

STATEMENT OF THE CASE

Defendant-Appellant James K. Hart appeals his conviction of and sentence for Class D felony possession of marijuana. We affirm.

ISSUES

Hart raises four issues for our review, which we restate as:

- I. Whether the trial court abused its discretion in admitting evidence obtained from the stop and subsequent search of a vehicle driven by Hart.
- II. Whether the State's evidence was sufficient to support Hart's conviction.
- III. Whether the sentence imposed by the trial court was inappropriate.
- IV. Whether the trial court erred in its determination of credit time.

FACTS AND PROCEDURAL HISTORY

At approximately 12:45 a.m. on August 5, 2005, New Point Town Marshal Andrew Hadler observed a vehicle make a right turn without signaling. Marshal Hadler stopped the vehicle and found that Hart was driving, while the owner, Joshua Mayes, was riding in the front seat. Marshal Hadler requested Hart's license and the vehicle registration. The items were produced by the two men, but Hart's and Mayes' hands were shaking and trembling as they did so. Moreover, the items were handed out the window without either Hart or Mayes making eye contact with Marshal Hadler. Even while speaking to Hadler, the men constantly looked "straight ahead."

When Marshal Hadler returned to his police vehicle with the information he had collected, he radioed a request for a canine operator. The officer was dispatched at 12:51 a.m. In the meantime, Marshal Hadler prepared a written warning for failure to signal. During his writing of the warning, Marshal Hadler was notified that Hart held a conditional driver's license.

Marshal Hadler walked back to the stopped vehicle and asked Hart about the condition placed on his license. Hart responded that he was required to show proof that he was insured. Marshal Hadler asked for proof of insurance, and a discussion ensued. During this time, the canine officer, Greensburg Patrol Sergeant Eric Blodgett, arrived. It was 12:59 a.m.

After the arrival of the canine officer, Marshal Hadler asked Hart and Mayes to exit the vehicle and stand with him by the police vehicle. While Marshal Hadler returned the documents and explained the citation to Hart and Mayes, Sergeant Blodgett conducted a sweep around the vehicle. In less than two minutes, the canine indicated the presence of an illegal substance.

Sergeant Blodgett then entered the vehicle, where he noticed an odor of fresh marijuana. He first detected the odor around the steering wheel, and he ultimately found 197.4 grams of marijuana concealed in a panel that was roughly level with the driver's knee.

Hart was charged with and convicted of possession of marijuana, and he was sentenced to three years of incarceration. This sentence was consecutive to sentences imposed in unrelated cases. Hart now appeals.

DISCUSSION AND DECISION

I. ADMISSION OF EVIDENCE

Hart contends that the trial court erred in admitting the evidence garnered from the stop and canine sweep. A trial court has broad discretion in ruling on the admissibility of evidence. *Washington v. State*, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). We will reverse a trial court's ruling on the admissibility of evidence only when the ruling constitutes an abuse of the court's discretion. *Id.* An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. *Id.* The standard used to review rulings on the admissibility of evidence is effectively the same whether the challenge is made by a pre-trial motion to suppress or by a trial objection. *Burkes v. State*, 842 N.E.2d 426, 429 (Ind. Ct. App. 2006), *trans. denied.*

Hart argues that there was no reasonable suspicion of criminal activity to detain him after the traffic stop for the purpose of conducting a canine sweep. *See Wilson v. State*, 847 N.E.2d 1064, 1067 (Ind. Ct. App. 2006).¹ He notes that once the purpose of the traffic stop is completed, a motorist cannot be further detained unless something that occurred during the stop caused the officer to have a reasonable and articulable suspicion

¹ We note that appellant's counsel should give the complete citation to cases relied upon.

that criminal activity was afoot. *See Meredith v. State*, 878 N.E.2d 453, 455 (Ind. Ct. App. 2007). However, we note that the canine sweep in the present case was proper because the traffic stop had not concluded at the time the sweep was conducted. A canine sweep does not implicate the privacy interest of the defendant; therefore, it is not a search that changes the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner. *Myers v. State*, 839 N.E.2d 1146, 1149 (Ind. 2005). In other words, if a canine sweep is conducted before a traffic stop is completed, that sweep cannot constitute a violation of the Fourth Amendment to the United States Constitution. *Id.* at 1149-50. The traffic stop in the instant case was in its fourteenth minute when the canine officer arrived, and, because Marshal Hadler was still discussing the insurance issue, the stop was not completed. The question of insurance was inextricably linked to the original purpose of the traffic stop, as it had a bearing on whether Hart should have been operating the vehicle in the first place. The trial court did not err in admitting the evidence from the subsequent search.

II. SUFFICIENCY OF THE EVIDENCE

Hart contends that the State failed to present sufficient evidence to sustain his conviction of constructive possession of marijuana. Constructive possession occurs when a defendant “has the intent and capability to maintain dominion and control over the contraband.” *State v. Emry*, 753 N.E.2d 19, 22 (Ind. Ct. App. 2001). The intent requirement requires proof that the defendant had knowledge of the contraband; however, such knowledge may be inferred from evidence “of additional circumstances pointing to

the defendant's knowledge of the presence of the contraband." *Id.* The capability requirement is met when the State shows that the defendant "is able to reduce the controlled substance to the defendant's personal possession." *Goliday v. State*, 708 N.E.2d 4, 6 (Ind. 1999).

In the present case, the State presented evidence of Hart's shaking hands and complete failure to make eye contact while talking with Marshal Hadler. This evidence, coupled with the distinct odor of fresh marijuana emanating from the area around the steering wheel, was sufficient to show Hart's knowledge and intent. The State also presented evidence that the marijuana was located in a compartment near Hart's knee, evidence that is sufficient to show his capability. *See Goliday, id.* (holding that the defendant, who was driving a vehicle owned by another, had the capability to control cocaine found in the trunk of the vehicle because the defendant possessed the key that would unlock the trunk). The trial court did not err in finding that the State provided sufficient evidence to support Hart's conviction.

III. SENTENCING

Hart contends that in light of his character and the nature of the offense, the trial court erred in imposing the maximum sentence for possession. When evaluating sentencing challenges under the advisory sentencing scheme, we first confirm that the trial court issued the required sentencing statement, which includes a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007). If the recitation includes a finding of mitigating or

aggravating circumstances, the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id.*

So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion. *Id.* An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.* One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. *Id.* Another example includes entering a sentencing statement that explains reasons for imposing a sentence, including mitigating and aggravating circumstances, which are not supported by the record. *Id.* at 490-91. A court may also abuse its discretion by citing reasons that are contrary to law. *Id.* at 491.

A sentence authorized by statute will not be revised unless the sentence is inappropriate in light of the nature of the offense and the character of the offender. Indiana Appellate Rule 7(B). In determining the appropriateness of a sentence, a court of review may consider any factors appearing in the record. *Roney v. State*, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), *trans. denied*. The “nature of the offense” portion of the appropriateness review concerns the advisory sentence for the class of crimes to which the offense belongs; therefore, the advisory sentence is the starting point in the appellate court’s sentence review. *Anglemyer, clarified on rehearing*, 875 N.E.2d 218 (Ind. 2007). The “character of the offender” portion of the sentence review involves consideration of

the aggravating and mitigating circumstances and general considerations. *Williams v. State*, 840 N.E.2d 433, 439-40 (Ind. Ct. App. 2006).

Here, the nature of the offense does not mandate a maximum sentence. However, our review does not stop here. A review of Hart's character discloses that he has previously been convicted of theft, intimidation, disorderly conduct, false reporting, public intoxication, and three counts of operating a vehicle while intoxicated. In addition, he absented himself from trial and bragged to others that he was going to another state to avoid incarceration. Clearly, the State has demonstrated that previous interventions have failed, and it is therefore not inappropriate to impose the maximum three-year sentence in this case.

IV. CREDIT

Hart contends that the trial court erred in failing to give him credit for time served while he was awaiting his sentencing hearing. He emphasizes that credit is to be applied for time spent in confinement that is a result of a charge for which the defendant is being sentenced. *See Bischoff v. State*, 704 N.E.2d 129, 130 (Ind. Ct. App. 1998), *trans denied*. Hart recognizes that a defendant is entitled to credit only against the aggregate term of any consecutive sentence.

We note that Hart has not presented this court with any evidence pertaining to this issue. Accordingly, the issue is waived. *See Thompson v. State*, 761 N.E.2d 467, 471 (Ind. Ct. App. 2002).

Affirmed.

DARDEN, J., and MAY, J.,concur.