2019 IL App (1st) 162786-U

FIRST DIVISION
January 22, 2019

No. 1-16-2786

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 15959
	)	
VINCENT HARRIS,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE MIKVA delivered the judgment of the court.
Justices Griffin and Walker concurred in the judgment.

ORDER

¶ 1 *Held*: Trial evidence was sufficient to convict defendant of delivery of a controlled substance but not to prove that the delivery was within 1000 feet of a public park.

¶ 2 Following a 2016 bench trial, defendant Vincent Harris was found guilty of delivery of a controlled substance (less than one gram of cocaine) within 1000 feet of a public park. Mr. Harris was sentenced to four years' imprisonment, which he appears to have already served. On appeal, he contends that the evidence was insufficient to convict him of delivery and, alternatively, that the evidence was insufficient to prove that the delivery was within 1000 feet of a public park. While we reject his argument that the evidence was insufficient to find him guilty

of delivery, we reverse Mr. Harris's conviction for delivery within 1000 feet of a public park.

¶ 3 I. BACKGROUND

¶ 4 Mr. Harris was charged with two counts of delivery of a controlled substance (720 ILCS 570/401(d) (West 2014)) for allegedly delivering less than one gram of a substance containing cocaine on or about September 12, 2015. Count 2 alleged that he did so within 1000 feet of a public park, specifically Douglas Park. See 720 ILCS 570/407(b)(2) (West 2014).

¶ 5 At trial, Chicago police officer Marco Mar testified that, on September 12, 2015, he was working undercover, so he was not in uniform and was driving an unmarked car. He went to a residential area at the intersection of Fillmore and Richmond Streets, and parked at 1104 South Richmond Street. He asked a man there if anybody was "working," meaning selling narcotics. The man asked Officer Mar what he was looking for, and Officer Mar replied that he was looking for $40 worth of "rock." The man told Officer Mar to wait, and then walked away while Officer Mar remained in his car. Officer Mar could not recall what the man looked like, and he did not see him again.

¶ 6 About two minutes later, Mr. Harris approached Officer Mar's car wearing a black cap, black shirt, and light gray pants. Officer Mar identified Mr. Harris at trial. Leaning into the open car window, Mr. Harris asked Officer Mar how much he needed. Officer Mar replied that he needed $40 worth of "rock." Mr. Harris had a bag in his hand, containing "a few zip-lock bags with rabbit logos containing a rock-like substance" that Officer Mar suspected to be cocaine. Mr. Harris gave Officer Mar "the narcotics," and Officer Mar gave him $40 of prerecorded currency. Officer Mar drove away and notified other officers by radio of his purchase and Mr. Harris's description. Officer Mar returned about four minutes later to see Mr. Harris being detained by other officers at about 1102 South Richmond Street, and he recognized Mr. Harris as the man

who sold him the suspected narcotics.

¶ 7 On cross-examination, Officer Mar acknowledged that he did not see where Mr. Harris came from before he appeared at Officer Mar's car window, and had never seen Mr. Harris before. Officer Mar also admitted that he only saw Mr. Harris in profile when he was being detained by the two other officers. Officer Mar also acknowledged that there were other people on the street and that the prerecorded funds he used to buy the drugs were never recovered.

¶ 8 Officer Piek testified that he was assigned to surveillance that morning and was in an unmarked truck about 20-30 feet from where Officer Mar was parked near Fillmore and Richmond Streets. Officer Piek saw Mr. Harris walk up to Officer Mar's car wearing a black hat, black shirt, and light gray pants. Officer Piek identified Mr. Harris at trial as the man who had leaned into Officer Mar's car window, was there for a few seconds, and then walked across the street. Officer Piek could not hear what either Mr. Harris or Officer Mar said during this interaction. After Officer Mar drove away, Mr. Harris paced briefly before walking to the area around 1101 or 1105 South Richmond, between the first two apartment buildings on that side of the block. Officer Piek lost sight of Mr. Harris when he went into the gangway between the buildings, but only for about 20 seconds. He then saw Mr. Harris interact with a man in camouflage clothing who was "around him pretty much the whole time watching the block." Officer Piek could not hear what they were saying. Officer Piek lost sight of Mr. Harris and the man in camouflage as they went between the two buildings. Mr. Harris then returned to the corner, Officer Piek told other officers to detain him, and Officer Piek saw them do so. The man in camouflage was standing by the two buildings. Officers went to look in the gangway between the buildings, but they did not detain the man in camouflage.

¶ 9 On cross-examination, Officer Piek testified that he did not leave his truck. He did not

see from which direction Mr. Harris approached Officer Mar's car, nor did he see Mr. Harris place anything on the ground afterwards. Officer Piek acknowledged that a police report reflected that Mr. Harris bent over and placed an unknown object on the ground near 1101 South Richmond Street after interacting with Officer Mar. Officer Piek explained that there were other surveillance officers, but could not recall who reported seeing Mr. Harris place an object on the ground. He could not see the end of the gangway between the buildings and could not recall if it had a gate. When shown a photograph of the gangway depicting a gate with a padlock, he reiterated that he did not see the gate and thus did not know if the padlock was there on the morning in question. The man in camouflage went into the gangway, out of Officer Piek's sight, just before the officers arrived to detain Mr. Harris, so the man would have seen them coming.

¶ 10 The parties stipulated that Officer Mar would testify to inventorying the items he purchased, and that a forensic chemist would testify to weighing and testing the content of the packets, finding them to contain less than 0.1 gram of a substance containing cocaine.

¶ 11 The parties also stipulated "that the distance from 1104 South Richmond, Chicago, Illinois, to the property line of Douglas Park located at 1401 Sacramento, Chicago, Illinois, is less than 1000 feet."

¶ 12 The State rested, and the defense unsuccessfully moved for a directed finding.

¶ 13 Maurice Harris (Maurice), Mr. Harris's brother, testified that Mr. Harris and their mother, Pearl Harris (Pearl), lived at 1101 South Richmond. On the morning in question, Maurice was wearing a black shirt and camouflage pants. Maurice went to his mother's home to use a grill kept in the gangway. When Maurice arrived, Mr. Harris was standing in front of the building inside the fence. Maurice noted that the gate leading to the gangway was locked with a padlock, so he went inside by the front door. Maurice denied crossing the street to stand with Mr. Harris,

picking something up in the gangway, or seeing Mr. Harris put something on the ground. Mr. Harris remained outside, talking with a man Maurice knew only as Mike. When Maurice went to the front door a short time later, Pearl was in front of the building talking with officers while Mr. Harris was across the street in handcuffs by a police car. The officers did not ask to speak with Maurice. The officers took Mr. Harris with them when they left.

¶ 14 On cross-examination, Maurice testified that Mr. Harris was wearing a cap and black jacket that morning. The building maintenance man had the key to the gate padlock, so Mr. Harris or Pearl could not open the gate themselves. While there were other people on the street that morning, Maurice saw nobody else wearing camouflage pants.

¶ 15 Pearl Harris, Mr. Harris's mother, testified that she came home from an errand that morning and saw Mr. Harris, in handcuffs, across the street with his friend Mike. Officers were in her yard searching for something. When she asked what they were doing, an officer replied that he was looking for drugs. Pearl testified that the front gate was padlocked that morning and that neither she nor Mr. Harris had a key to that padlock. She would have to call her landlord to have the gate unlocked. On cross-examination, Pearl testified that Mr. Harris was wearing a black hat, black jacket, and stone-washed blue jeans. She could not recall what Mike was wearing, nor what kind of pants Maurice was wearing. Pearl had a key to the rear gate, and could access the grill by using her back door. Mr. Harris did not have a key to the rear gate. On redirect examination, Pearl testified that she calls to have the front gate unlocked when she barbecues so guests can join her outside without entering the building.

¶ 16 Maurice and Pearl both testified that certain photographs accurately depicted the home of Mr. Harris and Pearl on the day in question, including a padlock on the front gate to the gangway.

¶ 17 Mr. Harris testified that he was in front of his home on the morning of September 12, 2015, chatting with Michael Collins or "Little Mike." While they were at the corner of Fillmore and Richmond Streets, across from his home, the police approached them. Maurice was not nearby, but inside the home in the doorway. Officers handcuffed Mr. Harris and Mr. Collins. An officer said "you know what this is?" to which Mr. Harris replied "no." The officers let Mr. Collins go, searched the area, and arrested Mr. Harris. Police had searched Mr. Harris's home a few days earlier pursuant to a search warrant, but the officers who executed the warrant wore masks so Mr. Harris did not know if they were the same officers who arrested him. Mr. Harris denied selling narcotics that morning, and denied having a bag of cocaine packets marked with a rabbit logo. He did not hide anything in the gangway because the gate was locked. He had $58 in cash when he was arrested, and it was all returned to him later. He tried "to get Mike to come to court" but was unsuccessful.

¶ 18 On cross-examination, Mr. Harris described Mr. Collins and testified that he was wearing a white t-shirt and orange pants on the morning in question. Mr. Collins was not selling drugs that morning. Maurice was wearing a black shirt and camouflage pants that morning.

¶ 19 In rebuttal, the State presented a certified copy of Mr. Harris's three felony convictions for possession of a controlled substance, unlawful use of a weapon by a felon, and manufacture or delivery of cannabis.

¶ 20 In closing arguments, defense counsel argued that the evidence was insufficient to show that Mr. Harris delivered drugs that morning at all. He did not challenge that Mr. Harris was within 1000 feet of a public park or that Douglas Park is a public park.

¶ 21 The court found Mr. Harris guilty of both counts. After reciting the evidence in detail, it found the defense witnesses "inherently biased, incredible at some times, absolutely unbelievable

at other times." It found Mr. Harris's testimony that masked officers executed a search warrant was "absolutely incredible." The failure to recover the prerecorded funds was "explainable" because Maurice, the man in camouflage pants, was there, the home was accessible, and the gangway was accessible through the home. The court made no reference in its findings to the 1000-feet element except to note "the stip to the lab and the stip to the less than 1000 feet."

¶ 22 Mr. Harris's posttrial motion, as written and as argued in court, challenged the sufficiency of the evidence to convict him of delivery of a controlled substance. The court denied the motion, reiterating its finding that the defense witnesses were not credible. Following a sentencing hearing, the court merged the counts and sentenced Mr. Harris to four years' imprisonment on the count alleging delivery within 1000 feet of a public park.

¶ 23 II. JURISDICTION

¶ 24 Mr. Harris was sentenced on September 20, 2016, and filed a timely notice of appeal on September 21, 2016. This court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rules 603 and 606, governing appeals from final judgments of conviction in criminal cases (Ill. S. Ct. Rs. 603 (eff. Feb. 6, 2013), 606 (eff. Dec. 11, 2014)).

¶ 25 III. ANALYSIS

¶ 26 On appeal, Mr. Harris contends that the trial evidence was insufficient to prove beyond a reasonable doubt that he delivered a controlled substance. Alternatively, he contends that the trial evidence was insufficient to convict him of doing so within 1000 feet of a public park.

¶ 27 On a claim of insufficient evidence, we must determine whether, taking the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Gray*, 2017 IL 120958, ¶ 35. It is the

responsibility of the trier of fact to weigh, resolve conflicts in, and draw reasonable inferences from the testimony and other evidence, and it is better equipped than this court to do so as it heard the evidence. *Id.*; *In re Jonathon C.B.*, 2011 IL 107750, ¶ 59. We do not retry a defendant; that is, we do not substitute our judgment for that of the trier of fact on witness credibility or the weight of evidence. *Gray*, 2017 IL 120958, ¶ 35.

¶ 28 To prove Mr. Harris guilty of the Class 1 felony of delivery of a controlled substance within 1000 feet of a public park, the State was required to show that he (1) knowingly delivered less than one gram of a substance containing cocaine and (2) did so in a public park, or on or within 1000 feet of the real property comprising a public park. 720 ILCS 570/401(d), 407(b)(2) (West 2014). In 2018, the aggravating distance was reduced to 500 feet from a public park. Pub. Act 100-3 (eff. Jan. 1, 2018). The same delivery, not done in or near a public park or other statutorily-specified location, is a Class 2 felony. 720 ILCS 570/401(d) (West 2014). While the State did not need to prove that Mr. Harris knew of his proximity to a public park, it needed to prove that the sale was within that proximity. *People v. Clark*, 406 Ill. App. 3d 622, 634 (2010). We address Mr. Harris's two sufficiency arguments in turn.

¶ 29 A. The Evidence was Sufficient to Prove Mr. Harris Guilty of the Delivery

¶ 30 Here, taking the evidence in the light most favorable to the State as we must, we cannot conclude that no rational trier of fact could find Mr. Harris guilty of the delivery itself. The positive and credible testimony of even a single witness is sufficient to convict. *Gray*, 2017 IL 120958, ¶ 36. Here, the State presented two witnesses. Officer Mar testified that Mr. Harris sold him a substance, which later testing revealed contained cocaine. Officer Piek testified to seeing Mr. Harris interact with Officer Mar at the time and in the location described by Officer Mar. Both officers identified Mr. Harris in court, and the court necessarily found them credible when

it found Mr. Harris guilty. We do not substitute our judgment for that of the trier of fact regarding credibility. *Id*. ¶ 35.

¶ 31 Against this conclusion, Mr. Harris argues that the account from Officers Mar and Piek was "too unsatisfactory, improbable, and at odds with the other evidence in the case." He notes that, although he had cash in his possession upon arrest, the prerecorded funds Officer Mar used to buy the contraband were not recovered from him. However, the court found this to be explicable in that Officer Piek testified to Mr. Harris interacting with a man in camouflage pants between his transaction with Officer Mar and his detention, and to Officer Piek losing sight of Mr. Harris in the gangway. The court found, based at least partially on the testimony of Mr. Harris and his brother Maurice, that the man in camouflage pants was Maurice.

¶ 32 Mr. Harris also argues that it "strains credulity that [Mr. Harris] would be able to discern which dollar bills were prerecorded funds and which were normal dollar bills, and only dispose of the former, while keeping the other currency." However, there is simply nothing incredible about Mr. Harris keeping these sale proceeds separate from his other cash, and we have made clear that "there is no requirement that [prerecorded] or marked funds used in a narcotics transaction be recovered for a conviction to stand." *People v. Trotter*, 293 Ill. App. 3d 617, 619 (1997).

¶ 33 Mr. Harris also notes Officer Piek's testimony that he lost sight of the man in camouflage in the gangway, and defense testimony that Maurice was wearing camouflage and was in the doorway of Mr. Harris and Pearl's home. Mr. Harris argues that "it is inconceivable, simply contrary to human experience, that these experienced officers would not have found and detained a suspect involved in the offense, who was not hiding and was still in the area of the offense, and at least attempt to question him." But the decision by the police to not detain Mr. Harris's brother

does not render the evidence of his guilt insufficient.

¶ 34 Mr. Harris also emphasizes the defense evidence of a locked front gate leading to the gangway where Officer Piek claimed Mr. Harris went with the man in camouflage pants and possibly disposed of the marked currency. However, the only evidence that the gate was padlocked the day Mr. Harris was arrested, and that Mr. Harris did not have a key for that padlock, also came from defense witnesses whom the trial court found to be incredible. In short, the evidence that Mr. Harris delivered a controlled substance was not so unreasonable, improbable, or unsatisfactory that the finding of guilt cannot stand.

¶ 35 B. There Was No Evidence That Douglas Park is a Public Park

¶ 36 Alternatively, Mr. Harris contends that the State failed to prove that he delivered a controlled substance within 1000 feet of a public park, and that his offense should be reduced from a Class 1 felony under section 407(b)(2) of the Illinois Controlled Substances Act (Act) (720 ILCS 570/407(b)(2) (West 2014)) to a Class 2 felony under section 401(d) of the Act (720 ILCS 570/401(d) (West 2014)).

¶ 37 The State's entire argument on this point is that Mr. Harris waived any challenge to the 1000-feet element by stipulating that the location across from his home where Officer Mar testified the cocaine sale occurred, 1104 South Richmond Street in Chicago, was within 1000 feet of Douglas Park. But, as Mr. Harris points out, "the facts to which the parties stipulated did not prove the enhancing element, that Douglas Park was, in fact, a public park, for purposes of this offense."

¶ 38 The State counters that our supreme court has held that a " 'stipulation is conclusive as to all matters necessarily included in it,' [citation] and '[n]o proof of stipulated facts is necessary, since the stipulation is substituted for proof and dispenses with the need for evidence' " *People v.*

Woods, 214 Ill. 2d 455, 469 (2005) (quoting 34 Ill. L. and Prac. Stipulations §§ 8, 9 (2001)). "Generally speaking, a defendant is precluded from attacking or otherwise contradicting any facts to which he or she stipulated." *Id*.

¶ 39 In *Woods*, our supreme court found the parties' stipulation to a forensic chemist's testimony was sufficient to establish the chain of custody necessary to admit into evidence the heroin that the defendant was charged with possessing. *Id.* at 466-67. Our supreme court made clear that "[a]lthough [the] defendant now contends that the stipulation was limited solely to his agreement with the State that the substance *tested* by the chemist was heroin and that the stipulation did not in any way agree that the substance *seized* at the time of his arrest was heroin, [the] defendant's narrow construction of the stipulation is belied by the record." (Emphasis in original.) *Id*. at 473-74. The supreme court found that the stipulation "to the chemist's testimony in a summary and brief manner served to remove from this case any dispute with respect to the chain of custody or the chemical composition of the recovered substance." *Id*. at 474. The *Woods* court concluded that the defendant had forfeited his chain-of-custody challenge by failing to object and had "affirmatively waived" any challenge by entering into the stipulation. *Id.* at 475.

¶ 40 The State contends that Mr. Harris's claim—that the stipulation was limited to the specified location being within 1000 feet of Douglas Park and did not include any stipulation that Douglas Park was a public park—is similar to the gamesmanship prohibited by *Woods*. The State argues that, as in *Woods*, Mr. Harris has placed the State in the position of believing that the 1000-feet element was not at issue and that, as in *Woods*, he may not make this argument for the first time on appeal.

¶ 41 However, there is an important distinction between this case and *Woods*. In *Woods* the defendant's arguments went to the admissibility into evidence of the narcotics that had been

tested, and here Mr. Harris is arguing sufficiency—that the State failed to put in evidence to prove an element of the crime. *Woods* makes clear that where, as in this case, a defendant challenges the sufficiency of the evidence, as opposed to evidentiary foundation, "his or her claim is not subject to the waiver rule and may be raised for the first time on direct appeal." *Id.* at 470.

¶ 42 We noted this important distinction in our decision in *People v. Lashley*, 2016 IL App (1st) 133401, ¶¶ 20-23. In that case, the defendant stipulated that the content of bags recovered tested positive for heroin and weighed 15.2 grams. We rejected any contention by the State that the defendant "waived" review of whether the State had proved that he possessed more than 15 grams of heroin by his stipulation (*id.* ¶ 23), or that *Woods* was "applicable" (*id.* ¶ 22). While this court found that the language of the stipulation was sufficient to establish the weight of the drugs, we completely rejected the waiver arguments that the State is making here.

¶ 43 The State does not point to any evidence that Douglas Park was a public park. Instead, the State insists that because defense counsel "never raised the issue," defense counsel demonstrated that the stipulation was "dispositive" to prove this element. But, in fact, the stipulation said nothing at all about the nature of Douglas Park, only its location. There is simply no way to read the stipulation in this case as supplying the necessary evidence that Douglas Park is a public park. Mr. Harris's conviction for delivery within 1000 feet of a public park must be vacated. However, as he acknowledges, this does not preclude us from reducing his conviction to a simple Class 2 delivery.

¶ 44 IV. CONCLUSION

¶ 45 Mr. Harris's conviction for delivery of a controlled substance within 1000 feet of a public park is reduced to the Class 2 felony of delivery of a controlled substance. The four-year

sentence that Mr. Harris received is within the statutory range for a Class 2 felony. 730 ILCS 5/5-4.5-35 (West 2014). Mr. Harris, who received the minimum possible sentence on the Class 1 felony for which he was convicted, might well have received a lighter sentence on this lesser felony. But it appears from the Illinois Department of Corrections website that he has already served his complete sentence, so there is no reason to remand this case for a new sentencing hearing. The clerk of the court is ordered to correct the mittimus to reflect the proper statutory citation for Mr. Harris's reduced conviction.

¶ 46 Conviction vacated and reduced conviction entered; mittimus corrected.