



**SULLIVAN, Senior Judge**

Brian V. Gavin (Gavin) appeals from the trial court's denial of his request to withdraw his guilty plea. In the alternative, Gavin seeks reduction of his sentence asserting that it is inappropriate to the nature of the offense and his character.

On July 11, 2008 following a traffic stop, a substance believed to be cocaine was discovered in Gavin's vehicle console. Gavin was arrested and the vehicle was impounded. It was subsequently determined that the substance found in the vehicle console was not cocaine.

However, pursuant to a search warrant, a further search of the impounded vehicle on January 6, 2009<sup>1</sup> revealed a substantial quantity of cocaine hidden beneath the vehicle and in the engine compartment. This resulted in the filing of a new count IV of the information on May 5, 2009 for Possession of Cocaine With Intent to Deliver as a Class B felony. The newly found cocaine was not discovered until the January 2009 search, but the information alleged that the possession charged took place July 1, 2008.<sup>2</sup>

Two days after the new charge was filed, a plea agreement was entered into on May 7, 2009 whereby Gavin agreed to plead guilty to the Class B felony Possession and

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<sup>1</sup> The vehicle impounded on July 11, 2008 remained continuously in the custody and possession of the police.

<sup>2</sup> The nature of the charge is not surprising given the fact that Gavin was in possession of the vehicle on July 11, 2008 and that the vehicle was not outside the custody and possession of the police from that date until the discovery of the hidden cocaine on January 6, 2009. Therefore, on July 11, 2008 Gavin had to have been in possession of the subsequently discovered cocaine. There is no suggestion that there was any tampering or break in the chain of custody of the discovered cocaine.

the State agreed to dismiss all other charges related to the July 11, 2008 arrest.<sup>3</sup> Sentencing was left to the discretion of the court.

The plea agreement was accepted by the court at the time of sentencing on June 4, 2009. The court concluded that the aggravating circumstances were that Gavin reflected a lack of remorse and that he benefited from the reduced charges. The court found as mitigating that Gavin had pleaded guilty. The court then opined that the aggravating factors and the mitigating factors were balanced and imposed the advisory ten year sentence for the offense.

#### I. Denial of Guilty Plea Withdrawal

It is Gavin's appellate position that were it not for the fact of the original arrest and charge for cocaine possession, later established to be without merit, the police would never have had occasion or opportunity to conduct a new search of his vehicle and discover the cocaine which formed the basis of the charge upon which he was convicted. In essence, Gavin claims that all of his problems emanate from what was an erroneous arrest and charge in the first place.

We reject Gavin's argument most particularly in light of his unequivocal admission at the guilty plea hearing that he knew of the presence of the metallic canister beneath the vehicle, that the substance contained in the canister was cocaine and that he did not dispute that the quantity of cocaine was in excess of five grams. Gavin also conceded that it was fair to say that the canister was present on July 11, 2008 although it

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<sup>3</sup> Gavin had been charged with Dealing in Cocaine as a Class A felony, Possession as a Class D felony, and Maintaining a Common Nuisance as a Class D felony.

was not discovered until January, 2009.

As noted by the trial court, the guilty plea entered into by Gavin took place at least four months after the cocaine which was the subject of the charge was discovered. All the facts deemed by Gavin to be relevant were therefore known to him at the time of his plea.

Whether to allow a defendant to withdraw a plea of guilty is within the sound discretion of the court. Hunter v. State, 676 N.E.2d 14, 18 (Ind. 1996). Gavin has not persuaded this court that the trial court abused its discretion in refusing the plea withdrawal. See Hollingsworth v. State, 717 N.E.2d 610, 613 (Ind. Ct. App. 1999), transfer denied; Smith v. State, 596 N.E.2d 257, 259 (Ind. Ct. App. 1992).

Gavin also maintains that the trial court should have conducted a full blown evidentiary hearing as to his withdrawal motion and that he was erroneously denied the opportunity to bring forth evidence that the guilty plea resulted in manifest injustice. Gavin points to no evidence which he would have submitted in this regard. Furthermore, case precedent holds that whether or not to conduct an evidentiary hearing is within the discretion of the court. Fletcher v. State, 649 N.E.2d 1022, 1023 (Ind. 1995); Mescher v. State, 686 N.E.2d 413, 416 (Ind. Ct. App. 1997), rehearing denied, transfer denied.

We affirm the ruling of the court with respect to Gavin's request to withdraw his guilty plea.

## II. Inappropriateness of Sentence

Gavin's alternative argument concerns the appropriateness of the ten year advisory sentence imposed. Gavin cites to Hollin v. State, 877 N.E.2d 462 (Ind. 2007) in which the defendant "had multiple previous contacts with the law that ended in juvenile adjudications". App. Br. 12. Hollin received an enhanced twenty year sentence upon the underlying B felony further enhanced by an additional twenty years for a habitual offender determination. Hollin, 877 N.E.2d at 463. Our Supreme Court deemed the sentence excessive and remanded for entry of an advisory ten year sentence further enhanced by an additional ten years for an aggregate of twenty years. Id. at 466.

Gavin observes that he has no prior criminal convictions, that he has a child at home and "was working full time when the police started investigating this incident." App. Br. 12. He thus concludes that if the defendant in Hollin was entitled to a reduction of the advisory sentence imposed there, he is entitled to a reduction of less than the advisory sentence here. We do not follow the implied logic of this argument. Gavin concedes that it is his burden to persuade this court that the sentence imposed is inappropriate.

As to the nature of the offense, Gavin asserts that he did not actually deliver the cocaine to any person, nor had he done so in the past. He notes that his crime was not one of violence. He fails to note, however, that by definition, the offense committed is not a crime of violence nor does it require actual delivery of the forbidden substance. The advisory sentence imposed here is precisely the sentence permitted for the crime to which Gavin pleaded guilty.

As to the propriety of the sentence in light of the nature of the offender we observe that Gavin explicitly admitted guilt for the offense. However, he sought to avoid his own responsibility for the crime by asserting poor police work in failing to discover the cocaine secreted under the car until months later and that he was not guilty of cocaine possession as originally charged. We are unable to attribute to this happenstance any beneficial result for Gavin. He is not rendered a less culpable person because of it.

Furthermore, we do not agree that Gavin's lack of criminal convictions and the fact he had a small child who lives with the mother compels a sentence of less than the advisory sentence. As noted in Gross v. State, 769 N.E.2d 1136, 1140 (Ind. 2002): "The trial court is not obligated to accept the defendant's contentions as to what constitutes a mitigating factor. Nor is the court required to give the same weight to proffered mitigating factors as the defendant does." (citation omitted).

In this case we do not see any basis to overturn the trial court's exercise of its sentencing discretion. See Bennett v. State, 862 N.E.2d 1281, 1286 (Ind. Ct. App. 2007); Comer v. State, 839 N.E.2d 721, 730 (Ind. Ct. App. 2005), transfer denied; Anglin v. State, 787 N.E.2d 1012, 1020 (Ind. Ct. App. 2003).

The judgment of the trial court is in all things affirmed.

MATHIAS, J., and CRONE, J., concur.