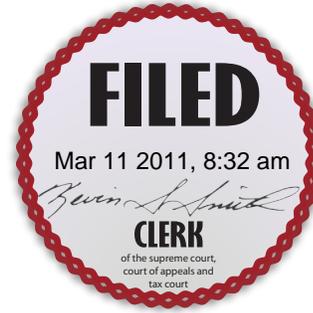


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

**ELIZABETH A. BELLIN**  
Cohen Law Offices  
Elkhart, Indiana

ATTORNEYS FOR APPELLEE:

**GREGORY F. ZOELLER**  
Attorney General of Indiana

**ARTURO RODRIQUEZ, II**  
Deputy Attorney General  
Indianapolis, Indiana

---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

JUSTIN LOONEY,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

)  
)  
)  
)  
)  
)  
)  
)  
)  
)

No. 20A03-1007-CR-395

---

APPEAL FROM THE ELKHART CIRCUIT COURT  
The Honorable Terry C. Shewmaker, Judge  
Cause No. 20C01-0812-FA-54

---

**March 11, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**DARDEN, Judge**

STATEMENT OF THE CASE

Justin Looney appeals his conviction and sentence, following a jury trial, for dealing in cocaine as a class A felony and false informing as a class B misdemeanor.

We affirm in part, reverse in part, and remand.

ISSUES

1. Whether the trial court erred in admitting evidence.
2. Whether the trial court abused its sentencing discretion.
3. Whether Looney's sentence is inappropriate pursuant to Indiana Appellate Rule 7(B).

FACTS

On November 5, 2008, Corporal Dan Jones of the Elkhart Police Department was dispatched to 517 Sherman Street after an anonymous 9-1-1 call from a male caller. Erica Sander and Keshena Bryant answered the door. Erica appeared to have been crying and was upset. She told Corporal Jones that her neighbor had called 9-1-1 because she and her boyfriend had been arguing loudly. Erica claimed that the fight was over, and that her boyfriend had since left. Corporal Jones' law enforcement training and experience led him to suspect that Erica's boyfriend might still be in the house. He later testified, "I told them I wanted to check to make sure nobody was dead or injured in there, and they opened the door and stood aside to allow me to enter." (Tr. 309).

The house appeared uninhabited and was “completely devoid of furniture” except for “a couple of bags on the floor and a TV off in a corner.” (Tr. 222). Erica told Corporal Jones that she was in the process of moving into the house. Corporal Jones opened a door “thinking it was a closet and it turned out to be a basement, and [ ] saw that the light was on[.]” (Tr. 222). He requested backup assistance and went downstairs only after Corporal Dawn Raeder arrived. Corporal Jones found Looney hiding in a dark corner of the basement and ordered him to go upstairs to wait with Corporal Raeder. Upon closer inspection of the corner, Corporal Jones observed a cell phone, approximately \$350.00 in cash, and “on the floor where [Looney] had been sitting and where his left hand was,” Jones saw a bag of individually wrapped baggies of a white rock-like substance “half buried in the dirt.” (Tr. 226-27).

Corporal Jones returned upstairs to question Looney. Asked to identify himself, Looney first stated his name as “Akori Harris,” (tr. 228), and then as “Jonathan Murphy.” (Tr. 231). He also provided invalid dates of birth. Corporal Jones later testified, “I told him I knew he was lying, and I wanted . . . his correct information[.] [F]or the longest time, he insisted it was Akori Harris, and then . . . he . . . insisted it was Jonathan Murphy and that he was being truthful about that.” (Tr. 233). Looney then told Corporal Jones that “if [Jones] wanted to prove who he was [Jones] could call his girlfriend.” (Tr. 233). Corporal Jones tried unsuccessfully to reach Looney’s “girlfriend” on Jones’s cell phone. Looney then recommended the use of his own cell phone. Corporal Jones obliged, dialed the phone number for “Mama” among Looney’s listed contacts, and reached Looney’s

mother. (Tr. 234). She identified the cell phone number as that of her son, Justin Looney. Corporal Jones arrested Looney and placed him into his squad car.

Corporal Jones then returned to the house, and asked Erica who owned the bags on the floor. She replied that the bags belonged to Looney, but that some of her clothing items were inside one bag. Corporal Jones opened the bag that Erica pointed out and found seven individually wrapped packages of crack cocaine, which he removed. Corporal Jones then took the bags to the squad car and asked Looney whether the bags belonged to him. When Looney replied, “[Y]eah, it’s my stuff,” (tr. 237), Corporal Jones asked, “[D]o you want to take it with you,” and Looney said, “[Y]eah.” (Tr. 237).

On December 1, 2008, the State charged Looney with Count I, dealing in cocaine as a class A felony; and Count II, false informing as a class B misdemeanor. On September 8, 2009, Looney filed a motion to suppress the evidence following the search of Erica’s residence and his bag, alleging that the search of the residence and his bag were unlawful and that the evidence seized should therefore be suppressed. The trial court heard evidence on Looney’s motion on January 7, 2009, and took the matter under advisement.

On March 22, 2010, the trial court issued an order denying Looney’s motion to suppress the evidence obtained pursuant to the search of Erica’s residence and his bag. It found, in pertinent part, the following: that (1) Corporal Jones’ warrantless entry and search of the residence were justified under the exigent circumstances exception to the warrant requirement of the Fourth Amendment; (2) that Corporal Jones had probable

cause to enter the house “because [he] reasonably believed the occupant(s) . . . may have still been in danger and he wanted to ensure that the assailant was no longer inside,” (Order 6); (3) that Corporal Jones’ search of Looney’s bag, after having established probable cause “due to the discovery of the cocaine in the basement,” (Order 7), was a search incident to lawful arrest, which arrest “had simply been delayed . . . because [Corporal Jones] did not know [Looney]’s true identity,” (Order 7); (4) that Looney did not have a reasonable expectation of privacy in the residence and lacked standing to challenge the search of the apartment; and (5) that no violation had occurred under Article 1, Section 11 because “exigent circumstances existed, the intrusion into the residence to ascertain the safety of the women was minimal, and these activities were a reasonable exercise of law enforcement duties in a 911 call.” (Order 6).

Looney’s jury trial commenced on May 17, 2010. Corporal Jones testified to the foregoing facts. Looney did not raise an objection to Jones’ testimony regarding the cocaine evidence seized from Erica’s house or from his bag. The following day, the jury found Looney guilty as charged. At his sentencing hearing on July 8, 2010, the trial court found the following aggravating circumstances: (1) his tender of false identifying information to police; (2) his commission of multiple offenses; (3) his involvement of others in his criminal enterprise; (4) his self-reported juvenile criminal history consisting of a truancy violation; and (5) his lack of steady employment. The trial court also found, as mitigating circumstances the following: (1) Looney’s youthful age of twenty-five years; (2) his nominal criminal history; (3) his addictions; and (4) statements by Looney

and his counsel. The trial court sentenced him as follows: Count I, thirty years, plus a seven year enhancement; and Count II, ninety days, with the sentences ordered to run concurrently. Looney now appeals.

## DECISION

Looney argues that the trial court erred in denying his motion to suppress; that the trial court considered improper aggravating circumstances at sentencing; and that his enhanced sentence is inappropriate pursuant to Indiana Appellate Rule 7(B). We will address each assertion in turn.

### 1. Admission of Evidence

Looney first argues that the trial court erred in denying his motion to suppress. We note that Looney did not seek an interlocutory appeal of the denial of his motion to suppress. Because he now challenges the denial of his motion to suppress following a completed trial, the issue on appeal is properly framed as whether the trial court abused its discretion by admitting the challenged evidence at trial. *Collins v. State*, 822 N.E.2d 214, 218 (Ind. Ct. App. 2005), *trans. denied*.

Our standard of review of a trial court's determination as to the admissibility of evidence is for an abuse of discretion. *Smith v. State*, 754 N.E.2d 502, 504 (Ind. 2001). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances. *Id.* We will not reweigh the evidence, and we consider any conflicting evidence in favor of the trial court's ruling. *Collins*, 822 N.E.2d

at 218. We must, however, also consider the uncontested evidence favorable to the defendant. *Id.*

Looney maintains that Corporal Jones' search of his duffel bag violated his rights under Article 1, Section 11 of the Indiana Constitution.<sup>1</sup> We note that at trial, he failed to object to Corporal Jones' testimony regarding the cocaine. He has, therefore, waived his challenge to the cocaine evidence seized from his duffel bag. *See Kubsch v. State*, 784 N.E.2d 905, 923 (Ind. 2003) (Failure to object at trial to the admission of evidence results in waiver of that issue on appeal.). Waiver notwithstanding, we briefly address the merits of Looney's appeal.

Assuming *arguendo* that the trial court erred in admitting the cocaine seized from Looney's duffel bag, any such error was harmless. When the trial court has erroneously admitted evidence, we "must disregard any error or defect which does not affect the substantial rights of the parties." Ind. Trial Rule 61. The improper admission of evidence is harmless error when the conviction is supported by such substantial evidence of guilt as to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction. *See Cook v. State*, 734 N.E.2d 563, 569 (Ind. 2000). Stated differently, a reversal may be obtained only if the record as a whole discloses that the erroneously admitted evidence was likely to have had a

---

<sup>1</sup> Although Looney asserts that Corporal Jones' search of his duffel bag also violates his right under the Fourth Amendment to the federal constitution, he has failed to present any separate argument and analysis with regard thereto. Thus, any separate federal constitutional claim is waived by his failure to make a cogent argument under that provision. *See Francis v. State*, 764 N.E.2d 641, 646-47 (Ind. Ct. App. 2002) (Indiana courts interpret and apply Article 1, Section 11 independently from federal Fourth Amendment jurisprudence. Failure by a defendant to provide separate analysis waives any claim of error).

prejudicial impact upon the mind of the average juror, thereby contributing to the verdict. *Hardin v. State*, 611 N.E.2d 123 (Ind. 1993).

Although he now challenges the crack cocaine seized from his duffel bag, Looney does not deny the admissibility of the fifty individually wrapped “baggie corners” of crack cocaine that Corporal Jones found in the basement where he was hiding, along with his cell phone and approximately \$350.00 in cash. In order to convict Looney of dealing in cocaine as a class A felony, the State was required to prove that he knowingly possessed three or more grams of cocaine with the intent to deliver that cocaine. *See* Ind. Code § 35-48-4-1. At trial, Indiana State Police forensic drug chemist Kristin Sturgeon testified that the crack cocaine from just eleven of the baggie corners found in the basement with Looney weighed in excess of three grams. *See Washington v. State*, 902 N.E.2d 280, 289 (Ind. Ct. App. 2009) (intent to deliver for the offense of class A felony dealing in cocaine is supported by evidence that police found nine rocks of cocaine in defendant’s pocket individually wrapped in knotted “baggie corners,” which is a common way dealers package cocaine), *trans. denied*.

In light of the foregoing “substantial independent evidence” that Looney was guilty of class A felony dealing in cocaine, we are satisfied that there is no substantial likelihood that the questioned additional evidence contributed to his conviction. *See Cook*, 734 N.E.2d at 569. Error, if any, from the admission of the crack cocaine seized from Looney’s duffel bag was, at best, harmless. Thus, we find no reversible error.

## 2. Aggravating Circumstances

Next, Looney argues that the trial court erred by considering improper aggravating circumstances. In *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on rehearing*, 875 N.E.2d 218 (2007), our Supreme Court held that trial courts are required to enter sentencing statements when they impose a sentence for a felony offense. The statement must include a reasonably detailed recitation of the trial court's reasons for imposing the sentence. *Id.* We review sentencing decisions for an abuse of discretion. *Id.* A trial court may abuse its discretion by entering a sentencing statement that includes reasons for imposing a sentence not supported by the record, omits reasons clearly supported by the record, or includes reasons that are improper as a matter of law. *Id.* at 490-91.

### a. *Lying about Identity*

Looney argues that his tender of false names and birth date information was improperly deemed an aggravating circumstance because such conduct is an element of false informing as a class B felony. We agree.

Indiana Code section 35-44-2-2(d) provides, in pertinent part, that a person who “gives false information in the official investigation of the commission of a crime, knowing the report or information to be false” commits false informing as a class B misdemeanor. It is well-settled that a trial court may not use a fact that comprises a material element of a crime as an aggravating circumstance. *Spears v. State*, 735 N.E.2d 1161, 1167 (Ind. 2000).

Here, the only facts in the record that establish that Looney gave false information in the course of an official criminal investigation by police were his acts of insisting that his name was “Akori Harris” or “Jonathan Murphy” and providing misleading birth date information. (Tr. 228, 231). We agree that his tender of false information to Corporal Jones was a material element of the false informing offense for which he was convicted and, therefore, was an improper aggravating circumstance. Thus, the trial court abused its sentencing discretion in finding this factor to be an aggravating circumstance; however, for reasons discussed below, we decline to remand for resentencing.

*b. Prior self-reported incident of juvenile truancy*

Looney argues further that it was error to find his juvenile record to be an aggravating circumstance where “[t]he pre-sentence report is devoid of any further information regarding whether [he] was formally adjudicated delinquent, whether [he] received any sanctions as a result, or whether the referral to juvenile authorities was ever acted upon by the Wayne County prosecutor’s office.” Looney’s Br. at 13. We agree.

The PSI report merely provides that in approximately 1999, when Looney was fourteen years of age, he “was referred to juvenile authorities for Truancy” and “was later released to his parents.” (PSI 3). The Probation Department did not follow up or obtain additional records regarding this truancy incident. As a result, absent more specificity, we agree that the trial court abused its sentencing discretion in finding Looney’s juvenile record to be an aggravating circumstance. *See Alvies v. State*, 905 N.E.2d 57, 63 (Ind. Ct. App. 2009) (finding the trial court abused sentencing discretion in relying upon

defendant's juvenile record as an aggravating circumstance where juvenile record "pale[d] in comparison to the instant convictions").

*c. Remaining Aggravating Circumstances*

Although Looney does not specifically challenge the remaining aggravating circumstances found by the trial court, in our review of the record, we find that trial court also erred in relying upon the following aggravating circumstances when it enhanced his sentence. First, at no time during the sentencing hearing was any evidence presented that Looney involved others in these offenses; thus, the record contains no evidentiary support for that aggravating circumstance. *See Anglemyer*, 868 N.E.2d at 490-91 (a trial court may abuse its discretion if its sentencing statement explains reasons for imposing a sentence, but the record does not support the reasons).

We also find the trial court's reliance upon Looney's lack of steady employment as an aggravating circumstance was error. In *Frederick v. State*, 755 N.E.2d 1078, 1084 (Ind. 2001), the defendant was convicted of murder and the trial court found his lack of employment to be an aggravating circumstance. On appeal, our Supreme Court found that "lack of gainful employment alone is not an aggravating circumstance," but that under the unique circumstances in *Frederick*, the trial court had been commenting upon Frederick's choice to "work" at drug dealing to be an aggravating circumstance.

Here, because Looney was already convicted of a drug dealing offense, a similar explanation to *Frederick* is unavailing. Drug dealing activity already comprises a

material element of a crime of which he has been convicted and, therefore, cannot properly be considered as an aggravating circumstance. *See Spears*, 735 N.E.2d at 1167.

### 3. Inappropriateness of Sentence

Finally, Looney argues that his enhanced sentence for class A felony dealing in cocaine was inappropriate in light of the nature of the offense and his character. Specifically, he argues that “there was no evidence that [he] actually sold cocaine to anyone,” his “only prior criminal history was a self-reported act of Truancy when he was fourteen years old,” and the trial court heard evidence of “several positive points<sup>2</sup> in [his] favor to justify a mitigated sentence.” Looney’s Br. at 14, 15. We are not persuaded.

We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). It is the defendant’s burden to “persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.” *Anglemyer*, 868 N.E.2d at 494 (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

In determining whether a sentence is inappropriate, the advisory sentence “is the starting point the Legislature has selected as an appropriate sentence for the crime committed.” *Childress*, 848 N.E.2d at 1081. The advisory sentence for a class A felony is thirty years. I.C. § 35-50-2-5. Looney was subject to a sentence of between twenty and fifty years. Here, the trial court imposed a thirty-year advisory sentence plus a seven-year enhancement.

---

<sup>2</sup> At the sentencing hearing, defense witness Wallace testified that Looney was pursuing his GED, had done some community work, and had attended his mother’s church.

The nature of the offense reveals that Looney was found in possession of more than three grams of crack cocaine which was packaged for sale. When Corporal Jones asked him to identify himself, Looney lied about his name and birth date. The trial court found such to be an aggravating circumstance for enhancement purposes. There is nothing particularly egregious about Looney's offense to distinguish it from the typical offense of dealing in cocaine. The record is devoid of any evidence that Looney's failure to identify himself (for which he was charged and ultimately convicted) was, in any way, prejudicial to the State's case.

Even if we accept the trial court's rationale that Looney's efforts to obstruct Corporal Jones' investigation does not reflect favorably upon his character, we are unable to discount that the sentencing record reveals that Looney was twenty-five years of age at the time of sentencing and that he had no documented prior criminal history. *See Beck v. State*, 790 N.E.2d 520, 522 (Ind. Ct. App. 2003) ("leniency is encouraged toward defendants who have not previously been through the criminal justice system."). We find no further evidence in the record to warrant an enhancement of Looney's sentence, which here represents a thirty-five (35%) percent enhancement above the advisory sentence.

Based upon our review of the nature of the offense and Looney's character, and our determination above that the trial court relied upon several improper aggravating circumstances at sentencing, we conclude that his thirty-seven year sentence is inappropriate in this case. Accordingly, we reverse and remand with instructions for the trial court to resentence Looney. For reasons that are not in the record, the PSI indicates

that Looney's dealing sentence was nonsuspendable.<sup>3</sup> Provided that the State can establish that his sentence is nonsuspendable, we remand with instructions to the trial court to reduce Looney's sentence to the advisory sentence of thirty years. Otherwise, we instruct the trial court to impose the advisory sentence of thirty years, with ten years ordered suspended.

Affirmed in part, reversed in part, and remanded with instructions.

NAJAM, J., and BAILEY, J., concur.

---

<sup>3</sup> Indiana Code 35-50-2-2 provides that a sentence for dealing in cocaine is nonsuspendable if: the court finds the person possessed a firearm (as defined in IC 35-47-1-5) at the time of the offense, or the person delivered or intended to deliver to a person under eighteen (18) years of age at least three (3) years junior to the person and was on a school bus or within one thousand (1,000) feet of:

- (i) school property;
- (ii) a public park;
- (iii) a family housing complex; or
- (iv) a youth program center[.]