

STATEMENT OF THE CASE

Tony L. Modesitt appeals his conviction and sentence, following a jury trial, for class D felony possession of marijuana¹ and for being an habitual substance offender.²

We affirm.

ISSUES

1. Whether the trial court erred when it admitted the marijuana into evidence.
2. Whether Modesitt's sentence is inappropriate pursuant to Indiana Appellate Rule 7(B).

FACTS

On September 25, 2007, Lafayette business owner Jerry Kalal called the police to report suspected drug dealing in the one thousand block of Main Street, an area known for drug-related activity. Officer Richard Welcher of the Lafayette Police Department was dispatched to investigate. At the scene, Kalal told Officer Welcher that two of the men -- one dressed in a dark blue shirt or jacket and dark blue jeans -- had met with a third man. After the men shook hands, the man in blue clothing immediately reached into his pocket, and Kalal "thought he'd just saw [sic] a drug deal." (Tr. 3-5). The men were still within view when Officer Welcher arrived. Officer Welcher drove his fully-marked squad car toward the men, parked, and approached on foot. He was soon joined by fellow LPD Officer Calhoon.

¹ Indiana Code § 35-48-4-10.

² Ind. Code § 35-50-2-10.

Officer Welcher asked the men whether he could speak to them. He then told them that a witness claimed to have seen them conducting a possible drug transaction. The men denied dealing drugs, and Officers Welcher and Calhoon asked to see their identification. The three were later identified as Modesitt, Anthony Ahrens, and Robert Haney. Officers Welcher and Calhoon viewed the men's identification cards, wrote down some information, returned their cards, and called in the information to check for outstanding warrants. Suddenly, Haney began breathing heavily; he grabbed his chest and dropped to his knees. The officers called an ambulance to the scene. The officers suspended their inquiry until paramedics arrived.

Subsequently, Officer Calhoon asked whether Ahrens would submit to a pat-down search; Ahrens agreed. Officer Calhoon performed the search, but found no contraband on him. Officer Welcher then turned his attention to Modesitt, who was dressed in a blue shirt and blue jeans. He told Modesitt that a witness specifically claimed that he thought he saw Modesitt dealing drugs. Officer Welcher then asked Modesitt whether he had any drugs in his possession. At first, Modesitt was unresponsive; however, when asked again, Modesitt admitted to carrying contraband. When Officer Welcher asked him how much, Modesitt responded that he had a quantity that would require him to go to jail. He then pulled two large bags of marijuana from his jeans. The larger of the bags contained small bags of loose marijuana and marijuana cigarettes. Modesitt was arrested for possession of marijuana.

On September 26, 2007, the State charged Modesitt with the following offenses: count I, class C felony dealing in marijuana; count II, class A misdemeanor possession of

marijuana; count III, class D felony dealing in marijuana while having a prior conviction; and count IV, class D felony possession of marijuana while having a prior conviction. The State also charged Modesitt with being an habitual substance offender.³ On October 25, 2007, Modesitt filed a motion to suppress the evidence. On January 8, 2008, the trial court conducted a hearing on Modesitt's motion, which was denied on January 10, 2008.

On March 13, 2008, the State dismissed count I. At the start of the bifurcated jury trial on March 18, 2008, the State dismissed count III. The jury convicted Modesitt of class A misdemeanor possession of marijuana, class D felony possession of marijuana, and adjudicated him to be an habitual substance offender. The trial court entered judgment of conviction on the class D felony possession of marijuana and the habitual substance offender adjudication. It imposed a three year sentence for the class D felony possession of marijuana as well as a five-year enhancement for the habitual substance offender adjudication, for an aggregate sentence of eight years.

DECISION

Modesitt argues that the police lacked reasonable suspicion to execute a lawful investigative stop. He also argues that his sentence is inappropriate in light of the nature of the offense and the character of the offender. We disagree with both contentions.

1. Reasonable Suspicion

³ Pursuant to Indiana Code section 35-50-2-10(b), "The State may seek to have a person sentenced as a habitual substance offender for any substance offense by alleging, . . . that the person has accumulated two (2) prior unrelated substance offense convictions."

First, Modesitt argues that the trial court erred in admitting the marijuana into evidence because the police lacked the requisite reasonable suspicion to make an investigatory stop.

We review the admission of evidence for an abuse of discretion. *Collins v. State*, 822 N.E.2d 214, 218 (Ind. Ct. App. 2005), *trans. denied*. We consider the conflicting evidence most favorable to the trial court's ruling and any uncontested evidence favorable to the defendant. *Id.* An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law. *Rich v. State*, 864 N.E.2d 1130, 1131 (Ind. Ct. App. 2007).

Modesitt's interaction with Officers Welcher and Calhoon did not constitute a seizure and, therefore, did not trigger Fourth Amendment scrutiny. In *Florida v. Royer*, 460 U.S. 491, 497 (1983), the United States Supreme Court held that police officers "do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." In the same vein, in *Florida v. Bostick*, 501 U.S. 429, 434 (1991), the Court held that "mere police questioning does not constitute a seizure." It stated further,

a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free 'to disregard the police and go about his business, . . . the encounter is consensual and no reasonable suspicion is required.' The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature.

* * *

[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage, -- as long as the police do not convey a message that compliance with their requests is required.

Bostick, 501 U.S. at 434 (internal citations omitted). “An encounter becomes a seizure only when an officer, by means of physical force or show of authority, has restrained the liberty of a citizen.” *United States v. Mendenhall*, 446 U.S. 544, 553-54 (1980).

The record reveals that after receiving a tip from a concerned citizen regarding possible drug activity, Officers Welcher and Calhoon approached and merely questioned Modesitt, which encounter did not rise to the level of a seizure. When Officer Welcher approached Modesitt, Haney, and Ahrens, he requested permission to speak with them and asked them a series of questions about suspected drug activity. When Officer Welcher asked Modesitt whether he had any drugs on his person, Modesitt admitted that he did possess illegal drugs. There is no support in the record for a finding that Officer Welcher in any way restrained Modesitt's liberty by use of force or show of authority.

In support, Modesitt further argues that the encounter with Officers Welcher and Calhoon was not consensual, because at trial Officer Welcher testified that Modesitt was not free to go during questioning because the investigation was not yet complete. Although Officer Welcher's testimony in this regard gives us pause, we conclude that his subjective impressions are not dispositive here. Rather, the applicable legal standard to determine whether an encounter with police is consensual is whether a reasonable person, under the totality of the circumstances, would have concluded from the police conduct that he was not free to decline the officers' requests or to otherwise terminate the

encounter. *Id.* at 440. Modesitt has not made such an evidentiary showing in this matter. Thus, we find that the trial court did not err in admitting the marijuana into evidence.

2. Inappropriate Sentence

Modesitt contends that his eight-year executed sentence is inappropriate in light of the nature of the offense and his character.

We may revise a sentence if, “after due consideration of the trial court’s decision,” we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). “Although Rule 7(B) does not require us to be ‘very deferential’ to a trial court’s sentencing decision, we still must give due consideration to that decision.” *Williams v. State*, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008). “We also understand and recognize the unique perspective a trial court brings to its sentencing decisions.” *Id.* The burden is on the defendant to persuade the reviewing court that his sentence is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007); *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

Our review of the nature of the offense reveals that Modesitt possessed 18.1 grams of marijuana. *See Davis v. State*, 791 N.E.2d 266, 270 (Ind. Ct. App. 2003) (the greater the quantity of drugs possessed, the stronger the inference that the defendant intended to deal the drugs).

Review of Modesitt’s character reveals an extensive criminal history consisting of thirteen misdemeanor convictions and five felony convictions, including crimes of violence, i.e., attempted battery while armed with a deadly weapon, battery, burglary,

criminal recklessness while armed with a deadly weapon, and criminal recklessness with serious bodily injury. Modesitt has also been convicted of operating a vehicle while intoxicated, possession of marijuana, possession of paraphernalia, public intoxication, and resisting law enforcement. According to the pre-sentence investigation report (“PSI”), the State has previously filed twelve petitions to revoke Modesitt’s probation, “with six (6) being found true.” (App. 162).

Further, Modesitt has a staggering record of drug abuse and offenses. According to the PSI, Modesitt has admitted abusing the following drugs:

Marijuana “all day” between the ages of 13 and 19.
Marijuana “all day” between the ages of 22 and 32.
Marijuana “all day” between the ages of 42 and 48.
Cocaine “3 times daily for 5 days” at age 23. He admitted injecting [t]his substance.
L.S.D. “20 times at least” between the ages of 13 and 19.
P.C.P. “constantly” between the ages of nine (9) and 13.
Mushrooms “1 time” at age 32.
Heroin “16 times” between the ages of 26 and 28. He admitted injecting this substance.
Abused Valium “frequently” between the ages of 22 and 25.
Abused Methaqualone “frequently” between the ages of 22 and 25.
Abused Seroquel “frequently” between the ages of 22 and 32.
Abused Phenobarbital “frequently” between the ages of 22 and 32.
Abused “Yellow Jackets ...speed... daily” between the ages of 22 and 32.
“Mixed upper – downer . . . frequently” between the ages of 22 and 32.
Abused Xanax “frequently” between the ages of 43 and 45.
Abused Lortab “5 times” at age 46.

(App. 164). He was convicted of possession of paraphernalia twice in 2004 and again in 2007, and he was convicted of possession of marijuana in 2004, 2005, and 2007. He committed the instant offenses while on release on his own recognizance for dealing in marijuana and being an habitual substance offender.

Based upon the foregoing, we must conclude that Modesitt is a chronic drug offender, who has not been dissuaded from engaging in criminal activity by his repeated contacts with the criminal justice system, and deserving of his status as an habitual substance offender. Nothing about the nature of the offenses and Modesitt's character could lead us to conclude that his sentence is inappropriate.

Affirmed.

RILEY, J., and VAIDIK, J., concur.