

Following a jury trial, Tommy L. Borders was convicted of possession of methamphetamine as a Class A felony,¹ possession of methamphetamine as a Class C felony,² maintaining a common nuisance as a Class D felony,³ possession of marijuana as a Class A misdemeanor,⁴ and possession of paraphernalia as a Class A misdemeanor.⁵ Borders was adjudicated an habitual substance offender, and the trial court sentenced him to forty-five years of imprisonment. On appeal, Borders presents the following issues for our review:

- I. Whether there was probable cause to support the issuance of a valid search warrant;
- II. Whether the trial court abused its discretion in admitting evidence seized during the traffic stop; and
- III. Whether the trial court improperly sentenced Borders.

We affirm.

FACTS AND PROCEDURAL HISTORY

On January 5, 2009, Brazil Police Officer Jeremy Mace observed a moving vehicle with no rear lights. He initiated a traffic stop and identified the driver as Borders. Officer Mace requested a narcotics detection dog, and Officer Kenny Hill, the K-9 handler responded. A canine sniff of the exterior of the vehicle was conducted, and the

¹ See Ind. Code § 35-48-4-6.1(b)(3).

² See Ind. Code § 35-48-4-6.1(b)(1).

³ See Ind. Code § 35-48-4-13(b)(1).

⁴ See Ind. Code § 35-48-4-11(1).

⁵ See Ind. Code § 35-48-4-8.3(a)(1).

dog alerted to the presence of contraband. Officer Hill requested that Borders exit the vehicle. As Borders did so, Officer Hill and two other officers smelled burnt marijuana. A search of Borders's vehicle revealed \$2,930 in cash.

Police obtained a search warrant for Borders's residence and executed the warrant early in the morning after the traffic stop. The search of the house revealed scales and paraphernalia, including smoking pipes and rolling papers, along with a hand-rolled marijuana cigarette. A search of the premises further revealed hypodermic needles, Q-tips, a metal spoon, and two bags of an off-white powdery substance later determined to be methamphetamine, weighing 29.02 grams.

The State charged Borders with Count I, Class A felony possession of methamphetamine; Count II, Class C felony possession of methamphetamine; Count III, Class D felony maintaining a common nuisance; Count IV, Class A misdemeanor possession of marijuana; Count V, Class A misdemeanor possession of paraphernalia; and Count VI, being an habitual substance offender. Prior to trial, Borders filed a motion to suppress evidence. The trial court held a hearing on the motion, and issued an order suppressing any statements Borders made during his custodial interrogation at the initial vehicle stop, but denying the remainder of the motion. After the conclusion of the jury trial, Borders was found guilty as charged. The trial court sentenced Borders to an aggregate term of forty-five years of imprisonment. Borders now appeals.

DISCUSSION AND DECISION

I. Search Warrant

Borders argues that the warrant authorizing the search of his home was not

supported by probable cause and that the evidence discovered as a result of the search was inadmissible. We disagree. While some of the matters set forth in the affidavit in support of the request for the search warrant were improper and insufficient to constitute probable cause, other facts, standing alone, were sufficient to issue the warrant.

In deciding whether to issue a search warrant, “the task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Query v. State*, 745 N.E.2d 769, 771 (Ind. 2001) (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983)); *Hensley v. State*, 778 N.E.2d 484, 487 (Ind. Ct. App. 2002). “A search warrant is presumed valid, and the burden is upon the challenger to rebut the presumption.” *Britt v. State*, 810 N.E.2d 1077, 1080 (Ind. Ct. App. 2004) (citing *Rios v. State*, 762 N.E.2d 153, 156-57 (Ind. Ct. App. 2002)). The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Indiana Constitution require that search warrants be supported by probable cause. *Bowles v. State*, 820 N.E.2d 739, 742 (Ind. Ct. App. 2005).

The duty of the reviewing court is to determine whether the magistrate had a “substantial basis” for concluding that probable cause existed. *Query*, 745 N.E.2d at 771 (quoting *Gates*, 462 U.S. at 238-39). A substantial basis requires the reviewing court, with significant deference to the magistrate’s determination, to focus on whether reasonable inferences drawn from the totality of the evidence support the determination of probable cause. *Id.* In our review, we consider only the evidence presented to the issuing magistrate and may not consider post hoc justifications for the search. *Id.*

Indiana Code section 35-33-5-2 specifies the minimum information necessary to establish probable cause, and provides in relevant part:

(a) Except as provided in section 8 of this chapter, no warrant for search or arrest shall be issued until there is filed with the judge an affidavit:

(1) particularly describing:

(A) the house or place to be searched and the things to be searched for; or

(B) particularly describing the person to be arrested;

(2) alleging substantially the offense in relation thereto and that the affiant believes and has good cause to believe that:

(A) the things as are to be searched for are there concealed; or

(B) the person to be arrested committed the offense; and

(3) setting forth the facts then in knowledge of the affiant or information based on hearsay, constituting the probable cause.

(b) When based on hearsay, the affidavit must either:

(1) contain reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information furnished; or

(2) contain information that establishes that the totality of the circumstances corroborates the hearsay.

“An affidavit demonstrates probable cause to search premises if it provides a sufficient basis of fact to permit a reasonably prudent person to believe that a search of those premises will uncover evidence of a crime.” *Hensley*, 778 N.E.2d at 488 (quoting *Utley v. State*, 589 N.E.2d 232, 236 (Ind. 1992)). Probable cause requires only a fair probability of criminal activity, not a prima facie showing. *Rios*, 762 N.E.2d at 160 (citing *Jellison v. State*, 656 N.E.2d 532, 534 (Ind. Ct. App. 1995)).

Speculative assertions and unsupported conclusions are insufficient to support

probable cause. *Bryant v. State*, 655 N.E.2d 103, 108 (Ind. Ct. App. 1995). Here, the statement of an unidentified informer describing the means by which Borders acquired the methamphetamine and the assumptions of a police detective regarding Borders's dealing methamphetamine were insufficient. The affidavit, however, also included the officers' observations, which included detecting strong marijuana odors and other odors consistent with the manufacturing methamphetamine coming from Borders's home. In addition, the affidavit set forth that three officers detected marijuana odors emanating from Borders's person upon the traffic stop. Another witness further stated that she had obtained methamphetamine from Borders. These facts create a sufficient basis for a magistrate to conclude that a search of Borders's home would uncover evidence of dealing methamphetamine. We conclude that the search warrant was supported by sufficient probable cause.

II. Traffic Stop

Borders next contends that the trial court abused its discretion in admitting evidence found during the search of his vehicle. Borders specifically claims that the stop and search of his vehicle violated his constitutional right to be free from unreasonable search and seizure under the Fourth Amendment to the United States Constitution.⁶

The Fourth Amendment protects persons from unreasonable search and seizure,

⁶ Borders also cites Article I, section 11 of the Indiana State Constitution, but fails to set forth analysis applying that provision to the facts of this case. "Where a party, though citing Indiana constitutional authority, presents no separate argument specifically treating and analyzing a claim under the Indiana Constitution distinct from its federal counterpart, we resolve the party's claim 'on the basis of federal constitutional doctrine and express no opinion as to what, if any, differences there may be' under the Indiana Constitution." *Myers v. State*, 839 N.E.2d 1154, 1158 (Ind. 2005) (quoting *Williams v. State*, 690 N.E.2d 162, 167 (Ind. 1997)).

and this protection has been extended to the states through the Fourteenth Amendment. *U.S. Const. amend. IV; Krise v. State*, 746 N.E.2d 957, 961 (Ind. 2001). Generally, a search warrant is a prerequisite to a constitutionally proper search and seizure. *Halsema v. State*, 823 N.E.2d 668, 676 (Ind. 2005) (citing *Perry v. State*, 638 N.E.2d 1236, 1240 (Ind. 1994)). Warrantless searches are per se unreasonable subject to a few well-delineated exceptions. *Frensemeier v. State*, 849 N.E.2d 157, 161 (Ind. Ct. App. 2006). One such exception is the automobile exception to the warrant requirement. *Carroll v. United States*, 267 U.S. 132, 149 (1925). “A vehicle that is temporarily in police control or otherwise confined is generally considered to be readily mobile and subject to the automobile exception to the warrant requirement if probable cause is present.” *Myers v. State*, 839 N.E.2d 1146, 1152 (Ind. 2005).

The admission of evidence is within the sound discretion of the trial court. *Amos v. State*, 896 N.E.2d 1163, 1167 (Ind. Ct. App. 2008). The trial court’s decision will not be disturbed absent an abuse of discretion. *Id.* An abuse of discretion occurs if the trial court’s decision is against the logic and effect of the facts and circumstances before the court. *Id.* Even if the trial court’s decision was an abuse of discretion, we will not reverse if the admission constituted harmless error. *Micheau v. State*, 893 N.E.2d 1053, 1059 (Ind. Ct. App. 2008) (citing *Fox v. State*, 717 N.E.2d 957, 966 (Ind. Ct. App. 1999)).

Police officers need not obtain a search warrant before searching a vehicle they have probable cause to believe contains illegal drugs. *Maryland v. Dyson*, 527 U.S. 465, 466-67 (1999). In cases where there is probable cause to search a vehicle, a search is not

unreasonable if it is based on facts that would justify the issuance of a warrant, even though a warrant has not been actually obtained. *Id.* at 467. (quoting *United States v. Ross*, 456 U.S 798, 809 (1982)).

Here, a narcotics detection dog conducted a canine sniff of the exterior of Borders's vehicle and alerted to the presence of contraband. A canine sweep of the exterior of a vehicle does not intrude upon a Fourth Amendment privacy interest. *Illinois v. Caballes*, 543 U.S. 405, 410 (2005). Probable cause, therefore, is not a prerequisite to the use of the narcotics detection dog. *Myers*, 839 N.E.2d at 1150. The narcotics detection dog's alert on the exterior of Borders's vehicle to the presence of contraband supplied the probable cause necessary for further police investigation of the contents of Borders's vehicle. Accordingly, the warrantless search of Borders's vehicle did not contravene the Fourth Amendment. The trial court did not abuse its discretion when it found the evidence admissible under the Fourth Amendment.

III. Sentencing

Finally, Borders contends that the trial court erred in identifying aggravating factors supporting his sentence and that his sentence is inappropriate. Sentencing decisions are within the sound discretion of the trial court and are reviewed on appeal only for an abuse of that discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007) (citing *Smallwood v. State*, 773 N.E.2d 259, 263 (Ind. 2003)), *clarified on reh'g*, 875 N.E.2d 218 (2007). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances and the reasonable inferences drawn therefrom. *Id.* We can only review the presence or absence of reasons justifying a

sentence for an abuse of discretion, but we cannot review the relative weight given to these reasons. *Id.* at 491.

The trial court sentenced Borders to an aggregate of forty-five years of imprisonment, finding his past criminal history and drug abuse were aggravating factors. Borders argues that the trial court abused its discretion when it used his criminal history as an aggravating circumstance. It is proper for a trial court to consider a defendant's prior criminal history as an aggravating factor. *Prickett v. State*, 856 N.E.2d 1203, 1208-09 (Ind. 2006). To the extent that Borders argues that the circumstances leading to the present convictions, specifically the shooting of his father, should mitigate against his criminal history, he is asking us to review the weight to be given to this aggravator—a matter that we cannot review. *Anglemyer*, 868 N.E.2d at 490. Therefore, the trial court did not abuse its discretion in finding Borders's criminal history as an aggravating circumstance.

Borders also contends that his sentence is inappropriate under Indiana Appellate Rule 7(b). Appellate courts may revise a sentence after careful review of the trial court's decision if they conclude that the sentence is inappropriate based on the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). Without regard to whether the nature of the crime was remarkable, Borders's extensive criminal history and his failure to be rehabilitated show that this sentence was not inappropriate in light of the character of the offender.

Affirmed.

CRONE, J., and BRADFORD, J., concur.