2018 IL App (1st) 160519-U

No. 1-16-0519

Order filed June 29, 2018

FIRST DIVISION

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 15 CR 3638
	)	
FREDRICK JONES,	)	Honorable
	)	Carol M. Howard,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Pierce and Justice Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's conviction for delivery of a controlled substance over his contention that the trial court erroneously admitted stipulated evidence that the items received from defendant contained heroin. We vacate the erroneously assessed $250 DNA analysis fee.

¶ 2 Following a bench trial, defendant Fredrick Jones was convicted of delivery of a controlled substance (720 ILCS 570/401(c)(1) (West 2014)), and sentenced to eight years'

imprisonment. On appeal, he contends the trial court (1) abused its discretion by admitting stipulated evidence that the items tested by a forensic chemist were found to contain heroin where there was no chain of custody linking those items to the items received from defendant, and (2) erroneously imposed the $250 DNA analysis fee. For the following reasons, we vacate the $250 DNA analysis fee and affirm in all other respects.

¶ 3 At trial, Chicago police officer Kevin Sellers testified that, on February 13, 2015, he was working undercover as part of a team in the narcotics division. He was in an unmarked vehicle, driven by his partner Officer Cathy Schmidt. Other surveillance and enforcement officers were participating in the undercover operation. At approximately 5:30 p.m., Sellers called a phone number to express interest in purchasing narcotics, speaking to a person who identified herself as "Kim."

¶ 4 At Kim's direction, Sellers and Schmidt picked up Kim and her "husband," later identified as defendant, in their unmarked vehicle at Jackson Boulevard and California Avenue. Kim and defendant sat in the back seat, and they spoke with the undercover officers about the narcotics purchase. The agreement was to purchase five bags of heroin for $70.

¶ 5 Both Kim and defendant gave instructions and spoke with the officers. They told Schmidt to park at a convenience store at the corner of Madison Street and California, where the buy would occur. There, Sellers gave Kim $70 in prerecorded police funds. Kim and defendant exited the vehicle and walked 25 feet away, where a man was standing on the sidewalk wearing a black jacket and coveralls. Sellers did not see the man's face. Kim and defendant spoke with the man and "there was an interaction," although Sellers could not see exactly what happened because it was dark out.

¶ 6 After a short period of time, Kim and defendant returned to the backseat of the undercover vehicle, and Kim gave Sellers five purple-tinted ziplock bags containing a white powder substance he suspected was heroin. Sellers and Schmidt thereafter started driving Kim and defendant back to the original pickup location. Schmidt gave a non-audible signal to the rest of their team by pumping the brakes to cause the tail lights to flash, indicating that a positive buy had occurred. After Schmidt gave the signal, their vehicle was curbed by an unmarked patrol vehicle. Officers approached the vehicle and ordered defendant and Kim out. Sellers told Officer Czarnik that there was a positive buy and defendant and Kim were arrested.

¶ 7 Following the arrests, Sellers received a radio communication that the secondary enforcement unit stopped the man in the coveralls near Madison and California. Schmidt drove to that location, and Sellers identified the man, later identified as codefendant Nolan Williams, as the person involved in the narcotics transaction.[1]

¶ 8 Sellers kept the five purple-tinted bags of suspected heroin in his custody and returned to the police station. He placed the bags in a Chicago police department evidence inventory bag, logged onto the e-track inventory system, placed identifiers in the system, submitted the inventory for approval, and obtained an inventory number unique to that inventory. Sellers' sergeant approved the inventory, and Sellers thereafter heat sealed the inventory and placed it in a vault for safekeeping.

¶ 9 On cross-examination, Sellers acknowledged that he did not record the conversation with Kim and defendant in the vehicle. He further acknowledged that he did not hand money to

[1] Defendant and codefendant Williams were tried in separate but simultaneous bench trials. Williams was acquitted of delivery of a controlled substance and possession with intent to deliver a controlled substance, and is not a party to this appeal.

defendant; rather, Sellers and Kim exchanged the money for narcotics. Sellers did not observe defendant in possession of money or narcotics.

¶ 10 Chicago police officers John Thornton and Joseph Meloscia testified that they were working as enforcement officers on a narcotics team on February 13, 2015. After receiving a radio communication from his team that the undercover officer had given a nonverbal signal that a positive buy had occurred, Thornton stopped Sellers' vehicle with defendant and a woman in the backseat. Thornton and his partner, Officer Czarnik, arrested defendant and the woman, Kim Harris. Following the arrests, Officer Czarnik handed Thornton one purple-tinted bag of suspected heroin. Thornton kept the bag in his custody and later inventoried it. Thornton and Czarnik also recovered $10 in prerecorded police funds from Kim. Pursuant to a radio call, Meloscia arrested codefendant Williams at the corner of California and Madison. Williams matched the radioed description of the offender and had $60 in prerecorded police funds in his possession.

¶ 11 The parties stipulated that if called, Officer G. Corona would testify that, on the day in question he was a surveillance officer. He observed undercover officers in a covert vehicle drive to area of Jackson and California where defendant and Kim Harris were located. Corona watched the vehicle drive to the parking lot located on California. Kim and defendant exited the vehicle and walked towards codefendant Williams. Corona observed Kim hand Williams an unknown sum of money in exchange for unknown items. Kim and defendant then walked back to the vehicle, which subsequently displayed a non-audible signal that a positive transaction took place. Corona notified enforcement officers of the vehicle's location so they could conduct a stop.

Corona also radioed a description of Williams to a secondary enforcement team so that they could detain Williams.

¶ 12 The State then informed the court that "the parties would also further enter into a stipulation regarding the chemical testing of the narcotics recovered." The parties stipulated that, if called, Tina Joyce would testify that, in her capacity as a forensic chemist for the Illinois State Police, "she received items as part of this case under RDHY 150600" for chemical analysis. Joyce received five items of suspect heroin under inventory 13374572, which tested positive for 2.4 grams of heroin. She additionally received one item under inventory 13374577, which tested positive for 0.4 gram of heroin. The parties additionally stipulated "that proper inventory procedures were maintained for all the items that were sent to her that she received them in a heat sealed condition."

¶ 13 Following arguments, the court found defendant guilty of delivery of a controlled substance. The court denied defendant's motion for a new trial, and subsequently sentenced him as a Class X offender based on his criminal background to 8 years' imprisonment. Defendant filed a motion to reconsider sentence, which the court denied. This appeal followed.

¶ 14 On appeal, defendant first contends that the trial court erroneously admitted forensic evidence regarding the chemical composition of the items tested by the chemist because there was "no link" between the items tested and the items recovered from defendant. Specifically, defendant argues that the inventory number and description of the recovered items and tested items did not match because Sellers failed to testify to the items' inventory number, and the chemist's stipulated testimony failed to describe the contents of the inventory.

¶ 15 As an initial matter, defendant acknowledges that he failed to preserve this issue below, as he did not object to the admissibility of the heroin, but argues it is reviewable under both prongs of the plain error doctrine. The State responds that defendant (1) affirmatively waived this issue by stipulating at trial to the chemical composition of the recovered substance, and (2) forfeited this issue by failing to preserve it below.

¶ 16 In order to prove defendant guilty of delivery of a controlled substance, specifically of 1 gram or more but less than 15 grams of heroin as charged, the State was required to prove that the items Officer Sellers received from defendant were, in fact, a controlled substance. *People v. Woods*, 214 Ill. 2d 455, 466 (2005). Necessarily, given that the presence of the controlled substance was only shown by the forensic chemist's testimony, the State had to prove these were the same items tested by the chemist. *Id.* at 467.

¶ 17 The rules of evidence mandate that the State, prior to introducing the results of chemical testing, provide a foundation for its admission by demonstrating the police utilized reasonable protective measures to ensure that the substance recovered from the defendant was the same substance tested by the forensic chemist. *People v. Alsup*, 241 Ill. 2d 266, 274 (2001). The trial court must determine whether the State has met its "burden to establish a custody chain that is sufficiently complete to make it improbable that the evidence has been subject to tampering or accidental substitution." *Woods*, 214 Ill. 2d at 467. Once the State has established this *prima facie* case, the burden then shifts to the defendant to present actual evidence of tampering, alteration, or substitution. *Id.* at 468.

¶ 18 A defendant 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. and Prac. *Stipulations* § 8 (2001) (now 34 Ill. L. and Prac. *Stipulations* § 11 (2018))). " '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. and Prac. *Stipulations* § 9 (2001) (now 34 Ill. L. and Prac. *Stipulations* § 12 (2018))). A defendant is generally precluded from attacking or otherwise contradicting any facts to which he has stipulated. *Id.* Stipulations are binding and conclusive on the parties. *People v. Calvert,* 326 Ill. App. 3d 414, 420 (2001). Parties will not be relieved from a stipulation absent a clear showing that the matter stipulated to was untrue and only then when there is a timely objection. *Id.*

¶ 19 We find defendant affirmatively waived any issue with the stipulation when he "took part in its offering into evidence" by agreeing to stipulate to Joyce's testimony and that proper inventory procedures were maintained for all items sent to the lab. *Woods*, 214 Ill. 2d at 473. As set forth below, the record reveals that it was the clear intent of the parties to remove from the case any issue related to the chain of custody. See *id.* at 468-69 ("The primary rule in the construction of stipulations is that the court must ascertain and give effect to the intent of the parties.").

¶ 20 The evidence showed that Officer Sellers kept the bags recovered from the transaction in his possession, then placed them in an evidence inventory bag, logged them into the e-track inventory system, obtained an inventory number, and heat sealed the inventory bag before placing it into a vault for safekeeping. Joyce's stipulated testimony revealed she received "items as part of this case" under number RDHY 150600, which contained an inventory under number 13374572 consisting of five items that tested positive for 2.4 grams of heroin. The parties further

stipulated that "proper inventory procedures were maintained for all the items that were sent to [Joyce] that she received them in a heat sealed condition." This evidence established that the police utilized reasonable protective measures to ensure that the substance recovered was the same substance tested by the forensic chemist (*Alsup*, 241 Ill. 2d at 274), and that the chain of custody chain was "sufficiently complete to make it improbable that the evidence ha[d] been subject to tampering or accidental substitution" (*Woods*, 214 Ill. 2d at 467).

¶ 21 Moreover, by agreeing to the stipulation, defendant led the State to believe that there was no issue with the chain of custody, and defendant at no point alleged that the recovered items were different than those tested by Joyce, the forensic chemist. His defense below was directed to challenging his role in the transaction, not the chain of custody of the heroin. Defendant may not now attack the admission of evidence to which he stipulated and claim his intent at trial was something else entirely. *Woods,* 214 Ill. 2d at 469. We therefore find that defendant affirmatively waived this issue. See *id.* at 475; see also *People v. Caffey,* 205 Ill. 2d 52, 114 (2001) (when a party procures, invites, or acquiesces in the admission of evidence, he cannot challenge on appeal the admission of that evidence).

¶ 22 Even if we did not find defendant affirmatively waived this issue, we are not persuaded by his contention that it reviewable under the plain error doctrine. Defendant failed to preserve his chain of custody challenge to the admissibility of evidence by objecting at trial and including the issue in a posttrial motion. See *Woods*, 214 Ill. 2d at 471. His chain of custody claim is therefore procedurally defaulted. See *id.* Nevertheless, in *Woods*, our supreme court noted there were limited circumstances in which a defendant may attack the chain of custody, notwithstanding forfeiture. *Id.* at 471-72. A defendant may raise a forfeited chain of custody

issue for the first time on appeal only if the alleged error rises to the level of plain error, *i.e.,* "in those rare instances" where there is a complete breakdown of the chain of custody such that there was no link between the substance recovered by the police and the substance tested. *Id.*

¶ 23 As detailed above, we find the testimonial evidence and stipulation sufficient to demonstrate that the chain of custody of the narcotics received from defendant was complete. Thus, there was no breakdown in the chain of custody and defendant's claim is not reviewable under the plain error doctrine.

¶ 24 Defendant next argues that he was erroneously assessed the $250 DNA analysis fee because he already submitted a DNA sample and paid that fee based on earlier felony convictions. He again acknowledges that he did not preserve this issue below, but asks that we review it pursuant to the second prong of the plain error doctrine. The State acknowledges defendant's forfeiture of the issue, but agrees it should be reviewed under the plain error doctrine and that the fee should be vacated. Accordingly, we address the issue. See *People v. Williams*, 193 Ill. 2d 306, 347-48 (2000) (rules of waiver and forfeiture apply to the State).

¶ 25 Sections 5-4-3(a) and (j) of the Unified Code of Corrections (730 ILCS 5/5-4-3(a) & (j) (West 2016)) require that any person convicted of certain offenses submit to DNA analysis and pay a $250 fee. However, the fee may not be reassessed on a defendant who has already submitted a DNA sample based on a prior conviction. *People v. Marshall*, 242 Ill. 2d 285, 297, 301-02 (2011). Here, defendant has prior felony convictions from 2001 and 2008, and we presume the trial court required submission of a DNA sample and payment of the fee as a result of those convictions. See *People v. Leach*, 2011 IL App (1st) 090339, ¶ 38 (we presume the DNA analysis and fee requirement was imposed as part of a defendant's sentence following at

least one prior conviction occurring after January 1, 1998, the effective date of the requirement). Therefore, the $250 DNA analysis fee was erroneously assessed in this case and we vacate that fee.

¶ 26 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County, but vacate the $250 DNA analysis fee and order the clerk of the circuit court to remove it from defendant's fines, fees and costs order.

¶ 27 Affirmed; fines and fees order modified.