

NOTICE

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2018 IL App (4th) 160524-U

NO. 4-16-0524

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

October 16, 2018
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Logan County
EMANUEL D. FOUCH, JR.,)	No. 14CF117
Defendant-Appellant.)	
)	Honorable
)	William G. Workman,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Knecht and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court (1) affirmed in part, concluding the State presented sufficient evidence to prove beyond a reasonable doubt that defendant possessed a controlled substance with intent to deliver on real property comprising a school (720 ILCS 570/407(b)(3) (West 2014)) and (2) vacated an improperly imposed \$25 Crime Stoppers fine.

¶ 2 In March 2016, the State tried defendant, Emanuel D. Fouch, Jr., on one count of unlawful possession of a controlled substance with intent to deliver on real property comprising a school (720 ILCS 570/407(b)(3) (West 2014)) (count I) and one count of unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2014)) (count II).

¶ 3 The trial court found defendant guilty of both counts. At sentencing, the court merged count II into count I and sentenced defendant to six years' imprisonment to run concurrently with a three-year term of imprisonment imposed for a probation violation. The court also imposed several fines and fees.

¶ 4 Defendant appeals, arguing (1) the State failed to prove him guilty beyond a reasonable doubt and (2) the trial court erroneously imposed a \$25 Crime Stoppers fine. We affirm in part and vacate in part.

¶ 5 I. BACKGROUND

¶ 6 In October 2014, the State charged defendant with one count of unlawful possession of a controlled substance with intent to deliver on real property comprising a school (720 ILCS 570/407(b)(3) (West 2014)) (count I) and one count of unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2014)) (count II).

¶ 7 At defendant's bench trial, the parties presented evidence on the charges above and simultaneously conducted a hearing on petitions to revoke defendant's probation in two other cases. Below, we summarize the testimony elicited during the trial of this matter.

¶ 8 A. Steven Farris

Late on October 1, 2014, Steven Farris, a security officer at Lincoln College, received information that defendant was trespassing on Lincoln College property. Prior to the October 2014 incident, Farris notified defendant of the ban prohibiting defendant's presence on school property. Farris went to the school dormitory and observed defendant's vehicle parked nearby.

¶ 9 Before engaging defendant, Farris requested support from the Lincoln Police Department. Lincoln police officers Joseph Meister and Heidi Moore responded. Farris, the two police officers, and the residence hall director proceeded to room 221, defendant's suspected location. Upon arriving at the room, Farris looked through the partially open room door and observed defendant sitting at the foot of the bed. Farris testified he saw defendant make some movement with his hand, but he could not determine what defendant was doing. Ultimately,

defendant followed the directions of the officers by stepping out of the room and submitting to arrest.

¶ 10 Subsequent to the arrest and removal of defendant, Farris asked Cavin Phipps, a student at Illinois College who lived in the room, whether he could search the room and she consented. Eventually, Farris discovered a white substance in a bag. Farris located the bag underneath the comforter on the bed in the area where Farris observed defendant sitting immediately prior to defendant being arrested. Farris radioed down to the Lincoln police officers and one returned to retrieve the bag. Farris did not touch the plastic bag and did not allow anyone else into the room prior to the officer's return.

¶ 11 B. Officer Joseph Meister

¶ 12 Officer Meister, a Lincoln police officer, testified to his training in narcotics investigations. This training included learning about commonly used drugs and paraphernalia.

¶ 13 Officer Meister indicated that on October 1, 2014, he went to a dormitory at Lincoln College, regarding a trespass complaint. Officer Meister testified that, upon observing defendant in Phipps's room, he noticed defendant's right hand was empty but that defendant used his body to keep his left hand from view. Defendant wore no shoes and when ordered to step out of the room, Defendant proceeded to put his shoes on by using only his right hand.

¶ 14 Officer Meister left the room, and subsequently, Farris called him back to the room where he "observed a bag that contained several smaller bags of a white chunky substance," on the bed near defendant's prior location. Officer Meister removed the bag and searched the rest of the room. A further search of the room revealed no other evidence of drugs or drug paraphernalia. Officer Meister testified that rock cocaine is typically smoked using a pipe.

¶ 22 Phipps consented to officers searching her room. When the officers discovered the cocaine under the comforter on her bed, she denied any knowledge of the drugs and indicated a complete absence of any idea of where they came from.

¶ 23 E. Stipulations

¶ 24 The parties stipulated (1) to the chain of custody for the recovered items, (2) that the recovered items tested positive for cocaine and weighed 0.8 grams, and (3) that the recovered items lacked any latent fingerprints suitable for comparison.

¶ 25 F. Verdict and Sentencing

¶ 26 The trial court found defendant guilty of both counts. At sentencing, the court merged count II into count I and sentenced defendant to six years' imprisonment followed by two years of mandatory supervised release. The court ordered defendant's sentence to run concurrently with a three-year term of imprisonment followed by one-year of mandatory supervised release imposed for defendant's probation violation. The court also assessed several fines and fees, including a \$25 Crime Stoppers fine.

¶ 27 This appeal followed.

¶ 28 II. ANALYSIS

¶ 29 On appeal, defendant argues (1) the State failed to prove him guilty beyond a reasonable doubt and (2) the trial court erroneously imposed a \$25 Crime Stoppers fine.

¶ 30 A. Standard of Review

¶ 31 When considering a challenge to the sufficiency of the evidence, we must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the required elements of the crime beyond a reasonable doubt. *People v. Bradford*, 2016 IL 118674, ¶ 12, 50 N.E.3d 1112. "It is the responsibility of

the trier of fact to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts." *Id.* It is not our function to retry the defendant. *People v. Givens*, 237 Ill. 2d 311, 334, 934 N.E.2d 470, 484 (2010). A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that it raises a reasonable doubt of the defendant's guilt. *People v. Belknap*, 2014 IL 117094, ¶ 67, 23 N.E.3d 325.

¶ 32 B. Sufficiency of the Evidence

¶ 33 To prove a defendant guilty of unlawful possession of a controlled substance with intent to deliver on real property comprising a school (720 ILCS 570/407(b)(3) (West 2014)), the State must present evidence to establish that (1) defendant had knowledge of the presence of the controlled substance; (2) the controlled substance was in the immediate possession or control of the defendant; (3) defendant intended to deliver the controlled substance (*People v. Robinson*, 167 Ill. 2d 397, 407-08, 657 N.E.2d 1020, 1026-27 (1995)); and (4) defendant did so on real property comprising a school. 720 ILCS 570/407(b)(3) (West 2014). Defendant argues the State failed to prove him guilty beyond a reasonable doubt on two grounds—first, that it failed to prove he knowingly possessed the controlled substance and, second, that it failed to prove he intended to deliver the controlled substance. We analyze both arguments below.

¶ 34 1. *Possession*

¶ 35 "In drug-related cases in general, the element of possession requires '[the] defendant's knowledge of the presence of the narcotics and his immediate and exclusive control over them.'" *People v. Scott*, 2012 IL App (4th) 100304, ¶ 19, 966 N.E.2d 340 (quoting *People v. Morrison*, 178 Ill. App. 3d 76, 90, 532 N.E.2d 1077, 1086 (1988)). Possession may be actual or constructive. *Givens*, 237 Ill. 2d at 335. "Constructive possession exists where an intent and capability to maintain control and dominion over the substance exists." *People v. Neylon*, 327

Ill. App. 3d 300, 306, 762 N.E.2d 1127, 1133 (2002). "Constructive possession may be inferred from the facts, but evidence establishing constructive possession is often entirely circumstantial."

Id. To support a finding of constructive possession, the State must prove the contraband was in defendant's immediate and exclusive control and defendant knew the contraband was present.

"Knowledge may be proved by evidence of defendant's acts, declarations, or conduct from which it can be inferred he knew the contraband existed in the place where it was found." *People v.*

Beverley, 278 Ill. App. 3d 794, 798, 663 N.E.2d 1061, 1064 (1996)

¶ 36 "Control of the premises is not required for a finding of constructive possession."

People v. Minniweather, 301 Ill. App. 3d 574, 578, 703 N.E. 2d 912, 914 (1998). "Where narcotics are found on premises that are *not* under the defendant's control, defendant's control of the premises is not dispositive. Rather, it is defendant's relationship *to the contraband* that must be examined." (Emphases in original.) *Id.*

¶ 37 Here, Farris found a bag of cocaine—a larger bag containing seven smaller bags of cocaine—in Phipps's room under a comforter on her bed where defendant previously sat.

Defendant contends that in order to find constructive possession the State needed to demonstrate proof that defendant was aware of the cocaine found in Phipps's bed and further sought to

exercise dominion and control over it. Defendant asserts that the State could not do so because

the evidence shows that on October 1, 2014, defendant had not been the only person in Phipps's room or the only person to sit on Phipps's bed. Evidence showed that four or five other people

spent time in Phipps's room a few hours before officers found the cocaine in the bed.

Specifically, defendant points to Phipps's testimony that her room lacked furniture and other people likely sat on her bed.

¶ 38 Defendant argues that mere presence in the vicinity of a controlled substance cannot establish constructive possession. *People v. Adams*, 242 Ill. App. 3d 830, 832, 610 N.E.2d 763, 765 (1993). Defendant cites two cases—that he argues are nearly identical to his—to support his argument that he lacked constructive possession of the cocaine. See *id.* at 830; *People v. Tate*, 2016 IL App (1st) 140619, 61 N.E.3d 175.

¶ 39 In *Adams*, 242 Ill. App. 3d at 832-33, the reviewing court reversed the defendant's conviction and determined that the only connection between defendant, a guest in the home, and the drugs seized, was location. Specifically, police found drugs in the bathroom, in a cabinet under the sink, in a plastic bag floating in a bucket of water. *Id.* at 831. Police found defendant in the bathroom, standing in front of the toilet, with his hands raised above his head. *Id.* Significantly, the State sought to establish defendant's constructive possession of the contraband by defendant's presence near the drugs. *Id.* at 832-33.

¶ 40 In *Tate*, 2016 IL App (1st) 140619, ¶ 31, the reviewing court determined that defendant's presence in a dining room with two other individuals where drugs were present and openly visible, failed to establish defendant's constructive possession of the drugs. The court noted that other than defendant's presence in the dining room, there existed a complete absence of evidence connecting defendant, a visitor in the home, to the drugs. *Id.* at ¶ 29.

¶ 41 We find both cases distinguishable. Here, there existed more evidence than just defendant's mere presence—near the cocaine—in Phipps's room. Specifically, Farris discovered the cocaine on the bed, under the comforter—defendant's location immediately prior to Farris searching the bed. Farris testified to viewing defendant through the partially open room door and seeing defendant seated on the bed making some type of movement with his hand. Officer Meister testified that when asked to step outside the room, defendant hid his left hand and put on

his shoes using only his right hand. Also, while Phipps testified to the likelihood that earlier in the evening others sat on her bed, she testified she did not use drugs, knew no one who did, and had no knowledge of the cocaine discovered. Finally, Phipps denied seeing the cocaine in her room before defendant arrived that evening.

¶ 42 This evidence entitled the trial court to infer defendant's awareness of the drugs and his intent to exercise control over the drugs. The court could also reasonably infer that defendant's behavior immediately prior to his arrest for criminal trespass was an attempt to conceal the bag containing cocaine. We find defendant's presence in Phipps's room, more specifically on her bed, and his behavior prior to arrest proved beyond a reasonable doubt that defendant constructively possessed the bag of cocaine. Therefore, we move on to the allegation of intent to deliver.

¶ 43 *2. Intent to Deliver*

¶ 44 "Intent to deliver is often proved by circumstantial evidence." *Beverly*, 278 Ill. App. 3d at 799. Relevant factors include whether the quantity of drugs possessed is too large to be reasonably viewed as an amount for personal consumption, the degree of drug purity, the possession of weapons, the possession and amount of cash, possession of police scanners, beepers or cellular telephones, possession of drug paraphernalia commonly associated with narcotics transactions, and the manner in which the drug is packaged. *Robinson*, 167 Ill. 2d at 408.

¶ 45 Defendant argues that based on the circumstantial factors in *Robinson* the State failed to prove beyond a reasonable doubt that he intended to deliver the cocaine. Specifically, defendant argues that the 0.8 grams of cocaine found is entirely consistent with personal consumption. See *People v. Ellison*, 2013 IL App (1st) 101261, ¶ 15, 987 N.E.2d 837

(describing expert testimony on amounts of cocaine and finding 3.1 grams of cocaine to be consistent with personal use); *People v. Nixon*, 278 Ill. App. 3d 453, 458, 663 N.E.2d 66, 69 (1996) (6.6 grams of cocaine a "relatively small amount" that did not support finding of intent to deliver).

¶ 46 "The quantity of [a] controlled substance alone can be sufficient to prove an intent to deliver." *Beverly*, 278 Ill. App. 3d at 799. However, "[w]hen the amount of substance seized is an amount that may be considered consistent with personal use, additional evidence of intent to deliver is required to support a conviction." *Id.*

¶ 47 Defendant argues that even with additional evidence the State failed to prove intent to deliver. In looking at the relevant factors, defendant argues the packaging of the cocaine in seven smaller bags is not proof that defendant intended to sell the drugs; rather, he asserts he could have been the buyer. Defendant also argues that the police found no drug paraphernalia on him or in Phipps's room. Lastly, defendant cites many cases, one being *People v. Hodge*, 250 Ill. App. 3d 736, 747, 620 N.E.2d 651, 660 (1993), to reject the argument that finding \$1905.33—fifty-five \$20 bills and seven \$100 bills—on his person is indicative of intent to deliver.

¶ 48 While possession of 0.8 grams of cocaine may arguably be indicative of personal consumption, we must consider all of the evidence. When we look at the totality of the evidence, it is clear defendant intended to deliver the cocaine.

¶ 49 Our case is analogous to *Beverly*, 278 Ill. App. 3d at 802-03, where the court found evidence similar to the evidence in our case sufficient to find the defendant guilty beyond a reasonable doubt of possession with intent to deliver. In *Beverly*, police found the defendant in possession of 0.9 grams of cocaine. *Id.* at 802. As is common for distribution, the cocaine came

in individual packages using the corners of plastic bags. *Id.* While police did not find drug paraphernalia on the defendant, they found \$427 in three different locations on his person. *Id.* Based on the additional evidence, the *Beverly* court found there was sufficient evidence to find the defendant guilty beyond a reasonable doubt of possession with intent to deliver. *Id.* at 803.

¶ 50 Here, police found a bag containing 0.8 grams of cocaine—packaged in seven smaller bags. While defendant argues he could have been the buyer and not the seller, the evidence suggested otherwise. Here, the manner of packaging supports the conclusion he intended to sell the drugs. It is unlikely a buyer leaves the transaction with the individual dose and the outer bag containing the individually bagged single doses—here, defendant possessed both. Also, we find the absence of drug paraphernalia in conjunction with his possession of a large quantity of money is evidence of defendant's intent to distribute the drugs. If defendant intended to consume the drugs, it is reasonable to expect him to possess some type of paraphernalia commonly used to consume the substance. Moreover, drug sales involve cash-and-carry transactions and this explains the large amount of money in defendant's pocket. Therefore, when viewing the evidence in the light most favorable to the State, we find the State offered sufficient evidence to allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48, 1 N.E.3d 888.

¶ 51 C. Crime Stoppers Fine

¶ 52 Lastly, defendant argues the trial court improperly imposed a \$25 Crime Stoppers fine. We agree with defendant, and note the State has forfeited any argument on appeal because it failed to address this issue in its brief. See Ill. S. Ct. R. 341(h)(7), (i) (eff. Nov. 1, 2017).

¶ 53 A Crime Stoppers fine is only applicable in instances where the defendant receives a community-based sentence. 730 ILCS 5/5-6-3(b)(13) (West 2014); *People v. Beler*,

327 Ill. App. 3d 829, 837, 763 N.E.2d 925, 931 (West 2002). Because defendant received a prison sentence, he is not subject to this fine. We therefore vacate the \$25 Crime Stoppers fine.

¶ 54

III. CONCLUSION

¶ 55 For the foregoing reasons, we affirm the trial court's judgment but vacate the \$25 Crime Stoppers fine.

¶ 56 Affirmed in part and vacated in part.