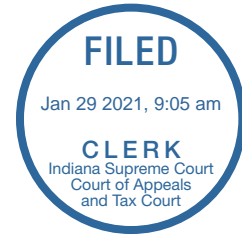


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT

Alexander L. Hoover
Law Office of Christopher G. Walter,
P.C.
Nappanee, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana
Ellen H. Meilaender
Supervising Deputy Attorney
General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Thomas Barr Willis,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 29, 2021

Court of Appeals Case No.
20A-CR-1442

Appeal from the Marshall Superior
Court

The Honorable Robert O. Bowen,
Judge

Trial Court Cause No.
50D01-1908-F2-38

Brown, Judge.

[1] Thomas Barr Willis appeals his status as an habitual offender and his sentence for dealing in methamphetamine as a level 2 felony. Willis raises two issues which we restate as:

- I. Whether he knowingly, voluntarily, and intelligently waived his right to a jury trial on the habitual offender charge; and
- II. Whether his sentence is inappropriate in light of the nature of the offense and his character.

We affirm.

Facts and Procedural History

[2] At some point on August 10, 2019, Willis, Kevin Weber, who knew Willis when they were teenagers, and Weber's friend, Kelsey Fleming, used methamphetamine. At some point in the evening, they traveled toward Logansport to sell methamphetamine.

[3] At approximately 3 a.m. on August 11, 2019, Marshall County Sheriff's Deputy Blake Bennett was on routine patrol in a fully marked vehicle and observed two vehicles traveling southbound on US 31. As a truck passed him, he observed that Weber, the driver of the truck, was rigid and stiff, and Fleming, the middle passenger, was leaning forward and staring directly at his patrol vehicle. He also noticed that the license plate light at the rear of the vehicle was not illuminated. Deputy Bennett initiated a traffic stop based upon the license plate light and the failure to properly signal a lane change. The truck took an unusual amount of time to stop.

- [4] After the truck eventually stopped, Deputy Bennett approached the vehicle, knocked on the window, and said hello. All of the occupants stopped talking, and looked at him but did not say anything. Deputy Bennett asked Willis, who was giving him a blank stare, if the window rolled down, and Willis rolled down the window. Deputy Bennett noticed that all three passengers appeared nervous.
- [5] At some point, Deputy Bennett asked Weber to exit the truck and walk back to the front of the patrol vehicle. Weber started putting his hands down his pants. Deputy Bennett asked him what he was stuffing in his pants, and Weber advised that it was marijuana and handed him a bag of marijuana.
- [6] Other law enforcement officers arrived, Deputy Bennett returned to the truck and asked Willis and Fleming if they knew Weber had marijuana, and they both advised that they did not. After Willis exited the vehicle and while Fleming was still inside, Deputy Bennett noticed a bag on the ground containing what resembled crystal methamphetamine, and which was later determined to weigh 29.2 grams.
- [7] When Deputy Bennett interviewed Willis at the scene, Willis stated that he knew only about the marijuana that Weber possessed. During a search of the truck, police discovered a scale, small baggies, and a black bag under the driver's seat which contained another bag of suspected methamphetamine. Police also discovered methamphetamine on Fleming, two syringes in her purse, and over \$1,600 on Weber's person.

- [8] On August 23, 2019, the State charged Willis with Count I, dealing in methamphetamine as a level 2 felony, and Count II, unlawful possession of a syringe as a level 6 felony. On October 18, 2019, the State filed a notice of intent to file an habitual offender enhancement.
- [9] On November 20, 2019, Willis filed a verified waiver of trial by jury, which was signed by Willis, his counsel, and the prosecutor. On January 31, 2020, the State filed an amended information charging Willis with Count I, dealing in methamphetamine as a level 2 felony, and Count II, possession of methamphetamine as a level 3 felony.
- [10] On February 5, 2020, the State filed a second amended information which altered the enhancing element of Count II, possession of methamphetamine as a level 3 felony, to allege that Willis possessed at least twenty-eight grams of methamphetamine. That same day, the State also filed an information alleging Willis was an habitual offender.
- [11] Also on February 5, 2020, the court held a hearing at which it informed Willis of the charges. The court also asserted that the State had filed a notice of intent to file an habitual offender enhancement, and Willis stated: “Yes.” Transcript Volume II at 9. The prosecutor indicated that the habitual offender allegation had been filed that morning. The court explained the habitual offender statute, Ind. Code § 35-50-2-8, and stated:

[Subsection] H if the person was convicted of the felony in a jury trial, and you currently have a bench trial set, the Jury shall reconvene for the sentencing hearing. This makes for a

bifurcated hearing, sir. It makes for a couple of different hearings.

If the trial was to the Court, which this one is set for, where judgment was entered on a guilty plea, the Court alone shall conduct a sentencing hearing under IC 35-38-1-3.

The role of the Jury will be to determine whether the Defendant has been convicted of the unrelated felonies. The State or the Defendant may not conduct any additional interrogation or questioning of the Jury during an habitual offender part of the trial.

So you would proceed under these charges. Bench trial is what's currently set. Okay. And then if you were found guilty of one of these two (2) charges, that would give you the requisite number. Then the Court would go back and the State would have the burden of proving the two (2) prior unrelated – unrelated to each other, unrelated to this one and that one of those two (2) is not a Class D or a Level 6 Felony. And, State, correct me if I ever say anything wrong, please. Do you understand that, sir?

A I think I do, ma'am.

Id. at 11-12. After some discussion, Willis indicated that he had a copy of the information for the habitual offender allegation, and the court read the allegation and informed him of the sentencing range.

[12] After further discussion, Willis requested a bench trial. Specifically, the following exchange occurred between the court and Willis:

Q Okay. So there's no question about – I mean, there's no question. You're wanting to proceed with a bench trial; correct?

A Um – yeah.

Q I mean, that's what it's set for.

A Yeah. I would want to proceed with a bench trial, I guess.

Id. at 20-21.

[13] At the beginning of the bench trial on May 13, 2020, at which Willis was represented by counsel, Willis reiterated his request for a bench trial. Specifically, the following exchange occurred between Willis and the court:

Q Now what I wanted to advise you of is that we have a bench trial set for today, but you do have the right to a jury trial. You'd previously, I believe, been in court, but there's documents showing that you were waiving the right to a jury trial. You want to proceed with the bench trial and not a jury trial; is that correct?

A Yes, sir.

Q You understand what a jury trial is and, I believe, we've covered that before; correct?

A Yes, sir.

Q And you've had full opportunity to discuss that with your attorney, Mr. Stanko; is that right?

A Yes, sir.

Q And knowing all of the risks of proceeding to trial in front of the bench instead of in front of a jury and . . . the procedures related to both, you still want to proceed with a bench trial?

A I do.

Id. at 33-34.

[14] The State presented the testimony of Deputy Bennett. Weber testified that he knew Willis when they were teenagers. When asked who was going to sell drugs in Logansport, Weber answered: “[Willis]. Me (inaudible).” *Id.* at 103. He stated that he panicked when he saw Deputy Bennett’s vehicle because he knew he and Willis had methamphetamine. He also testified that the black bag discovered under the seat belonged to him. On cross-examination, he testified that the money he possessed came from selling drugs. He also indicated that he had drugs and paraphernalia commonly used for the sale or purchase of methamphetamine in his bag. On redirect examination, Weber indicated that he had already had a conversation with Willis and was taking him to sell drugs in Logansport.

[15] On June 10, 2020, the court continued the trial. Fleming testified that she did not throw the bag of methamphetamine out of the truck, the bag did not belong to her, and she did not know how the bag ended up on the ground.

[16] Michael Mincy testified that he was in custody at the Marshall County Jail and was in the same pod with Willis. He stated that Willis told him that he “kicked the dope underneath the truck because he had a hole in the pocket” and “was going to blame it on the girl or the other guy.” *Id.* at 173.

[17] Willis testified that he was homeless at the time Weber, who he indicated he had not seen in thirty-three years, picked him up at Walmart and told him he would give him a ride to Logansport. He testified that he did not have any drugs on him that he could sell and did not talk to Weber about selling drugs.

On cross-examination, Willis indicated that he consumed methamphetamine that night.

[18] The court found Willis guilty of Count I, dealing in methamphetamine as a level 2 felony, and Count II, possession of methamphetamine as a level 3 felony. The court then asked the parties if they were ready to proceed on the habitual offender enhancement. The prosecutor mentioned that two of the witnesses were retired police officers and asked to address the habitual offender determination at the time of sentencing. Willis's counsel stated that "if we go ahead and set a date for that process and if . . . [the prosecutor] provides me with a proposed stipulation that designates the prior convictions, I will arrange to have that emailed over to . . . my client, and if he indicates he wants to sign off of that stipulation, we would so advise the Court." *Id.* at 221. The court scheduled a hearing for July 9, 2020.

[19] On July 9, 2020, the court stated that Willis had previously waived his jury trial and asked if it was correct that Willis wanted to proceed with a bench trial, and Willis answered in the negative. After some discussion, the prosecutor objected and asserted that Willis waived his right to a jury trial. The court found that the waiver applied to the habitual offender enhancement and denied Willis's request for a jury trial on the enhancement portion. The court found Willis to be an habitual offender and that Count II merged into Count I.

[20] During the sentencing hearing, Willis stated that he was the only one who looks after his mother who has diabetes and heart issues. He indicated his desire to

be considered for participation in a program called Rehabilitation While Incarcerated (“RWI”). When asked why, he answered that “for one to be honest I know that it will get me out sooner” and that he “might as well try to become a better person” Transcript Volume III at 2. On cross-examination, when asked if he had any trouble in the Marshall County Jail, he answered: “Absolutely not.” *Id.* at 4. He then indicated that he broke up a fight in the jail.

[21] Upon questioning by the court regarding the mention of four negative conduct reports attached to the presentence investigation report (“PSI”), Willis indicated that another inmate altercation lasted for twelve minutes, he had an altercation with his bunkie, and he yelled. He also stated that he never damaged county property but “[m]aybe it was suit that I turned or something that had a snap broke off or whatever.” *Id.* at 6. He also stated that he was welcome at his mother’s home and occasionally stayed overnight. When asked about his testimony at trial that he was homeless, he indicated that he could have gone to his mother’s home but was hoping to go to Colorado to obtain a “grant in college in Colorado – to an entrepreneurship” *Id.* at 7.

[22] The court sentenced Willis to thirty years for Count I, dealing in methamphetamine as a level 2 felony, and enhanced the sentence by ten years for his status as an habitual offender for an aggregate sentence of forty years.

I.

[23] The first issue is whether Willis knowingly, voluntarily, and intelligently waived his right to a jury trial on the habitual offender charge. Willis argues that the State had not filed the habitual offender allegation until after he filed the verified waiver of trial by jury on November 20, 2019, and he requested a jury trial at the beginning of the habitual offender phase of the trial. The State points out that Willis personally re-affirmed his desire to waive his right to a jury trial at the February 5, 2020 hearing and the May 13, 2020 trial.

[24] Both the United States Constitution¹ and the Indiana Constitution² guarantee the right to trial by jury. *Dixie v. State*, 726 N.E.2d 257, 258 (Ind. 2000). A criminal defendant is presumed not to waive this right unless he affirmatively acts to do so. *Id.* A defendant may waive his right if he does so personally, intelligently, and voluntarily. *Id.* The right to trial by jury applies to habitual offender proceedings. *Id.* at 259; Ind. Code § 35-50-2-8. “The defendant must express her personal desire to waive a jury trial and such a personal desire must be apparent from the court’s record, whether in the form of a written waiver or a colloquy in open court.” *O’Connor v. State*, 796 N.E.2d 1230, 1234 (Ind. Ct. App. 2003).

¹ U.S. CONST. amend. VI.

² IND. CONST. art. 1, § 13.

[25] The record reveals that the State filed a notice of intent to file an habitual offender enhancement on October 18, 2019. On November 20, 2019, Willis filed a verified waiver of trial by jury, which was signed by Willis, his counsel, and the prosecutor. On February 5, 2020, the State filed an information alleging that Willis was an habitual offender. That same day, the court held a hearing and explained the habitual offender statute, Ind. Code § 35-50-2-8, and stated that “if the person was convicted of the felony in a jury trial, and you currently have a bench trial set, the Jury shall reconvene for the sentencing hearing. This makes for a bifurcated hearing, sir.” Transcript Volume II at 11. It also stated: “Bench trial is what’s currently set. Okay. And then if you were found guilty of one of these two (2) charges, that would give you the requisite number. Then the Court would go back and the State would have the burden of proving the two (2) prior unrelated” felonies. *Id.* at 11-12. Willis indicated that he understood. After further discussion, Willis requested a bench trial.

[26] At the beginning of the bench trial on May 13, 2020, Willis reiterated his request for a bench trial and indicated that he had a full opportunity to discuss the issue with his attorney. At the end of the June 10, 2020 trial, the prosecutor mentioned that two of the witnesses were retired police officers and asked to address the habitual offender determination at the time of sentencing. Willis’s counsel discussed the possibility of a stipulation, and the court scheduled a hearing for July 9, 2020. Willis did not raise a request for a jury trial until the July 9, 2020 hearing. Under these circumstances, we cannot say that his jury trial waiver was not voluntary, knowing, or intelligent or that the court erred in

refusing to allow him to withdraw his waiver.³ See *Jones v. State*, 518 N.E.2d 479, 481 (Ind. 1988) (rejecting the defendant’s assertion that the trial court erred in refusing to allow him to withdraw his waiver of his right to a jury trial immediately before his bench trial was to begin), *abrogated on other grounds by Richardson v. State*, 717 N.E.2d 32 (Ind. 1999).

II.

[27] The next issue is whether Willis’s sentence is inappropriate in light of the nature of the offense and his character. Willis argues that the trial court essentially sentenced him to the remainder of his life, the offense involved no victims, he was not involved in a never-ending stream of criminal activity in the years he was not incarcerated, and he has an addiction issue.

[28] Ind. Appellate Rule 7(B) provides that we “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Under this rule, the burden is on the defendant to persuade

³ To the extent Willis cites *Jones v. State*, 810 N.E.2d 777 (Ind. Ct. App. 2004), and *O’Connor v. State*, 796 N.E.2d 1230 (Ind. Ct. App. 2003), we find those cases distinguishable. See *Jones*, 810 N.E.2d at 779 (“Jones knew the [habitual offender] count would be filed if a guilty plea agreement was not accepted, but it was not filed until nine days after the bench trial on his underlying charges. Neither the Waiver of Trial by Jury nor the questions by the judge during the hearing on the waiver of jury trial indicate the charges for which Jones was waiving his right to a jury trial.”); *O’Connor*, 796 N.E.2d at 1235 (“The record reveals that O’Connor was never advised of her right to a jury trial as to the habitual offender determination and that at no time after the State filed the habitual offender information did she waive her right to such.”).

the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

[29] Ind. Code § 35-50-2-4.5 provides that a person who commits a level 2 felony shall be imprisoned for a fixed term of between ten and thirty years, with the advisory sentence being seventeen and one-half years. Ind. Code § 35-50-2-8(i) provides in part that “[t]he court shall sentence a person found to be a habitual offender to an additional fixed term that is between . . . six (6) years and twenty (20) years, for a person convicted” of a level 2 felony and “[a]n additional term imposed under this subsection is nonsuspendible.”

[30] Our review of the nature of the offense reveals that Willis used methamphetamine with Weber and planned to travel to Logansport to sell methamphetamine. Willis initially told Deputy Bennett that he did not know Weber had marijuana and later stated that he knew only about the marijuana Weber possessed. Willis dropped a bag containing methamphetamine which weighed 29.2 grams. During cross-examination, when asked whether 29.2 grams was a fairly substantial amount, Deputy Bennett answered affirmatively.

[31] Our review of the character of the offender reveals that Willis, who was born in 1968, has convictions for three incidents of public intoxication as misdemeanors in 1991; battery resulting in serious bodily injury as a class C felony, public intoxication, resisting law enforcement, fleeing a police officer, false informing, disorderly conduct, criminal conversion, and failure to appear as misdemeanors in 1994; possession of cocaine or narcotic drug as a class B

felony in 2002; driving while suspended as a misdemeanor in 2016; and residential entry as a level 6 felony in 2017. The PSI indicates that Willis violated probation in 1992, 1997, and 2007. It also indicates that he had behavioral write-ups in the past while incarcerated. It states that Willis refused to fill out his presentence investigation packet on two separate occasions. It also states that he had been listed in four negative conduct reports at the Marshall County Jail since August 11, 2019. The PSI further indicates Willis's overall risk assessment score using the Indiana Risk Assessment System places him in the high risk to reoffend category.

[32] After due consideration, we conclude that Willis has not sustained his burden of establishing that his sentence is inappropriate in light of the nature of the offense and his character.

[33] For the foregoing reasons, we affirm Willis's habitual offender status and sentence.

[34] Affirmed.

Vaidik, J., and Pyle, J., concur.