

Jermarcus J. Starnes (“Starnes”) was found guilty in Elkhart Circuit Court of two counts of Class B felony dealing in cocaine. The trial court sentenced Starnes to sixteen years for each conviction to be served concurrently in the Indiana Department of Correction. Starnes appeals and raises four issues, which we renumber and restate as the following three:

- I. Whether the State presented sufficient evidence to sustain Starnes’s convictions;
- II. Whether the trial court abused its sentencing discretion by considering improper aggravating factors; and
- III. Whether Starnes’s sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

Facts and Procedural History

On December 1, 2009, the Elkhart County Police Department arranged a controlled buy with a cooperating source (“CS”) to purchase twenty dollars worth of crack cocaine from Starnes. Prior to the controlled buy, Corporal Brian Chomer (“Corporal Chomer”) searched the CS and his vehicle for contraband, wired him with an audio transmitter, and gave him twenty dollars with which to purchase the drugs. The CS then drove to the intersection where he had arranged to meet Starnes. When Starnes did not show, the CS called him and the two agreed to meet at a different location. The officers providing security and surveillance briefly lost sight of the CS when he walked through an alleyway toward the new meeting place. Shortly thereafter, Starnes rode up to

the CS on a bicycle, handed the CS the cocaine, and rode away. The CS then gave the cocaine to Corporal Chomer.

On December 8, 2009, the CS again called Starnes and arranged to buy another twenty dollars worth of crack cocaine. Corporal Chomer again searched the CS for contraband, wired him with an audio transmitter, and gave him twenty dollars with which to purchase the drugs. Corporal Chomer and Corporal Tim Freel (“Corporal Freel”) dropped off the CS at a location near the meeting place. When the CS arrived at the meeting place, a woman was also waiting to buy drugs. The CS spoke briefly to her but did not make physical contact. Later, a man known by the CS as “Toon” told the CS that Starnes was on his way. The CS did not make physical contact with Toon. The CS then walked away from the corner to talk to Toon, which Corporal Chomer misinterpreted as meaning that the transaction was complete. Corporals Chomer and Freel left the scene briefly but returned when another officer providing surveillance notified Corporal Chomer that the CS was still waiting for Starnes. Corporals Chomer and Freel returned to their position in time to see Starnes exit a white SUV and give the CS crack cocaine in exchange for twenty dollars. Following the transaction, the CS gave the cocaine to the officers. The CS later identified Starnes through a photo lineup as the person who had sold him the crack cocaine on December 1 and 8, 2009.

On May 21, 2010, the State charged Starnes with two counts of Class B felony dealing in cocaine. Starnes’s two-day trial commenced on June 21, 2010, after which the jury found Starnes guilty as charged. On July 22, 2010, the trial court sentenced Starnes

to sixteen years for each conviction to be served concurrently in the Indiana Department of Correction. Starnes now appeals.

I. Sufficiency of the Evidence

Starnes first claims that the State presented insufficient evidence to prove that he sold crack cocaine to the CS. In reviewing a challenge to the sufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of the witnesses. Atteberry v. State, 911 N.E.2d 601, 609 (Ind. Ct. App. 2009). Instead, we consider only the evidence supporting the conviction and the reasonable inferences to be drawn therefrom. Id. If there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt, then the verdict will not be disturbed. Baumgartner v. State, 891 N.E.2d 1131, 1137 (Ind. Ct. App. 2008).

To establish that Starnes committed Class B felony dealing in cocaine, the State was required to prove that he knowingly or intentionally delivered cocaine to the CS. Ind. Code § 35-48-4-1 (2006). At trial, the CS identified Starnes as the person who sold him crack cocaine on December 1 and 8, 2009. The State also presented testimony from Corporal Freel who also identified Starnes as the person he observed selling drugs to the CS on December 1, 2009. Additionally, the State presented testimony from Corporal Chomer and Sergeant Jeffrey Eaton regarding the circumstances of the controlled buys. Starnes argues that the standards for a controlled buy were not met on either occasion and that there was insufficient evidence from the State's other witnesses to corroborate the CS's testimony.

Adequacy of the standards for a controlled buy goes to the weight and credibility of the evidence presented, which we will not consider. Hudson v. State, 462 N.E.2d 1077, 1083 (Ind. Ct. App. 1984). Furthermore, we remind Starnes that the sole uncorroborated testimony of an informant-buyer is sufficient to convict, despite any arguable inadequacies in the controls of the buy. Id.

Starnes's argument is simply an invitation to reweigh the evidence and judge the credibility of witnesses, which we will not do. The jury was free to accept the CS's testimony and find the standards for the controlled buy to be adequate. The State presented sufficient evidence to support Starnes's convictions for Class B felony dealing in cocaine.

II. Sentencing

A. Aggravating Circumstances

As to his sentence, Starnes first argues that the trial court abused its discretion by relying on improper aggravating factors in imposing Starnes's two concurrent sixteen-year sentences. Sentencing decisions rest within the sound discretion of the trial court. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007). So long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. Id. An abuse of discretion will be found "where 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. (citing K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)).

A trial court may abuse its discretion in a number of ways, including: (1) failing to enter a sentencing statement at all; (2) entering a sentencing statement that includes aggravating and mitigating factors that are unsupported by the record; (3) entering a sentencing statement that omits reasons that are clearly supported by the record; or (4) entering a sentencing statement that includes reasons that are improper as a matter of law. Id. at 490-491. If the trial court abuses its discretion in one of these or another way, remand for resentencing is the appropriate remedy, but only “if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.” Id. at 491.

In the record before us, there are inconsistencies between the trial court’s oral sentencing pronouncement and its written sentencing statement regarding the aggravating and mitigating factors that are relevant to Starnes’s challenge to his sentence. “The approach employed by Indiana appellate courts in reviewing sentences in non-capital cases is to examine both the written and oral sentencing statements to discern the findings of the trial court.” McElroy v. State, 865 N.E.2d 584, 589 (Ind. 2007). This court “has the option of crediting the statement that accurately pronounces the sentence or remanding for resentencing.” Id. With this flexibility in mind, we now proceed to examine both sentencing statements.

The trial court’s written sentencing statement found the following seven aggravating circumstances: (1) that Starnes had a criminal history consisting of one juvenile adjudication, five misdemeanors, two violations of probation, and one failure to

appear; (2) that Starnes failed to complete the COWP program;¹ (3) that Starnes failed to pay costs; (4) that Starnes committed the current offenses while on probation; (5) that Starnes was found in contempt of court during his trial for uttering obscenities in the presence of the jury; (6) that Starnes committed the current offenses while under the influence of marijuana; and (7) that Starnes has used marijuana since age eight.

The trial court noted the following mitigating circumstances in its written sentencing order: (1) that Starnes apologized to the trial court for his disruption of the proceedings which led to his contempt finding; (2) Starnes's age of nineteen years; and (3) all statements of Starnes and his counsel.²

The trial court's written statement differed slightly from its oral sentencing statement. In its oral sentencing statement, the trial court was concerned with whether Starnes had committed the current offenses either while under the influence of marijuana or while on probation. The court suggested that *if* Starnes had committed the current offenses while under the influence of marijuana or while on probation, those circumstances would be considered aggravators if found to be true. The written order, however, listed both factors as aggravators, indicating that the trial court found that Starnes was under the influence of marijuana and on probation at the time of his current offenses.

¹ It is unclear from the record what the COWP program entails or how Starnes failed to complete the program. Other than a brief note in the presentencing investigation report that "COWP filed an 'unsuccessful' sentence completion report" we know nothing more about it.

² Starnes argues under the banner of challenging the appropriateness of his sentence that these mitigating factors equal or outweigh the aggravators described by the trial court. However, we will not review the weight or value assigned to factors properly found by the trial court for an abuse of discretion. Anglemyer, 868 N.E.2d at 491.

With respect to the trial court's contempt of court finding, in its oral sentencing pronouncement the trial court said, "To the extent he made an apology . . . the court will consider that to be a mitigating factor, although I would say that I'm not considering [the incident leading to the contempt of court finding] to be an aggravator because I think [Starnes has] already been punished for that." Tr. p 222.

The trial court did not specifically note Starnes's age as a mitigating factor in its oral sentencing pronouncement, but instead noted, "[Starnes] is only nineteen . . . but yet he has accumulated a substantial criminal history now consisting of two felonies and five misdemeanors." Tr. p. 223.

Starnes argues that the trial court abused its discretion because it relied on aggravating factors that were either not supported by the record or were improper. Specifically, Starnes argues that his criminal history, contempt of court, and drug use as a child were improper aggravators and that the trial court's conclusions that he was on probation and under the influence of marijuana at the time of the current offenses were not supported by the record. Starnes does not challenge the other aggravating factors noted by the trial court.

Starnes first argues that his criminal history consisted of only misdemeanor charges unrelated to his current charges, and that his failure to appear was not his fault because he was being held at the Elkhart County Correctional Complex at the time he was required to appear in court. The trial court, however, noted that the quantity, not necessarily the quality of the prior charges was more concerning in light of Starnes's age of nineteen years. The fact that Starnes was in custody at the time he was to be present in

court for an unrelated cause supports the trial court's concern regarding the frequency of his prior offenses in such a short time as an adult. Furthermore, the trial court noted, "It is clear from [Starnes's] criminal history that he will not follow court orders and the law of this State and other sanctions have proved ineffective in causing [Starnes's] rehabilitation." Appellant's App. pp. 81-82. Thus, it was not improper for the trial court to consider Starnes's criminal history as an aggravating factor.

Starnes further argues that it was improper for the trial court to consider its contempt of court finding as an aggravator. Contempt of court is a proper consideration as an aggravating circumstance as it shows a defendant's unwillingness to follow the court's orders. See Moore v. State, 882 N.E.2d 788, 796 (Ind. Ct. App. 2008).

During the sentencing hearing, the trial court said it would not consider Starnes's outburst in front of the jury as an aggravating factor but would consider his letter of apology to the court following the incident as a mitigating factor. The trial court then orally sentenced Starnes to sixteen years on each count. We conclude that it was the trial court's intent to not consider the contempt of court to be an aggravator but instead to consider Starnes's apology to be a mitigating factor. Had the court increased the sentence from what was orally ordered, one could conclude that the contempt finding was considered. That did not happen here. Therefore, it is unlikely the trial court used it as an aggravating factor, although it would have been within its discretion to do so. Moreover, any error in including the contempt finding as an aggravator in the written sentencing statement is harmless because Starnes's sentence remained the same. See McElroy, 865 N.E.2d at 591 (finding harmless error when the trial court included the

defendant's criminal history as an aggravating factor in the written statement but not in the oral statement because there was no difference in the sentence ordered).

Starnes next argues that it was improper for the trial court to consider his use of marijuana in childhood and that the record does not support the trial court's finding that he was under the influence of marijuana at the time he committed the current offenses. Yet Starnes admitted in the presentence investigation report that he began smoking marijuana when he was eight and that the last time he smoked marijuana was on May 21, 2010, the day he was arrested. The trial court was entitled to find Starnes's history of drug use to be an aggravating circumstance under Indiana Code section 35-38-1-7.1(a)(2) (2005) (allowing the court to consider a person's history of criminal or delinquent behavior as an aggravating factor). Moreover, "[a] court may consider evidence that a defendant committed crimes at an earlier date as support for a finding that the defendant has a history of criminal activity, even if those acts were not reduced to judgment." Bailey v. State, 763 N.E.2d 998, 1004 (Ind. 2002). While it is true that Starnes did not admit to using marijuana on the specific days he committed the current offenses, the fact that he admitted to using marijuana on the date of his arrest suggests an ongoing pattern of criminal conduct, which may properly be considered as an aggravating factor.

Lastly, Starnes argues that the trial court's conclusion that he was on probation when he committed the current offenses was not supported by the record. There is conflicting evidence in the record as to Starnes's probation status at the time of the current offenses. The presentence investigation report, which Starnes acknowledged at the sentencing hearing to be correct, answers "Yes" to the question "At the time of the

present offense, was offender on probation?” Appellant’s App. p. 72. However, the record also shows that in December 2009, Starnes was on “good behavior status”³ through the Elkhart City Court and was not placed on probation until January 8, 2010 for an incident separate from the current offenses. Thus, Starnes was not on probation at the time of the current offenses but was placed on probation prior to the charges in the present case being filed. Considering the significant overlap in Starnes’s offenses in such a short period of time, confusion as to his probation status on a particular date is understandable. Furthermore, even assuming that consideration of his probation status at the time of his current offenses was improper, the remaining aggravators were properly found by the trial court.

The trial court noted that “any one of the aggravators taken individually or all of them taken as a whole outweigh the mitigators warranting the imposition of an enhanced sentence.” Appellant’s Br. at 30. Under these facts and circumstances, we can say with confidence that the trial court would have imposed the same sentence even if it had not mistakenly believed that Starnes was on probation at the time of the offense. See Anglemyer, 868 N.E.2d at 491. Accordingly, remand for resentencing is unwarranted.

B. Inappropriate Sentence

Finally, Starnes challenges the appropriateness of his sentence. However, Starnes failed to provide any cogent arguments, support from the record, or sources of law addressing the nature of the offense or the character of the offender to support his

³ The record is unclear what “good behavior status” means, however, it is clear that at the time of the current offenses Starnes was receiving some kind of intervention from the Elkhart City Court, although he was not formally on probation.

challenge to the appropriateness of his sentence. Instead, Starnes merely draws our attention to the mitigating factors, which he feels outweigh the aggravating circumstances found by the trial court. As we stated previously, this court will not reweigh the values assignable to reasons properly found by the trial court. Anglemyer, 868 N.E.2d at 491. Given that Starnes has not addressed the nature of the offense or the character of the offender, he has waived appellate review of the appropriateness of his sentence. Ind. Appellate Rule 46(a)(8) (2010).

Waiver notwithstanding, we cannot conclude his sentence is inappropriate. Although a trial court may have acted within its lawful discretion in imposing a sentence, Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a sentence imposed by the trial court. Anglemyer, 868 N.E.2d at 491. This appellate authority is implemented through Indiana Appellate Rule 7(B), which provides that a court “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Id. However, “we must and should exercise deference to a trial court’s sentencing decision, both because Rule 7(B) requires us to give ‘due consideration’ to that decision and because we understand and recognize the unique perspective a trial court brings to its sentencing decisions.” 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).

Starnes was convicted of two counts of Class B felony dealing in cocaine, for which the sentence range is six to twenty years, with an advisory sentence of ten years. The trial court sentenced Starnes to sixteen years for each conviction, to be served concurrently in the Indiana Department of Correction.

With respect to the nature of the offense, Starnes sold crack cocaine twice with barely a week between the offenses. Furthermore, these offenses were committed in the open, on a public street, which negatively affects a neighborhood's safety. Finally, these offenses, which Starnes characterizes as small-time drug dealing, have been classified by our General Assembly as Class B felonies, a far cry from the misdemeanors Starnes previously committed.

In our consideration of Starnes's character, we note his criminal history, which is significant given his young age, and which includes one juvenile adjudication, five misdemeanors, two violations of probation, and one failure to appear. Furthermore, his adult criminal history can be seen as a continuation of his juvenile history, which Starnes admits includes possession of heroin and firearms. Starnes also admits he consumes alcohol although under age and uses marijuana. Starnes's character is further revealed by his profane outbursts directed at the jury and trial judge. All told, Starnes's character demonstrates a cavalier attitude toward the law. Under these facts and circumstances, we cannot conclude that Starnes's sentence was inappropriate.

Conclusion

The State presented sufficient evidence to support Starnes's convictions for Class B felony dealing in cocaine. The trial court did not abuse its discretion by considering

Starnes's criminal history and drug use as aggravators and the trial court did not consider Starnes's contempt of court to be an aggravator. Although the trial court abused its discretion by considering Starnes's probation status at the time of the current offense, remand for resentencing is unwarranted because the court would have imposed the same sentence without considering the allegedly improper factors. Finally, under these facts and circumstances, and giving due consideration to the trial court's sentencing discretion, we cannot conclude that Starnes's concurrent sixteen-year sentences are inappropriate.

Affirmed.

FRIEDLANDER, J., and MAY, J., concur.