MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Brandi Elizabeth Leon,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

December 28, 2023

Court of Appeals Case No. 23A-CR-1420

Appeal from the Huntington Superior Court

The Honorable Jennifer E. Newton, Judge

Trial Court Cause No. 35D01-2207-F2-219

Memorandum Decision by Judge May
Judges Bailey and Felix concur.

May, Judge.

[1] Brandi E. Leon appeals her convictions of Level 2 felony dealing in methamphetamine,[1] Level 6 felony unlawful possession of a syringe,[2] and Class B misdemeanor possession of marijuana.[3] Leon raises three issues on appeal, which we revise and restate as:

(1) Whether the State presented sufficient evidence to support Leon's convictions;

(2) Whether Leon's twenty-six-year sentence is inappropriate in light of the nature of her offenses and her character; and

(3) Whether a finding of guilt on a charge of Level 3 felony possession of methamphetamine[4] should have been vacated on double jeopardy grounds.

After finding no error in the issues raised by Leon, we affirm her convictions and sentences. Nevertheless, we also remand for correction of the sentencing order, which erroneously indicates the jury found Leon guilty of Level 3 felony possession of cocaine rather than of Level 3 felony possession of methamphetamine.

Facts and Procedural History

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[1] Ind. Code § 35-48-4-1.1(e).

[2] Ind. Code § 26-42-19-18(a).

[3] Ind. Code § 35-48-4-11(a)(1).

[4] Ind. Code § 35-48-4-6.1(d).

[2] Officers from the Huntington Police Department and U.S. Marshals Service were searching for a wanted person believed to be staying in Courtney Taylor's apartment. Leon and Taylor were friends, and Leon occasionally stayed at Taylor's apartment. On July 19, 2022, Leon arrived at Taylor's apartment with a black tote. While Leon went into the apartment with the black tote, David Saunders and Erika Clark stayed in Leon's car. Leon dropped off the black tote and asked Zachary Fellers, who was also staying at Taylor's apartment, to help her carry something else from her car into the apartment.

[3] Officers observed people coming and going from Taylor's apartment and began speaking to Leon, Fellers, and Saunders in the parking lot. Taylor, who was still inside her apartment, went out onto her balcony and asked the officers what was happening. After hearing their explanation, Taylor allowed officers to enter her apartment to search for the wanted person. While conducting that search, officers observed drugs and drug paraphernalia in plain view. Officers "asked [Taylor] for written consent to further search her apartment," and she consented. (Tr. Vol. 2 at 152.)

[4] During the apartment search, police found a black tote that contained a black bag and personal hygiene items. Inside the black bag, there were "38 bags that had an opaque crystal substance inside[,]" "one large bag that contained a substantial amount of crystal substance" and one bag with "green plant material." (*Id*. at 160.) Forensic testing revealed the large bag contained 7.15 grams of methamphetamine, the thirty-eight smaller plastic bags contained a

combined weight of 53.41 grams of methamphetamine, and the other bag contained 3.91 grams of marijuana.

[5] Officers seized Taylor's cell phone and transported her to the Huntington Police Department for an interview. Officers questioned Taylor on the drugs and paraphernalia found in her apartment during the search. Taylor indicated the black tote and black bag were not hers, but she admitted ownership of other items found in the apartment. Taylor was released later that evening, but police kept Taylor's cell phone. Taylor went home and used her mother's cell phone to communicate with Leon through Facebook Messenger:

> Leon: "About to run"
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> * * * * *
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> Leon: "No doll like lave town forever"
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> * * * * *
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> Leon: "Its important dude did they find all thpe gram bags?"
>
> * * * * *
>
> Taylor: "Yes they did"
>
> Leon: "Im sick"
>
> * * * * *
>
> Leon: "I think Im going on the run forevr"
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> * * * * *
>
> Leon: "Im messed up in the game rn"
>
> * * * * *
>
> Leon: "Im so done w this life bro"
>
> * * * * *
>
> Leon: "Gorl the cops are basically saying that u implicated me as a drug dealer"
>
> Taylor: "I didnt say anything like that i said you stayed here for 2 nights and that the black bag was not mine"

> Taylor: "I told them that i was not going to talk about anyone i am getting like 3 felonies dude"

(Ex. Vol. 4 at 117-126) (errors in original). After messaging with Leon, Taylor returned to the police station to provide officers with her messages with Leon that "she felt were relevant to the investigation." (Tr. Vol. 3 at 15.) Taylor signed a written consent to allow officers to search her cell phone, which was still in their possession, and to access her social media accounts, including Facebook Messenger. During the cell phone search, officers found Leon's cell phone number and called her.

[6] Officer Jordan Corral of the Huntington Police Department contacted Leon and asked her to come to the police station for an interview regarding the items found during the apartment search earlier that day. Leon initially agreed to come in for an interview in "about 20 to 25 minutes" but she did not show up. (*Id*. at 16.) Leon called the non-emergency dispatch line, and her call was forwarded to Officer Corral. Leon indicated she did not want to come to the police department because she was concerned that officers were going to arrest her. Leon agreed to meet officers in the parking lot of Planet Fitness.

[7] Leon drove to the Planet Fitness parking lot and met her friend Brandon Durnell, who arrived on his bike. Leon gave Durnell her car keys and cell phone because she anticipated being arrested. Officer Corral and Officer Moore arrived at the Planet Fitness parking lot. Leon did not want to answer the officers' questions, so she was taken into custody. Leon wanted Durnell to take

her vehicle, but police "requested a canine come to the location to do an open-air sniff on the vehicle." (*Id.* at 17.) The canine, Kylo, provided a positive alert, and then officers searched Leon's vehicle. Officers found five syringes, one of which contained a brown liquid that tested positive for fentanyl in a field test; two digital scales; and a "box containing two smoking devices for marijuana and a plant grinder with a plant material residue in it." (App. Vol. 2 at 59.)

[8] Police searched Leon's person and no cell phone was recovered. Police asked where her cell phone was and she "claimed it was not anywhere on scene at Planet Fitness." (*Id.*) Officer Corral noticed Durnell was holding two cell phones, and he asked Durnell if one phone belonged to Leon. Durnell indicated both cell phones belonged to him, and when Officer Corral called Leon's phone, a third phone on Durnell's person began ringing. The phone number on the screen was Officer Corral's, so officers seized the cell phone as evidence. Police obtained a search warrant and discovered additional Facebook Messenger conversations from earlier in the day on July 19, 2022.

[9] On July 20, 2022, the State charged Leon with Level 2 felony dealing in methamphetamine/amount of 10 or more grams, Level 6 felony possession of a narcotic drug,[5] Level 6 felony unlawful possession of a syringe, Class B misdemeanor possession of marijuana, Class A misdemeanor resisting law

[5] Ind. Code § 35-48-4-6(a).

enforcement,[6] and Class B misdemeanor maintaining a common nuisance – controlled substances.[7] On April 5, 2023, the State amended the charge of Level 6 felony possession of a narcotic drug to Level 3 felony possession of methamphetamine.

[10] The trial court held a jury trial on May 11-12, 2023. A jury found Leon guilty of all four charges. The trial court merged the finding of Level 3 felony possession of methamphetamine into Level 2 felony dealing in methamphetamine and entered convictions of dealing methamphetamine, possession of a syringe, and possession of marijuana. On May 30, 2023, the trial court held a sentencing hearing and imposed concurrent sentences of twenty-six years for Level 2 felony dealing in methamphetamine, two years for Level 6 felony unlawful possession of a syringe, and 180 days for Class B misdemeanor possession of marijuana.

Discussion and Decision

[11] Leon appeals her convictions and sentence. Leon raises three issues on appeal: (1) whether the state presented insufficient evidence to support her convictions; (2) whether Leon's sentence was inappropriate in light of the nature of the offenses and her character; and (3) whether a finding of guilt of Level 3 felony

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[6] Ind. Code § 35-44.1-3-1(a)(3).

[7] Ind. Code § 35-45-1-5(a)(3).

possession of methamphetamine should have been vacated on double jeopardy grounds. We will address each in turn.

1. Insufficient Evidence

[12] Leon first alleges the State's evidence was insufficient to support her convictions. We review such claims pursuant to a well-settled standard of review:

> Sufficiency-of-the-evidence claims . . . warrant a deferential standard, in which we neither reweigh the evidence nor judge witness credibility. Rather, we consider only the evidence supporting the judgment and any reasonable inferences drawn from that evidence. We will affirm a conviction if there is substantial evidence of probative value that would lead a reasonable trier of fact to conclude that the defendant was guilty beyond a reasonable doubt.

Powell v. State, 151 N.E.3d 256, 262-63 (Ind. 2020) (internal citations omitted).

[13] More specifically, Leon challenges whether the State proved she "knowingly" or "intentionally" possessed methamphetamine, marijuana, and a hypodermic syringe or needle. (Appellant's Br. at 18.) "A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." Ind. Code § 35-41-2-2(b). "A person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so." Ind. Code § 35-41-2-2(a).

1.1 Possession of Items in the Black Tote

[14] The black tote contained 60.56 grams of methamphetamine and 3.91 grams of marijuana. These drugs were used to support Leon's guilty verdicts of dealing in methamphetamine, possession of methamphetamine, and possession of marijuana. To prove Leon committed Level 2 felony dealing in methamphetamine, the State had to present evidence she knowingly or intentionally possessed more than ten grams of methamphetamine with the intent to deliver. *See* Ind. Code § 35-48-4-1.1(e)(1) (defining crime). To prove Leon committed Class B misdemeanor possession of marijuana, the State had to present evidence that she knowingly or intentionally possessed marijuana. *See* Ind. Code § 35-48-4-11(a) (defining crime).

[15] Leon argues the State failed to prove she knowingly or intentionally possessed the marijuana and methamphetamine found in the black tote inside Taylor's apartment. Leon argues the black tote was in a common area of Taylor's apartment and was easily accessible. She further argues that nothing in the black tote or the black bag found therein that contained the illegal substances could be directly attributed to her, like a "driver's license, piece of mail, or debit card." (Appellant's Br. at 20.)

[16] Convictions based on possession of illegal items can be based on either actual or constructive possession. Actual possession occurs when a person "has direct physical control over" an item. *Gray v. State*, 957 N.E.2d 171, 174 (Ind. 2011). Constructive possession can be inferred when a person had the capability and intent to maintain dominion and control over the item. *Id.* "'This knowledge

may be inferred from either the exclusive dominion and control over the premise containing the contraband or, if the control is non-exclusive, evidence of additional circumstances pointing to the defendant's knowledge of the presence of the contraband.'" *Taylor v. State*, 482 N.E.2d 259, 261 (Ind. 1985) (quoting *Woods v. State*, 471 N.E.2d 691, 694 (Ind. 1984), *reh'g denied*). Additional circumstances to support the inference of intent for constructive possession include:

> (1) incriminating statements made by the defendant, (2) attempted flight or furtive gestures, (3) location of substances like drugs in settings that suggest manufacturing, (4) proximity of the contraband to the defendant, (5) location of the contraband within the defendant's plain view, and (6) the mingling of the contraband with other items owned by the defendant.

Henderson v. State, 715 N.E.2d 833, 836 (Ind. 1999).

[17] In this instance, a bag of marijuana and multiple bags of methamphetamine were discovered during the search of Taylor's apartment. Taylor testified that Leon brought the black tote from Leon's storage unit and then went back to her car for something else, which was when police officers approached Leon and other friends outside. Taylor testified that she did not know what was in the black tote or what officers would discover when they searched it.

[18] Facebook Messenger conversations between Leon and Taylor reveal that Leon was aware of the presence and nature of the drugs because she was worried officers located them during the search:

Leon: "Its important dude did they find all thpe gram bags?"

* * * * *

Taylor: "Yes they did"

Leon: "Im sick"

* * ** *

Leon: "I think Im going on the run forevr"

(Ex. Vol. 4 at 126) (errors in original). In addition, Facebook Messenger conversations from earlier in the day on July 19, 2022, indicate Leon not only knew she possessed methamphetamine, but she also intended to deal or distribute the methamphetamine.

Leon: "That's okay but I'm in need so bad o got a whole bunch I of shit just good to move 40 a g"
Leon: "Bagged m all up"

* * * * *

Leon: "All i have is prepared for 60 a G . . ."

* * * * *

Leon: "I got 50 dollar gs"

* * * * *

Leon: "Tell her i have gs for 50 or 40 if yall xan make some money too"

(*Id*. at 135-40) (errors in original).[8] Captain Ty Whitacre with the Huntington City Police Department testified that prices of methamphetamine fluctuate based on "supply and demand," but "methamphetamine at the time was cheaper, so it was around 40 to $60 a gram." (Tr. Vol. 2 at 150.) Leon was

[8] All statements made by someone other than Leon were redacted from the State's exhibit.

seen bringing into Taylor's apartment the black tote that contained marijuana, bulk methamphetamine, and thirty-eight ready-to-sell plastic bags of methamphetamine. This evidence was sufficient to demonstrate Leon's constructive possession of the drugs in the black tote and her intent to deal the methamphetamine. *See Davis v. State,* 791 N.E.2d 266, 270 (Ind. Ct. App. 2003) (holding that it is reasonable to infer intent to sell based on the possession of individually wrapped quantities and large quantities of the illegal substance), *reh'g denied*, *trans. denied*.

1.2 Possession of Items in the Car

[19] Leon also argues the State failed to prove that she constructively possessed the contraband found in her vehicle, including the five syringes, because Durnell or some other person might have accessed her vehicle without her knowledge. Not only did Leon own the car, but she was in possession of the vehicle just before meeting officers at the destination of her choice. There is no evidence to support Durnell being in Leon's car that day, as Durnell rode his bike to the Planet Fitness parking lot so he could take possession of Leon's car, keys, and phone if she was arrested. *See Parson v. State*, 431 N.E.2d 870, 872 (Ind. Ct. App. 1982) (despite defendant's assertion that another had prior access to the vehicle, jury could reasonably conclude vehicle had been in defendant's exclusive possession given evidence that he was the driver and sole occupant). We decline Leon's invitation to reweigh the evidence. *See Bell v. State*, 31 N.E.3d 495, 499 (Ind. 2015) ("We do not reweigh the evidence or assess the credibility of witnesses in reviewing a sufficiency of the evidence claim."). The

State presented sufficient evidence to prove Leon possessed the items that police found in her car. *See, e.g., Wilson v. State*, 966 N.E.2d 1259, 1265 (Ind. Ct. App. 2012) (evidence sufficient to prove defendant possessed the items found in his car when he was only person in car), *trans. denied*.

[20] Even if Leon had not had exclusive possession of her vehicle, her possession of the contraband can be inferred from additional circumstances. *See Harrison v. State*, 32 N.E.3d 240, 248 (Ind. Ct. App. 2015) (inferences supporting possession permitted if additional circumstances indicate defendant knew of the contraband and intended to control it), *trans. denied*. Many of the syringes were in close proximity to Leon while she was driving, some of the syringes were in plain view, and the contraband was located in proximity to other items owned by Leon. Officers found one used syringe in the passenger seat, two used syringes in the driver's door, one used syringe in a bag in the rear seat, and one syringe filled with fentanyl in the driver's door. Furthermore, Leon arranged for Durnell to take her car in the event she was arrested, which suggests she wanted to avoid police taking possession of her car and finding more incriminating evidence. This evidence was sufficient to prove Leon unlawfully possessed the syringes found in her car. *See, e.g., Lampkins v. State,* 682 N.E.2d 1268 (Ind. 1997) (defendant's proximity to drugs, flight, and recent trip to Atlanta to obtain drugs are additional circumstances permitting inference of constructive possession of drugs, even when defendant does not have exclusive possession of vehicle), *modified on reh'g on other grounds,* 685 N.E.2d 698, 699 (Ind. 1997) (affirming conviction after overturning court's reliance on drugs

being in "plain view" because while Tylenol bottle was in plain view, plain view did not reveal that bottle contained cocaine).

2. Inappropriateness of Sentence

[21] Leon also argues that her aggregate twenty-six-year sentence is inappropriate. We evaluate inappropriate sentence claims using a well-settled standard of review:

> Indiana Appellate Rule 7(B) gives us the authority to revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Our review is deferential to the trial court's decision, and our goal is to determine whether the appellant's sentence is inappropriate, not whether some other sentence would be more appropriate. We consider not only the aggravators and mitigators found by the trial court, but also any other factors appearing in the record. The appellant bears the burden of demonstrating [the] sentence [is] inappropriate.

George v. State, 141 N.E.3d 68, 73-74 (Ind. Ct. App. 2020) (internal citations omitted), *trans. denied*.

[22] "When considering the nature of the offense, we first look to the advisory sentence for the crime." *McHenry v. State*, 152 N.E.3d 41, 46 (Ind. Ct. App. 2020). When a sentence deviates from the advisory sentence, "we consider whether there is anything more or less egregious about the offense as committed by the defendant that distinguishes it from the typical offense accounted for by our legislature when it set the advisory sentence." *Madden v. State*, 162 N.E.3d 549, 564 (Ind. Ct. App. 2021).

[23] Indiana Code section 35-50-2-4.5 states: "A person who commits a Level 2 felony shall be imprisoned for a fixed term of between ten (10) and thirty (30) years, with the advisory sentence being seventeen and one-half (17 ½) years." The trial court sentenced Leon to twenty-six years for Level 2 felony dealing in methamphetamine. Leon's twenty-six-year sentence is above the advisory sentence but below the maximum. Indiana Code section 35-50-2-7 states: "A person who commits a Level 6 felony shall be imprisoned for a fixed term of between six (6) months and two and one-half (2 ½) years, with the advisory sentence being one (1) year." The trial court sentenced Leon to two years for Level 6 felony unlawful possession of a syringe. Leon's two-year sentence is above the advisory sentence but below the maximum. Indiana Code section 35-50-3-3 states: "A person who commits a Class B misdemeanor shall be imprisoned for a fixed term of not more than one hundred eighty (180) days." The trial court sentenced Leon to 180 days for Class B misdemeanor possession of marijuana.

[24] Leon argues the nature of her offense is not the most egregious because "the State failed to demonstrate any particularized harm afflicted by Leon to the State or any other enumerated victim." (Appellant's Br. at 23-4.) However, our Indiana Supreme Court has made clear that drug dealing is not a "victimless" crime because "distributing or possessing even small amounts of drugs threatens society." *State v. Timbs*, 169 N.E.3d 361, 373 (Ind. 2021). Leon did not distribute "small amounts" of drugs. She possessed four times the amount of methamphetamine necessary to be found guilty of Level 2 felony dealing in

methamphetamine. Officers also found five syringes in Leon's vehicle, one of which contained a substance that tested positive for fentanyl, when all they needed to support her conviction was one syringe. In light of the amount of drugs and number of syringes that Leon possessed, we do not see her sentence as inappropriate based on the nature of her offenses. *See Ricketts v. State*, 108 N.E.3d 416, 422 (Ind. Ct. App. 2018) (holding that the nature of defendant's crime was egregious when it exceeded what was needed to support the charge against him, so the sentence was not inappropriate), *trans. denied.*

[25] Nor do we find Leon's sentence inappropriate for her character. When assessing a defendant's character, one relevant fact we consider is the offender's criminal history. *Johnson v. State*, 986 N.E.2d 852, 857 (Ind. Ct. App. 2013). "The significance of criminal history varies based on the gravity, nature, and number of prior offenses in relation to the current offense." *Id.* In 2014, Leon was convicted of Class A Felony dealing in methamphetamine – in/on/within 1,000 ft of a youth program center. Leon was placed in Community Corrections, but her placement was revoked after Leon violated the conditions of Community Corrections. Leon also violated the terms of her probation, so the court revoked probation. Leon has past convictions of Class A misdemeanor battery resulting in bodily injury, Class B misdemeanor public intoxication, Class C misdemeanor illegal consumption of an alcoholic beverage, and Fraud-Swindle-Defraud Innkeeper under $300. Following some of those convictions she was placed on probation and four additional petitions to revoke probation were filed. As a juvenile, Leon was also placed on informal

probation. Leon's criminal history reflects poorly on her character. *See Heyen v. State*, 936 N.E.2d 294, 305 (Ind. Ct. App. 2010) (extensive criminal history reflects poorly on offender's character), *trans. denied*.

[26] In addition to her convictions, in September 2022 in Wabash County, the State charged Leon with Level 2 felony dealing in methamphetamine with an amount of ten grams or more, Level 4 felony possession of methamphetamine between ten and twenty-eight grams, and Level 3 felony possession of methamphetamine between ten and twenty-eight grams. The Wabash County case (85C01-2209-F2-1074) is still ongoing. While we do not consider a history of arrest to be evidence of criminal history, "a record of arrest, particularly a lengthy one, may reveal that a defendant has not been deterred even after having been subject to the police authority of the State." *Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005). Leon's convictions and arrest history reflect a pattern of disdain for the law.

[27] In the PSI, Leon indicated she uses drugs daily and while methamphetamine is her drug of choice, she also uses marijuana. Leon failed to take responsibility for her crimes.[9] In Leon's version of the events in the PSI, "she blamed

[9] Leon argues "she has consistently maintained her innocence in this matter as she is entitled to do and any lack of remorse cannot be held negatively against her." (Appellant's Br. at 25.) She is incorrect – a court may take a lack of remorse into consideration at sentencing because the defendant has already been convicted. *See Georgopulos v. State*, 735 N.E.2d 1138, 1145 (Ind. 2000) (the trial court did not err when finding an aggravator in lack of remorse and continued assertion of innocence). *See also Bacher v. State*, 722 N.E.2d 799 (Ind. 2000) ("A sentencing court may consider as a modest aggravating circumstance the fact that a defendant lacks remorse and insists upon his innocence.").

everything on someone else. She didn't take responsibility at all." (Tr. Vol. 3 at 83.) In light of Leon's failure to take responsibility, her admitted daily use of illegal drugs, and her history of crimes and arrests, we cannot hold the sentence is inappropriate in light of her character. *See Rutherford v. State,* 866 N.E.2d 867, 874 (Ind. Ct. App. 2007) (continuing to commit crimes after frequent contacts with judicial system is a poor reflection on one's character).

3. Double Jeopardy

[28] Finally, Leon argues the jury finding of guilt of Level 3 felony possession of methamphetamine should have been vacated on double jeopardy grounds. Leon is incorrect. There is no reason to vacate a jury finding of guilt when the court does not enter judgment of conviction and sentence for the crime. *Carter v. State*, 750 N.E.2d 778, 781 (Ind. 2001). Our Indiana Supreme Court has held that "where a trial court merges some offenses into others for the purposes of sentencing, there is no double jeopardy violation." *Kilpatrick v. State*, 746 N.E.2d 52, 60 (Ind. 2001). "[U]nder those circumstances the defendant is not being punished for the merged offenses." *Id.* Accordingly, no double jeopardy violation occurred. *See Carter*, 750 N.E.2d at 781 ("a jury verdict on which the court did not enter judgment . . . is unproblematic").

Conclusion

[29] Leon's convictions were supported by sufficient evidence, her twenty-six-year sentence is not inappropriate in light of the nature of her offenses or her character, and no double jeopardy violation occurred. Accordingly, we affirm

the judgment of the trial could and remand for correction of the scrivener's error in the sentencing order regarding the identity of the Level 3 felony.

[30] Affirmed and remanded for correction of the sentencing order.

Bailey, J., and Felix, J., concur.