenger seat and was close enough to defendant to be able to reach his hand. When Officer Francone was about eight feet away, he saw defendant holding United States paper currency in his left hand and "tendering" three ziplock bags, which contained a "white powder substance," with his right hand to Booker-Brown. Then, Officer Francone heard defendant say, "oh, shit, police." Officer Francone and Officer Mulcahy, who was on the driver's side, announced their office. Officer Francone stepped toward Booker-

[1] Codefendant Adrienne L. Booker-Brown was tried jointly with defendant, but is not a party to this appeal.

Brown, who put the ziplock bags in her mouth, and told defendant and Booker-Brown to exit the minivan.

¶ 5 The officers took defendant and Booker-Brown out of the minivan and put them in handcuffs. Officer Francone instructed Booker-Brown to spit the items out of her mouth, and she complied. The three ziplock bags were clear on one side and red and black on the other side and contained a "white powder substance," which Officer Francone suspected to be heroin. Officer Mulcahy recovered $30 in United States currency from defendant. Officer Francone put the three ziplock bags in his pocket and transported them to the police station, where they were inventoried.

¶ 6 The State presented a stipulation between the parties that Linda Jenkins, a forensic scientist from the Illinois State Police Crime Lab qualified as an expert witness in forensic science, would have testified that she received the three items that were inventoried by Officer Francone in a heat sealed condition. Jenkins would have also testified as follows: "[W]hen she received these three items she tested them using equipment that was properly calibrated and within a reasonable degree of scientific certainty, she would testify that these three items tested positive for 1.3 grams of heroin."

¶ 7 Defendant called James L. Hillard to testify on his behalf. On the day in question, he, Booker-Brown, and Booker-Brown's friend, Tyrone, were parked in a minivan near 1234 South Sawyer. Defendant approached, got into the backseat of the minivan, sat down, and closed the sliding door. Hillard never saw defendant and Booker-Brown exchange anything and never saw defendant with any money or small red or black ziplock bags. After defendant shut the door, two police officers "very quickly" approached the minivan, one from the driver's side and the other

from the passenger's side. When the officer approached the passenger's side door, which was closed, Hillard heard the officer say, "open the door." Hillard unlocked all the doors, got out of the minivan, and was placed in handcuffs. Hillard testified that in 2002, he was convicted of a felony for the possession of a controlled substance.

¶ 8 Following closing argument, the trial court found defendant guilty of the offense of delivery of a controlled substance of 1 gram or more but less than 15 grams of heroin. The trial court denied defendant's motion for a new trial and, based on his criminal history, sentenced him to a Class X term of seven years in prison.

¶ 9 Defendant contends on appeal that the State did not prove that the total amount of heroin recovered from all three bags was over one gram because the stipulated testimony of the State's forensic expert, Linda Jenkins, did not establish that she tested a sample from all three bags in order for the contents of each bag to be included in the combined total weight of the heroin. Defendant requests that we reduce his conviction to delivery of less than one gram of heroin, which would reduce his offense from a Class 1 offense to a Class 2 offense, and that we reduce his seven-year prison sentence to six years, which would be the minimum sentence for a Class X offender.

¶ 10 On appeal, when reviewing the sufficiency of the evidence, the question 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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). It is the fact finder's responsibility "to determine the credibility of the witnesses and draw reasonable inferences from the evidence." *People v. Robinson,* 167 Ill. 2d 397, 413 (1995). On review, all reasonable inferences from the record must

be drawn in favor of the prosecution (*People v. Saxon*, 374 Ill. App. 3d 409, 416 (2007)) and we will only reverse a conviction if the evidence is "so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt" (*People v. Green*, 256 Ill. App. 3d 496, 500 (1993)).

¶ 11 "When a defendant is charged with possession of a specific amount of an illegal drug with intent to deliver and there is a lesser included offense of possession of a smaller amount, then the weight of the seized drug is an essential element of the crime and must be proved beyond a reasonable doubt." *People v. Jones*, 174 Ill. 2d 427, 428-29 (1996). Here, defendant was convicted of the offense of delivery of a controlled substance in that he knowingly delivered 1 gram or more but less than 15 grams of heroin, which is a Class 1 felony. 720 ILCS 570/401(c)(1) (West 2014). The Code of Criminal Conduct also contains an offense for the delivery of less than one gram of heroin, which is a Class 2 felony. 720 ILCS 570/401(d) (West 2014). Therefore, because the class of defendant's offense depends on the amount of controlled substance defendant was found to have delivered, the weight of the seized substance is an essential element of the offense. See *People v. Harden*, 2011 IL App (1st) 092309, ¶ 40.

¶ 12 To render an opinion as to the makeup of the seized substance as a whole, a chemist need not test every sample that was seized. *Jones*, 174 Ill. 2d at 429. "Rather, random testing is permissible when the seized samples are sufficiently homogenous so that one may infer beyond a reasonable doubt that the untested samples contain the same substance as those that are conclusively tested." *Id.* However, if the substance "is not sufficiently homogenous, then a portion from each container or sample must be tested to determine the substance in each container or sample." *People v. Clinton*, 397 Ill. App. 3d 215, 221 (2009). If the recovered substance is "in the form of powder in separate packets, a sufficient number of the seized packets

must be tested to establish that the defendant possessed the requisite amount of the illegal drug to prove the weight element beyond a reasonable doubt." *People v. Fountain*, 2011 IL App (1st) 083459-B, ¶ 14. When the contents of the packages are commingled before they are tested, then the test results are insufficient to support the weight element beyond a reasonable doubt. *Harden*, 2011 IL App (1st) 092309, ¶ 40.

¶ 13 As an initial matter, by stipulating to Jenkins's testimony, we conclude that defendant has affirmatively waived his claim for review. *People v. Woods*, 214 Ill. 2d 455, 475 (2005) ("A defendant forfeits any issue as to the impropriety of the evidence if he procures, invites, or acquiesces in the admission of that evidence."). Defendant argues that he did not forfeit his claim because he "raises a challenge to the sufficiency of the evidence as to the overall weight of the narcotics, based on the State's failure to show that its chemist tested each of the three bags individually." We disagree. Jenkins's stipulation provides, in part, that she "would testify that these three items tested positive for 1.3 grams of heroin." Thus, defendant stipulated to the identity of the controlled substance, heroin, and to its total weight, 1.3 grams. As such, because defendant stipulated to the identity of the controlled substance, defendant is attacking the foundation for the proof of that element, which is a challenge to admissibility and not to the sufficiency of the evidence. *People v. Durgan*, 346 Ill. App. 3d 1121, 1130-31 (2004) (" 'Arguably, sufficiency involves absence of proof of a basic element of the crime. Defendant here is not challenging the lack of proof as to the existence of an element of the crime, since [the expert] testified to the identity of the controlled substance. The challenge is to the failure to lay a proper foundation for the proof of that element. This goes to a determination of its admissibility, rather than sufficiency of the evidence presented.' " (quoting *People v. DeLuna*, 334 Ill. App. 3d

1, 20 (2002))). Further, because the parties stipulated that "these three items tested positive for 1.3 grams of heroin," the stipulation included all matters that Jenkins could and should have testified about, including what tests she performed. *Durgan*, 346 Ill. App. 3d at 1131-32 ("[B]ecause a stipulation is a substitute for the witness's actual testimony, all of those matters that the witness could have and should have testified about are encompassed by the stipulation. Thus, if a defendant and the State agree to stipulate that the forensic chemist tested a substance and determined its weight and content, they eliminate any issue as to that expert's testimony, such as *** what tests she performed on the substance.").

¶ 14 Accordingly, we conclude that because the parties stipulated that the three bags tested positive for heroin in the amount of 1.3 grams, defendant cannot challenge on appeal the foundation for Jenkins's testimony. *People v. Besz*, 345 Ill. App. 3d 50, 57 (2003); *Durgan*, 346 Ill. App. 3d at 1132 ("we conclude that because defendant stipulated to [the expert's] testimony that the substance contained 1.8 grams of cocaine, he cannot challenge on appeal the foundation for [the expert's] testimony").

¶ 15 Additionally, we note that the record indicates that Jenkins's stipulated testimony was not disputed at trial, closing arguments, or in his posttrial motion, and the stipulation is the only evidence regarding the identity and weight of the three recovered bags. Because the parties did not address the testimony regarding the identity and weight other than when it was presented as a stipulation, the record supports that the parties agreed to remove from the case the issues regarding the weight and identity of the heroin. *People v. Miller*, 218 Ill. App. 3d 668, 673 (1991) (where the defendant argued the chemist commingled the contents of the seized packages before she determined the substance contained in each package, the court affirmed the

defendant's conviction, noting that the stipulated testimony of the two chemists was the only evidence regarding the weight and contents of the seized substances and that, "we too decline to subject the statement 'having removed the white powder from the containers' to further scrutiny since the parties stipulated to this testimony and other than the stipulated testimony, never addressed the issue at trial"); *People v. Williams*, 200 Ill. App. 3d 503, 516 (1990) ("the result of the parties' agreement to present the chemist's testimony by stipulation, in such a brief and summary fashion, was essentially to remove from the case any issue of the expert's qualifications, the chain of custody, or the weight and chemical composition of the suspect materials").

¶ 16 Notwithstanding our conclusion that defendant affirmatively waived his claim for review by stipulating to Jenkins's testimony, even if we were to analyze defendant's challenge as a sufficiency of the evidence issue, our conclusion does not change.

¶ 17 As discussed above, the parties stipulated that Jenkins would testify that she tested the three items and "that these three items tested positive for 1.3 grams of heroin." Defendant asserts Jenkins's stipulation did not state that she individually tested the contents of each of the three bags, or whether she commingled the contents and tested the bags together, and that therefore, the evidence was insufficient to prove he delivered more than one gram of heroin. To support his argument, defendant cites *Jones*, 174 Ill. App. 2d at 427, *People v. Adair*, 406 Ill. App. 3d 133 (2010), and *Clinton*, 397 Ill. App. 3d at 215. However, these cases are distinguishable.

¶ 18 In *Jones*, the evidence expressly indicated that only two out of the five packets seized from the defendant were tested for the presence of cocaine. *People v. Jones*, 276 Ill. App. 3d 926, 927 (1995). The supreme court affirmed the appellate court's reduction of the defendant's

conviction, noting that "[w]hether the untested packets in the instant case may have contained cocaine or mere look-alike substances is pure conjecture." *Jones*, 174 Ill. 2d at 430. Here, unlike *Jones*, Jenkins's stipulation did not expressly provide that she did not test all three bags individually to determine whether each contained heroin.

¶ 19 In *Adair*, the defendant was charged with unlawfully possessing methylenedioxymethamphetamine (MDMA) and methamphetamine after he was found to be in possession of a bag of pills, which were of various colors, and powder. *Adair*, 406 Ill. App. 3d at 134-35. At trial, the forensic scientist testified that she combined the pills, pill fragments, and the powder together, weighed them, crumbled portions of each individual pill and fragment into a representative sample, and then took a smaller sample from this mix to test for the presence of each controlled substance. *Id.* at 135-36, 139. The appellate court reduced the defendant's conviction, noting that "the single sampling method used by the chemist does not support an evidentiary finding beyond a reasonable doubt that *each* of the pills and fragments the defendant possessed contained the two controlled substances." (Emphasis in original.) *Id.* at 142. Here, in contrast, only a single controlled substance was at issue and there was no affirmative testimony that the packets had been combined, crumbled together, or commingled.

¶ 20 Finally, in *Clinton*, the appellate court reduced the defendant's conviction where the forensic chemist testified that he combined 6 of the 13 packets of heroin before he determined whether each packet actually contained heroin. *Clinton*, 397 Ill. App. 3d at 219, 223. Unlike *Clinton*, Jenkins's stipulated testimony does not state that she combined the substances before she tested each bag for the presence of heroin.

¶ 21 Accordingly, we are not persuaded by *Jones*, *Adair*, or *Clinton.* Rather, viewing Jenkins's stipulated testimony in the light most favorable to the State, we would find that the evidence is sufficient to support that Jenkins tested each bag individually for the presence of heroin, and therefore, that the combined weight of heroin from each bag was 1.3 grams. See *Harden*, 2011 IL App (1st) 092309, ¶ 42; See *Fountain*, 2011 IL App (1st) 083459-B, ¶ 23.

¶ 22 Furthermore, we will not presume that Jenkins performed an improper procedure. *Harden*, 2011 IL App (1st) 092309, ¶ 43 ("The record may not expressly state whether [the forensic scientist] tested all 20 bags of 'the chunky substance' or whether he commingled the contents before testing. Where the record is ambiguous, however, 'we will not presume that an improper procedure was performed.' " (quoting *Miller*, 218 Ill App. 3d at 673)). Rather, it is the fact finder's responsibility to draw inferences from ambiguous testimony, and, on appeal, when reviewing the sufficiency of the evidence, we must consider the evidence in the light most favorable to the State. *Fountain*, 2011 IL App (1st) 083459-B, ¶¶ 25-26 ("Under our system, we allow the jury to decide on the inferences to be drawn from ambiguous testimony. *** Thus, it falls to the defendant to challenge ambiguous testimony during the course of the trial or else risk the application of this rule on appeal."). Here, Jenkins's stipulation provides that "when she received these three items she tested them using equipment that was properly calibrated" and that "these *three items* tested positive for 1.3 grams of heroin." (Emphasis added.) Given that the stipulation references the three bags individually as "these three items" and that it expressly states that there are "three items," the trial court could have reasonably inferred that Jenkins considered the three bags individually and that she tested each of them separately for the presence of heroin. *Durgan*, 346 Ill. App. 3d at 1132 ("Giving the stipulation its natural and

ordinary meaning, we conclude that it adequately shows that [the forensic chemist] tested all 18 of the individually wrapped packages."); *Harden*, 2011 IL App (1st) 092309, ¶ 43 ("Where the evidence presented is susceptible to conflicting inferences, 'it is best left to the trier of fact for proper resolution.' ") (quoting *People v. McDonald*, 168 Ill. 2d 420, 447 (1995))).

¶ 23 Moreover, there is no evidence that Jenkins commingled the contents before testing each bag. Thus, the trial court could have reasonably concluded that Jenkins tested the contents of each bag separately and that the combined weight of 1.3 grams tested positive for heroin. *Fountain*, 2011 IL App (1st) 083459-B, ¶¶ 28 ("the rules regarding inferences do not permit the defendant's assertion that under the reasonable doubt standard we must draw from ambiguous testimony only the inference that favors the defendant"); *Harden*, 2011 IL App (1st) 092309, ¶ 43 (where the State's expert forensic scientist did not explicitly testify that he tested all 20 packets recovered from the defendant for the presence of a controlled substance or that the contents of the 20 packets were not commingled before they were tested, the court affirmed the defendant's conviction, stating, "Here, the jury could reasonably conclude from [the forensic scientist's] testimony that he tested a sample of substance from each package and the combined weight of the substances, 1.2 grams, tested positive for cocaine.").

¶ 24 Defendant cites *People v. Maurice*, 31 Ill. 2d 456 (1964), to support his argument that, when the State introduces evidence through stipulation, the reviewing court must not assume or infer facts that are not in the stipulation. Defendant argues that because Jenkins's stipulation did not state that she tested the contents of the three bags individually, the State failed to prove him guilty beyond a reasonable doubt. In *Maurice*, the reviewing court held that there was no link between the controlled substance introduced into evidence and the defendant, as the stipulation

presented by the State failed to connect the link between the substance the chemist analyzed with the packets that were recovered from the defendant. *Maurice*, 31 Ill. 2d at 458. Unlike *Maurice*, here, defendant is not challenging the chain of custody between the three items recovered from the incident and the three items Jenkins tested. Rather, he argues that the stipulation is insufficient to prove beyond a reasonable doubt that Jenkins tested each bag individually for heroin. Accordingly, we do not find *Maurice* persuasive.

¶ 25 In sum, we find that by entering into Jenkins's stipulation, defendant affirmatively waived his claim for review. However, even if we were to assume that defendant's claim is a challenge to the sufficiency of the evidence, viewing Jenkins's stipulated testimony in the light most favorable to the State, we would conclude that the evidence was sufficient to support that Jenkins tested the three bags separately for the presence of heroin and that the combined weight of the heroin from each bag was 1.3 grams. Therefore, we would conclude that based on the evidence presented at trial, any rational trier of fact could have found defendant guilty of the offense of delivery of 1 gram or more but less than 15 grams of heroin, and that the evidence was not "so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *Green*, 256 Ill. App. 3d at 500.

¶ 26 Defendant next contends, and the State concedes, that this court must vacate four assessments imposed by the trial court and offset one assessment for the time he spent in presentence custody.

¶ 27 Defendant did not raise this challenge in the trial court but urges us to review it under the plain error doctrine. A sentencing error may affect a defendant's substantial rights and thus, we may review it for plain error. *People v. Akins*, 2014 IL App (1st) 093418-B, ¶ 20. On appeal, the

reviewing court may modify the fines and fees order without remanding the case back to the circuit court. Ill. S. Ct. R. 615(b)(1) (eff. Jan. 1, 1967). The propriety of court-ordered fines and fees is reviewed *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 28 Defendant argues, and the State concedes, that we should vacate the $5 Electronic Citation Fee. Section 105 of the Clerk of Courts Act provides that that the circuit court clerk is permitted to collect an electronic citation fee in "any traffic, misdemeanor, municipal ordinance, or conservation case upon a judgment of guilty or grant of supervision." 705 ILCS 105/27.3e (West 2014). The electronic citation fee does not apply to felonies. *People v. Moore*, 2014 IL App (1st) 112592-B, ¶ 46. Defendant was convicted of the offense of delivery of 1 or more but less than 15 grams of heroin, which is a Class 1 felony. 720 ILCS 570/401(c) (West 2014). Therefore, we vacate the $5 Electronic Citation Fee.

¶ 29 Defendant argues, and the State concedes, that we should vacate the $100 Methamphetamine Law Enforcement Fund fine and the $25 Methamphetamine Drug Traffic Prevention Fund fine. Pursuant to section 5-9-1.1.5(a) of the Unified Code of Corrections, these fines apply "when a person has been adjudged guilty of a methamphetamine related offense." 730 ILCS 5/5-9-1.1-5(a) (West 2014). Here, defendant was convicted of the offense of delivery of heroin, which is not a methamphetamine-related offense. Therefore, we vacate both methamphetamine assessments.

¶ 30 Defendant argues, and the State concedes, that we should vacate the $250 DNA analysis fee. Our supreme court has held that the DNA analysis fee may not be assessed on a defendant who has previously submitted a DNA sample based on a prior conviction. *People v. Marshall*, 242 Ill. 2d 285, 297, 301-02 (2011). Where a defendant has been convicted of prior felonies after

January 1, 1998, the date the DNA requirement went into effect, we presume this mandatory requirement was imposed following at least one of the defendant's prior convictions. *People v. Leach*, 2011 IL App (1st) 090339, ¶ 38. Here, defendant was convicted of "Manufacture Delivery Controlled Substance" in 1999 and "Possession of Controlled Substance" in 2010, both of which are felonies. As such, we presume defendant has already submitted his DNA. Therefore, we vacate the $250 DNA analysis fee.

¶ 31 Defendant argues, and the State concedes, that we should vacate the $5 Court System Fee. This fee is applicable when there is "a judgment of guilty or a grant of supervision for violation of the Illinois Vehicle Code other than Section 11-501 or violations of similar provisions contained in county or municipal ordinances." 55 ILCS 5/5-1101(a) (West 2014). Here, because defendant was not convicted of a violation of the Illinois Vehicle Code or a similar provision contained in the county or municipal ordinances, we vacate the $5 Court System Fee.

¶ 32 Defendant argues, and the State concedes, that the $15 State Police Operations Fee imposed on him is considered a "fine" and that he is entitled to presentence incarceration credit toward this fine. Pursuant to section 110-14(a) of the Code of Criminal Procedure, defendant is entitled to a credit of $5 toward his fines for each day he was incarcerated prior to his sentencing. 725 ILCS 5/110-14(a) (West 2014). A "fine" is considered to be "part of the punishment for a conviction," and a "fee" is imposed to "recoup expenses incurred by the state—to 'compensat[e]' the state for some expenditure incurred in prosecuting the defendant." *People v. Jones*, 223 Ill. 2d 569, 582 (2006). Because the $15 State Police Operations Fee does not reimburse the State for expenses incurred in defendant's prosecution, this charge is considered a "fine." *People v.*

Milsap, 2012 IL App (4th) 110668, ¶ 31. The fines, fees, and costs order provides that defendant was credited for 184 days of presentence custody, but the order does not reflect that he received credit toward this $15 fine. Therefore, we order the clerk of the circuit court to modify the judgment to reflect that defendant is entitled to $15 credit.

¶ 33 In sum, we vacate the following charges: (1) the $5 Electronic Citation Fee; (2) the $100 Methamphetamine Law Enforcement Fund fine; (3) the $25 Methamphetamine Drug Traffic Prevention Fund fine; (4) the $250 DNA analysis fee; and (5) the $5 Court System fee. In addition, the fines, fees, and costs order should be modified to reflect that defendant is entitled to presentence custody credit toward the $15 State Police Operations Fee imposed on him.

¶ 34 For the reasons explained above, we affirm defendant's conviction and order modification of the fines, fees, and costs order.

¶ 35 Affirmed; fines, fees, and costs order modified.