

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Larry Marksberry,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 23, 2023

Court of Appeals Case No.
22A-CR-1566

Appeal from the Jennings Circuit
Court

The Honorable Jeffrey L. Sharp,
Special Judge

Trial Court Cause No.
40C01-1803-F3-3

Memorandum Decision by Judge Mathias
Judges Robb and Foley concur.

Mathias, Judge.

[1] Larry Marksberry appeals his conviction for Level 3 felony dealing in methamphetamine. Marksberry raises two issues for our review, namely, whether the State presented sufficient evidence to establish that he delivered methamphetamine to a confidential informant and whether his sentence is inappropriate in light of the nature of the offense and his character.

[2] We affirm.

Facts and Procedural History

[3] In April 2017, Leland Cassetty (“Cassetty”) became a confidential informant for Nick Megel (“Megel”), a detective at the North Vernon Police Department. Tr. Vol. II, p. 89. During April and May 2017, Cassetty participated in four controlled buys with Josh Schumacher (“Schumacher”), with one of the buys occurring on May 23, 2017. *Id.* at 90. On that date, Detective Megel and Detective Wes Thayer (“Thayer”) conducted a pre-buy briefing with Cassetty, and they provided Cassetty with recording equipment and \$475 to complete the transaction. *Id.* at 89-91. After the meeting, the detectives followed Cassetty to his designated meeting place with Schumacher on Dogwood Lane in North Vernon. *Id.* at 93.

[4] Upon arriving at the location, the detectives parked in an abandoned lot across from Schumacher’s trailer. Cassetty approached the trailer and met Schumacher. Schumacher’s girlfriend was also present. *Id.* at 156. Cassetty and Schumacher sat on the front porch at first, during which time no narcotic sale

occurred. *Id.* at 95. Eventually, Marksberry arrived at the trailer, carrying a small soft container, which officers recognized as a container typically used during narcotics deals. *Id.* at 107. Immediately after Marksberry's arrival, he, Cassetty, and Schumacher walked into the trailer. *Id.* at 95. Inside, the two detectives observed Cassetty in real time. *Id.* at 93.

[5] While inside the trailer, Schumacher and Marksberry stood directly across the kitchen counter from Cassetty. *Id.* at 96. Cassetty laid down the \$475 Megel and Thayer had provided to him while Schumacher placed a scale down on the counter. *Id.* at 95. Someone then placed methamphetamine on the scale and then into a baggie. However, because Cassetty was focused on aiming the camera to capture the exchange, Cassetty did not observe who had handled the methamphetamine. *Id.* at 183.

[6] After the transaction, Cassetty gave a small amount of the methamphetamine to Schumacher as payment for setting up the exchange. *Id.* at 162. Approximately five minutes later, Cassetty exited and drove to a predetermined location to meet with Detectives Megel and Thayer. *Id.* There, the officers seized the methamphetamine and debriefed Cassetty. *Id.* An Indiana State Police Lab examiner, Jenna Crawford, later confirmed that the bag collected from Cassetty contained 5.77 grams of methamphetamine. *Id.* at 74.

[7] On March 2, 2018, the State charged Marksberry with Level 3 felony dealing in methamphetamine and Level 5 felony possession of methamphetamine. During Marksberry's ensuing jury trial, Detective Megel testified that the recording of

the live-feed video showed Marksberry laying down a bag of methamphetamine and then sliding it over to Cassetty. *Id.* at 95. Cassetty testified that he and Schumacher were sitting on the porch waiting “for the meth to arrive” so the transaction could occur. *Id.* at 157. The jury found Marksberry guilty of dealing in methamphetamine and possession of methamphetamine. *Id.* at 215. Due to double jeopardy concerns, the Court vacated the possession of methamphetamine finding and entered judgment of conviction for Level 3 felony dealing in methamphetamine. Tr. Vol. III, p. 5.

- [8] During a sentencing hearing on January 31, 2022, the Court found the following aggravating circumstances: Marksberry’s extensive prior criminal history; Marksberry’s commission of two separate criminal offenses while on bond; and his high risk for re-offending. *Id.* at 7. The Court also noted that Marksberry owed a child support arrearage, he had not participated in his older children’s lives since his divorce in 2015, he had been incarcerated for most of the youngest child’s life, and he did not have a strong support system. *Id.* at 8. The court did not find any mitigating circumstances. The court then sentenced Marksberry to twelve years executed in the Indiana Department of Correction. Marksberry now appeals.

Sufficiency of the Evidence

- [9] On appeal, Marksberry first contends that the evidence is insufficient to support his conviction for Level 3 felony dealing in methamphetamine. For sufficiency of the evidence challenges, we do not determine witness credibility nor reweigh

the evidence. *Woodward v. State*, 187 N.E.3d 311, 318 (Ind. Ct. App. 2022). Instead, we consider only probative evidence and reasonable inferences that support the judgment of the trier of the fact. *Id.* We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Hall v. State*, 177 N.E.3d 1183, 1191 (Ind. 2021). Reversal is only appropriate when reasonable persons cannot form inferences from the evidence to support each material element of the offense. *Heyen v. State*, 936 N.E.2d 294, 302 (Ind. Ct. App. 2010).

[10] To show that Marksberry committed Level 3 felony dealing in methamphetamine, the State had to prove beyond a reasonable doubt that Marksberry “knowingly or intentionally deliver[ed] . . . methamphetamine” or “possesse[d], with intent to deliver . . . methamphetamine.” *Ind. Code § 35-48-4-1.1. Indiana Code section 35-48-1-11* defines “delivery” as “(1) an actual or constructive transfer from one (1) person to another of a controlled substance, whether or not there is an agency relationship; or (2) the organizing or supervising of an activity described in subdivision (1).”

[11] Marksberry asserts that the State failed to prove that he delivered the methamphetamine. Appellant’s Br. at 12. He cites no case law in his sufficiency argument on appeal. Rather, Marksberry argues the State failed to show that he “delivered” methamphetamine because he “had not been involved in any of the prior controlled buys with Schumacher” and that “[a]ll of the information and planning of the [present] controlled buy involved Schumacher.” *Id.* at 11. Marksberry further contends that the State relied on a video recording that did

not show individuals' faces during the transaction and notes Cassetty's testimony that Schumacher laid the methamphetamine on the counter. *Id.* Therefore, Marksberry continues, the evidence shows only that he was present at the transaction. *Id.* at 12.

[12] We do not agree. The evidence and reasonable inferences from the evidence show that Marksberry delivered the narcotic to Cassetty. The State presented evidence that Schumacher and Cassetty waited approximately ten to twenty minutes for "the meth to arrive." Tr. Vol. II, p. 157. While watching the live feed from the audio record, the detectives could hear Schumacher on the phone, presumably with Marksberry, stating, "yea[h] he is here," shortly before telling his girlfriend that he was on the phone handling "business." Tr. Vol. III, p. 6. After arriving, Marksberry was observed holding a small soft container, one commonly used to transport drugs, and he repeatedly claimed to Cassetty and Schumacher that he did not like "to be rushed" in these circumstances. Tr. Vol. II, pp. 99-107. The transaction occurred within a few minutes of Marksberry arriving, and Cassetty subsequently left the trailer. *Id.* at 157.

[13] The State also presented the recording of the live--feed video footage as evidence, which corroborated the testimony of the State's witnesses. In addition to the video footage, Detectives Megel and Thayer positioned themselves across the street from the trailer, where they could see the men arriving and interacting before they continued the transaction inside the trailer. *Id.* at 96-98. After observing the three men and reviewing the video, Detective Megel identified Marksberry by his clothing.

- [14] Further, even if the evidence was insufficient to establish that Marksberry actually delivered the methamphetamine, the evidence shows that he constructively delivered the drug. Cassetty testified that Schumaker might have laid the methamphetamine on the counter, but that if that is what occurred, Marksberry gave it to Schumacker first. *Id.* at 161. See e.g. *Laird v. State*, 483 N.E.2d 68, 69-70 (Ind. 1985) (holding that the defendant constructively delivered narcotics when giving a bag containing narcotics to his girlfriend to turn over to a third party).
- [15] Based on the testimony and evidence presented, the jury could reasonably infer that Marksberry knowingly or intentionally possessed methamphetamine with the intent to deliver it to Cassetty. For this reason, we affirm Marksberry's conviction for Level 3 felony dealing in methamphetamine.

II. Inappropriate Sentence

- [16] Marksberry argues that his twelve-year sentence is inappropriate under *Indiana Appellate Rule 7(B)*. Under this rule, we may modify a sentence that we find is “inappropriate in light of the nature of the offense and the character of the offender.” *App. R. 7(B)*. To make this determination, we turn to “our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and [a] myriad [of] other factors that come to light in a given case.” *Wilson v. State*, 157 N.E.3d 1163, 1181 (Ind. 2020). When conducting this review, we generally defer to the sentence imposed by the trial court. *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). Therefore, a sentence modification

under Rule 7(B) is reserved for “a rare and exceptional case.” *Livingston v. State*, 113 N.E.3d 611, 612 (Ind. 2018). Finally, the defendant bears the burden of persuading us that his sentence is inappropriate. *Sanchez v. State*, 891 N.E.2d 174, 176 (Ind. Ct. App. 2008).

- [17] Initially, we note that the trial court did not impose the maximum possible sentence. Marksberry committed Level 3 felony dealing in methamphetamine. [Indiana Code section 35-48-4-1.1](#) provides that a person who possesses, with the intent to deliver, at least five grams but less than ten grams of methamphetamine commits a Level 3 felony. A person who commits a Level 3 felony may be sentenced to a “fixed term of between three (3) and sixteen (16) years, with the advisory sentence being nine (9) years.” [I.C. § 35-50-2-5\(b\)](#).
- [18] The trial court found the following aggravating circumstances: Marksberry’s significant criminal history, his violation of the conditions of his bond and the high likelihood that he will reoffend. The court found no mitigating factors. The court sentenced Marksberry to twelve years.
- [19] Concerning the nature of the offense, Marksberry asserts that the conduct did not exceed the statutory elements nor the conduct proscribed by the legislature. Appellants Br. at 13. He also argues that his conduct was not intended to harm, nor did it harm any other, and that his conduct was an effort to support his methamphetamine addiction. *Id.* at 13-14. But Marksberry fails to address the fact that he has been selling narcotics since 2017 and continued dealing after being released on bond in the instant case. Tr. Vol. III, p. 7. Additionally, while

there was no harm to any person, our Supreme Court has noted that society is the victim when distributing illegal drugs and that dealing or possessing even a small amount of drugs is not a victimless crime. *State v. Timbs*, 169 N.E.3d 361, 373 (Ind. 2021). Therefore, we cannot conclude that the nature of the offense warrants a revised sentence.

[20] With respect to his character, Marksberry recognizes the “significantly deteriorative effect methamphetamine” has had on his life and contends that he has “demonstrated an attitude of remorse, responsibility, reformation, and rehabilitation.” Appellant Br. at 14. However, Marksberry has never attempted to seek treatment for his addiction.

[21] Marksberry also suggests that his criminal history is relatively minor. Prior to the instant offense, Marksberry’s criminal history consists of two felony and six misdemeanor convictions. Appellant’s App. Vol. 3, pp. 7-10. Additionally, concurrent to this offense, Marksberry pleaded guilty to Level 4 felony dealing in methamphetamine, an offense he committed in February 2020. *Id.* While he was released on bond awaiting trial for this instant case, Marksberry was charged with six more felonies, including theft, possession of methamphetamine, and neglect of a dependent, as well as an additional misdemeanor charge. *Id.* Those seven charges remain pending. *Id.*

[22] Marksberry claims his good behavior during incarceration merits a reduced sentence. He notes that he was a trustee at the jail for eleven months before he was released on bond. The trial court recognized Marksberry’s good behavior

while incarcerated but observed that it was “more indicative of his behavior while in custody and does not reflect his most recent behavior while free in society.” *Id.* at 32.

- [23] Last, Marksberry attempts to portray his character in a favorable manner by claiming that he wishes to provide financial and personal support for his five children. He also contends he has a large family support system. *Id.* But here too, Marksberry ignores his failure to actively participate in his children’s lives and failure to pay child support. Additionally, no family member attended any of the hearings or trial in this case. For all of these reasons, we conclude that his twelve-year sentence is not inappropriate in light of his character.

Conclusion

- [24] The State presented sufficient evidence to support Marksberry’s conviction for Level 3 felony dealing in methamphetamine. Additionally, Marksberry has not persuaded our court that his sentence is inappropriate in light of the nature of the offense and his character. We therefore affirm Marksberry’s conviction and sentence.

- [25] Affirmed.

Robb, J., and Foley, J., concur.