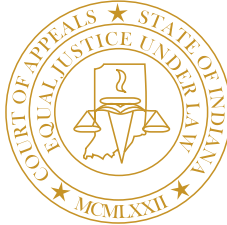


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



IN THE Court of Appeals of Indiana

Bruce Murray,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

September 11, 2024

Court of Appeals Case No.
24A-CR-577

Appeal from the Wells Circuit Court
The Honorable Kenton W. Kiracofe, Judge

Trial Court Cause No.
90C01-2110-F4-14

Memorandum Decision by Judge Bailey
Chief Judge Altice and Judge Mathias concur.

Bailey, Judge.

Case Summary

[1] Bruce Murray appeals his convictions and sentence for Dealing in Methamphetamine, as a Level 2 felony,¹ and Possession of Methamphetamine, as a Level 4 felony.² We affirm the convictions and sentences for Dealing in Methamphetamine and Resisting Law Enforcement,³ the latter of which he does not contest. We reverse the conviction for Possession of Methamphetamine and remand with instructions to the trial court to vacate that conviction and sentence.

Issues

- [2] Murray presents four issues for review:
- I. Whether the State presented sufficient evidence that methamphetamine was in his possession;
 - II. Whether his convictions for dealing and possession violate double jeopardy principles;

¹ Ind. Code § 35-48-4-1.1.

² I.C. § 35-48-4-6.1.

³ I.C. § 35-44.1-3-1.

III. Whether the trial court abused its sentencing discretion;
and

IV. Whether his sentence for Dealing in Methamphetamine is
inappropriate.

Facts and Procedural History

[3] In 2021, Murray lived with his wife, Brenda, in a house in Wells County. In early October of that year, Brenda’s probation officer was advised that text messages had been sent suggesting that Brenda was communicating with individuals who sought to purchase methamphetamine. On October 14, probation officer Stephen Pastore arrived at the Murray residence to conduct a probationary search.⁴ He was accompanied by officers from the Bluffton Police Department and by Detective Quinton Greer of the Wells County Sheriff’s Department.

[4] Pastore knocked on the door and requested entry. He detected only Murray inside, partially visible through a window, and appearing to be moving around. Murray did not open the door but called out to the officers to ask if they had a warrant. The officers explained that they were there to conduct a warrantless probationary search, and they continued to request entry. Murray called out that he was “not on [probation].” (Tr. Vol. III, pg. 96.) He moved toward the

⁴ Brenda had signed a waiver of rights agreement, granting the probation department access to her home to conduct searches initiated by her probation officer.

back of the house and called for Brenda, who had apparently been sleeping. Approximately one minute after the first knock, officers entered the house through an unlocked door.

[5] Pastore and Sergeant Jason Baker entered the living room, where Murray was standing in front of a sofa accented by a coffee table. Sergeant Baker directed Murray to leave the residence so that a K-9 search could safely be performed. Murray insisted that he “knew his rights” and he “wasn’t going to exit.” (*Id.* at 102.) Murray then sat down on the sofa. Sergeant Baker began to slide the coffee table to the side, whereupon Murray began to call out “whoa, whoa, whoa.” (*Id.* at 164.) A “scuffle” between the officers and Murray ensued, ending with Murray being transported outside and handcuffed. Brenda walked out of the residence without incident.

[6] Officers then conducted the search, discovering a plastic bag underneath the sofa cushion where Murray had been sitting. The bag contained a white “rock-like substance,” later tested and identified as methamphetamine in the amount of 10.72 grams. (*Id.* at 170.) Upon sliding aside the coffee table, officers could see a mirror with a white powder on it – later identified in laboratory testing as methamphetamine. The search also yielded scales, cut straws, plastic cards with white residue, cut foil, a hollowed-out pen with white residue, and a small white rock-like ball. The officers also retrieved messages from a cellphone shared by Murray and Brenda. Numerous messages indicated that methamphetamine was being offered for sale by the Murrays.

- [7] On October 15, 2021, the State charged Murray with Possession of Methamphetamine and Resisting Law Enforcement. On October 21, the State filed an amended information to add a count of Dealing in Methamphetamine. On February 6, 2024, Murray was brought to trial before a jury. Brenda, who had pleaded guilty to Dealing in Methamphetamine, testified that she and Murray had been involved in methamphetamine sales for a few years. According to Brenda, they routinely traveled to Columbus, Ohio to pick up methamphetamine which they would sell in small quantities in Wells County to fund their own addictions.
- [8] On February 8, Murray was convicted as charged. On March 5, Murray was sentenced to ten years imprisonment for Possession of Methamphetamine, one year for Resisting Law Enforcement, and twenty years for Dealing in Methamphetamine. All sentences were to be served concurrently, providing for an aggregate sentence of twenty years. Murray now appeals.

Discussion and Decision

Sufficiency of the Evidence

- [9] Murray contends that the State presented insufficient evidence to support his convictions for Possession of Methamphetamine and Dealing Methamphetamine. To convict Murray of Possession of Methamphetamine, as a Level 4 felony, as charged, the State was required to prove beyond a reasonable doubt that Murray knowingly or intentionally

possessed methamphetamine in an amount of at least 10 grams. Ind. Code § 35-48-4-6.1. To convict Murray of Dealing in Methamphetamine, as a Level 2 felony, as charged, the State was required to prove beyond a reasonable doubt that Murray knowingly or intentionally possessed methamphetamine, pure or adulterated, in an amount of at least 10 grams, with intent to deliver the methamphetamine. I.C. § 35-48-4-1.1(a)(2). Murray does not contest the discovery of 10.78 grams of methamphetamine at his residence. Rather, he points out that “numerous persons, other than [himself], such as his wife and all of the State’s witnesses, had access to [his] residence,” Appellant’s Brief at 19, and argues that, accordingly, the State failed to prove that he “knowingly” was in possession of the seized methamphetamine.

[10] The State proceeded on the theory that Murray had constructive possession of methamphetamine. Possession of contraband may be either actual or constructive. *See Gee v. State*, 810 N.E.2d 338, 340 (Ind. 2004). A person actually possesses an item when he has direct physical control over it. *Gray v. State*, 957 N.E.2d 171, 174 (Ind. 2011). But when the State cannot show actual possession, a conviction for possessing contraband may rest upon proof of constructive possession. *Id.* A person constructively possesses something when the person has the capability to maintain dominion and control over the item and the intent to maintain dominion and control over it. *Id.*

[11] When a possessory interest is not exclusive, the State must show additional circumstances as to the defendant’s knowledge of the presence and the nature of the item. *Id.* Some possible, non-exclusive examples include: (1) a defendant’s

incriminating statements; (2) a defendant's attempting to leave or making furtive gestures; (3) the location of contraband like drugs in settings suggesting manufacturing; (4) the item's proximity to the defendant; (5) the location of contraband within the defendant's plain view; and (6) the mingling of contraband with other items the defendant owns. *Id.* at 175. "[F]inding contraband hidden from plain view on premises in which a defendant has a nonexclusive possessory interest when the defendant was not even present will not, without more, support a conviction on a theory of constructive possession." *Id.*

[12] Here, the bag of methamphetamine was found under the sofa cushion where Murray had been sitting just before the discovery. His wallet with his identification was found on the other sofa cushion. Murray appeared protective over the immediate vicinity, refusing to stand up at the officers' direction, and calling out in protest as the coffee table was being moved aside. There were digital scales in Murray's kitchen, and, in his bedroom, there were several articles of paraphernalia typically associated with methamphetamine use. Finally, Brenda testified that Murray had been involved in procuring and selling methamphetamine for a few years. She testified that he had made weekly trips to Dayton to get two to four ounces of methamphetamine, and that he typically kept two or three ounces in their house. Although Brenda claimed that Murray weighed and packaged the contraband for sale, and kept the proceeds in his possession, she admitted that she functioned as a "connector" for sales. (Tr. Vol. IV, pg. 130.) She described having daily visitors to purchase and/or

consume methamphetamine. Brenda’s testimony was partially corroborated by the testimony of her daughter, who had lived with the Murrays, purchased methamphetamine from Murray, and loaned Murray her vehicle to travel to Ohio. In sum, the State presented sufficient evidence from which the factfinder could reasonably conclude that Murray knowingly possessed the seized methamphetamine.

Double Jeopardy

[13] Murray contends that, in the circumstances present here, the offense of Possession of Methamphetamine is a lesser-included offense of Dealing in Methamphetamine, and his multiple convictions cannot stand.⁵ He points out that each of the charges involves the same methamphetamine.

[14] Article 1, Section 14 of the Indiana Constitution bars procedural double jeopardy. *A.W. v. State*, 229 N.E.3d 1060, 1065 (Ind. 2024). The “protective scope” of this Article is restricted to “successive prosecutions for the same offense.” *Wadle v. State*, 151 N.E.3d 227, 246 (Ind. 2020). Substantive double jeopardy refers to claims related to multiple convictions for the same offense in a single proceeding; these are grounded in statutory law. *A.W.*, 229 N.E.3d at 1065. The latter, which is the type of claim herein, are analyzed under the

⁵ The State does not contest this argument.

three-step approach of *Wadle*, as recently explained by our Indiana Supreme Court in *A.W.*:

1. Interpret statutory language

We start with the statutory language of the offenses. “If the language of either statute clearly permits multiple punishment, either expressly or by unmistakable implication, the court’s inquiry comes to an end and there is no violation of substantive double jeopardy.” [*Wadle*] at 248 (footnote omitted).

2. Apply included-offense statute

If the statutory language does not clearly permit multiple punishments, “a court must then apply our included-offense statutes to determine statutory intent.” *Id.* (emphasis added) (citing *Collins v. State*, 645 N.E.2d 1089, 1093 (Ind. Ct. App. 1995) (highlighting that our included-offense statute helps courts ascertain “legislative intent”), *aff’d in part, vacated in part on other grounds*, 659 N.E.2d 509 (Ind. 1995)). An “included offense,” as defined by the General Assembly, is an offense

- (1) that “is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged,”

- (2) that “consists of an attempt to commit the offense charged or an offense otherwise included therein,” or

- (3) that “differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property, or public interest, or a lesser kind of culpability, is required to establish its commission.”

I.C. § 35-31.5-2-168. “If neither offense is an included offense of the other (either inherently or as charged), there is no violation of double jeopardy” and the analysis ends—full stop. *Wadle*, 151 N.E.3d at 248. But if one offense is included in the other, the court must proceed to Step 3. *See id.* . . .

Wadle defined an “inherently included” offense as one that “may be established by proof of the same material elements or less than all the material elements defining the crime charged,” or if “the only feature distinguishing the two offenses is that a lesser culpability is required to establish the commission of the lesser offense.” *Id.* at 251 n.30 (quoting *Young v. State*, 30 N.E.3d 719, 724 (Ind. 2015)). *Wadle* thus approved subsection (1) and the last part of subsection (3) of the included-offense statute to be within the inherently included inquiry. *Id.* Today, we clarify that this evaluation should be made under all three subsections. Thus, to constitute an inherently included offense, it must fit within one of those enumerated subsections. I.C. § 35-31.5-2-168.

3. Examine the facts underlying the statutory offenses

We have now arrived at the final step in *Wadle*. If a court has found that one offense is included in the other—either inherently or as charged—the court must then (and only then) “examine the facts underlying those offenses, as presented in the charging instrument and as adduced at trial.” *Wadle*, 151 N.E.3d at 249 (emphasis added) (citing *Bigler v. State*, 602 N.E.2d 509, 521 (Ind. Ct. App. 1992), *trans. denied*). Step 3 functions as a cabined version of *Richardson’s*^[6] actual evidence test, and it serves an

⁶ *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999).

important, practical role in our double jeopardy analysis: to facilitate the distinction between what would otherwise be two of the “same” offenses. *See id.* at 249 n.27. So, at this final step, a court may only then probe the underlying facts—as presented in the charging instrument and adduced at trial—to determine whether a defendant’s actions were “so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction.” *Id.* at 249. If the underlying facts reveal the two offenses are indeed “separate,” there is no *Wadle* violation, “even if one offense is, by definition, ‘included’ in the other.” *Id.* That said, if the “facts show only a single continuous crime, and one statutory offense is included in the other, then the prosecutor may charge these offenses only as alternative (rather than cumulative) sanctions.” *Id.*

A.W., 229 N.E.3d at 1066-67, 1071.

- [15] Murray was charged with Possession of Methamphetamine in an amount of at least 10 grams, under Indiana Code Section 35-48-4-6.1. He was also charged with Dealing in Methamphetamine under Indiana Code Section 35-48-4-1.1, which requires possession with intent to deliver or finance the delivery of methamphetamine with a weight of at least 10 grams but less than 28 grams. Neither statute expressly authorizes multiple punishments for the same criminal act. These criminal statutes are not part of a statutory scheme that requires multiple punishments.
- [16] Proceeding to step two of the *Wadle* test, we look to whether one of the two offenses is inherently or factually included in the other offense. An included offense is an offense that:

(1) is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged;

(2) consists of an attempt to commit the offense charged or an offense otherwise included therein; or

(3) differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property, or public interest, or a lesser kind of culpability, is required to establish its commission.

I.C. § 35-31.5-2-168.

[17] The material elements of Possession of Methamphetamine, i.e., knowing or intentional possession of that drug, are established through proof of the material elements of Dealing in Methamphetamine, i.e., knowing or intentional possession with intent to deliver. *See* I.C. §§ 35-48-4-1.1, 35-48-4-6-1. The former offense is inherently included in the latter.

[18] The final step of the *Wadle* analysis involves an examination of the underlying facts to determine whether the criminal actions were “so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction.” 151 N.E.3d at 253. Murray’s possession of methamphetamine and possession of methamphetamine with intent to deal concerned the same methamphetamine on the same day. Under *Wadle*, his multiple convictions amount to a double jeopardy violation.

[19] “Where a defendant is found guilty of both the greater offense and an included offense, the proper procedure is to vacate the conviction for the included offense and to enter a judgment of conviction and sentence only upon the greater offense.” *O’Connor v. State*, 234 N.E.3d 242, 247 (Ind. Ct. App. 2024). A double jeopardy violation cannot be remedied by the “practical effect” of concurrent sentences. *Morrison v. State*, 824 N.E.2d 734, 741-42 (Ind. Ct. App. 2005), *trans. denied*. We thus remand this cause to the trial court with an order to vacate Murray’s conviction and sentence for Possession of Methamphetamine.

Abuse of Sentencing Discretion

[20] Murray challenges only his sentence for Dealing in Methamphetamine. The sentencing range for a Level 2 felony is between ten years and thirty years, with an advisory sentence of seventeen and one-half years. I.C. § 35-50-2-4.5. Murray received a twenty-year sentence. In imposing this sentence, the trial court found Murray’s criminal history, violations of probation, and his pretrial conduct – failing to appear at two hearings and violating the conditions of his bond – to be aggravating. The trial court observed that Murray had expressed some remorse, he was an older offender, and he had some medical conditions. Ultimately, the trial court found that there were no mitigators that outweighed the aggravators. Murray contends that the trial court “should have found at least one” mitigator from the following list: “[his] crimes didn’t cause particularized harm, his substantial health issues, his history of alcohol abuse, and lastly, his remorse.” Appellant’s Brief at 27.

[21] When imposing a sentence for a felony offense, the trial court must issue “a reasonably detailed recitation of the trial court’s reasons for imposing a particular sentence.” *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218 (2007). We review the sentence for an abuse of discretion. *Sloan v. State*, 16 N.E.3d 1018, 1026 (Ind. 2014). The trial court abuses its discretion by (1) failing to issue a sentencing statement; (2) finding aggravating or mitigating factors that are not supported by the record; (3) omitting factors that are clearly supported by the record and advanced for consideration; or (4) by finding factors that are improper as a matter of law. *Anglemyer*, 868 N.E.2d at 490-91.

[22] It is well settled that the finding of mitigating circumstances is within the discretion of the trial court. *Rascoe v. State*, 736 N.E.2d 246, 248-49 (Ind. 2000). An allegation that the trial court failed to identify or find a mitigating circumstance requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Id.* at 249. The trial court is not obligated to accept the defendant’s contentions as to what constitutes a mitigating circumstance. *Id.*

[23] At the sentencing hearing, Murray apologized for his actions, and his counsel argued that Murray should be allowed to engage in a particular program, Purposeful Incarceration. Counsel observed that Murray and his wife had been living on a fixed disability income and had a stable life until addiction caused significant behavioral changes. The trial court indicated that it had considered Murray’s expression of “some remorse.” (Tr. Vol. V, pg. 115.) The court also

considered Murray's age and poor health but commented that his health conditions "had not stopped" the drug use in the past and observed that Murray looked healthier after his incarceration. (*Id.*) In other words, the trial court considered some potentially mitigating factors and did not accord them great weight. Murray advanced no argument that the trial court should find a lack of particularized harm to be a mitigator. In sum, Murray has not shown that the trial court ignored mitigating evidence that was both "significant and supported by the record." *Rascoe*, 736 N.E.2d at 249. We find no abuse of discretion in this regard.

Inappropriateness

- [24] As previously stated, Murray received a sentence of two and one-half years above the advisory sentence for a Level 2 felony. He maintains that his sentence is inappropriate in light of the nature of the offense and his character.
- [25] Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a trial court's sentencing order. *E.g., Livingston v. State*, 113 N.E.3d 611, 613 (Ind. 2018). This appellate authority is implemented through Indiana Appellate Rule 7(B). *Id.* Revision of a sentence under Rule 7(B) requires the appellant to demonstrate that his sentence is inappropriate in light of the nature of his offenses and his character. *See Ind. Appellate Rule 7(B); Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We consider not only the aggravators and mitigators found by the trial court, but also any other factors appearing in the record. *Baumholser v. State*, 62

N.E.3d 411, 417 (Ind. Ct. App. 2016), *trans. denied*. It is the defendant's burden to "persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." *Roush v. State*, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007).

[26] Indiana's flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented, and the trial court's judgment "should receive considerable deference." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). The principal role of appellate review is to attempt to "leaven the outliers." *Id.* at 1225. Whether we regard a sentence as inappropriate at the end of the day turns on "our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." *Id.* at 1224. The question is not whether another sentence is more appropriate, but rather whether the sentence imposed is inappropriate. *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008). Deference to the trial court "prevail[s] unless overcome by compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) and the defendant's character (such as substantial virtuous traits or persistent examples of good character)." *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[27] As to the nature of the offense, there is nothing remarkable. The statute pursuant to which Murray was convicted prohibits possessing, with intent to deal, methamphetamine having a weight of at least 10 grams. Murray possessed, with intent to deal, 10.78 grams of methamphetamine.

[28] As for Murray’s character, he has a criminal history consisting of three prior felonies and five prior misdemeanors. He has violated probation on at least four occasions. During the pendency of this case, Murray failed to appear on two occasions, and warrants were issued for his arrest. He was released on home detention, but that pretrial release was revoked after Murray tested positive for fentanyl, THC, and methamphetamine. As of the date of the sentencing hearing in this case, Murray was facing new criminal charges. He has long-standing substance abuse issues, for which he did not seek treatment. Indeed, there was evidence that Murray financed his addiction by engaging in methamphetamine sales over a period of two years. We perceive no “substantial virtuous traits or persistent examples of good character.” *Id.* We cannot say that Murray’s sentence is inappropriate in light of the nature of his offense and his character.

Conclusion

[29] The State presented sufficient evidence to support Murray’s convictions for Possession of Methamphetamine and Dealing in Methamphetamine; however, due to a violation of double jeopardy principles, the conviction and sentence for the lesser offense must be vacated. Murray has not demonstrated an abuse of the trial court’s sentencing discretion, nor has he shown that his sentence is inappropriate. We affirm the convictions for Dealing in Methamphetamine and Resisting Law Enforcement. We reverse the conviction for Possession of Methamphetamine and remand to the trial court with instructions to vacate the conviction and sentence for that offense.

[30] Affirmed in part, reversed in part, and remanded with instructions.

Altice, C.J., and Mathias, J., concur.

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