2019 IL App (1st) 160338-U

No. 1-16-0338

Order filed March 27, 2019

Third Division



IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 14 CR 16787 |
| | ) | |
| LARRY SMITH, | ) | Honorable |
| | ) | Raymond Myles, |
| Defendant-Appellant. | ) | Judge presiding. |

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

**ORDER**

¶ 1 *Held*: Affirmed in part, vacated in part. Defendant's conviction for delivery of controlled substance within 1000 feet of school is affirmed over his contention that State failed to present evidence that exact location of drug transaction was within 1000 feet of school. Defendant's conviction for delivery of controlled substance is vacated under one-act, one-crime doctrine.

¶ 2 Following a bench trial, defendant Larry Smith was found guilty of delivery of a controlled substance (heroin) (720 ILCS 570/401(d) (West 2014)) and delivery of a controlled substance (heroin) within 1000 feet of a school (720 ILCS 570/401(d), 407(b)(2) (West 2014))

and was sentenced to six years in prison. On appeal, defendant contends that the State did not prove beyond a reasonable doubt that he delivered the heroin within 1000 feet of a school, as it did not prove that the exact location of the transaction was within 1000 feet of a school. In the alternative, defendant contends that we should vacate his conviction and sentence for delivery of a controlled substance under the one-act, one-crime doctrine because that conviction was based on the same physical act as his conviction for delivery of a controlled substance within 1000 feet of a school. We affirm in part and vacate in part.

¶ 3 BACKGROUND

¶ 4 At trial, Chicago police officer Cobb testified that on the evening of September 5, 2014, he was conducting an undercover narcotics operation. When Officer Cobb was in the area of Ashland Avenue and 69th Street, he approached defendant and asked if anyone was "working out here." In response, defendant asked Officer Cobb if he was looking for "blows," (a term for heroin), and told Officer Cobb to follow him.

¶ 5 Together, Officer Cobb and defendant then walked west to Paulina Street, then north on Paulina until they reached "[a]pproximately the location of 6831 South Paulina." Defendant then asked Officer Cobb for money and told him to wait there. Officer Cobb gave defendant $20 dollars in prerecorded "1505" funds, and defendant left and walked approximately five houses down and went into a residence at 6811 South Paulina. Two to five minutes later, defendant left the residence, returned to Officer Cobb, and gave him two purple Ziploc bags containing a white powdery substance.

¶ 6 Chicago police officer Scott Hall testified that he was a surveillance officer on Officer Cobb's narcotics team. Officer Hall testified that he observed Officer Cobb and defendant walk

north on Paulina to approximately 6831 South Paulina, where they engaged in a hand-to-hand transaction. Officer Hall could not see what they had exchanged. Officer Cobb remained at 6831 South Paulina, and defendant walked into a residence at 6811 South Paulina. A few minutes later, Officer Hall saw defendant leave the residence, walk back to Officer Cobb, and engage in a second hand-to-hand transaction.

¶ 7 Wendell Saffold, an investigator for the Cook County State's Attorney's office testified that he measured the distance from 6831 South Paulina Street to 6936 South Hermitage Street, where the Betty Shabazz International Charter School was located. To measure the distance, Saffold used a Westward measuring device, which was tested, calibrated, and functioning properly. Saffold calibrated the measuring device before and after he took the measurement. The distance from 6831 South Paulina to 6936 South Hermitage was 866 feet.

¶ 8 The parties stipulated that Lenetta Watson, a forensic chemist, would testify that one of the Ziploc bags contained a substance that tested positive for the presence of heroin in the amount of 0.1 grams.

¶ 9 The court found defendant guilty of delivery of less than one gram of heroin within 1000 feet of a school and delivery of less than one gram of heroin and sentenced him to two concurrent six year terms of imprisonment. This appeal followed.

¶ 10 ANALYSIS

¶ 11 On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt of delivery of a controlled substance within 1000 feet of a school, because it did not present evidence that the exact location of the drug transaction was within 1000 feet of a school. Defendant claims the State presented no testimony establishing the exact location of the

transaction. He asserts that Officers Cobb and Hall merely testified about the approximate location of the transaction, as the officers testified that it occurred at the "approximate" location of 6831 South Paulina. Defendant requests we reverse his conviction for delivery of a controlled substance within 1000 feet of a school.

¶ 12 When we review the sufficiency of the evidence, the question is 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." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). We must take all reasonable inferences from the evidence in favor of the State. *People v. Hardman*, 2017 IL 121453, ¶ 37. It is the responsibility of the fact finder (here, the circuit court) to determine the credibility of witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence. *People v. Branch*, 2014 IL App (1st) 120932, ¶ 9. We will only reverse a conviction if the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of the defendant's guilt. *Branch*, 2014 IL App (1st) 120932, ¶ 9.

¶ 13 To prove a defendant guilty of delivery of a controlled substance within 1000 feet of a school, the State must prove that the distance from the actual site of the drug transaction to the real property comprising the school is 1000 feet or less. *Davis*, 2016 IL App (1st) 142414, ¶ 13. In the present case, the evidence at trial established that, before the transaction, Officer Cobb and defendant walked northbound on the 6800 block of South Paulina. Officer Cobb then waited for defendant at 6831 South Paulina while defendant went to a nearby residence to retrieve the drugs. Defendant returned to Officer Cobb and gave him two Ziploc bags containing heroin. Investigator Saffold testified that his measuring device was calibrated and functioning properly,

and that it recorded a distance of 866 feet between 6831 South Paulina and the Betty Shabazz International School. Viewing the evidence in the light most favorable to the State, this evidence was sufficient for the trial court to conclude that the actual location of the transaction occurred at 6831 South Paulina, and that it took place within 1000 feet of a school.

¶ 14 Defendant nevertheless argues that the State did not identify or present testimony to establish the exact location of the drug transaction. He takes issue with the fact that Officer Cobb and Hall testified that Officer Cobb walked with defendant until they reached the "approximate" location of 6831 South Paulina. We are not persuaded. When Officer Cobb testified, he stated that he "remained at 6831 South Paulina" and, on cross-examination, that he waited at 6831 South Paulina for defendant to retrieve the drugs. Likewise, when Officer Cobb testified on cross-examination about where defendant went to retrieve the drugs, he did so by using his own status at 6831 South Paulina as a geographical reference point to pin down where defendant was. And Investigator Saffold testified that the distance from 6831 South Paulina to the school was 866 feet. We are therefore not persuaded by defendant's argument that we must reverse his conviction because the evidence with respect to the actual location of the drug exchange was insufficient.

¶ 15 Defendant cites *People v. Davis*, 2016 IL App (1st) 142414, and *United States v. Soler*, 275 F.3d 146 (1st Cir. 2002), but neither case advances his argument. In *Davis*, the officer and the defendant spoke about a drug transaction in a parking lot of a gas station located at 901 North Pulaski Road. *Davis*, 2016 IL App (1st) 142414, ¶ 3. The actual drug transaction took place in the alley behind the gas station. *Id.* ¶ 3. The parties stipulated that the distance from 901 North Pulaski Road, where the gas station was located, to the school, was 822 feet. *Id.* ¶¶ 3, 5. The

defendant was convicted, but we reversed, finding that the evidence did not establish that the actual location in the alley where the drug transaction took place was within 1000 feet of the school. *Id.* ¶¶ 14-15. We noted that the measurement must be made from the exact location of the drug transaction to the school. *Id.* ¶ 13. Unlike *Davis*, where the transaction took place in an alley behind a gas station, and the parties stipulated that the distance from the gas station to the school was 822 feet, here, the evidence showed that the actual location of the transaction occurred at 6831 South Paulina, not somewhere in an alley behind the building. *Id.* ¶ 5.

¶ 16 In *Soler*, the drug transaction took place on a third-floor landing of an apartment building. *Soler*, 275 F.3d at 149. The distance between the rear entrance of the apartment building to the corner of the school building was 963 feet. *Id.* at 154. The First Circuit Court of Appeals concluded that the evidence was insufficient to prove that the transaction took place within 1000 feet of a school, finding that there was an obvious gap in distance "between the base of the [apartment building] and the third-floor landing" where the transaction took place. *Id.*

¶ 17 Unlike *Soler*, the evidence at trial in this case established that Saffold began the measurement at 6831 South Paulina, and the transaction took place outside the actual location of 6831 South Paulina, not in a place inside the building that could have somehow been more than 1000 feet from the school.

¶ 18 Alternatively, defendant contends, and the State concedes, that we should vacate his conviction and sentence for delivery of a controlled substance under the one-act, one-crime doctrine. Under the one-act, one-crime doctrine, multiple convictions based on precisely the same physical act are prohibited. *People v. Akins*, 2014 IL App (1st) 093418-B, ¶ 17. When the one-act, one-crime doctrine is violated, sentence is imposed on the most serious offense and the

defendant's conviction for the less serious offense must be vacated. *People v. Smith*, 233 Ill. 2d 1, 20 (2009).

¶ 19 The circuit court convicted defendant of delivery of less than one gram of heroin and delivery of less than one gram of heron within 1000 feet of a school. Defendant's convictions were based on the same physical act of delivering less than one gram of heroin to Officer Cobb. Thus, his convictions violate the one-act, one-crime doctrine, and we must vacate his sentence for the less serious offense. Delivery of less than one gram of heroin is a Class 2 felony but it is a Class 1 felony when the offense is committed within 1000 feet of a school. 720 ILCS 570/407(b)(2) (West 2014). Accordingly, we vacate defendant's sentence for delivery of less than one gram of heroin, the less serious offense, and order the clerk of the circuit court to correct the mittimus accordingly. See *Akins*, 2014 IL App (1st) 093418–B, ¶ 17 ("if guilty verdicts are obtained for multiple counts arising from the same act, then a sentence should be imposed on the most serious offense").

¶ 20 CONCLUSION

¶ 21 We affirm defendant's conviction for delivery of a controlled substance within 1000 feet of a school. We vacate defendant's conviction and sentence for delivery of a controlled substance.

¶ 22 Affirmed in part and vacated in part.