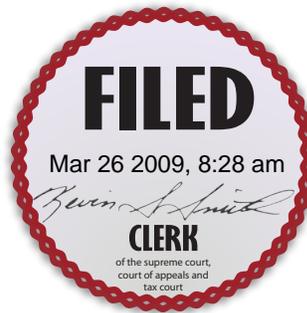


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

SERVAN ALLEN,)

Appellant-Defendant,)

vs.)

No. 79A02-0809-CR-798)

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0710-FA-38

March 26, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Servan Allen appeals his conviction and sentence that was imposed for Conspiracy to commit Dealing in Cocaine¹, a Class A felony. Specifically, Allen argues that the trial court abused its discretion by admitting into evidence \$2,980 in cash and a cellular phone that was seized from Allen during a protective pat-down search. In addition, Allen asserts that the trial court abused its discretion when it failed to issue an admonishment or limiting instructions after it sustained his objection to the State's line of questioning. Similarly, Allen maintains that the trial court abused its discretion by failing to give his proposed jury instruction. Furthermore, Allen contends that there was insufficient evidence supporting the conviction. Finally, Allen argues that the trial court abused its discretion when it considered the amount of cocaine as an aggravating factor in sentencing him and that his thirty-five-year sentence is inappropriate in light of the nature of the offense and his character. Finding no reversible error, we affirm the judgment of the trial court.

FACTS

On October 16, 2007, Sergeant Timothy Payne of the Lafayette Police Department made a routine traffic stop and learned from the driver how he could purchase crack cocaine. Specifically, the driver gave Sergeant Payne the number to a cellular phone (the "work phone") where he could set up the purchase and the address to an apartment where

¹ Ind. Code § 35-41-5-2; Ind. Code § 35-48-4-1.

the purchase would take place. Sergeant Payne contacted Officer Jason Walters and gave him the information.

Sometime after 9:00 p.m., Officer Walters called the work phone posing as a person who wanted to purchase drugs. Allen answered, and told Officer Walters to call back when he was closer to the apartment. Allen then handed the phone to Myron James, who told him the same thing.

When Officer Walters arrived at the apartment complex, Sparkle Bennett came out of the apartment carrying trash in her hands. Officer Walters met her on the sidewalk, where she spit a plastic baggie of crack cocaine out of her mouth and handed it to him. Officer Walters then handed her the money and immediately arrested her.

Bennett was taken to police headquarters where she told the officers that three drug dealers were in her apartment. The police then set up a perimeter around Bennett's building and kept it under surveillance. Sergeant Robert Petillo was positioned at the rear of the building. At one point, Allen opened the back door and Sergeant Petillo said, "Stop. Police." Tr. p. 329. Allen immediately slammed the door and remained inside. Sergeant Petillo moved farther from the apartment and could see at least three people running frantically up and down the stairs in Bennett's apartment.

About thirty to sixty minutes later, Officer Walters obtained Bennett's consent to search her apartment and joined the other officers at the apartment. After repeatedly knocking on the door and receiving no answer, the officers obtained a key from a building maintenance employee. When the officers entered the apartment, they found

Allen, James, and Bryon Simmons in the living room. All three were taken into the hallway and searched for weapons. Sergeant Payne searched Allen and felt what he “thought to be U.S. currency or money.” Id. at 304. When asked what it was, Allen responded that it was money, and a total of \$2,980 was removed from Allen’s pockets. Sergeant Payne also removed a cellular phone from one of Allen’s pockets.

The work phone was found in a coat pocket in a closet near the front entrance. The battery for the work phone was discovered underneath the couch. When the officers investigated the upstairs bathroom, they found that the toilet was clogged and water was all over the bathroom floor. The officers removed the toilet and found 53.42 grams of crack cocaine in a bag.

On October 23, 2007, Allen, James, and Simmons were each charged with four counts: Count I, conspiracy to commit dealing in cocaine, a class B felony; Count II, dealing in cocaine, a class A felony; Count III, possession of cocaine, a class A felony; and Count IV, obstruction of justice, a class D felony. The jury trials for all three defendants were consolidated and commenced on July 1, 2008. Allen was found guilty of conspiracy to commit dealing in cocaine, a class A felony, but was acquitted of all other charges.

At Allen’s sentencing hearing, which commenced on August 8, 2008, the trial court determined that Allen’s criminal history and the nature and circumstances of the crimes were aggravating factors. In mitigation, the trial court credited Allen with working towards his GED while incarcerated and his strong familial support system.

After concluding that the aggravating factors outweighed the mitigating factors, the trial court sentenced Allen to thirty-five years imprisonment. Allen now appeals.

DISCUSSION AND DECISION

I. Pat-down Search

Allen argues that the trial court abused its discretion when it denied his motion to suppress and admitted into evidence the money and cellular phone that were seized during a pat-down search. Specifically, Allen contends that the pat-down search exceeded the scope of a protective pat-down search and, therefore, violated his Fourth Amendment² rights under the U.S. Constitution.³

The decision to admit or exclude evidence is within the trial court's discretion and its decision is afforded great deference on appeal. Carpenter v. State, 786 N.E.2d 696, 702 (Ind. 2003). An abuse of discretion occurs when the trial court's decision is clearly erroneous and against the logic and effect of the facts and circumstances before it. Id. at 703.

Generally the Fourth Amendment prohibits searches and seizures conducted without a search warrant. Trowbridge v. State, 717 N.E.2d 138, 143 (Ind. 1999). When a

² The Fourth Amendment to the U.S. Constitution states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

³ Allen also maintains that the pat-down search violated his rights under Article I, Section 11 of the Indiana Constitution. However, Allen does not present any claim or argument that Section 11 requires a different analysis or yields a different result than that produced under the Fourth Amendment to the U.S. Constitution. Therefore, we resolve his claim on the basis of the Fourth Amendment only. D.L. v. State, 877 N.E.2d 500, 503 (Ind. Ct. App. 2007).

search is conducted without a warrant, the burden is on the State to prove that an exception to the warrant requirement existed at the time of the search. Berry v. State, 704 N.E.2d 462, 465 (Ind. 1998).

One exception to the warrant requirement is when a police officer briefly detains an individual and conducts a pat-down search of the individual's outer clothing. Terry v. Ohio, 392 U.S. 1, 30 (1968). A Terry stop is appropriate "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous." Id. The police officer is required to identify himself as a police officer and make reasonable inquiries. If the encounter does not dispel the police officer's "reasonable fear for his own or others' safety, he is entitled . . . to conduct a carefully limited search of the outer clothing . . . in an attempt to discover weapons which might be used to assault him." Id.

While conducting a protective pat-down search of an individual's outer clothing, if the police officer feels something that he instantly recognizes as contraband, he is not required to ignore it and may seize it without offending the Fourth Amendment. Minnesota v. Dickerson, 508 U.S. 366, 376-77 (1993). However, if the contraband is discovered after the officer has concluded that no weapons are present, then the search has exceeded the scope of Terry, and the subsequent seizure of the contraband is unconstitutional. Id. at 378.

Allen contends that seizure of the cash and cellular phone exceeded the scope of Terry because Sergeant Payne did not instantly recognize the items as contraband and cites to this court's decisions in Barfield v. State, 776 N.E.2d 404 (Ind. Ct. App. 2002), and Burkett v. State, 785 N.E.2d 276 (Ind. Ct. App. 2003), in support of his contention.

In Barfield, the defendant was pulled over by a sheriff's deputy after the deputy had observed him driving at a high rate of speed without a functioning taillight. 776 N.E. 2d at 405. Because the defendant appeared very nervous, the deputy asked him to step outside his vehicle and conducted a pat-down search to make sure that he did not have any weapons. Id. at 406. When the deputy felt "something like a box," he reached in and pulled out a cigarette box. Id. After noticing that all of the weight seemed to be at the bottom of the box, he opened it and found what was eventually determined to be methamphetamine. Id. This court held that the pat-down went beyond the scope of Terry because the deputy did not state that he thought the box was a weapon nor was it immediately apparent to him that the box was contraband. Id. at 407.

In Burkett, the defendant was taken to the county jail to take a chemical test after receiving an alcosensor test, for which he tested .10. 785 N.E.2d at 277. After arriving at the jail and before the state trooper removed the defendant's handcuffs, he conducted a pat-down search for weapons. Id. The state trooper felt a "hard, cylindrical object" in the defendant's pants pocket and pulled the object out and discovered that it was a pill bottle containing what was later determined to be a controlled substance. Id. A panel of this court held that the seizure of the pills was not justified under the "plain feel" doctrine

because there was no indication that it was readily apparent to the trooper that the pill bottle was a weapon or contraband. Id. at 278-79.

In the instant case, Sergeant Payne testified that while he “was patting down Mr. Allen for weapons, [he] came across his right front pocket and his right back pocket and felt what [he] thought to be U.S. currency or money.” Tr. p. 304. Thus, Sergeant Payne immediately recognized the item in Allen’s pocket as money. Moreover, although Sergeant Payne never referred to the money as contraband, this court has stated that cash may be considered contraband if “it can be connected to some illegal activity.” Newby v. State, 701 N.E.2d 593, 601 (Ind. Ct. App. 1998). Here, because of the nature of the activity described by Bennett and the experience Sergeant Payne possessed as a seasoned narcotics officer, it was reasonable for Sergeant Payne to connect the large amount of cash with cocaine dealing. Therefore, in this context, the cash can be regarded as contraband.

The seizure of the cellular phone requires a different analysis. The record is silent as to whether or not Sergeant Payne instantly recognized the phone as a weapon or contraband. As such, its seizure does not fall within the scope of the “plain feel” doctrine. Nevertheless, even if the trial court erroneously admits evidence, we will not reverse if the admission was harmless error. Ind. Trial Rule 61; Micheau v. State, 893 N.E.2d 1053, 1059 (Ind. Ct. App. 2008).

Here, Allen does not argue how he was prejudiced by the admission of the phone. In addition, the police found Allen in Bennett’s apartment, and Bennett had informed the

police that three drug dealers were in her apartment. Furthermore, when Officer Walters called to set up the purchase, it was Allen who answered the work phone. Moreover, Allen did not comply with Sergeant Petillo's demand to stop when he opened the back door to Bennett's apartment. Instead, he slammed the door and at least three people began running up and down the stairs in Bennett's apartment. When the police entered the apartment, they found cocaine in a clogged toilet, the work phone, which had been disassembled, and a large amount of money on Allen's person. Given the amount of evidence against Allen, we cannot conclude that Allen was prejudiced by the admission of this cellular phone and find that its admission was harmless error.

II. Doyle Violation

Allen asserts that his due process rights were violated when the prosecutor asked Officer Walters whether Allen, after being arrested, had denied ownership of the cocaine. Specifically, Allen argues that the trial court should have admonished the jury or issued a limiting instruction after sustaining his objection to the question, and that its failure to do so was fundamentally unfair.

In Doyle v. Ohio, the United States Supreme Court held that the State could not comment on a defendant's post-arrest, post-Miranda⁴ silence to impeach the defendant at trial. 426 U.S. 610, 617 (1976); Bieghler v. State, 481 N.E.2d 78, 91 (Ind. 1985). The Court reasoned that Miranda warnings give an individual an assurance that his or her

⁴ Miranda v. Arizona, 384 U.S.436 (1966).

silence will not be punished. Doyle, 426 U.S. at 618. Moreover, the Court highlighted that using a criminal defendant's silence against him would be fundamentally unfair and a violation of due process. Id. However, in Fletcher v. Weir, the United States Supreme Court declined to extend Doyle to prohibit comment on post-arrest silence that occurs before a defendant has been given his Miranda warnings. 455 U.S. 603, 606-07 (1982).

Here, during the prosecution's redirect examination of Officer Walters, the following colloquy occurred:

PROSECUTOR: And this brings up an interesting point. Mr. Fouts asked you were there any admissions about if it was his cocaine?

WALTERS: No, he didn't.

PROSECUTOR: And how long were you there with the defendants while you were searching the house?

WALTERS: Uh, I'm not sure.

PROSECUTOR: Can you give us an approximation?

WALTERS: Maybe directly in contact with him, maybe five minutes.

PROSECUTOR: Five minutes. And you told him you were placing him under arrest.

WALTERS: Correct.

PROSECUTOR: For, the possession of cocaine.

WALTERS: Yes.

PROSECUTOR: Did the defendants say, "No, no, no. It's not my cocaine. It's not mine." Did any of them say that?

WALTERS: No.

Tr. p. 283-84.

It is unclear from the record whether or not Allen had been given his Miranda warnings during the time in which Allen's silence is at issue. Nevertheless, because the issue is one of due process and fundamental fairness, we will assume that Allen had been read his Miranda rights and understood that he had the right to remain silent. Thus, a Doyle violation occurred when the prosecutor asked Officer Walters whether Allen had denied ownership of the cocaine.

Once a court determines that a Doyle violation has occurred, it must then determine whether the error was harmless. Bevis v. State, 614 N.E.2d 599, 602 (Ind. Ct. App. 1993). A constitutional error may be harmless if it is clear beyond a reasonable doubt that the error did not contribute to the defendant's conviction. Sobolewski v. State, 889 N.E.2d 849, 857 (Ind. Ct. App. 2008). Because of the egregious nature of a Doyle violation, reversal is the norm, rather than the exception. Teague v. State, 891 N.E.2d 1121, 1126 (Ind. Ct. App. 2008), Our Supreme Court has established a non-exclusive five-factor analysis to determine whether a Doyle violation is harmless:

1. The use to which the prosecution puts the post-arrest silence.
2. Who elected to pursue the line of questioning.
3. The quantum of other evidence indicative of guilt.
4. The intensity and frequency of the reference. . . .
5. The availability to the trial judge of an opportunity to grant a motion for mistrial or to give curative instructions.

Bieghler, 481 N.E.2d at 92.

In addition to these factors, this court has stated that another important factor is “to whom the prosecutor directs the question regarding a defendant’s post-arrest silence, or from whom the prejudicial response is elicited.” Bevis, 614 N.E.2d at 604. “When the State asks the defendant about his silence, the probable impact upon the jury tends to be more harmful than harmless.” Id.

As we will discuss when we address Allen’s sufficiency claim, there was sufficient evidence for the jury to reasonably conclude that Allen was guilty, even in the absence of the improper questions. Furthermore, after the trial court conducted a sidebar and explained to the prosecutor why his questions were improper, the prosecutor did not pursue Allen’s post-arrest silence through the questioning of witnesses or during closing arguments. Thus, the intensity and frequency of the questioning was minimal.

Moreover, although defense counsel objected to the question, presenting an opportunity for the trial court to give a limiting instruction, defense counsel’s failure to request one when asked by the trial court how he wanted to address the issue coupled with what appears to be defense counsel’s satisfaction with the prosecutor’s decision to ask no further questions leads more towards harmless error. Finally, the fact that improper questioning was asked of Officer Walters rather than Allen also points towards harmless error. In evaluating the totality of the circumstances, we conclude that the Doyle violation was harmless error, and this argument fails.

III. Jury Instruction

Allen contends that the trial court abused its discretion by not giving his tendered Final Instruction 8.3, which explained what must be proved before the jury could convict Allen based on accomplice liability. Specifically, Allen argues that by failing to give his tendered instruction, the trial court failed to instruct the jury on the knowledge and conduct required to convict Allen of aiding or inducing the crime of dealing in cocaine.

The trial court has broad discretion in the manner of instructing the jury and we will review its decision only for an abuse of discretion. Stringer v. State, 853 N.E.2d 543, 548 (Ind. Ct. App. 2006). In reviewing a challenge to a jury instruction, an appellate court must consider “whether the instruction correctly states the law, whether there was evidence in the record to support the giving of the instruction, and whether the substance of the tendered instruction is covered by other instructions.” Hubbard v. State, 742 N.E.2d 919, 921 (Ind. 2001). Jury instructions are to be considered as a whole, and before a defendant is entitled to reversal, he must affirmatively show that the instructional error prejudiced his substantial rights. Stringer, 853 N.E.2d at 548.

Allen’s tendered Final Instruction 8.3 read:

The mere presence of a person where a crime is being committed, even coupled with knowledge by the person that a crime is being committed, or the mere acquiescence by a person in the criminal conduct of others, even with guilty knowledge, is not sufficient to establish aiding, inducing, or causing a crime. You must not convict the Accused of aiding, inducing, or causing an offense unless you find beyond a reasonable doubt that the Accused knowingly or intentionally participated in some conduct of an affirmative nature.

Appellant's App. p. 112.

As an initial matter, we note that Allen was convicted of conspiracy to commit dealing in cocaine, and was acquitted of all other charges, including dealing in cocaine and possession of cocaine. Because Allen is challenging the trial court's failure to give a jury instruction on accomplice liability, it seems that Allen is confusing accomplice liability with conspiracy because, otherwise, Allen is challenging the trial court's failure to give an instruction regarding a crime for which he was acquitted. Therefore, we will assume that Allen is arguing that the trial court failed to properly instruct the jury regarding the intent and conduct necessary to convict him of conspiracy.

Here, the trial gave Final Jury Instruction 8.12, which read:

Mere presence at the scene of the crime or mere association with conspirators will not by themselves support a conspiracy. Presence or a single act will support a conspiracy only if the circumstances permit an inference that the presence or act was intended to advance the ends of a conspiracy. Although a conspiracy entails an intelligent and deliberate agreement between the parties, the State is not required to prove the existence of a formal express agreement. The existence of the agreement may be inferred from the conduct of the parties or proved by circumstantial evidence.

Id. at 158-59.

Final Jury Instruction 8.12 highlights the fact that Allen's mere presence at the scene of the crime or a single act is insufficient to convict him of conspiracy, unless the presence or single act was intended to advance the purposes of the conspiracy. In addition, the instruction charges the jury that it must find a deliberate agreement between the alleged conspirators before convicting Allen of conspiracy. Therefore, the jury was

instructed as to the conduct and intent necessary to convict Allen of conspiracy to commit dealing in cocaine, and the trial court's refusal to give Allen's tendered jury instruction was not an abuse of discretion.

IV. Sufficiency of the Evidence

Allen argues that there was insufficient evidence to convict him of conspiracy to commit dealing in cocaine. Specifically, Allen claims that the State failed to prove that he was part of an agreement to deal in cocaine, which is an element of the crime. In addition, Allen asserts that there was insufficient evidence to conclude that the drug-related transaction occurred at a family housing complex as alleged in the State's information.

When reviewing the sufficiency of the evidence, we will neither reweigh the evidence nor judge the credibility of witnesses. Vitek v. State, 750 N.E.2d 346, 352 (Ind. 2001). Instead, this court looks to the evidence most favorable to the verdict together with all reasonable inferences to be drawn from that evidence. Id. We will not reverse a finding of guilt unless we conclude that no reasonable trier of fact could have found that the defendant was guilty beyond a reasonable doubt. Joyner v. State, 678 N.E.2d 386, 390 (Ind. 1997).

To convict Allen of conspiracy, the burden was on the State to prove beyond a reasonable doubt that Allen: (1) intended to commit a felony; (2) agreed with another person to commit the felony; and (3) either he or the other person performed an overt act in furtherance of the conspiracy. Ind. Code § 35-41-5-2. When establishing the

existence of a conspiracy, the State is not required to prove the existence of a formal express agreement. Dickenson v. State, 835 N.E.2d 542, 552 (Ind. Ct. App. 2005). Rather, an agreement can be and usually is inferred from circumstantial evidence, which may be the overt act of one of the conspirators. Id.

Allen maintains that, at most, the evidence shows that he had knowledge of the drug transactions that were occurring from Bennett's apartment and points out that "[m]ere knowledge of, or presence at, a drug transaction and association with co-conspirators are insufficient evidence of that person's agreement to conspire." Kats v. State, 559 N.E.2d 348, 352 (Ind. Ct. App. 1990) (citing United States v. Williams, 798 F.2d 1024 (7th Cir. 1986)).

In the instant case, Bennett testified that that she had dealt drugs for the defendants three to five times. Tr. p. 148. In addition, Bennett testified that she would take part of the crack that she had received from the defendants for herself. Id. at 149.

Furthermore, when Officer Walters called to set up the purchase, it was Allen who answered the work phone. Contrary to Allen's assertion, he did not merely answer the phone, but engaged Officer Walters in a conversation to establish who he was and how he knew to call the work phone. In addition, after determining that Officer Walters wanted to purchase a "fifty," he told him to call again when he was closer to the apartment and then handed the phone to James. Id. at 162-63. The degree to which Allen engaged Officer Walters in the conversation indicates more than mere knowledge of drug dealing or being present where drug dealing is occurring.

Moreover, after Bennett had been arrested and the police set up a perimeter around her apartment, Sergeant Petillo yelled, “Stop. Police,” when Allen opened the back door of the apartment. Id. at 329. Sergeant Petillo saw Allen slam the door and at least three people running up and down the stairs in Bennett’s apartment. Sergeant Petillo testified that based upon his training, education, and experience, he believed “[t]hat they were destroying contraband and evidence.” Id. at 331. Cocaine was later discovered clogging the upstairs toilet and the work phone was found dismantled and hidden around the apartment. From this, the jury could reasonably infer that Allen participated in trying to conceal the evidence.

Finally, when Allen was searched by Sergeant Payne, he had \$1,020 in one pocket and \$1,960 in another. Simmons had \$1,020 stuffed in his sock. Because both had large sums of cash on them, the jury could reasonably infer that they were splitting the profits from dealing in drugs. In sum, from the totality of the circumstances, the jury could reasonably infer that there was an agreement between Allen, Simmons, and James to deal cocaine.

Allen also contends that there was no evidence to support the State’s allegation that prior transactions had occurred at a family housing complex. As stated earlier, Bennett testified that she had delivered drugs for Allen, Simmons, and James three to five times from her apartment. Id. at 140-49, 173. This is sufficient to show that multiple transactions had occurred at a housing complex and this claim also fails.

V. Sentencing

A. Improper Aggravating Factor

Allen next claims that he was improperly sentenced. Specifically, Allen argues that his sentence must be set aside because the trial court improperly considered the amount of drugs involved as an aggravating factor when it sentenced him because the quantity of drugs is an element of the offense of conspiracy to commit dealing in cocaine, a class A felony.

Sentencing decisions “rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion.” Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh’g, 875 N.E.2d 218 (2007). Trial courts are required to enter sentencing statements whenever imposing a sentence for a felony offense. 868 N.E.2d at 490. 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.

We also note that a trial court may not consider a material element of a crime as an aggravating factor when sentencing a defendant. Lemos v. State, 746 N.E.2d 972, 975 (Ind. 2001). In addition, the amount of drugs is not typically considered a proper aggravator. Donnegan v. State, 809 N.E.2d 966, 978 (Ind. Ct. App. 2004). However, a trial court “may look to the particularized circumstances of the criminal act” when sentencing the defendant. Henderson v. State, 769 N.E.2d 172, 180 (Ind. 2002).

In this case, Allen was charged and convicted of conspiracy to commit dealing in cocaine, a class A felony. Therefore, Allen is correct when he asserts that the involvement of three or more grams of cocaine was a necessary element of the crime. However, the amount of cocaine seized was nearly eighteen times the amount needed to charge Allen with conspiracy to commit dealing in cocaine, a class A felony, and “one of [the] largest seizures to date” in Tippecanoe County. Tr. p. 438. Thus, because the quantity of cocaine that was seized was so significant, the amount of cocaine was a “particularized circumstance of the criminal act,” Henderson, 769 N.E.2d at 180, and a proper aggravating factor. Thus, Allen’s claim fails.

B. Inappropriate Sentence

Allen contends that his thirty-five year sentence was inappropriate in light of the nature of the offense and his character pursuant to Indiana Appellate Rule 7(B). In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Our Supreme Court has recently further articulated the role of appellate courts in reviewing a 7(B) challenge:

Ultimately the length of the aggregate sentence and how it is to be served are the issues that matter. . . . And whether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case. . . . There is thus no right answer as to the proper sentence in any given case. As a result, the role of an appellate court

in reviewing a sentence is unlike its role in reviewing an appeal for legal error or sufficiency of evidence. . . .

The principal role of appellate review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived “correct” result in each case. In the case of some crimes, the number of counts that can be charged and proved is virtually entirely at the discretion of the prosecution. For that reason, appellate review should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count.

Cardwell v. State, 895 N.E.2d 1219, 1224-25 (Ind. 2008) (footnotes omitted).

Indiana code section 35-50-2-4 provides that “[a] person who commits a Class A felony shall be imprisoned for a fixed term of between twenty (20) and fifty (50) years, with the advisory sentence being thirty (30) years.” Here, Allen was sentenced to thirty-five years, which is five years more than the advisory sentence.

As for the nature of the offense, the 53.42 grams of cocaine that was found and seized by the police was described by Officer Walters as “one of our largest seizures to date.” Tr. p. 438. In addition, Allen was engaged in selling cocaine out of an apartment where a ten-month-old baby was living. Furthermore, when Allen was asked to stop by Sergeant Petillo, Allen quickly stepped back inside. Finally, nearly \$3,000 was found on Allen’s person, indicating that cocaine had already been sold.

As for Allen’s character, the record shows that he has been convicted of several drug-related offenses. Specifically, Allen was convicted of manufacturing/dealing in cannabis, a felony offense, in June 1998. Appellant’s App. p. 220. In September 2002,

Allen was convicted of possession of a controlled substance, a felony offense. Less than six months later, in January 2003, Allen was convicted of manufacturing/dealing in cocaine, a felony offense. In addition, Allen has six children, none of whom live with him or receive child support from him. Id. at 222. Moreover, Allen was unemployed at the time he was arrested. Thus, the totality of the nature of the offense and Allen's character indicates that the thirty-five year sentence is not inappropriate.

The judgment of the trial court is affirmed.

NAJAM, J., and KIRSCH, J., concur.