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FOR THE RECORD

BY CRAIG M. SANDBERG

Throwing Crack Pipe Over Fence Does Not Constitute "Concealing"

On February 25th, Justice Anne M. Burke writing on behalf of a split Illinois Supreme Court (*People v. Danny Comage*; Docket No. 109495) reversed the appellate and circuit court's order denying plaintiffs' request to bar defendant's expert from testifying at trial.

In March 2007, the State charged Danny Comage, with obstructing justice (720 ILCS 5/31-4(a)), alleging that defendant, "with the intent to obstruct the prosecution of himself for possessing drug paraphernalia, knowingly concealed physical evidence, in that he threw a metal pipe and push-rod over a wooden privacy fence and out of view while being pursued by police." The State also charged defendant with unlawful possession of drug paraphernalia (720 ILCS 600/3.5) and resisting a peace officer (720 ILCS 5/31-1).

In July 2007, a jury in the circuit court of Macon County convicted defendant of obstructing justice and resisting a peace officer but found him not guilty of possession of drug paraphernalia. Defendant subsequently filed a motion for judgment notwithstanding the verdict or, alternatively, for a new trial. Defendant contended, *inter alia*, that one of the State's witnesses made reference to defendant having invoked his right to remain silent during police questioning in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976). The trial court granted defendant's motion for a new trial. Thereafter, the trial court dismissed the unlawful possession count on double jeopardy grounds and the State then voluntarily dismissed the charge for resisting arrest.

A second jury trial commenced in February 2008 on the remaining charge of obstructing justice. Officers Chad Larner and Kathleen Romer, both of the Decatur police department, testified on behalf of the State. On the night of March 19, 2007, shortly before 10:50 p.m., Larner was

investigating a theft at a gas station in the 900 block of West Eldorado Street in Decatur. Larner began looking for the suspect, who had been described as a clean-shaven, thinly built, black man who was wearing "nice casual clothes." While patrolling the area, Larner observed a man who matched the suspect's description in the parking lot of a McDonald's restaurant. The man ran south from the parking lot, across Eldorado Street, and into the parking lot of a Pizza Hut restaurant. Larner stopped the man, advised him of the purpose for the stop, and asked for identification. The man identified himself as the defendant.

As Larner was conducting a warrant check on defendant, Officer Kathleen Romer arrived. While the officers were talking to defendant, Romer noticed that defendant began to act strangely: jumping around, fidgeting, and at one point, threatening to urinate on the squad car. As the dispatcher radioed back information about defendant to the officers, defendant took off running through the parking lot. The two officers chased defendant for 20 to 30 yards before he finally stopped.

During the chase, both officers saw defendant reach into his pocket, pull out two rod-like objects that were five to six inches in length, and throw them over a six-foot-tall, wooden privacy fence that abutted the Pizza Hut parking lot. The officers were a short distance behind defendant when he threw the objects. Larner stated that the area was "well-lit with artificial lighting" and that he had a "clear observation" of defendant as they were running. Defendant stopped 10 to 15 feet after throwing the objects when Romer threatened to use her Taser.

After securing defendant, Larner walked around to the other side of the fence to recover the objects defendant had thrown. Larner found a crack cocaine pipe and a push rod (A "push-rod" is a tool used to clean and pack drugs into crack pipes) in a parking lot on the other side of the fence.

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At trial, Larner testified that he clearly saw defendant toss the items over the fence and that the items were within 10 feet of where

defendant was apprehended. Larner further stated that he located the items "twenty seconds" after he went to look for them. The jury found defendant guilty.

Defendant filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. Citing *In re M.F.*, 315 Ill. App. 3d 641 (2000), defendant contended he had not concealed evidence because the officers in this case observed him toss the crack pipe and push rod over the fence and knew where the items were, and the officers promptly retrieved the items with no difficulty. The trial court denied defendant's motion. Defendant was then sentenced to three years' imprisonment.

Defendant appealed, arguing that the State failed to prove him guilty beyond a reasonable doubt because the items at issue were never concealed within the meaning

of the obstructing justice statute. Illinois' obstructing justice statute, section 31-4 of the Criminal Code of 1961, provides: "A person obstructs justice when, with intent to prevent the apprehension or obstruct the prosecution or defense of any person, he knowingly commits any of the following acts: (a) Destroys, alters, conceals or disguises physical evidence, plants false evidence, furnishes false information[.]" 720 ILCS 5/31-4(a). The appellate court, with one justice dissenting, affirmed. 295 Ill. App. 3d 560. We allowed defendant's petition for leave to appeal. Ill. S. Ct. R. 315.

As he did in the appellate court, defendant contended that the State failed to prove him guilty beyond a reasonable doubt of obstructing justice because he never concealed the crack pipe and push rod. To address this argument, the Court looked to Webster's dictionary and other state's case law to decide the meaning of the word "conceal" as it is used in the obstructing justice statute.

The Court concluded that defendant did not "conceal" the crack pipe and push rod within the meaning of the obstructing justice statute because both the existence and location of the evidence were fully known to the officers the evidence at the scene. Importantly, the Court emphasized that its agreement with the proposition that a defendant who places evidence out of sight during an arrest or pursuit has "concealed" the evidence for purposes of the obstructing justice statute if, in doing so, the defendant actually interferes with the administration of justice, *i.e.*, materially impedes the police officers' investigation. ■

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