2018 IL App (1st) 153456-U

No. 1-15-3456

Order filed December 12, 2018

Third 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 13471
	)	
TERRON BROWN,	)	Honorable
	)	Thomas M. Davy,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for possession of a controlled substance with intent to deliver is affirmed over his contention that the evidence was insufficient to establish that he possessed between 15 and 100 grams of heroin. Defendant's appeal of certain fines and fees is dismissed because the circuit court did not enter a fines and fees order.

¶ 2 Following a bench trial, defendant Terron Brown was found guilty of possession of a controlled substance (between 15 and 100 grams of heroin) with intent to deliver (720 ILCS 570/401(a)(1)(A) (West 2012)) and sentenced to six years' imprisonment. On appeal, defendant

maintains that the evidence was insufficient to find him guilty beyond a reasonable doubt because the State failed to prove that the weight of the heroin. He further asserts he was improperly assessed fines and fees. We affirm in part and dismiss in part.

¶ 3 BACKGROUND

¶ 4 Defendant was charged by indictment with one count of possession of a controlled substance with intent to deliver (between 100 and 400 grams of heroin). 720 ILCS 570/401(a)(1)(B) (West 2012). The following evidence was presented at defendant's bench trial.

¶ 5 On June 25, 2013, Chicago police officer Ferreras was working undercover in the area of the 3900 block of Grenshaw Street. Officer Ferreras received was notified that defendant, who was a target of an investigation, was present in the area. Officer Ferreras observed defendant exit a building in the 3900 block of Fillmore Street and walk enter an alley, where defendant and an unidentified man had a conversation. During the conversation, Officer Ferreras saw defendant reach into his right pocket, retrieve an item, and exchange the item with the man for money. Based on his experience and training, Officer Ferreras believed he had witnessed a narcotics transaction and radioed his partner, Officer Shvartser.

¶ 6 Officer Shvartser testified that after he received Officer Ferreras' radio dispatch, he went to the alley and spoke to defendant.[1] Defendant initially told Officer Shvartser that he was "hanging out." According to Officer Shvartser, however, when he attempted to exit his police vehicle, defendant began to run northbound in the alley. Officer Shvartser to give chase on foot. When Officer Shvartser was five feet from defendant, defendant reached into his right pocket,

[1] At trial, the parties stipulated to Shvartser's testimony from a hearing on a motion to quash and suppress evidence that defendant filed. Additionally, Shvartser was called as a witness at trial. Our recitation of the facts will include both Shvartser's testimony at the hearing on the motion to suppress evidence and at trial.

retrieved a "small, white item," and threw it to the ground. Officer Shvartser eventually caught defendant and placed him in handcuffs. Afterwards, Officer Shvartser went into a driveway adjacent to the alley and retrieved the item defendant threw, which contained Ziplock bags containing a substance Officer Shvartser suspected to be heroin.

¶ 7 When Officer Shvartser returned, defendant was placed under arrest. The officers then performed a custodial search of defendant. Officer Shvartser recovered $275 and knotted plastic bags containing smaller Ziplock bags which contained a suspect Officer Shvartser suspected to be heroin.

¶ 8 At the police station, Officer Shvartser inventoried the four bags he had recovered. The first and second items were knotted plastic bags which each contained 13 Ziplock bags that contained a white, powdery substance. The third and fourth items were larger knotted plastic bags which contained nine knotted bags. Each of the 9 knotted bags in turn contained 13 Ziplock bags, each containing a white, powdery substance. In total, the police recovered 260 Ziplock bags. Thirteen of the bags were recovered from the driveway; the remainder were recovered from defendant.

¶ 9 The parties stipulated that, in total, 260 Ziplock bags containing a white, powdery substance were recovered and inventoried under the same inventory number. The parties further stipulated that Laneen Blount, a forensic chemist received the inventory containing 260 Ziplock bags. Blount analyzed 226 of the 260 Ziplock bags and determined that the substance in each of the bags tested positive for the presence of heroin. The actual weight of those items was 101.3 grams.

¶ 10 Defendant testified that, on June 25, 2013, he was living in the 3900 block of West Fillmore and went out to pick up a cup of coffee and a newspaper. Defendant had around $280 on him from his disability check. As he was walking towards the alley, the police arrived and asked him where he was going. Defendant explained that he was going to a gas station to pick up a cup of coffee and a newspaper. The police officer asked him if he knew "Fry," to which defendant responded that he did not. The officer then told defendant that he had to search him. Defendant responded, "sure, come on."

¶ 11 The officer searched defendant but did not find anything. He then told defendant to sit on the ground while he searched an abandoned building on Fillmore. Defendant testified that more officers arrived and one officer "kicked [him] in [his] private and he said you know that the drugs is in the building and you know Fry is your cousin." Defendant denied knowing any drugs were in the building and further denied ever selling drugs.

¶ 12 Two of the officers went inside the building while the other officer stayed with defendant. About 5 to 10 minutes later, the two officers returned with a black bag. The officers informed defendant that, if he did not call Fry, the drugs would be attributed to him. Defendant denied possessing the 260 bags of heroin. While at the police station, defendant gave the officers permission to search his home.

¶ 13 In closing, defense counsel argued defendant was innocent, credible, had no drugs on his person, and the police found the drugs in an abandoned building and not on defendant.

¶ 14 The trial court found defendant guilty of the lesser-included charge of possession with intent to deliver between 15 and 100 grams of heroin. The court reasoned:

"As I indicated, all the narcotics were inventoried under one inventory number. No separate distinction as to what was from the person of the defendant, what was from the other location where this item was allegedly discarded. More likely than not, that item that was recovered there was in fact discarded by the defendant. But as far as the – definitely the other items were recovered from the person of the defendant. There was no description in the stipulation as to which particular items were recovered. The items tested were 101.3. Not being able to say what were the items which I find beyond a reasonable doubt were on the person of the defendant and what items more likely than not, which would not be a finding of reasonable doubt, there will be a finding of guilty but for an amount under 101.3 grams. I believe the next level would be over 15 but less than 100 grams.

So there will be a finding of guilty on the charge of possession with intent based on the amount of the items, the packaging."

¶ 15 The trial court denied defendant's motion for a new trial and sentenced him to six years' imprisonment. The following colloquy then occurred:

[ASSISTANT STATE'S ATTORNEY:] Judge, I did also pass the fines and fees are you applying those in this case?

[THE COURT:] I don't usually on IDOC sentence.

[ASSISTANT STATE'S ATTORNEY:] That's fine, Judge. Thank you.

There is an unsigned fines and fees order contained in the record. Defendant filed a timely notice of appeal.

¶ 16 ANALYSIS

¶ 17 On appeal, defendant argues the evidence was insufficient to prove him guilty beyond a reasonable doubt of possession with intent to deliver 15 to 100 grams of heroin. Specifically, he asserts that, because the State only introduced the total weight of the 226 Ziplock bags, and the trial court discounted 13 of those bags, it cannot be ascertained how much heroin he had in his possession to sustain the conviction. Defendant contends the discounted Ziplock bags found on the ground may have contained more powder than the ones found to be in defendant's possession, thus making the State's evidence too ambiguous to show he possessed any amount of heroin over one gram. He posits that the 13 discounted bags may have contained 86.5 grams of heroin, and the remaining bags therefore contained less than 15 grams (101.3 grams minus 86.5 grams equals 14.8 grams). He therefore asks that we reduce his conviction to Class 2 possession with intent to deliver "any other amount" of heroin (720 ILCS 570/401(d) (West 2012)).

¶ 18 When reviewing a challenge to the sufficiency of the evidence, the standard of review is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *People v. Hardman*, 2017 IL 121453, ¶ 37. In a bench trial, the trial judge, as the trier of fact, is tasked with determining the credibility of witnesses, weighing the evidence and any inferences derived, and resolving any conflicts in the evidence. *People v. Brown*, 2017 IL App (1st) 142877, ¶ 39. "A reviewing court will not substitute its judgment for that of the trier of fact on issues involving the weight of evidence or the credibility of witnesses." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009). A conviction will not be overturned unless the evidence is so

improbable, unsatisfactory, or inconclusive that a reasonable doubt of defendant's guilt exists. *People v. Bradford*, 2016 IL 118674, ¶ 12.

¶ 19 Defendant was convicted of Class X felony possession of 15 to 100 grams of heroin with intent to deliver. See 720 ILCS 570/401(a)(1)(A) (West 2012)). He does not challenge his possession of the heroin with intent to deliver, only the weight element of the offense. "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).

¶ 20 As an initial matter, the State contends defendant's argument regarding the weight of the heroin is a new theory of defense on appeal which was not preserved. It points out that defendant never challenged the chemist's testing or the State's proof of the weight of the heroin required for the Class 1 conviction (15 grams to less than 100 grams). The State also asserts that defense counsel conceded the equality of the weight of all the bags when arguing his motion for a new trial. Citing *People v. Hughes*, 2015 IL 117242, it reasons that, had defendant raised this argument before the trial court, the State could have responded with pertinent rebuttal evidence. *People v. Hughes*, 2015 IL 117242, ¶ 38.

¶ 21 We find *Hughes* to be inapposite. In *Hughes*, our supreme court found that the defendant failed to preserve the argument that his confession was involuntary by failing to raise those arguments at the suppression hearing in the trial court, which prevented both the State and the trial court an opportunity to respond and consider those arguments. *Id.* ¶¶ 44-50. Here, contrary to *Hughes*, defendant raises a sufficiency of the evidence claim regarding the weight of the

heroin to support his conviction at trial. "[W]hen a defendant makes a challenge to the sufficiency of the evidence, his or her claim is not subject to the waiver rule and may be raised for the first time on direct appeal." *People v. Woods*, 214 Ill. 2d 255, 470 (2005). We reject the State's waiver argument and will consider defendant's claim on the merits.

¶ 22 On the merits, however, defendant's argument fails. It is well-established that "an accused may, by stipulation, waive the necessity of proof of all or part of the case which the People have alleged against him." *People v. Polk*, 19 Ill. 2d 310, 315 (1960). " 'A stipulation is conclusive as to all matters necessarily included in it.' " *Woods*, 214 Ill. 2d at 469 (quoting 34 Ill. L. & Prac. *Stipulations* § 8 (2001)). " 'No proof of stipulated facts is necessary, since the stipulation is substituted for proof and dispenses with the need for evidence.' " *Id.* (quoting 34 Ill. L. & Prac. *Stipulations* § 9 (2001)). Generally, a defendant is prohibited from attacking or contradicting any facts to which he has stipulated. *Id.* "The primary rule in the construction of stipulations is that the court must ascertain and give effect to the intent of the parties." *Id.* at 468-69.

¶ 23 Here, the parties stipulated that 226 of 260 Ziplock bags tested positive for heroin with a weight of 101.3 grams. Arguably, based on this stipulation, the State proved the weight element that defendant possessed between 100 and 400 grams of heroin. However, the trial court discounted 13 of the 260 bags, finding that it could not be certain that the item purportedly discarded by defendant, which contained 13 Ziplock bags, was actually in defendant's possession.

¶ 24 So we have 260 bags recovered, 226 of which were tested—all testing positive for heroin and weighing just over 101 grams collectively. We have 13 packets that were not proven to be in

defendant's possession. We don't know whether those 13 packets were among the 226 tested, but let's give defendant the benefit of the doubt and assume that all 13 of the excluded packets were included in the 226 test sample. If we exclude those 13 bags, we now have 213 bags that were tested. For the exclusion of those 13 bags to be enough to take down the weight of the heroin from 101.3 grams to below 15 grams, those excluded 13 bags would have to contain over 86 grams of heroin, and the remaining 213 bags would have to contain, in total, less than 15 grams. To say that this scenario is hard to believe—that each of the 13 excluded bags would have to contain about 6.6 grams each on average, while each of the other 213 bags would contain, on average, 0.07 grams each—is an understatement. The trial court was well within its province to infer that the distribution of heroin among the bags was not so ridiculously lopsided, and that the 213 bags of heroin, collectively, easily accounted for more than 15 grams of heroin in total. See *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."); *People v. Hall*, 194 Ill. 2d 305, 332 (2000) ("the trier of fact is not required to disregard inferences which flow normally from the evidence and to search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt.").

¶ 25 Since defendant failed to challenge any ambiguities in the chemist's testimony regarding the weight of the individual bags, we find that the circuit court could have found beyond a reasonable doubt that defendant possessed with intent to deliver 15 to 100 grams of heroin. See *Fountain*, 2011 IL App (1st) 083459-B, ¶¶ 25-26 (where defendant fails to challenge ambiguous

testimony at trial, it is for trier of fact to draw inferences from that ambiguous testimony, and we allow all inferences in light most favorable to State).

¶ 26 We next consider defendant's argument that we should vacate $3964 in fines and fees which defendant claims were improperly assessed against him. But there's no order for us to vacate. As the court made clear at sentencing, it did not intend on imposing any fines and fees. And although there is a fines and fees order in the record, the order is unsigned. The clerk of the circuit court must "record the ruling of the court and has no authority to enter a judgment on his or her volition." *People v. Vara*, 2018 IL 121823, ¶ 18. As the circuit court never imposed fines and fees and the clerk of the circuit court cannot alter the circuit court's judgment, there is no fines and fees order for us to review. Since the order defendant is appealing does not exist, we must dismiss this portion of defendant's appeal.

¶ 27 CONCLUSION

¶ 28 For the reasons set forth above, we affirm defendant's conviction and dismiss his appeal of the fines and fees order.

¶ 29 Affirmed in part; dismissed in part.