2019 IL App (4th) 160299-U

NO. 4-16-0299

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
February 4, 2019
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Morgan County
JEVON K. WALTON,	)	No. 15CF25
Defendant-Appellant.	)	
	)	Honorable
	)	Christopher E. Reif,
	)	Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court.
Presiding Justice Holder White concurred in the judgment.
Justice DeArmond specially concurred.

ORDER

¶ 1 *Held*: Because the separate bags of plant material were commingled before they were tested and weighed, the State was unable to prove beyond a reasonable doubt that defendant possessed with intent to deliver the amount of cannabis as charged.

¶ 2 Following a jury trial, defendant, Jevon K. Walton, was found guilty of unlawful possession of cannabis with intent to deliver. The trial court sentenced him to nine years in prison. Defendant files this direct appeal, claiming the State failed to prove beyond a reasonable doubt that he possessed more than 500 grams of a substance containing cannabis when separate bags of suspected cannabis were commingled before the substance was tested and weighed. We agree.

¶ 3 I. BACKGROUND

¶ 4 In January 2016, a jury convicted defendant of unlawful possession of cannabis with intent to deliver more than 500 grams but not more than 2000 grams of a substance containing cannabis. 720 ILCS 550/5(e) (West 2014). In February 2016, the trial court sentenced him to nine years in prison.

¶ 5 The following evidence was presented at defendant's trial. Sean Haefeli, an inspector with the Illinois State Police (ISP) Central Illinois Enforcement Group (Group), testified that in his 16 years as a police officer, he received specific training related to investigating and detecting illicit drug activity and he has conducted hundreds of related investigations. In January 2015, a citizen informed the Group that Derek Whitaker was selling drugs at 221 East Beecher Avenue, Apartment 4, in Jacksonville. On February 26, 2015, while conducting surveillance of the apartment, Haefeli saw a vehicle known to be used by defendant parked in front of the apartment. Haefeli discovered Whitaker had moved out of the apartment on February 11, 2015. Haefeli continued to conduct surveillance of the apartment because he received information that there appeared to be continued drug activity at the location.

¶ 6 Haefeli said, on March 2, 2015, his team conducted surveillance and decided to engage in "some enforcement activity." As a result of the enforcement detail, ISP Trooper Howell, a K-9 officer, conducted a traffic stop of a vehicle that had just left the Beecher Avenue apartment. The dog conducted a free-air sniff around the vehicle. Based on the dog's conduct, the officers searched the contents of the vehicle and found 14 grams of marijuana. On March 3, 2015, as a result of the traffic stop, the officers secured a search warrant for the apartment, and on March 4, 2015, the officers executed the search.

¶ 7 During the search, Haefeli said he saw "a small plastic bag of suspected cannabis that was sitting on top of the entertainment center in the family room," "a larger bag of suspected

cannabis sitting on the floor next to the couch," a plastic bag (with 50 grams) of suspected cannabis in the lower drawer of the oven, and "multiple [(12)] bags of suspected cannabis that was inside" a child's Spider-Man backpack in the attic. He also found a digital scale, remnants of smoked "joints or blunts," a letter addressed to defendant with a different address lying on top of the refrigerator, and a "large amount of United States currency in the ceiling tiles in the kitchen." The cash consisted of "four bundles of money folded in half and wrapped up with hair ties." Haefeli estimated the street value of the cannabis at $10 per gram for a total of $13,000.

¶ 8 The prosecutor presented Haefeli with a paper bag marked as People's exhibit No. 1. Haefeli said he placed the contents of the Spider-Man backpack into this paper bag. Specifically, he stated: "The contents of this bag [were] inside 12 clear Ziploc plastic bags that were contained inside the child's Spider-Man backpack that was up in the attic." The prosecutor presented Haefeli with People's exhibit No. 2, which Haefeli identified as the "12 plastic bags, or plastic Ziploc bags that were—that contained the approximate 1,300 grams of cannabis." The following exchange occurred:

> "Q. Were those—those 12 plastic bags were found inside the backpack that you previously described?
>
> A. Yes, they were.
>
> Q. Did you place those plastic bags into that exhibit?
>
> A. I did.
>
> Q. Why remove the cannabis from the plastic bags and put them in People's Exhibit No. 1 and put the plastic bags in People's Exhibit No. 2?

A. Okay. We do that when we submit items to the fingerprint lab for, for latent fingerprint examination. They want us to separate the, the plastic bags from the actual drugs itself so that they can conduct their, their own tests.

Q. Okay. And how do you know that that's the 12 plastic bags that you collected on March 4th of 2015 and placed in People's Exhibit No. 2?

A. It has my exhibit No. of 18A, along with my—the red evidence tape that I placed on here, with my initials and badge number over it."

¶ 9 ISP forensic scientist, Brian Long, testified as the State's latent-fingerprint expert. The prosecutor gave Long exhibit No. 2 and asked if he recognized it. Long said he did. The following exchange occurred:

"Q. What is that?

A. This is a brown paper bag which contains 12 plastic bags.

Q. And did you conduct fingerprint analysis on any or all of the plastic bags contained in that brown paper bag?

A. Yes. I examined three plastic bags in — that are contained in People's exhibit No. 2."

Long said he found one fingerprint on two separate bags suitable for comparison. Those fingerprints matched the fingerprints on defendant's fingerprint card.

¶ 10 Joshua Stern, another ISP forensic scientist, was qualified, without objection, as the State's expert in the analysis of controlled substances and cannabis. In looking at People's exhibit No. 1, Stern said he analyzed the plant material contained therein. The following exchange occurred:

"Q. And would you tell the ladies and gentlemen of the jury what that item is, first of all?

A. This is my laboratory exhibit 6 of S-146258, and inside here I—there are six sealed clear plastic evidence bags, each one containing plant material.

Q. And so inside that paper bag there is, in fact, plant material that you analyzed?

A. Yes.

Q. How do you know that that's the exact paper bag that you did the analysis on?

A. I can identify it with this laboratory sticker (indicating), as well as the blue tape with my markings across the bottom. As I stated, this is—I can recognize the exhibit number, the case number, I can recognize my initials and the day which I took custody on here as well, and then across the bottom, on this blue tape, which is the tape I placed on there, I can recognize my initials, the date which I sealed it, the exhibit and the case number across there as well.

Q. So as you sit here today, you have no doubt that that's the paper bag that you conducted the analysis of the plant material on?

A. Correct.

Q. When, when you received it, was it in sealed condition?

A. Yes, it was.

Q. Could you describe the seal that was on it when you first described it—or first obtained the item?

A. When I first received the bag, there was no blue tape across here at the bottom. It was just like this (indicating), it was just a regular paper bag with agency seal at the top with this red tape, with somebody's markings across the top.

Q. And when you received it, did you have—had it—did it appear to—that the seal on it had been breached in any way?

A. No, it did not.

Q. Okay. You say you analyzed the plant material that's contained in People's exhibit No. 1. Did you come to any conclusions related to what that material is?

A. Yes, I did.

Q. What was it?

A. That the plant material from the six bags was cannabis.

Q. And the — did you weigh the plant material in that bag?

A. Yes, I did.

Q. And what was the weight of that—of the plant material in that bag?

A. The weight of the plant material alone was 1,303—1,303.5 grams."

¶ 11 The prosecutor gave Stern People's exhibit No. 3, which Stern identified as another plastic bag containing plant material. Stern said he analyzed its contents and determined the plastic bag contained 50.3 grams of cannabis.

¶ 12 On this evidence, the jury found defendant guilty of unlawful possession of cannabis with intent to deliver. Defendant filed posttrial motions, alleging evidentiary errors. The trial court denied defendant's motions and sentenced him to nine years in prison.

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 In his direct appeal, defendant argues the evidence was insufficient to prove him guilty beyond a reasonable doubt of the unlawful possession with the intent to deliver more than 500 but less than 2000 grams of a substance containing cannabis. He challenges the sufficiency of the evidence related to the weight and identity of the commingled plant material. Defendant contends the testimony of Haefeli and Stern did not establish that the contents of the 12 plastic bags of plant material found in the backpack were separately weighed or analyzed.

¶ 16 The State argues defendant forfeited this issue for purposes of appeal by not raising the issue in the trial court. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). The State contends defendant is trying to circumvent forfeiture by framing his argument as a sufficiency-of-the-evidence claim when actually he is challenging the lack of an adequate foundation by presenting a chain-of-custody claim. Citing *People v. Woods*, 214 Ill. 2d 455, 471 (2005), the State contends such an evidentiary issue, unlike a sufficiency-of-the-evidence claim, *is* subject to forfeiture. We do not interpret defendant's claim as a challenge to the adequacy of the chain of custody. Instead, defendant frames his issue as one specifically challenging the sufficiency of the evidence as to the weight and identity of cannabis in light of the officer's testimony of commingling. Further, we do not find defense counsel's use of the word "cannabis" at various points during the trial court proceedings in any way constituted his acquiescence to the State's position that the commingled plant material was, in fact, 1300 grams of cannabis.

¶ 17 When confronted with a challenge to the sufficiency of the evidence, this court considers whether, 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 beyond a reasonable doubt. *People*

v. Wheeler, 226 Ill. 2d 92, 114 (2007). The trier of fact has the responsibility to resolve conflicts in the evidence and to draw reasonable inferences from the facts. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). A conviction will be reversed where the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt. *Wheeler*, 226 Ill. 2d at 115.

¶ 18 The offense of unlawful possession of cannabis with intent to deliver depends on the amount of cannabis one is found to possess. 720 ILCS 550/5 (West 2014). When a defendant is charged with an offense under this statute specifying a certain amount of cannabis and a lesser-included offense exists for possessing a smaller amount, the weight of the cannabis is an essential element of the crime and must be proved beyond a reasonable doubt. See *People v. Jones*, 174 Ill. 2d 427, 428-29 (1996) (referencing the offense of possession of a controlled substance with intent to deliver). In this case, lesser-included offenses exist for possessing less than 500 grams of cannabis. See 720 ILCS 550/5(a), (b), (c), (d) (West 2014). Therefore, the weight of the cannabis in this case is considered an essential element of the offense.

¶ 19 When separate packages of a substance are seized, a sample from each package must be tested to determine whether it contains a controlled substance. *People v. Harden*, 2011 IL App (1st) 092309, ¶ 40. (An exception to that rule occurs when the separate packages are sufficiently homogeneous (*Jones*, 174 Ill. 2d at 429), but the State does not argue that that exception applies in this case.) Commingling the contents of separate packages prior to testing renders the test results insufficient to prove the weight element beyond a reasonable doubt. *Harden*, 2011 IL App (1st) 092309, ¶ 40.

¶ 20 Defendant does not challenge the evidence related to the 50.3 grams of cannabis found in the lower oven drawer. Rather, he argues that Stern’s testimony, which established that

the combined weight of the plant material taken from backpack was 1303.5 grams, failed to establish that he or Haefeli had tested and weighed the contents of the original 12 packages individually before Haefeli commingled them into six packages. As a result, defendant claims, the evidence was insufficient to prove him guilty beyond a reasonable doubt of the offense as charged. We agree.

¶ 21 Haefeli's testimony was unambiguous. He testified he removed the plant material from the 12 plastic bags he found inside the backpack. The plant material was ultimately placed in a paper bag marked as an exhibit, later identified as People's exhibit No. 1. He put the 12 empty plastic bags in a paper bag marked as an exhibit, later identified as People's exhibit No. 2. Haefeli said he removed the plant material from the original 12 plastic bags because "[t]hey want us to separate the, the plastic bags from the actual drugs itself so that they can conduct their, their own tests." There was no testimony presented that the plant material from the 12 plastic bags was tested prior to the commingling. Thus, the testimony was clear and uncontested that the plant material was commingled before testing. *Cf. Harden*, 2011 IL App (1st) 092309, ¶ 43 (forensic chemist's testimony was ambiguous regarding his testing procedures so reviewing court would not presume an improper procedure).

¶ 22 Stern testified he analyzed exhibit No. 1, which consisted of "six sealed clear plastic evidence bags, each one containing plant material." From this testimony, it is clear that Haefeli commingled the plant material, placing the contents of the 12 plastic bags into 6 plastic evidence bags. Stern testified the "plant material from the six bags was cannabis" and "the weight of the plant material alone was *** 1,303.5 grams."

¶ 23 A similar issue was before us in the context of an ineffective-assistance-of-counsel claim. See *People v. Coleman*, 2015 IL App (4th) 131045, ¶ 71. There, this court held

counsel rendered ineffective assistance when he stipulated to the content and weight of the commingled substance. *Id.* at ¶ 83. As we stated, under *Jones*, it was imperative for the State to sufficiently prove, beyond a reasonable doubt, that each individual bag contained cocaine, and each bag must have been chemically tested prior to commingling the substance. *Id.* at ¶ 83.

¶ 24 According to *Jones*, the State's burden is clear. If suspected contraband is contained in multiple packages, it is necessary to chemically test the substance in each and every container to prove, beyond a reasonable doubt, the identity and weight of the suspected contraband. *Jones*, 174 Ill. 2d at 429. As our supreme court noted, "While it is not difficult to speculate, as did the trial judge, that the remaining three [untested] packets may have contained cocaine, such a finding must be based on evidence and not upon guess, speculation, or conjecture." *Id.* at 430. The State must conclusively test a sample from each package to ensure a proper weight and identity. The specific charge depends on it. "The greater the amount of illegal substance the defendant possesses, the greater the crime—and, for that reason, the State must prove, beyond a reasonable doubt, the weight of the substance containing the drug." *People v. Coleman*, 391 Ill. App. 3d 963, 971 (2009).

> "Contrary to the holding of the Third District in *People v. Jackson*, 134 Ill. App. 3d 785, 787 *** (1985), the State cannot evade this requirement by the facile expedient of eliminating the multiplicity of containers, that is, dumping the contents of several containers into one container and then testing a sample from the one container. See *People v. Little*, 140 Ill. App. 3d 682, 686 *** (1986) (Heiple, J., dissenting) ('The defendant correctly points out that when the contents of the 11 manila envelopes were combined by the police before they were individually weighed and tested, *** the prosecution lost any basis to charge the

> defendant with possession of any specific quantity of a substance containing cannabis as to those 11 envelopes. The State, after all, is required to prove its case beyond a reasonable doubt. We may speculate that each of those 11 envelopes contained cannabis. That, however, amounts to guess and conjecture[,] which will not do. It is possible that only one of those 11 envelopes contained cannabis [(and we do not know the weight of any of them.]"). *Coleman*, 391 Ill. App. 3d at 972.

¶ 25 Assume for a moment that only six of the plastic bags found in the backpack contained cannabis. The others contained either a look-alike substance, some other type of plant material, or various kitchen spices. Is such a scenario likely? Probably not. However, our supreme court has made it clear that, in order to charge a defendant with possession of a specific weight of cannabis, the State must *prove* the substance was actually cannabis. *Jones*, 174 Ill. 2d at 430.

¶ 26 Because Haefeli's testimony demonstrated he commingled the 12 plastic bags of plant material found in the backpack before the material was tested and measured, the State failed to prove, beyond a reasonable doubt, defendant guilty of unlawful possession of more than 500 grams but not more than 2000 grams of a substance containing cannabis. Accordingly, we reduce defendant's conviction from a Class 2 felony to unlawful possession of cannabis with intent to deliver more than 30 grams but not more than 500 grams, a Class 3 felony. 720 ILCS 550/5(d) (West 2014). We remand for resentencing.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, defendant's conviction is reduced to a conviction of unlawful possession of cannabis with intent to deliver more than 30 grams but not more than 500

grams, a Class 3 felony. 720 ILCS 550/5(d) (West 2014). The cause is remanded to the trial court with directions to resentence defendant on the modified judgment of conviction.

¶ 29 Affirmed as modified, sentence vacated, and cause remanded with directions.

¶ 30 JUSTICE DeARMOND, specially concurring:

¶ 31 I agree with the majority based on the law as it relates to commingling and the ability to raise a sufficiency of the evidence claim for the first time on appeal. I believe there is a reasonable argument defendant forfeited this issue, however. For this reason, I specially concur.

¶ 32 The primary problem I have with defendant's issue on appeal is that, for the trial court and the reviewing court, it was like trying to hit a moving target. At no time during the trial did defendant's counsel raise this issue. There was no pretrial motion attacking the admissibility of the evidence due to commingling (something which had to be apparent from the laboratory reports and arguably the investigative reports obtained in discovery). There was no foundational objection at trial; in fact, the questioning of the forensic scientist was limited to converting grams to pounds. Defense counsel did not question whether it was cannabis and his closing argument presupposed the entire amount was cannabis. "Am I saying this is not cannabis? No, I'm not saying this is not cannabis, right. What we're saying is, did he exercise control; did he exercise dominion over this cannabis?" He noted only that his client's fingerprints were identified on a smaller quantity than the entire amount seized. The first arguable reference to the issue of commingling appeared in the posttrial motion and, even there, only tangentially. Paragraph nine of defendant's amended posttrial motion stated:

¶ 33 "The testimony offered by Joshua Stern related to the plant material should not have been admitted. The admission of an expert's testimony requires the proponent to lay an adequate foundation establishing that the information upon which the expert bases his opinion is reliable."

¶ 34 At this point, defendant cited People v. Safford, 392 Ill. App. 3d 212 (2009), a case which has been roundly criticized as an outlier and the only reported case of its kind. See People v. Robinson, 2018 IL App (1st) 153319, ¶ 19 (noting "Safford has been heavily criticized, and characterized as an 'outlier.' [Citations.] Indeed, we can find no published case following Safford's reasoning."); People v. Simmons, 2016 IL App (1st) 131300, ¶ 110 (stating "[w]e cannot square Safford with the supreme court case law we have cited above and, in any event, we find the reasoning in Safford to be flawed"); see also People v. Negron, 2012 IL App (1st) 101194, ¶ 41.

¶ 35 Defendant's motion continued:

¶ 36 "It is the function of the trial court to determine whether the foundation requirements have been met. That determination presents a question of law. Joshua Stern's testimony consisted of his conclusion that the plant material was cannabis. There was no testimony regarding the manner or method by which the witness analyzed the plant material. *** Moreover, the plant material weighed approximately 1300 grams and approximately 50 grams that was purported to be in the brown evidence bag was never removed from the bag for the jury's visual inspection. There is a reasonable probability the jury would have acquitted the Defendant had the opinion testimony not been admitted. Additionally, as *People v. Castillo*[, 2012 IL App (3d) 091037-U] *** suggests, each of the individual bags of plant material should have been analyzed separately. There is no testimony which suggests the individual bags were analyzed separately. Nor is there any testimony regarding the homogenous nature of the plant material in each of the separate bags. [Citing *Castillo*, 2012 IL App (3d) 091037-U]."

¶ 37 As can be seen, there is only the barest mention of anything related to commingling, and then only if you read *Castillo*, a Rule 23 order that is not even supposed to be

cited. The arguments by counsel at the hearing on the posttrial motion related solely to the alleged failure of the State to lay a proper foundation for the experts' ultimate opinions regarding fingerprints and cannabis. When given the opportunity, defendant's counsel did not address the commingling issue at all. Counsel does not reference *Jones* in his posttrial motion, relying instead on an unpublished Rule 23 order.

¶ 38 Defendant did not stipulate the substance was cannabis; however, he did not question the forensic scientist on the specific testing methodology either. Defendant made no specific claim the testing was insufficient due to commingling of the amounts until this appeal. Instead, he merely argued there was an insufficient foundation to conclude it was cannabis.

¶ 39 I question whether a defendant can sit on his hands on the issue of commingling under the facts here and raise it for the first time on appeal without having forfeited the issue. It seems rather disingenuous for defendant to contend he did not want to "make the State's case for them on cross examination" as his reason for not questioning the chemist. Had he made a foundational objection at trial specific to the issue of commingling, the State was not in a position to cure it. The lab tests had already been run, the trial was in progress, the individual packages had already been combined into one by the detective, and if the State had not tested all of the packages, it could not fix it in the middle of the trial. The reason he did not do so is, to me, evident from the record; he was not attacking the issue of commingling at all. At trial, the issue was dominion or control over the cannabis. Having lost before the jury, defendant has taken a second bite at an apple he did not even want at trial.

¶ 40 The question of whether *Jones* and similar cases relating to otherwise unidentifiable controlled substances are applicable to cannabis cases where a preliminary visual inspection may provide assistance in determining what the substance may be is, in my mind, not

clearly decided. The court in *Jones* said "random testing is permissible when the seized samples are sufficiently homogenous so that one may infer beyond a reasonable doubt that the untested samples contain the same substance as those that are conclusively tested." *Jones*, 174 Ill. 2d at 429. Most of the cases relying on *Jones* are controlled substance cases where powders, chunky substances, or pills are indistinguishable from one another. Here, the contents of 12 plastic bags the detective said were suspected cannabis were taken from the backpack found in the attic and placed in a paper bag in 6 plastic evidence bags, and samples were taken from each of the 6 bags for testing. No other cannabis was commingled with the contents of the backpack. The forensic scientist then testified he examined samples from each of the six bags and found the contents to contain cannabis. The cannabis was found hidden in a child's backpack in the attic of a residence under suspicion for cannabis selling activity. Also found in the residence were other smaller amounts of cannabis, digital scales, and $13,000 in United States currency in four bundles, "folded in half and wrapped with hair ties" in the ceiling tiles of the kitchen. Under this set of facts, I would contend, although commingling could be the subject of cross-examination and argument to the jury, the fact that the entire contents of the backpack were placed into six bags, all of which were sampled and tested, should be sufficient to get beyond the constraints of *Jones*. If defendant wanted to argue that perhaps he stored oregano in some of those 12 plastic bags, he is free to do so. Cannabis can be sufficiently homogenous, like here, when it is identically packaged and contained in the same backpack. When the contents of the six evidence bags all prove to contain cannabis and where other cannabis is also found, along with scales and a substantial quantity of hidden cash, that should be a sufficient foundation from which to conclude the entire contents of the backpack amounted to "a substance containing cannabis," leaving it a question for the jury.

¶ 41 I recognize there is currently insufficient precedent upon which to base a dissent. I am also cognizant of the fact that a sufficiency of the evidence claim, no matter how thinly veiled, has been enough to convince the majority defendant is entitled to appellate review, for those reasons I reluctantly concur.