FIFTH DIVISION
September 22, 2017

No. 1-15-0493

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.	)	13 CR 22681
	)	
MARIO GIBBS,	)	Honorable
	)	Thomas V. Gainer Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *HELD*: The evidence was sufficient to prove defendant guilty of possession of a controlled substance with intent to deliver. Defendant was not entitled to presentence custody credit to be applied against certain assessments imposed during sentencing.

¶ 2 Following a bench trial, defendant Mario Gibbs was found guilty of possession of a controlled substance (3.9 grams of heroin) with intent to deliver. After denying defendant's motion for a new trial, the trial court sentenced defendant to four years' imprisonment. The court also assessed fines and fees totaling $2,714 and credited defendant with 438 days of presentence incarceration. Defendant raises a number of issues on appeal none of which warrant reversal of his conviction or sentence.

¶ 3 BACKGROUND

¶ 4 The following evidence was presented at trial. On November 5, 2013, at approximately 11:39 a.m., plainclothes police officers Ricardo Sanchez and his partner Montoya were on patrol in an unmarked squad car in the vicinity of 734 East 82nd Street in Chicago. Officer Sanchez, from his position in the front passenger seat, observed a grey four-door automobile parked on the street more than twelve inches from the curb, in a tow zone. The officers pulled their squad car alongside the parked automobile to conduct a field interview. There were three people in the automobile.

¶ 5 Officer Sanchez exited his squad car and approached the automobile's driver's side door. When he reached the door, he observed the defendant, who was seated in the front passenger seat, use his left hand and place a clear plastic bag containing a white substance onto the vehicle's center console. Officer Sanchez claimed that when he made this observation, he was about "arm's length" from the defendant and his view was not obstructed. The officer described the plastic bag as "a clear plastic bag with a white substance, the approximate size of a golf ball." He described the vehicle's center console as an "open console," approximately three to four inches deep.

¶ 6 After observing defendant's actions, officer Sanchez alerted his partner and radioed for assisting officers, who shortly arrived on the scene. The defendant and the two other occupants in the automobile were ordered out of the vehicle and patted down. During a search of the vehicle, officer Montoya recovered a bag of suspect narcotics from the center console. The bag was the same size, shape, and appearance as the bag officer Sanchez had observed defendant place onto the console.

¶ 7 Defendant was placed in custody and transported to the police station where a custodial search of his person uncovered $345. The parties entered into two stipulations. First, the parties stipulated that if officer Montoya was called to testify, he would testify that "on November 5, 2013, he recovered a plastic bag, which contained 18 Ziplock bags of suspect heroin, which he kept within his safe keeping and control from the time of recovery until the inventory of those items." Second, the parties stipulated that if Illinois State Police forensic chemist Fella Johnson was called to testify, she would testify that she received a sealed inventory envelope under inventory number 13040390 containing 18 packages of powder substance. After performing tests on the contents of the 18 recovered items, it was her expert opinion that the contents tested positive for the presence of heroin weighing 3.9 grams.

¶ 8 The State then rested its case. The defense presented no witnesses. The trial court found defendant guilty of possession of a controlled substance with intent to deliver. The court determined that officer Sanchez's testimony had been "clear and convincing." The court added that the "way the items were packaged is indicative of possession with intent to deliver, and the fact the defendant had a considerable sum of money on him is further evidence of his intent to deliver."

¶ 9 After denying defendant's motion for a new trial, the trial court sentenced defendant as previously stated. This appeal followed.

¶ 10 ANALYSIS

¶ 11 Defendant first contends the evidence was insufficient to prove him guilty beyond a reasonable doubt of possession of a controlled substance with intent to deliver. We disagree.

¶ 12 A criminal conviction will not be set aside on grounds of insufficient evidence unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of defendant's guilt. *People v. Jackson*, 232 Ill. 2d 246, 280 (2009). When reviewing the sufficiency of the evidence in a criminal case, we must determine "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." *People v. Cooper*, 194 Ill.2d 419, 430-31 (2000). In reviewing a challenge to the sufficiency of the evidence, it is not our role to retry the defendant; rather, it is for the trier of fact to determine the credibility of the witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence. *People v. Enis*, 163 Ill. 2d 367, 393 (1994).

¶ 13 Defendant claims the evidence was insufficient to prove him guilty beyond a reasonable doubt of possession of a controlled substance with intent to deliver because Officer Sanchez's version of events leading up to his arrest was contrary to human experience and too implausible to be believed. Specifically, defendant argues that it is implausible to believe he would have placed illegal narcotics on the vehicle's center console while officer Sanchez stood watching right outside the driver's side window. We disagree and do not believe that it necessarily runs counter to human experience that defendant would attempt to discard the illegal narcotics, in the fashion as alleged, when he was suddenly confronted by the police.

¶ 14 It does not defy common sense that defendant would abandon the heroin and place it on the vehicle's center console, when suddenly confronted by police officers where such conduct could reasonably be seen as an attempt to surreptitiously relinquish possession of the illegal narcotics before officers inevitably found them on his person. Maybe the defendant assumed that the police were not close enough to the vehicle to observe him placing the narcotics on the center console or maybe he assumed that the depth of the console was deep enough to hide the narcotics from view of the officers. In any event, it is not our function to speculate as to why defendant decided to place the illegal narcotics on the vehicle's center console.

¶ 15 As our supreme court has recognized, "[f]ar from being contrary to human experience, cases which have come to this court show it to be a common behavior pattern for individuals having narcotics on their person to attempt to dispose of them when suddenly confronted by authorities." *People v. Henderson*, 33 Ill. 2d 225, 229 (1965) (and cases cited therein). In addition, this court recently rejected arguments similar to those defendant raises here in *People v. Moore*, 2014 IL App (1st) 110793-B, ¶ 10, (defendant's conduct in removing handgun from his waistband and kicking it under a bush while officers were nearby was consistent with his situation and not improbable) *vacated on other grounds*, 2016 IL 117919.

¶ 16 Defendant's arguments essentially amount to no more than an attack on the credibility of officer Sanchez's testimony and the weight to be given his testimony. In considering a challenge to the sufficiency of the evidence, it is not our function to substitute our judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of the witnesses. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009). Rather, the trier of fact, in this case the trial court, was responsible for determining the weight to be given to the officer's testimony, resolving

conflicts and inconsistencies in the evidence, and drawing reasonable inferences from the testimony. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006).

¶ 17 In this case the trial court observed officer Sanchez while he testified and specifically determined that his testimony was "clear and convincing." We thus, have no basis for substituting our judgment for that of the trial court on this matter. And consequently, we decline to disturb the trial court's judgment.

¶ 18 For these same reasons, we reject defendant's related argument that officer Sanchez's account of the defendant's conduct amounted to "dropsy" testimony, which was inherently incredible and suspect. "Dropsy" testimony is testimony given by a police officer falsely claiming that a defendant dropped an illegal substance in plain view; the testimony is given in an attempt to avoid the exclusion of evidence obtained in violation of the defendant's fourth amendment rights against unreasonable search and seizure. 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))."

¶ 19 This is not a dropsy case. The trial court determined that officer Sanchez's testimony was "clear and convincing," and we cannot say that the court had any reason to disbelieve the officer's testimony. We cannot conclude that the officer's testimony was inherently incredible. In sum, when viewing the evidence presented in the light most favorable to the prosecution, we find that the State sustained its burden of establishing that the defendant was guilty of possession of a controlled substance with intent to deliver beyond a reasonable doubt.

¶ 20 Defendant next argues that even if we find the evidence was sufficient to establish his possession of the recovered narcotics, his conviction should nevertheless be reduced to simple

possession because there was insufficient evidence that he intended to deliver the 3.9 grams of heroin, an amount he claims is consistent with personal use. Again, we disagree.

¶ 21 Direct evidence of the intent to deliver a controlled substance is rare and is therefore usually established by circumstantial evidence such as the nature, quantity, and manner in which the narcotics are packaged. *People v. Robinson*, 167 Ill. 2d 397, 408 (1995). Other nonexclusive factors include the level of purity of the confiscated narcotics, as well as the defendant's possession of weapons, large amounts of cash, police scanners, beepers, and drug paraphernalia. *Id*. The issue of whether the evidence was sufficient to prove intent to deliver is made on a case-by-case basis according to the facts. *Id*. at 412-13.

¶ 22 Viewing the evidence in the light most favorable to the prosecution, as we must, we find that the evidence was sufficient to establish the intent-to-deliver element of the charged offense. Evidence concerning the manner in which the confiscated narcotics was packaged was sufficient to establish defendant's intent to deliver where the narcotics were recovered in a plastic bag containing 18 separate smaller ziplock bags each of which contained suspect heroin. See, *e.g.*, *People v. Pavone*, 241 Ill. App. 3d 1001, 1005 (1993) (rational trier of fact could have found beyond a reasonable doubt that defendant intended to deliver cocaine where the police recovered, among other things, a clear plastic bag containing 10 smaller clear plastic bags each filled with white powder and 28 individual tin foil packets also filled with white powder).

¶ 23 The State's circumstantial evidence of intent to deliver was sufficient to support the defendant's conviction of possession of heroin with intent to deliver. Accordingly, defendant's challenge to the sufficiency of the evidence fails.

¶ 24 Finally, the defendant contends that various assessments the trial court imposed against him at the time of sentencing are fines, rather than fees, which should have been offset by his

presentence custody credit. Under section 110-14(a) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/110-14(a) (West 2010)), 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 custody. The presentence custody credit applies only to reduce fines, not fees. *People v. Jones*, 223 Ill. 2d 569, 599 (2006). "The central characteristic that separates a fee from a fine is that a 'fee' is intended to reimburse the state for a cost incurred in the defendant's prosecution, whereas a 'fine' is punitive in nature, and is part of the punishment for a conviction." *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 63.

¶ 25 Contrary to the State's assertion, defendant's claims were not forfeited, since an application for monetary credit under section 110-14(a) of the Code may be raised for the first time on appeal. *People v. Woodard*, 175 Ill. 2d 435, 457 (1997); *People v. Vasquez*, 368 Ill. App. 3d 241, 261 (2006). "We review the propriety of assessed fees and fines *de novo* because the matter raises a question of statutory interpretation." *People v. Brown*, 2017 IL App (1st) 142877, ¶ 70.

¶ 26 Defendant maintains that the $15 clerk automation fee (705 ILCS 105/27.3a(1), (1.5) (West 2014)); $25 court services fee (55 ILCS 5/5-1103 (West 2014)); $2 State's Attorney records automation fee (55 ILCS 5/4-2002.1(c) (West 2014)); and $2 Public Defender records automation fee (55 ILCS 5/3-4012 (West 2014)), are fines which should be offset by his presentence incarceration credit.

¶ 27 We disagree, because contrary to the defendant's argument, our courts have previously considered identical challenges to these assessments and have found them to be fees, not fines, and thus, not subject to presentence incarceration credit. See *People v. Tolliver*, 363 Ill. App. 3d 94, 97 (2006) (automation assessments are fees); *Bowen*, 2015 IL App (1st) 132046, ¶¶ 62-65

(both the State's Attorney records automation assessment and the Public Defender records automation assessment are fees); see *contra People v. Camacho*, 2016 IL App (1st) 140604, ¶¶ 47-56 (finding that automation assessments do not compensate the State for the costs associated with prosecuting a particular defendant and, therefore, cannot be considered fees); *Brown*, 2017 IL App (1st) 142877, ¶ 78 (finding clerk automation assessment to be a fee not subject to offset by presentence incarceration credit); *People v. Reed*, 2016 IL App (1st) 140498, ¶¶ 16-17 (finding both the State's Attorney records automation assessment and Public Defender records automation assessment are fees). Thus, defendant is not entitled to presentence custody credit to be applied against these assessments.

¶ 28 Accordingly, for the foregoing reasons, we affirm defendant's conviction for possession with intent to deliver 3.9 grams of heroin and the 4-year sentence imposed for that conviction. We also affirm the fines and fees order.

¶ 29 Affirmed.