2017 IL App (1st) 151146-U

No. 1-15-1146

Fifth Division
June 23, 2017

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. JOSEPH COMMON, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. No. 14 CR 19305 The Honorable Charles P. Burns, Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices Lampkin and Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* Where the parties stipulated to the weight of a controlled substance at trial and defendant did not object during trial or in his posttrial motion that the controlled substance was improperly handled when weighed, defendant may not object to the weight for the first time on appeal.

¶ 2 After a jury trial, defendant was convicted of: (1) the possession of a fictitious or unlawfully altered identification card; and (2) the delivery of one gram or more of heroin, and was sentenced to a total of 6½ years with the Illinois Department of Corrections (IDOC).

¶ 3 On this appeal, defendant claims: (1) that the State failed to prove beyond a reasonable doubt that he delivered one gram or more of heroin, and (2) that the mittimus should be corrected to reflect that defendant was convicted of delivery of one gram or more of heroin rather than delivery of heroin within 1,000 feet of a school. For the following reasons, we affirm his conviction and sentence but order the mittimus corrected to reflect that defendant was convicted of delivery of one gram or more of heroin.

¶ 4 BACKGROUND

¶ 5 On October 4, 2014, a narcotics unit of the Chicago police department executed a controlled buy, and defendant was arrested for selling two Ziploc bags of heroin to an undercover police officer. After the officer inventoried the two bags, a forensic chemist tested and weighed the contents of the bags. At trial, defendant and the State stipulated as to what the forensic chemist would testify to. In this stipulation, the parties agreed that the chemist would testify that the contents of the two Ziploc bags tested positive for the presence of heroin, and that the actual weight of those two "items" was 1.05 grams. Defendant did not dispute the weight of the heroin at the time of the stipulation, and was found guilty of delivery of 1 gram or more but less than 15 grams of heroin.

¶ 6 I. Pretrial Proceedings

¶ 7 Defendant was indicted for: (1) delivery of heroin within 1,000 feet of a school; (2) delivery of one gram or more of heroin; and (3) possession of a fictitious or unlawfully altered identification card. However, the State proceeded to trial on only counts II and III.

¶ 8 II. Evidence at Trial

¶ 9 At the jury trial, Officer Adrianne Carter testified that, on October 4, 2014, she was working undercover as a buy officer in a narcotics unit of the Chicago police department.

While stationed in the area of Chicago Avenue and Lavergne Avenue, she observed a group of unknown men on the corner. She approached the group and inquired about purchasing "blows," a street term for heroin. Defendant asked Officer Carter "how many" and she responded that she wanted three. Defendant then asked to use Officer Carter's phone, and she complied. Defendant subsequently informed Officer Carter that they could meet an individual at Laramie Avenue and Iowa Street. The two walked towards Laramie Avenue and Iowa Street, and turned into an alley where there was an unknown man.

¶ 10 Officer Carter gave defendant $30, and defendant approached the man. The man asked defendant "how many they were trying to get." The man then handed defendant something, and defendant proceeded to hand the unknown man the $30 from Officer Carter. Officer Carter and defendant walked out of the alley and proceeded westbound on Iowa Street. At this time, defendant gave officer Carter two plastic Ziploc bags containing what was later determined to be heroin.

¶ 11 Defendant and Officer Carter then separated, and Officer Carter continued walking westbound on Iowa Street. Once she had returned to her vehicle, Officer Carter radioed the other officers on her team and notified them that she had successfully completed a narcotics buy. Defendant was then detained by the other officers and identified by Officer Carter via radio. Officer Carter further testified that she inventoried the two bags defendant had handed to her.

¶ 12 Officer Carter's testimony as to the sequence of events was corroborated by the testimony of a surveillance officer, Armando Ugarte, and an enforcement officer, Joseph Mirus.

¶ 13 The parties then stipulated that Jamie Hess, a forensic chemist at the Illinois State Police, would testify as follows:

"A. That she received People's Exhibit No. 3 from the Chicago Police Department in a heat-sealed condition.

B. That People's Exhibit No. 3 was opened by Ms. Hess and found to contain two clear Ziploc bags, each containing a white powdery substance.

C. That Forensic Chemist Jamie Hess is employed by the Illinois States Police Crime Lab and is qualified to testify as an expert in the area of forensic chemistry, and all equipment used was tested, calibrated, and functioning properly when the items received in this case were tested.

D. That Ms. Hess performed tests commonly accepted in the area of forensic chemistry for ascertaining the presence of a controlled substance on the white powdery substance from the two clear plastic Ziploc bags from People's Exhibit No. 3.

E. That after performing the tests on the contents of the two clear plastic Ziploc bags from People's Exhibit No. 3, Ms. Hess' expert opinion within a reasonable degree of scientific certainty is that the contents of the two clear Ziploc bags were positive for the presence of heroin, and the actual weight of those two items was 1.05 grams.

F. That after the testing and analysis of People's Exhibit No. 3 was completed, Ms. Hess would further testify that both exhibits were again sealed, and Ms. Hess would be able to identify both exhibits in open court as the same items that she tested, and that they are still in a sealed condition.

G. And that a proper chain of custody was maintained at all times."

¶ 14 Following the State's case in chief, defendant moved for a directed finding, which the trial court denied. The trial court instructed the jury on counts II and III, but did not instruct the jury or provide a verdict form on the dismissed count I, which was for delivery of a controlled substance within 1,000 feet of a school.

¶ 15 III. Conviction and Sentencing

¶ 16 The jury found defendant guilty of the possession of a fictitious or unlawfully altered identification card (count III), and the delivery of one gram or more of a controlled substance (count II). Defendant filed a posttrial motion for a new trial, which the trial court denied. At the sentencing on March 20, 2015, the trial court determined that defendant had to be sentenced as a Class X offender due to prior convictions. It then sentenced him to 6½ years with IDOC for count II, the delivery of one gram or more of a controlled substance. No sentence was entered as to count III. Defendant filed a motion to reconsider the sentence, which the trial court denied. This appeal followed.

¶ 17 ANALYSIS

¶ 18 On appeal, defendant argues: (1) that the State failed to prove beyond a reasonable doubt that he delivered one gram or more of heroin, and (2) that the mittimus should be corrected to reflect that he was convicted of delivery of one gram or more of heroin rather than

¶ 19 delivery of heroin within 1,000 feet of a school. For the following reasons, we affirm defendant's conviction and sentence but order the mittimus corrected to reflect that he was convicted of delivery of one gram or more of heroin only.

¶ 20 I. Sufficiency of the Evidence

¶ 21 When the State charges a defendant with delivery of a certain amount of drugs, and there is a lesser-included offense of delivery involving a smaller amount of drugs, the weight of the drugs is an essential element of the offense and the State must prove it beyond a reasonable doubt. *People v. Lashley*, 2016 IL App (1st) 133401, ¶ 27 (citing *People v Jones*, 174 Ill. 2d 427, 428-29 (1996)).

¶ 22 Defendant argues that the State failed to show sufficient evidence that the heroin weighed one gram or more and therefore it did not prove this element beyond a reasonable doubt. In response, the State argues that defendant waived his right to appeal the issue of weight because he stipulated to the weight, and failed to object at trial or in his posttrial motion.

¶ 23 Defendant characterizes his challenge to the weight of the heroin as a sufficiency of the evidence argument. However, by arguing that the chemist included the weight of the bags with the heroin, defendant is in essence arguing that the chemist failed to properly handle the evidence while it was in her possession. A claim that the State failed to properly handle the evidence is not a challenge to the sufficiency of the evidence, but to its foundation, and thus is subject to forfeiture. *People v. Banks*, 2016 IL App (1st) 131009, ¶ 68 (citing *People v Woods*, 214 Ill. 2d 455, 471 (2005)).

¶ 24 Furthermore, defendant entered into a stipulation regarding the weight of the heroin. The stipulation stated that the chemist had tested "the contents of the two clear plastic Ziploc bags" and "the actual weight" was 1.05 grams. The invited error doctrine therefore applies to this case. A person cannot invite the trial court to take an action and then complain about that same action in a reviewing court. *People v. Chatman*, 2016 IL App (1st) 152395, ¶ 39 n.15, *People v. Ciborowski*, 2016 IL App (1st) 143352, ¶ 99; *Lozman v. Putnam*, 379 Ill. App. 3d

807, 828-29 (2008). In the case at bar, defendant invited the trial court to rely on these statements by stipulating to them.

¶ 25 In essence, defendant is seeking to exploit a possible ambiguity in the word "items." The stipulation stated the weight of "two items," and these words refer to "the contents of the two clear plastic Ziploc bags" which the chemist averred that she tested, or they could arguably refer to the powder and the bags. Defendant argues that if it is not clear whether the heroin was weighed with or without the bags then reasonable doubt exists. However, on appeal is not the time to first raise the issue of an ambiguity in a statement which defendant stipulated to. As we have observed, defendant's argument is more properly characterized as an objection to the foundation of the chemist's opinion concerning the weight. A defendant may waive the necessity of proof of foundation for an expert's opinion by entering into a stipulation with respect to that evidence. *People v. Bush*, 214 Ill. 2d 318, 333 (2005) (citing *People v. Polk*, 19 Ill. 2d 310, 315 (1960)). By agreeing to the weight in the stipulation, defendant waived the necessity of the State proving the foundation for the expert's opinion concerning the weight. *Bush*, 214 Ill.2d at 333. Therefore, even if the stipulation is unclear as to whether or not the chemist properly handled the evidence by weighing the heroin without the bags, "to the extent that [the chemist's] opinion lacks an adequate foundation, it is defendant's stipulation, not the State's neglect, that is responsible." *Bush*, 214 Ill. 2d at 333.

¶ 26 The application of waiver to this type of claim is particularly appropriate because defendant's failure to object when the stipulation was entered deprived the State of an opportunity to cure any deficiency. *Banks*, 2016 IL App (1st) 131009, ¶ 71 (citing *Woods*, 214 Ill. 2d at 470). Defendant waited until appeal to raise this objection, and by doing so

gave the State no opportunity to cure the alleged deficiency. Defendant therefore cannot complain now.

¶ 27 Even if we were to consider defendant's argument, we do not find it persuasive. Defendant argues that he did not stipulate that the heroin was weighed without the bags. In other words, he claims it was not his intent to stipulate that the 1.05 grams was based solely on the heroin, but rather that it was his intent that this weight included the weight of the bags, too. However, this argument is not supported by either the dictionary definition of the word "item" or by his actions during and after trial. *Lashley*, 2016 IL App (1st) 133401, ¶ 28 (holding that the statement "the actual weight of those items was 15.2 grams" in the parties' stipulation referred to the weight of the heroin without the weight of the bags).

¶ 28 Defendant correctly observes that the word "item" is defined as "a distinct part in an enumeration, account, or series." *Item*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/item (last visited May 30, 2017). However, the contents of each bag in this case was "a distinct part in an enumeration." There were two separate and distinct contents that needed to be tested and weighed in order to come to the total of 1.05 grams: (1) the contents of the first bag, and (2) the contents of the second bag. The word "items" merely enumerated those two distinct parts that were weighed and added up to 1.05 grams. The stipulation states: "Ms. Hess' expert opinion within a reasonable degree of scientific certainty is that the *contents* of the two clear Ziploc bags were positive for the presence of heroin, and the actual weight *of those two items* was 1.05 grams." (Emphases added.) Thus, the "two items" refers back to, or enumerates, the two separate contents that were tested for the presence of heroin.

¶ 29 Additionally, defendant's actions during and after trial reveal his intent that the stipulation would be conclusive as to the element of weight. Courts must "ascertain and give effect to the intent of the parties" in the construction of a stipulation. *Woods*, 214 Ill. 2d at 468-69 (citing *In re Marriage of Galen*, 157 Ill. App. 3d 341, 344-45 (1987)). In defendant's case, at no point during the trial or in his posttrial motions did he argue that the State failed to establish that the heroin weighed one gram or more. Defendant forfeited his right to complain on appeal where doing so would be inconsistent with his position in the trial court. *McMath v. Katholi*, 191 Ill. 2d 251, 255 (2000).

¶ 30 II. Mittimus

¶ 31 Defendant also asks this court to correct the mittimus to reflect that he was convicted of delivery of one gram or more of heroin rather than delivery of heroin within 1,000 feet of a school. As we may correct the mittimus without remanding the cause to the trial court (*People v. Smith*, 2016 IL App (1st) 140039, ¶ 19), we direct the clerk of the circuit court to correct the mittimus to reflect the correct offense of delivery of a controlled substance, specifically, "1 gram or more but less than 15 grams of any substance containing heroin, or an analog thereof." 720 ILCS 570/401(c)(1) (West 2014).

¶ 32 CONCLUSION

¶ 33 In sum, we do not find persuasive defendant's arguments that the State failed to prove that he delivered one gram or more of heroin where he stipulated to the weight at trial. Additionally, we order the mittimus corrected to reflect that defendant was convicted of delivery of one gram or more of heroin rather than delivery of heroin within 1,000 feet of a school.

¶ 34 Affirmed; mittimus corrected.