MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Justin R. Wall
Wall Legal Services
Huntington, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Daylon L. Welliver
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Brandon J. Hochstetler,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 9, 2023

Court of Appeals Case No. 22A-CR-2261

Appeal from the Huntington Superior Court

The Honorable Jennifer E. Newton, Judge

Trial Court Cause No. 35D01-2010-F3-367

Memorandum Decision by Judge Bailey
Judges Brown and Weissmann concur.

Bailey, Judge.

Case Summary

[1] Brandon Hochstetler appeals his convictions and sentence following a jury trial for possession of methamphetamine with the intent to deal, as a Level 3 felony (Count 1);[1] possession of methamphetamine, as a Level 5 felony (Count 2);[2] possession of paraphernalia, as a Class C misdemeanor (Count 3);[3] operating a vehicle while intoxicated, as a Class C misdemeanor (Count 4);[4] and operating a vehicle with a scheduled I or II controlled substance in his blood, as a Class C misdemeanor (Count 5).[5] We affirm in part, reverse in part, and remand with instructions.

Issues

[2] Hochstetler raises three issues for our review, which we revise as the following four issues:

1. Whether the court erred when it merged his conviction on Count 2 with Count 1 rather than vacating it.

2. Whether the State presented sufficient evidence to support his convictions for Counts 1 and 3.

---

[1] Ind. Code § 35-48-4-1.1(a)(2) (2022).

[2] I.C. § 35-48-4-6.1(b).

[3] I.C. § 35-48-4-8.3(b).

[4] I.C. § 9-30-5-2(a).

[5] I.C. § 9-30-5-1(c).

2. Whether his convictions for Counts 4 and 5 violate the prohibition against double jeopardy.

3. Whether his sentence is inappropriate in light of the nature of the offenses and his character.

Facts and Procedural History

[3] At approximately 2:20 a.m. on October 22, 2020, Officer Ryan Gatchel with the Huntington City Police Department observed a vehicle "with a headlight out." Tr. Vol. 2 at 135. Officer Gatchel initiated a traffic stop of that vehicle. The driver, later identified as Hochstetler, "didn't pull over right away." *Id.* at 136. Rather, Hochstetler "continued to go at a slow pace" until he ultimately pulled into a parking lot. *Id.* Before Officer Gatchel exited his vehicle, he observed Hochstetler "leaning very far over . . . either towards the center console or passenger side" for an "extended amount of time." *Id.* Officer Gatchel then exited his vehicle and observed that Hochstetler was the only occupant of the car. Officer Gatchel twice ordered Hochstetler to "stop reaching" and to put his hands on the steering wheel. *Id.*

[4] Hochstetler was "extremely nervous," and his hands "were shaking really bad." *Id.* at 137. Based on his observations of Hochstetler, Officer Gatchel requested the assistance of a K-9 unit. Approximately five minutes later, a K-9 arrived, conducted a free air sniff, and gave a "positive alert." *Id.* at 138. Officer Gatchel opened the driver's side door and informed Hochstetler of the K-9's positive alert, and Hochstetler "began reaching around[.]" When Officer

Gatchel asked Hochstetler if he had "anything on him or in the vehicle," Hochstetler "hesitated" but "continued to reach[.]" *Id*.

[5] At that point, officers removed Hochstetler and searched him. Officer Gatchel found a digital scale with a "crystal substance" on it and over $1,900 in cash. *Id*. Officer Gatchel also searched the vehicle, which he discovered belonged to a friend of Hochstetler named Kendra Dotson. Officer Gatchel found two bags of a "crystallized substance" located between the driver's side door and the center console. *Id*. at 141. Later testing revealed that one bag contained 1.78 grams of methamphetamine and the other contained 5.06 grams of methamphetamine. *See* Ex. Vol. 4 at 43. He also found a "glass smoking device" located between the front passenger seat and the center console and additional cash. *Id*.

[6] At that point, Officer Gatchel performed a series of field sobriety tests on Hochstetler, two of which he failed. Hochstetler admitted to having smoked marijuana, and Officer Gatchel offered Hochstetler a certified chemical test. Hochstetler refused, so Officer Gatchel obtained a warrant to get a blood sample. The result of the test demonstrated that Hochstetler's blood contained amphetamine and methamphetamine.

[7] The State charged Hochstetler with possession of methamphetamine with the intent to deal, as a Level 3 felony; possession of methamphetamine, as a Level 5 felony; possession of paraphernalia, as a Class C misdemeanor; operating a

vehicle while intoxicated, as a Class C misdemeanor; and operating a vehicle with a Schedule I or II substance in his blood, as a Class C misdemeanor.[6]

[8] Following a jury trial, the jury found Hochstetler guilty as charged. At the subsequent sentencing hearing, the court identified as aggravating factors Hochstetler's criminal history and the fact that he took "responsibility for absolutely nothing." Tr. Vol. 3 at 105. The court did not identify any mitigators. The court then "merge[d]" Count 2 into Count 1 and sentenced Hochstetler to sixteen years on Count 1 and sixty days each on Counts 3, 4, and 5. *Id.* The court ordered all of the sentences to run concurrently, for an aggregate term of sixteen years in the Department of Correction.

Discussion and Decision

Issue One: Merger of Count 2

[9] We first address Hochstetler's assertion that the court erred when it merged his conviction on Count 2 with Count 1. As outlined above, the State charged Hochstetler in Count 1 with possession of methamphetamine with the intent to deal, as a Level 3 felony. And the State charged him in Count 2 with possession of methamphetamine, as a Level 3 felony.

---

[6] The State also initially charged Hochstetler with possession of methamphetamine, as a Level 6 felony, and driving while suspended, as an infraction. But the court dismissed those charges on the State's motion prior to trial.

[10] The parties do not dispute that those convictions were supported by the same fact: that officers had found methamphetamine in the car Hochstetler was driving. And there is no dispute that the jury entered guilty verdicts against Hochstetler on both counts. Then, during sentencing, both the parties appeared to agree that the court could not sentence Hochstetler on both counts. As a result, the court "merge[d]" Count 2 into Count 1. Tr. Vol. 3 at 105.

[11] On appeal, Hochstetler asserts that "[m]erger in this particular case is not an appropriate remedy" and that "the only appropriate remedy would be vacating his conviction" on Count 2. Appellant's Br. at 24. The State responds and contends that the court did not err when it merged the counts because "the record does not establish that a judgment of conviction was entered" on Count 2. Appellee's Br. at 25.

[12] The State is correct that, "[i]f a trial court does not formally enter a judgment of conviction on a jury verdict, then there is no requirement that the trial court vacate the 'conviction,' and merger is appropriate." *Kovats v. State*, 982 N.E.2d 409, 414 (Ind. Ct. App. 2013). However, "if the trial court does enter judgment of conviction of a jury's guilty verdict, then simply merging the offenses is insufficient and vacation of the offense is required." *Id.* at 414-15.

[13] Here, contrary to the State's assertion, the CCS clearly states under Count 2: "Conviction Merged[.]" CCS at 15; Appellant's App. Vol. 2 at 49.[7] In other words, the court entered judgment of conviction on that count and then merged it with Count 1 without also vacating the judgment on that conviction. Because the court entered a judgment of conviction, merger of the offenses was improper. *See Kovats*, 982 N.E.2d at 414-15. We therefore remand with instructions for the court to vacate Hochstetler's conviction on Count 2.

Issue Two: Sufficiency of the Evidence

[14] Hochstetler also asserts that the State failed to present sufficient evidence to support his convictions for Counts 1 and 3. Our standard of review on a claim of insufficient evidence is well settled:

> For a sufficiency of the evidence claim, we look only at the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess the credibility of witnesses or reweigh the evidence. *Id*. We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id*.

Love v. State, 73 N.E.3d 693, 696 (Ind. 2017).

[15] To demonstrate that Hochstetler committed possession of methamphetamine with intent to deal, as a Level 3 felony, the State was required to show that he

---

[7] The case summary provided by Hochstetler "is not the official court record." Appellant's App. Vol. 2 at 30. However, we obtained a copy of the official CCS from the Odyssey case management system.

had knowingly or intentionally possessed methamphetamine, pure or adulterated, with the intent to deliver and that the amount of methamphetamine involved was at least five grams but less than ten grams. Ind. Code § 35-48-4-1.1(a)(2) and (d)(1) (2022). And to establish that Hochstetler committed possession of paraphernalia, the State was required to prove that he knowingly or intentionally possessed an instrument, device, or another object that he intended to use for introducing a controlled substance into his body. I.C. § 35-48-4-8.3(b).

[16] On appeal, Hochstetler does not dispute that the substance officers had found in the car he was driving was methamphetamine or that the amount of methamphetamine involved was between five and ten grams. Hochstetler similarly does not dispute that officers found a glass pipe in the car or that the pipe constituted paraphernalia. However, Hochstetler contends that the State failed to prove that he possessed those items or that he did so knowingly.

[17] A conviction for possession of illegal items can be based on either actual or constructive possession. *See Gray v. State*, 957 N.E.2d 171, 174 (Ind. 2011). When the State cannot show actual possession, "a conviction for possessing contraband may rest instead on proof of constructive possession." *Id*. "A person constructively possesses contraband when the person has (1) the capability to maintain dominion and control over the item; and (2) the intent to maintain dominion and control over it." *Id*.

[18] Hochstetler does not make any argument regarding the "capability" prong. And the evidence is clear that he had the ability to reduce the contraband to his personal possession. Indeed, officers found the methamphetamine between the driver's seat and the center console and the pipe between the center console and the passenger seat, both of which would have easily been within Hochstetler's reach.

[19] Rather, Hochstetler only challenges the "intent" prong. To satisfy the intent element, the State must demonstrate the defendant's knowledge of the presence of the item. *Grim v. State*, 797 N.E.2d 825 (Ind. Ct. App. 2003). Such knowledge may be inferred from the exclusive control over the premises containing the item. *Goliday v. State*, 708 N.E.2d 4, 6 (Ind. 1999). If control of the premises is non-exclusive, the inference of intent must be supported by additional circumstances indicating the defendant's knowledge of the presence of the item. *Cannon v. State*, 99 N.E.3d 274 (Ind. Ct. App. 2018), *trans. denied*. These additional circumstances have been found to include: (1) incriminating statements by the defendant; (2) attempted flight or furtive gestures; (3) location of substances like drugs in settings that suggest manufacturing; (4) proximity of the item to the defendant; (5) location of the item within the defendant's plain view; and (6) mingling of the item with other items owned by the defendant. *Id*.

[20] Hochstetler contends that the State failed to present sufficient evidence to support his possession convictions because the undisputed evidence demonstrates that the car belonged to someone else. And he maintains that,

because the car was not his, the State failed to demonstrate that he had knowledge of the contraband. However, Hochstetler's sole occupancy and exclusive possession of the car at the time police stopped him was sufficient to raise a reasonable inference of intent. *See Goliday*, 708 N.E. 2d at 6 (holding that the defendant's exclusive possession of the vehicle was adequate to raise a reasonable inference of intent where, though he was in a borrowed car, he was the only person in the car at the time he was stopped).

[21] However, even if this were a case of nonexclusive control of the premises where the contraband was found, the State provided evidence of additional circumstances that would support the inference of Hochstetler's knowledge of the contraband. In particular, Officer Gatchel testified that, when he initiated the traffic stop, Hochstetler "didn't pull over right away." Tr. Vol. 2 at 136. He also testified that, once Hochstetler stopped the car, he was able to observe Hochstetler "leaning very far over . . . either toward the center console or passenger side," which is where officers found the methamphetamine and pipe. *Id*. In addition, Officer Gatchel observed that Hochstetler was "extremely nervous" and that his hands "were shaking really bad." *Id*. at 136-37. And, when officers searched Hochstetler, they found a digital scale with a white, crystalline substance and over $1,900 in cash on his person.

[22] Based on that evidence, a reasonable jury could conclude that Hochstetler knew about the contraband and had the intent to maintain dominion and control over it. As such, the State presented sufficient evidence to support Hochstetler's convictions on Counts 1 and 3. We therefore affirm those convictions.

Issue Three: Double Jeopardy

[23] Next, Hochstetler asserts, and the State agrees, that his convictions on Counts 4 and 5 violate the prohibition against double jeopardy. In 2020, our Supreme Court adopted a new test for addressing substantive claims of double jeopardy. In *Wadle v. State*, the Court established the test to be applied where, as here, "a simple criminal act or transaction violates multiple statutes with common elements." 151 N.E.3d 227, 247 (Ind. 2020).

> This framework, which applies when a defendant's single act or transaction implicates multiple criminal statutes (rather than a single statute), consists of a two-part inquiry: First, a court must determine, under our included-offense statutes, whether one charged offense encompasses another charged offense. Second, a court must look at the underlying facts—as alleged in the information and as adduced at trial—to determine whether the charged offenses are the "same." If the facts show two separate and distinct crimes, there's no violation of substantive double jeopardy, even if one offense is, by definition, "included" in the other. But if the facts show only a single continuous crime, and one statutory offense is included in the other, then the presumption is that the legislation intends for alternative (rather than cumulative) sanctions. The State can rebut this presumption only by showing that the statute—either in express terms or by unmistakable implication—clearly permits multiple punishment.

Wadle v. State, 151 N.E.3d 227, 235 (Ind. 2020).

[24] Here, to convict Hochstetler on Count 4, the State was required to prove that he had operated a vehicle while intoxicated. I.C. § 9-30-5-2. And, to convict him as charged in Count 5, the State was required to prove that Hochstetler had

operated a vehicle with a schedule I or II controlled substance in his blood. I.C. § 9-30-5-1(c). To support both of those charges, the State relied on the same evidence: that, at the time Hochstetler was driving the car, he had methamphetamine and amphetamine in his blood.

[25] The State agrees, and so do we, that Hochstetler's convictions under two statutes based on the same facts is a violation of substantive double jeopardy principles. As such, we remand this matter back to the trial court with instructions to vacate Hochstetler's conviction on Count 4.

Issue Four: Appropriateness of Sentence

[26] Finally, Hochstetler argues that his aggregate sixteen-year sentence is inappropriate in light of the nature of the offenses and his character.[8] Indiana Appellate Rule 7(B) provides that "[t]he Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." This Court has recently held that "[t]he advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed." *Sanders v. State*, 71 N.E.3d 839,

[8] Even though we vacate Hochstetler's conviction on Count 4, his sentence on that count was a concurrent term of sixty days. And while the trial court improperly merged Hochstetler's conviction on Count 2 instead of vacating it, the court never entered a sentence on that count. As such, his aggregate sentence remains intact.

844 (Ind. Ct. App. 2017). And the Indiana Supreme Court has recently explained that:

> The principal role of appellate review should be to attempt to leaven the outliers . . . but not achieve a perceived "correct" result in each case. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). Defendant has the burden to persuade us that the sentence imposed by the trial court is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind.), as amended (July 10, 2007), *decision clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007).

Shoun v. State, 67 N.E.3d 635, 642 (Ind. 2017) (omission in original).

[27] 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*, 895 N.E.2d at 1222. 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 facts 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).

[28] The sentencing range for Hochstetler's Level 3 felony conviction is three years to sixteen years, with an advisory sentence of nine years. I.C. § 35-50-2-5(b). And Hostetler faced a sentence of not more than sixty days for each of his Class C misdemeanor convictions. I.C. 35-50-3-4. At sentencing, the court identified as aggravators Hochstetler's criminal history and the fact that he did not take responsibility for his actions. The court did not identify any mitigators. Accordingly, the court sentenced Bullins to the maximum term on each count, but ordered them to run concurrently, for an aggregate sentence of sixteen years.

[29] On appeal, Hochstetler contends that his sentence is inappropriate in light of the nature of the offenses because the amount of methamphetamine he had in his possession was "much less than the upper threshold required" for a Level 3 felony. Appellant's Br. at 18. He further argues that "the State failed to demonstrate any particularized harm afflicted by [him] to the State or any other enumerated victim" such that a maximum sentence was inappropriate. *Id*. at 19. And he maintains that his sentence is inappropriate in light of his character because he is "very regretful of his life choices," he is "interested in getting treatment," and he had a "very rough upbringing." *Id*. at 19-20.

[30] However, Hochstetler has not met his burden on appeal to demonstrate that his sentence is inappropriate. With respect to the nature of the offenses, Hochstetler possessed almost seven grams of methamphetamine, which is almost two grams above the amount required to support his Level 3 conviction. *See* I.C. 35-48-4-1.1(d). In addition, Hochstetler disregards the fact that he

operated a vehicle while under the influence of methamphetamine, which put himself and other motorists at risk. While we acknowledge that Hochstetler's crimes were not crimes of violence, he has not presented any evidence to show any restraint or regard on his part. He has not presented compelling evidence portraying the nature of the offenses in a positive light. *See Stephenson*, 29 N.E.3d at 122.

[31] As for his character, Hochstetler has a criminal history that dates back to 1997 and includes two prior misdemeanor convictions and four prior felony convictions. In addition, Hochstetler was convicted of another crime while out on bond for the instant offense. Further, Hochstetler has had his placement on probation revoked three times. And Hochstetler has a long history of drug-abuse problems for which he has not sought treatment, which reflects poorly on his character. We cannot say that his sentence is inappropriate in light of his character.

Conclusion

[32] The State presented sufficient evidence to demonstrate that Hochstetler knowingly possessed methamphetamine and paraphernalia as charged in Counts 1 and 3. In addition, Hochstetler's sentence is not inappropriate in light of the nature of the offenses and his character. However, the court erred when it simply merged Hochstetler's conviction on Count 2 into Count 1. And Hochstetler's convictions on Count 4 and Count 5 violate the prohibition against double jeopardy. We therefore affirm Hochstetler's convictions on

Counts 1, 3, and 5 and his aggregate sentence. But we reverse and remand with instructions for the court to vacate his convictions on Counts 2 and 4.

[33] Affirmed in part, reversed in part, and remanded.

Brown, J., and Weissmann, J., concur.