2013 IL App (1st) 113092-U

SECOND DIVISION
August 13, 2013

No. 1-11-3092

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LEE JAMES TAYLOR, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. No. 10 CR 21662 Honorable Mary Colleen Roberts, Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Quinn and Simon concurred in the judgment.

O R D E R

¶ 1 ***Held:*** The evidence presented by the State was sufficient to prove defendant guilty beyond a reasonable doubt of possession of a controlled substance with intent to deliver. Because the trial court erred in not exercising its discretion in denying defendant presentence custody credit for time spent on electronic home monitoring, the cause is remanded. The mittimus is corrected to reflect 68 days of presentence custody credit, and the fines and fees order is corrected to reflect vacation of the $200 DNA indexing fee, as well as $340 of $5-per-day presentence custody credit toward the imposed fines.

¶ 2 Following a bench trial, defendant Lee James Taylor was convicted of possession of a controlled substance with intent to deliver and sentenced to four years in prison. On appeal, defendant contends that he was not proved guilty beyond a reasonable doubt where the State

failed to show that the item he tossed out of a window to his codefendant was narcotics; that he is entitled to 68 days of presentencing custody credit and a correlative $340 credit toward his fines; that the trial court failed to exercise its discretion in determining whether the 16 days he spent on electronic home monitoring was custodial and thus subject to presentence custody credit; and that the $200 DNA indexing fee must be vacated.

¶ 3 For the reasons that follow, we affirm defendant's conviction and sentence, order correction of the mittimus, order the fines and fees order corrected, and remand for the circuit court to determine how much credit, if any, defendant may be entitled to receive for time spent on electronic home monitoring.

¶ 4 At trial, Chicago police officer Kwan Nguyen testified that on the morning of November 11, 2009, he was in a covert vehicle with the windows cracked slightly, conducting surveillance of the corner of North St. Louis Avenue and Ohio Street. He was conducting surveillance prior to the execution of a search warrant for 604 North St. Louis Avenue, with "the target of Mr. Lee." As Officer Nguyen watched the street corner, he switched back and forth between using his naked eye and the zoom lens of a handheld video camera. He did not video record everything he saw because at times, people would pass too close to his vehicle and he had to lower the camera. In addition, he selectively recorded events he thought might be important as part of the investigation. The surveillance video was entered into evidence.

¶ 5 At about 7:36 a.m., Officer Nguyen saw defendant on the corner, talking with codefendant Melvin Banks and a woman known as "Peaches." Defendant then entered a residence at 604 North St. Louis Avenue. After defendant went into the house, Officer Nguyen watched Banks and Peaches engage in several hand-to-hand narcotic transactions with pedestrians and drivers of passing cars. Banks or Peaches would give a customer a "small object" and in return accept "U.S.C." from the customer. At one point, Peaches gave Banks what appeared to be a narcotics package.

¶ 6 At 8:06 a.m., Officer Nguyen saw Banks walk toward the house defendant had entered. Banks stood outside, held his hand up to his mouth, and yelled, " 'Lee, Lee,' pretty loud two times." Defendant leaned out a second-floor window and tossed a small object down to the ground. Banks picked up the object. Officer Nguyen saw Banks "tear open the small package, at which time he immediately began conducting suspect narcotic transactions with two individuals, one in the vehicle and one on the sidewalk." After conducting the two transactions, Banks went into a gangway near 612 North St. Louis Avenue, where he bent down and attempted to conceal narcotics. Following his first visit to the gangway, Banks engaged in several more transactions and would periodically go back to the gangway and retrieve some items.

¶ 7 When asked how he knew Banks was using the same object defendant had dropped to engage in hand-to-hand transactions, Officer Nguyen answered, "Because from the point where [defendant] had dropped the small object down, Mr. Banks would retrieve it, held it in his hand [after] he retrieved it and conduct a narcotic transaction. After the narcotic transaction he would go by 612 in an attempt to conceal the narcotics at that location." However, on cross-examination, Officer Nguyen agreed that he "actually ha[d] no way of knowing whether the item that was retrieved from the gangway was the same item that was picked up off the ground or perhaps something Mr. Banks got from this third person."

¶ 8 After Banks was placed in custody, Officer Nguyen directed his sergeant to the gangway. The sergeant recovered seven tinfoil packages of suspect heroin. Officer Nguyen testified that officers executed the search warrant for 604 North St. Louis Avenue. Despite a thorough search of the premises, no narcotics were found. In addition, no narcotics were found on defendant.

¶ 9 Defendant was arrested. After being given *Miranda* warnings at the police station, defendant told Officer Nguyen that he was on probation and could not go to jail. He said he could give the police general information about narcotics sales at that location and said he could provide a handgun and some heroin in exchange for his release. Defendant related that he would

have to call his sister to determine how much heroin he could provide. After making a phone call to her, defendant told Officer Nguyen that there were about five "jabs" left, with approximately 13 foils in each jab. Officer Nguyen explained that a "jab" was a group of narcotics.

¶ 10 Chicago police sergeant Daniel O'Shea testified that about 8:15 a.m. on the day in question, he was directed to the area of 612 North St. Louis Avenue by Officer Nguyen. In the gangway, on the ground under a pile of leaves, he recovered a plastic bag containing seven smaller plastic bags, each containing a tinfoil packet. Inside each tinfoil packet was suspect heroin. Sergeant O'Shea testified that the packaging was more consistent with distribution than personal use, as heroin packaged for personal use would be "single, loose," but heroin packaged for distribution on the street would usually be in a "jab," which is one bag containing smaller bags of drugs. Sergeant O'Shea gave the suspect heroin to the on-scene evidence officer.

¶ 11 The parties stipulated that a proper chain of custody was maintained at all times. They also stipulated that the recovered items weighed 1.3 grams and tested positive for the presence of heroin.

¶ 12 Following closing arguments, the trial court found defendant guilty of possession with intent to deliver 1 to 15 grams of heroin. Upon conviction, defendant was placed on electronic home monitoring until sentencing. The trial court subsequently sentenced defendant to four years in prison with a recommendation for prison boot camp. When defense counsel inquired whether defendant would receive presentence custody credit for time on electronic monitoring, the trial court responded, "No. I don't think you get time for E.M., just actual time. Let me double check on that -- no, he doesn't. Even the public defender is telling me no." The trial court credited defendant 25 days for time served in presentence custody, imposed fines and fees, including a $200 DNA indexing fee, and credited defendant $125 in $5-per-day presentence custody credit toward the imposed fines.

¶ 13 On appeal, defendant first challenges the sufficiency of the evidence. He argues that the State failed to prove beyond a reasonable doubt that he ever possessed, either actually or constructively, the narcotics recovered in the gangway. Specifically, he asserts that Officer Nguyen's testimony did not establish that the item he tossed out the window was the same item as the one recovered by Sergeant O'Shea, which he was charged with possessing. Defendant points out that Officer Nguyen observed Banks and Peaches engage in hand-to-hand transactions with several customers over the course of a half hour before defendant dropped the object from the window; that after Banks picked up the object, he exchanged items with a car driver and a pedestrian before walking to the gangway and concealing something; and that Officer Nguyen acknowledged he had "no way of knowing whether the item that was retrieved from the gangway was the same item that was picked up off the ground or perhaps something Mr. Banks got from this third person." Defendant asserts that given the multiple interactions Banks had with Peaches and other individuals throughout the morning, there is no way of knowing exactly from whom Banks obtained the drugs that he concealed in the gangway. Defendant further argues that the fact he cooperated with the police and that the police thoroughly searched both his person and the residence he was occupying and found no drugs further supports the inference that the item he tossed out the window was not the same item recovered from the gangway.

¶ 14 When reviewing the sufficiency of the evidence, the relevant inquiry 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. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). The credibility of the witnesses, the weight to be given their testimony, and the resolution of any conflicts in the evidence are within the province of the trier of fact, and a reviewing court will not substitute its judgment for that of the trier of fact on these matters. *People v. Brooks*, 187 Ill. 2d 91, 131 (1999). Reversal is justified only where the

evidence is "so unsatisfactory, improbable or implausible" that it raises a reasonable doubt as to the defendant's guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶ 15 Here, Officer Nguyen testified that he observed Banks pick up the object defendant dropped from the window, tear it open, and immediately begin conducting suspect narcotic transactions. Officer Nguyen then saw Banks go into the gangway and attempt to conceal the drugs, which were later recovered by Sergeant O'Shea. The video recording corroborates Nguyen's testimony. It depicts Banks opening the package that was dropped to him, taking items from it, giving the items to the driver of a car and a passing pedestrian in exchange for money, and then proceeding into the gangway.

¶ 16 From this evidence, the trial court found that defendant transferred narcotics to Banks, that Banks secreted those narcotics in the gangway, and that those narcotics were recovered by the police. Defendant's alternate theory -- that the drugs Banks hid in the gangway came not from defendant, but from Peaches or one of Banks' customers -- is not beyond the realm of possibility. However, we do not agree that the mere possibility the recovered drugs came from a source other than defendant justifies reversal. In weighing the evidence, the finder of fact is neither required to disregard inferences that flow from the evidence nor to search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt. *People v. Bull*, 185 Ill. 2d 179, 205 (1998). After reviewing the record in the light most favorable to the prosecution, we cannot say that the evidence was so improbable or unsatisfactory that no rational fact finder could have found defendant guilty beyond a reasonable doubt. Defendant's challenge to the sufficiency of the evidence fails.

¶ 17 Defendant's second contention on appeal is that he is entitled to 68 days of presentencing custody credit and a correlative $340 credit toward his fines. The State concedes the issue. We accept the State's concession. The clerk of the circuit court is ordered to modify the mittimus to

reflect 68 days of credit for presentence custody and to enter a modified fines, fees, and costs order to reflect $340 worth of credit toward the assessed fines.

¶ 18 Next, defendant contends that the trial court failed to exercise its discretion in determining whether the 16 days he spent on electronic home monitoring was custodial and thus subject to presentence custody credit. Defendant argues that the trial court erroneously believed it had no discretion in the matter, and that we must remand for an evidentiary hearing so that the trial court can conduct meaningful inquiry into whether the electronic home monitoring was custodial in nature.

¶ 19 Section 5-4.5-100(b) of the Unified Code of Corrections provides that "the trial court may give credit to the defendant for time spent in home detention *** if the court finds that the detention or confinement was custodial." 730 ILCS 5/5-4.5-100(b) (West 2010). The decision whether to grant such credit for home detention falls within the discretion of the court. *People v. Witte*, 317 Ill. App. 3d 959, 965 (2000). Accordingly, we review a trial court's denial of such credit under an abuse of discretion standard. *People v. Gonzalez*, 314 Ill. App. 3d 993, 999 (2000).

¶ 20 In the instant case, defense counsel, a privately retained attorney, asked the trial court whether defendant would be given credit for the time he spent on electronic home monitoring. The trial court answered, "No. I don't think you get time for E.M., just actual time. Let me double check on that -- no, he doesn't. Even the public defender is telling me no." Defendant asserts that this statement indicates the trial court mistakenly believed it had no discretion to give credit for time on electronic home monitoring. The State counters that the trial court's response that it would "double check" on the issue, followed by a pause, demonstrates that the court made some sort of inquiry and then, in the exercise of its discretion, decided not to grant defendant the credit.

¶ 21 We agree with defendant. The trial court's comments indicate it erroneously believed it had no discretion to award credit for time spent on electronic home monitoring. Accordingly, we vacate that part of the trial court's judgment denying defendant credit for electronic home monitoring and remand for the trial court to determine whether the electronic home monitoring in this case was custodial in nature and how much credit, if any, defendant may be entitled to receive.

¶ 22 Defendant's final contention on appeal is that the $200 DNA indexing fee must be vacated. Because defendant has already submitted a DNA sample following a prior felony conviction in Illinois and is currently registered in the DNA database, the State concedes the issue. We accept the State's concession and accordingly vacate the fee. See *People v. Marshall*, 242 Ill. 2d 285, 302-03 (2011) (an order imposing a duplicative DNA analysis fee is void and must be vacated, as it exceeds statutory authority). The clerk of the circuit court is ordered to enter a modified fines, fees, and costs order consistent with our decision.

¶ 23 For the reasons explained above, we affirm defendant's conviction and sentence; order correction of the mittimus; order the fines and fees order corrected; and vacate that part of the trial court's judgment denying defendant credit for time spent on electronic home monitoring and remand for the trial court to determine how much credit, if any, defendant may be entitled to receive for that time.

¶ 24 Affirmed in part and vacated in part; cause remanded with directions; mittimus corrected; fines and fees order corrected.