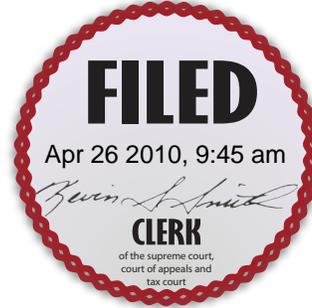


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JOSHUA BRAZZEL,)
)
Appellant-Defendant,)
)
vs.) No. 47A04-0907-CR-426
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE LAWRENCE SUPERIOR COURT
The Honorable William G. Sleva, Judge
Cause No. 47D02-0801-FA-96

April 26, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Josh Brazzel appeals his conviction of Dealing in Methamphetamine,¹ a class A felony, Dealing in Marijuana,² a class C felony, and Receiving Stolen Property,³ a class D felony, and the sentence imposed thereon. Brazzel presents the following consolidated and restated issues for review:

1. Was there probable cause to issue a search warrant for Brazzel's home and storage unit?
2. Did the officers who executed the search warrant exceed the scope of the warrant during the search of Brazzel's property?
3. Did the trial court abuse its discretion by denying Brazzel's motion for involuntary dismissal of a charge of receiving stolen property?
4. Did the trial court abuse its discretion in instructing the jury that intent to deliver may be inferred from the amount of drugs discovered?
5. Did the trial court err in sentencing Brazzel?

We affirm in part and remand.

The facts favorable to the convictions are that early in the morning on January 31, 2008, law enforcement officers from the Lawrence County Sheriff Department (the Sheriff Department) and the Bedford Police Department executed search warrants on Brazzel's home and a storage unit he rented at KTK Enterprises Storage Lockers (KTK).⁴ The initial entry was made by officers from the Lawrence County Emergency Response Team and Bedford Emergency Services Unit using stun grenades. After gaining entry, the officers discovered

¹ Ind. Code Ann. § 35-48-4-1.1(b)(1) (West, Westlaw through 2009 1st Special Sess.).

² I.C. § 35-48-4-11 (West, Westlaw through 2009 1st Special Sess.).

³ Ind. Code Ann. § 35-43-4-2(b) (West, Westlaw through 2009 1st Special Sess.).

⁴ We will set out a more detailed recitation of the facts relevant to the issuance of the search warrant in our discussion of Issue 1 below.

Brazzel sitting on a couch in the living room, while his girlfriend, Alisha Cooper, and her three young children were found in the master bedroom. Deputy Aaron Shoults read the search warrant and searched the master bedroom, master bath, and master closet area. Sergeant Dave Flynn, a canine officer, and his dog, Osco,⁵ assisted Deputy Shoults in searching the bedroom.

Osco indicated on a gun safe located inside the master bedroom. The safe was seized and taken to the Sheriff Department. Osco also indicated on a duffel bag on the floor of the master closet. Inside the bag, officers discovered what was later determined to be nine bags of marijuana weighing a total of 4318.6 grams. Sergeant Flynn took Osco to the kitchen to assist in the search there. Once there, Osco indicated on a drawer containing plastic baggies. One of the baggies contained marijuana residue. Detective Gerald McGee went outside to search the crawl space under the house. The entrance door to the crawl space was locked and when a key could not be found, Detective McGee forcibly pried the door open. As soon as he did so, the detective smelled the scent of marijuana emanating from under the house. Just inside the doorway, Detective McGee discovered a large, lidded, plastic tub and pulled it out. It was later determined that the tub contained two large trash bags filled with marijuana weighing a total of 3394.9 grams.

Sergeant Flynn took Osco to assist Detective Commander Kevin Jones of the Bedford Police Department in searching the vehicles in Brazzel's driveway. Osco indicated on two of

⁵ Apparently, there is some discrepancy as to whether the dog's name is Asko or Osco. Of course, it does not matter which is correct. We choose to use the spelling most often appearing in the transcript.

the vehicles but no drugs were found inside. Detectives Jones and Phil Wigley then searched Brazzel's detached garage. Inside, they discovered a Honda generator with "Miller Pipeline Corp." decals and the Miller Pipeline logo. Detective Wigley had recently participated in an investigation concerning the reported theft of a generator from Miller Pipeline on January 20, 2008. A sticker affixed to the top of generator bore a unique identification number identifying it as the property of Miller Pipeline.

A short time after the search of Brazzel's residence was underway, Sergeant Flynn traveled with Osco to Brazzel's storage unit at KTK. Detective Jones and Captain Herr of the Bedford Police Department arrived with a key retrieved from Brazzel's residence and used it to open unit 40, Brazzel's storage unit. Inside the storage unit, the officers discovered several firearms, including a Millennium handgun, a Bursa .45 caliber handgun, a 30-30 long gun rifle, a .22 rifle with a hard case, a 20-gauge shotgun in a soft case, and two SKS 762mm assault rifles. They also found a shoebox wrapped in Christmas paper that had been torn open. Inside the box were six plastic packages of methamphetamine. Five of the plastic packages each contained four additional plastic packages with methamphetamine inside them; the sixth contained methamphetamine that was not packaged into smaller packages. All told, the weight of the methamphetamine recovered from the shed was 666.6 grams, which Detective Daniel Atchison of the Bedford Police Department described as "the most [methamphetamine] that I have ever seen in my life". *Transcript at 563*

While searching Brazzel's residence, Sergeant James Slone of the Sheriff Department discovered a contract for a second storage facility, this one located at 2178 U.S. 50 East (the

second storage facility). He passed this information along to Deputy Shoults, who obtained a search warrant for that unit. Deputy Shoults also obtained a search warrant to open the safe that had been removed from the closet in Brazzel's bedroom. The safe contained a loaded Taurus .357 handgun in a holster, a Taurus PT22 handgun with pearl grips, a digital scale, several key rings, a partial box of .357 ammunition, a box of Remington 22 long rifle ammunition, a small baggie with three 7.62 military rounds, six boxes of 7.62 x 39, 123-grain ammunition, and another bag containing loose rounds of .22 long rifle ammunition and several .357 rounds, and \$117,825 in cash. A search of the second storage unit revealed two cardboard boxes, each containing a large black plastic trash bag holding a number of smaller bags. One of the trash bags contained 24 smaller bags of marijuana weighing a total of 52.5 pounds. The other trash bag contained 19 smaller bags weighing a total of 38.5 pounds.

Brazzel ultimately was charged with dealing in methamphetamine, a class A felony; dealing in marijuana, a class C felony; and receiving stolen property, a class D felony. He was convicted as charged following a jury trial. Our review of the materials⁶ submitted in

⁶ Indiana Appellate Rule 50(C) provides: "A table of contents shall be prepared for every Appendix. The table of contents shall specifically identify each item contained in the Appendix, including the item's date." Volume 1 of *Amended Appellant's Appendix* is 250 pages long and contains numerous motions, orders, notices – and more. The table of contents for this volume reflects but a single entry: "CLERK'S RECORD ... 1-250". This does not comply with the requirements set out in App. R. 50(C), either in letter or spirit. In future appellate endeavors, when creating a table of contents, counsel is instructed to provide the appropriate specific references to each individual item included in each volume of the appendix. This means that the numerous individual items that comprise the clerk's record should have been listed separately in the table of contents.

We note also that the page numbers for the appendices are located at the bottom of the pages and obviously were applied via a mechanical process that resulted in the numbers gradually migrating off of the bottom of the pages, disappearing altogether for many pages at a time. The result is that the number on many pages is difficult to read and on others is not present at all. Needless to say, this hinders the review process. We encourage counsel in future appellate endeavors to review the appendices before submitting them to ascertain that they are free of such defects and otherwise comply with the applicable appellate rules.

conjunction with this appeal reveals that he was given the maximum fifty-year sentence for the class A felony conviction, but the court imposed no sentence upon the remaining two convictions.

1.

Brazzel contends there was insufficient probable cause to support the issuance of a search warrant for his home and storage unit.⁷ This claim is based upon the contention that the search warrants were based upon unreliable information provided by confidential informants.

Probable cause to issue a search warrant exists where the facts and circumstances would lead a reasonably prudent person to conclude that a search of those premises will uncover evidence of a crime. *State v. Foy*, 862 N.E.2d 1219 (Ind. Ct. App. 2007), *trans. denied*. Upon review of a probable cause determination, a reviewing court's duty is to ensure that the magistrate had a substantial basis for concluding that probable cause existed. *Id.* In determining whether a substantial basis existed, the reviewing court, giving deference to the magistrate's determination, considers whether reasonable inferences drawn from the totality of the evidence support the determination of probable cause. *Id.* “[U]ncorroborated hearsay from a source whose credibility is itself unknown, standing alone, cannot support a finding of probable cause to issue a search warrant.” *Jagers v. State*, 687 N.E.2d 180, 182 (Ind. 1997).

⁷ Brazzel presents several issues pertaining to the validity of the search warrants. In so doing, he invokes both article 1, section 11 of the Indiana Constitution and the Fourth Amendment of the United States Constitution. We note, however, that Brazzel's analysis of each issue is general in nature, with no attempt made to present a discreet analysis under article 1, section 11. *See Litchfield v. State*, 824 N.E.2d 356 (Ind. 2005). Therefore, we analyze Brazzel's claims under the Fourth Amendment.

For the purpose of establishing probable cause, the trustworthiness of hearsay can be established in several ways, including where (1) the informant has given correct information in the past; (2) independent police investigation corroborates the informant's statements; (3) some basis for the informant's knowledge is demonstrated; or (4) the informant predicts conduct or activity by the suspect that is not ordinarily easily predicted. *State v. Foy*, 862 N.E.2d 1219.

At this point, we will consider the facts leading to the issuance of the search warrant. Deputy Andrew Phillips was the drug investigation officer for the Sheriff Department when, in the fall of 2007, Detective Phil Wigley obtained information that Brazzel was engaged in drug trafficking. The information was provided to Detective Wigley from Eric Hackney, a confidential informant. Hackney had served as a confidential informant for Detective Wigley before he provided the information about Brazzel and his prior work had resulted in arrests and convictions. Detective Wigley regarded Hackney as a reliable source of information and therefore passed along to Deputy Phillips the information provided by Hackney. Deputy Phillips began an investigation of Brazzel's drug activities and was assisted by Deputies Flynn and Branham.

On January 1, 2008, Deputy Shoults took over Deputy Phillips's position as drug investigation officer. He was briefed by the deputies who had been investigating Brazzel about the status of the investigation. They told Deputy Shoults that based in part upon personal knowledge gained as a result of their investigation and in part upon information from confidential informants, Brazzel was dealing drugs from his house and using an offsite

storage facility in his trafficking operation. Although Deputy Shoults could not independently vouch for the reliability of the informants used by the other deputies, he regarded the other deputies who provided information as reliable sources. Nonetheless, at that point, Deputy Shoults took no action.

Late in the evening on January 25, 2008, Deputy Shoults was informed that three individuals had arrived at the “Lawrence County Police Department” and wanted to speak to him. *Amended Appellant’s Supplemental Appendix*, Volume 2 at 69. One was an eight-year-old boy, who was Cooper’s son, the others were the boy’s father and an unidentified woman. They told Deputy Shoults they had been inside Brazzel’s home that afternoon sometime between 4:00 p.m. and 5:00 p.m. The boy told Deputy Shoults he had seen a brick of “weed” in Brazzel’s kitchen and that he had seen a couple of baggies of white powder, which he referred to as “something he called an eight ball”. *Id.* at 73. The boy had observed two individuals come to the house and purchase a quantity of marijuana and some of the white powder. The boy reported that he saw Brazzel weigh the marijuana on a digital scale. He indicated that the two men then left in a silver van. He also told Deputy Shoults that he had seen a gun in Brazzel’s vehicle a couple of months earlier. The woman told Deputy Shoults that Brazzel was known to keep a handgun in his vehicle when he was traveling and that he took it inside when he went into his house. She told the deputy she had seen a handgun in Brazzel’s Dodge Durango that evening and that she had seen a brick of marijuana in a silver Cavalier-type vehicle on the property.

Deputy Shoults had learned from the officers working on Brazzel’s case before he

arrived that Brazzel had a storage unit at KTK in Mitchell, Indiana. He had been informed when he was briefed about Brazzel's case that the deputies' confidential informants reported that at times Brazzel would leave the house in his vehicle for fifteen or twenty minutes and then return with drugs. The boy confirmed this when he informed Deputy Shoults he had been to a storage unit at KTK with Brazzel. Although the boy could not tell Deputy Shoults Brazzel's unit number at KTK, he was able to describe its location, i.e., that it was the unit with the house and pool in front of it. Deputy Shoults contacted KTK's owner and confirmed that Brazzel rented unit number 40.

We conclude that these facts were sufficient to confirm the reliability of the hearsay statements used to establish probable cause to issue the search warrants. Deputy Shoults initially received his information about Brazzel from Detective Wigley, who informed Deputy Shoults that he (Wigley) had worked with confidential informant Hackney on previous occasions and he had provided accurate information that led to arrests. The subsequent investigation led by Deputy Phillips corroborated Hackney's information. These facts, in turn, were passed along to Deputy Shoults when he took over the investigation. Taken together, the reliability of the information provided by Deputy Phillips and the other officers to Deputy Shoults when he assumed leadership was sufficiently trustworthy. *See State v. Foy*, 862 N.E.2d 1219. The information provided by the boy, his father, and the woman on the evening of January 25, 2008 corroborated everything that had thus far been relayed to Deputy Shoults. It also corroborated the facts that Brazzel possessed large quantities of drugs, sold drugs from his home, and kept drugs in the KTK unit. There was

sufficient probable cause to support the warrants.

We note finally on this topic Brazzel's argument that the information provided in obtaining the warrant was stale by the time the warrant was served. The three witnesses spoke with Deputy Shoults late on Friday evening on January 25, 2008. Deputy Shoults telephoned KTK's owner on Monday, January 28, 2008, to determine the number of the storage unit that Brazzel was renting. The owner was able to confirm that Brazzel was renting a unit, but was in a car when they spoke and thus could not tell Deputy Shoults the unit number at that time. The owner called Deputy Shoults later that evening and informed him that Brazzel was renting unit 40. A probable cause hearing was conducted the following day, January 29, and the warrants were executed two days later, on January 31. Therefore, five or six days lapsed between the time Detective Shoults received information from the witnesses on January 25 and the time the warrant was served. Was the information stale by that time?

Our court has set forth the following analysis for determining whether the information supporting a warrant was stale by the time the warrant was served:

"It is a fundamental principle of search and seizure law that the information given to the magistrate or judge in the application for a search warrant must be timely." *Breitweiser v. State*, 704 N.E.2d 496, 499 (Ind. Ct. App. 1999) (citing *Sgro v. United States*, 287 U.S. 206, 53 S.Ct. 138, 77 L.Ed. 260 (1932)). Stale information gives rise to a mere suspicion and not a reasonable belief, especially when the items to be obtained in a search are easily concealed and moved. Although the age of the information supporting an application for a warrant can be a critical factor when determining the existence of probable cause, our courts have not established a bright-line rule regarding the amount of time which may elapse between obtaining the facts upon which the search warrant is based and the issuance of the warrant. Instead, whether the information is tainted by staleness must be determined by the facts and

circumstances of each particular case.

Scott v. State, 883 N.E.2d 147,156-57 (Ind. Ct. App. 2008) (quoting *Frasier v. State*, 794 N.E.2d 449, 457 (Ind. Ct. App. 2003), *trans. denied*) (some internal citations omitted). In *Scott*, the court indicated that the mere passage of a particular amount of time does not render information stale where evidence “indicates an ongoing, rather than transient, operation.” *Id.* at 157. This applies in the instant case. An ongoing police investigation of several months duration indicated that Brazzel had been dealing drugs out of his house. Thus, the information regarding Brazzel’s drug activity that the three individuals provided on January 25 was not stale five or six days later.

Brazzel also contends that the evidence should have been suppressed because the officers did not knock and announce before entering his home to execute the search warrant. Citing Ind. Code Ann. § 35-33-5-7 (West, Westlaw through 2009 1st Special Sess.), which provides that an officer may break and enter in order to execute a search warrant “if he is not admitted following an announcement of his authority and purpose”, Brazzel contends the fruits of the search must be excluded because “[t]here is no evidence in this case that the officers announced their authority and purpose prior to obtaining entry into the Brazzel’s residence.” *Appellant’s Brief* at 34.

It is well settled that the knock-and-announce requirement under the United States Constitution and the Indiana Constitution “need not be adhered to blindly regardless of the particular circumstances confronting the authorities at the time the search is to be conducted.” *Beer v. State*, 885 N.E.2d 33, 43 (Ind. Ct. App. 2008). We must examine the

particular facts of each case to determine whether exigent circumstances exist that would permit deviation from the knock-and-announce requirement. *Willingham v. State*, 794 N.E.2d 1110 (Ind. Ct. App. 2003). *See Richards v. Wisconsin*, 520 U.S. 385, 394 (1997) (“[i]n order to justify a ‘no-knock’ entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence”); *cf. Beer v. State*, 885 N.E.2d 33 (applying this principle in the context of a no-knock warrant).

At the probable cause hearing on the State’s request for search warrants, Detective Shoults explained to the court why he wanted a warrant to search Brazzel’s house for weapons: “Firearms we know from the confidential – one of the confide – actually two of the confidential informants that we talked to on Friday, that [Brazzel] is known to carry a handgun with him in his vehicle, usually beside the seat, when he’s traveling. And he keeps that same firearm in the home when he is at the home.” *Amended Appellant’s Appendix*, Vol. 1 at 31-32. In that same hearing, Shoults described to the court a recent incident in which Brazzel had jumped in his car and “chased [two undercover police officers] down the road to see who they were as they drove by, *id.* at 27, illustrating the deputy’s assertion that Brazzel “is very aware of his surroundings and who is going by and stuff like that[.]” *Id.* at 26. Under these circumstances, knowing that Brazzel was vigilant and customarily armed, we conclude the failure to knock and announce was justified because of the danger presented in giving Brazzel an opportunity to arm himself.

As a final matter concerning the service of the warrant, Brazzel contends that the language of the warrant rendered is a general search warrant. The language in question provides: “Any narcotics, including but not limited to marijuana, cocaine, methamphetamines, scheduled/controlled substances; trace evidence of any of the aforementioned” *Id.* at Volume 1, pp.12, 17. The Fourth Amendment and article 1, section 11 of the Indiana Constitution require a particular description of the articles to be seized. U.S. Const. Amend. IV; Ind. Const. art. 1, § 11. *See Membres v. State*, 889 N.E.2d 265 (Ind. 2008). “[C]ourts have been liberal in drug cases regarding the specificity with which items to be seized must be named in the warrant since the purpose for search warrants in cases involving contraband is not necessarily to seize specified property, but to seize property of a specified character.” *Phillips v. State*, 514 N.E.2d 1073, 1075 (Ind. 1987). This court has affirmed warrants reciting a “quantity of heroin,” “controlled drugs,” and “gaming implements and apparatus”. *See Layman v. State*, 407 N.E.2d at 265.

In the instant case, the warrant authorized law enforcement officials to search for and seize the following: “Any narcotics, including but not limited to marijuana, cocaine, methamphetamine, scheduled/controlled substances; trace evidence of any of the aforementioned narcotics, weighing devices including scales; distribution material including plastic bags and wrap[.]” *Amended Appellant’s Appendix*, Volume 1 at 12. This language is more specific than that approved in *Layman*, i.e., “controlled drugs,” which encompasses not only narcotics, but any scheduled non-narcotic drug. The language utilized in the warrant was sufficiently specific to satisfy the requirements of the Indiana and United States

Constitutions.

We note finally our agreement with the State's assertion that even if the warrant here had authorized a search only for the two substances the boy claimed he saw inside Brazzel's house, i.e., marijuana and cocaine, the officers would have been authorized to seize the methamphetamine as soon as they discovered it because its illegal nature would have been readily apparent. *See Frasier v. State*, 794 N.E.2d 449.

2.

Brazzel contends the officers who executed the search warrant at his house exceeded the scope of the warrant in that they searched his locked crawl space and the interior of a safe found in his closet, which were not mentioned in the original search warrant. Brazzel's entire argument on this *specific* issue is as follows: "There were no warrants issued in this case that allowed the officers to search the crawl space of Brazzel's residence or ... the ... gun safe. Thus, any evidence found within those two locations should be suppressed because ... no exigent circumstances ... existed [when] those searches were conducted." *Appellant's Brief* at 11.

Brazzel's argument with respect to the crawl space assumes that, for purposes of the Fourth Amendment and article 1 § 11 of the Indiana Constitution, the crawl space of a house is not a part of the house. Brazzel offers no legal argument to support this assertion. The argument is waived. *See Davis v. State*, 835 N.E.2d 1102, 1113 (Ind. Ct. App. 2005) ("party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record"), *trans. denied*; *see also* Ind. Appellate Rule

46(A)(8) (requiring contentions in appellant's brief be supported by cogent reasoning and citations to authorities, statutes, and the appendix or parts of the record on appeal).

With respect to the gun safe, the record reflects that the safe was taken, unopened, to the Sheriff Department. Once there, officers removed a plate to discover its serial number and then a warrant to search the safe was sought and obtained. Thus, it is not correct to say that the safe was searched without benefit of a warrant. There is no error here.

3.

At the conclusion of the State's case-in-chief, Brazzel submitted a motion for directed verdict. We note on appeal, however, that Brazzel characterizes this motion as a motion for involuntary dismissal under Trial Rule 41(B) and the State responds accordingly. In point of fact, T.R. 41(B) would not have been the appropriate vehicle to test the sufficiency of the State's case in this context. T.R. 41(B) states, in pertinent part:

After the plaintiff or party with the burden of proof upon an issue, *in an action tried by the court without a jury*, has completed the presentation of his evidence thereon, the opposing party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the weight of the evidence and the law there has been shown no right to relief.

T.R. 41(B) (emphasis supplied). This was a jury trial, thus T.R. 41(B) would not have been applicable. As we indicated, however, it does not appear to us that the motion submitted when both parties rested (not at the conclusion of the presentation of the State's case-in-chief, which would be the proper time for a T.R. 41(B) motion), was a T.R. 41(B) motion. Rather, though not so denominated, it appears to have been a T.R. 50 motion for directed verdict, or judgment on the evidence. We will treat it as such.

The denial of a motion for a directed verdict cannot constitute error if the evidence is sufficient to support a conviction on appeal. *Huber v. State*, 805 N.E.2d 887 (Ind. Ct. App. 2004). Our standard of review for challenges to the sufficiency of evidence is well settled.

When considering a challenge to the sufficiency of evidence to support a conviction, we respect the fact-finder's exclusive province to weigh conflicting evidence and therefore neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the verdict, and "must affirm 'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" *Id.* at 126 (quoting *Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

Gleaves v. State, 859 N.E.2d 766, 769 (Ind. Ct. App. 2007).

In order to prove the offense of receiving stolen property, the State was required to prove that Brazzel 1) knowingly or intentionally; 2) received, retained, or disposed of; 3) the property of another person; 4) that has been the subject of a theft. I.C. § 35-43-4-2(b). Brazzel challenges the sufficiency of the evidence only with respect to the element that Brazzel knew the generator was stolen. Knowledge that property is stolen can be inferred from the surrounding facts; however, it may not be inferred solely from unexplained possession of recently stolen property. *Fortson v. State*, 919 N.E.2d 1136 (Ind. 2010). "[T]he mere unexplained possession of recently stolen property standing alone does not automatically support a conviction for theft. Rather, ... possession and all the surrounding evidence about the possession must be assessed to determine whether any rational juror could find the defendant guilty beyond a reasonable doubt." *Id.* at 1142.

The generator found in Brazzel's possession had a large decal bearing the words

“Miller Pipeline Corp.”, as well as a corporate logo spanning prominently across the top of the generator. *Evidence, Table of Contents* – Vol. II, at State’s Exhibit 47. The generator also had a sticker affixed to it that read:

WARNING

This equipment permanently marked with this number

[Identification number]

MILLER PIPELINE CORPORATION

8850 Crawfordsville Road

Indianapolis, IN 46234

Phone (317) 293-0273

Id. at State’s Exhibit 48. Because the generator was clearly identified as the property of Miller Pipeline, the evidence went beyond showing mere possession. Instead, it included exhibits that support a reasonable inference that Brazzel knew the generator was the property of Miller Pipeline Corporation. Therefore, the trial court did not err in denying Brazzel’s motion for directed verdict.

4.

Brazzel contends the trial court abused its discretion in reading Final Instruction No. 13 to the jury, which stated that intent to deliver maybe be inferred from the amount of drugs discovered. This instruction read as follows:

The law does not require a direct statement of intent by a defendant to prove the intent to commit a particular crime.

Circumstantial evidence showing possession with intent to deliver may

support a conviction. Possessing a large amount of a narcotic substance is circumstantial evidence of intent to deliver. The more narcotics a person possesses, the stronger the inference that he intended to deliver it and not consume it personally.

Intent, being a mental state, can only be established by considering the behavior of the relevant actor, the surrounding circumstances, and the reasonable inferences to be drawn from them.

Amended Appellant's Supplemental Appendix, Volume 2 at 239.⁸

We review a trial court's decision regarding instructing the jury for an abuse of discretion. *Gamble v. State*, 831 N.E.2d 178 (Ind. Ct. App. 2005), *trans. denied*. In reviewing a trial court's decision to give or refuse a tendered instruction, we consider whether the instruction (1) correctly states the law; (2) is supported by evidence in the record; and (3) is covered in substance by other instructions. *Wal-Mart Stores v. Wright*, 774 N.E.2d 891 (Ind. 2002).

Brazzel contends element (2) was not present here, i.e., that there was no evidence that supported giving the instruction. In support of this argument, he attempts to contrast this case with *Davis v. State*, 791 N.E.2d 266 (Ind. Ct. App. 2003), *trans. denied*, the case upon which the instruction in question was "predicated". *Appellant's Brief* at 36. According to Brazzel, "in *Davis*, circumstantial evidence presented was specific to the officer's testimony

⁸ We were required to do much more than glance at the bottom of the page in order to determine the number of the page of the appendix on which this exhibit appears. There is no page number on the relevant page. Therefore, we first noted that appellant's counsel indicates there are 250 pages in this volume and that this instruction appears near the end of this volume. Next, omitting the attorney attestation and certificate of services pages, we thumbed backward in the appendix from 250, counting all the while, until we arrived at this instruction, at what we believe to be page 239. The page nearest the one bearing the instruction that has a legible number (*see* footnote 3, *supra*) on it is page 105. After that, the page numbers disappear completely off of the bottom of the page. We trust we have made our point that failure to adhere to the appellate rules with respect to the contents of the appendix can, and in this case did, impede our review.

as to what was the practice of a typical drug dealer and the way the drugs were packaged in ‘bindles.’” *Id.* at 37. He contends there must be evidence both of the quantity of drugs *and* individual packaging in order to give rise to a reasonable inference of intent to deliver. He maintains: “In the case at bar, there was no specific testimony as to Brazzel’s action with regard to a typical drug dealer and no evidence that the narcotics were packaged for sale.” *Id.* We cannot agree that the principle announced in *Davis* should be limited in application as Brazzel suggests.

Davis held that the intent to sell drugs can be inferred from the fact that the drugs were packaged for sale *and* by possession of an amount that is sufficiently large to indicate the quantity of drugs was more than could be accounted for by personal use. These two conditions need not be present in tandem, but stand independent of each other as indicia of intent to deal. *See Davis v. State*, 791 N.E.2d at 270 (“[d]ue to the amount of cocaine that Davis possessed compared to the amount a drug user would typically use, and the fact that the rocks were individually wrapped, we find that the State presented sufficient evidence to sustain Davis’ conviction for possession of cocaine with intent to deliver”). The trial court did not err in reading Final Instruction No. 13 to the jury.

5.

Brazzel presents several issues related to sentencing. This matter must be remanded to the trial court to rectify the error of inadvertently failing to impose sentence for the convictions of possession of marijuana and receiving stolen property. Nevertheless, anticipating the likelihood that the sentence imposed upon the conviction for dealing

methamphetamine will not be altered upon remand, we address the appropriateness of that sentence.

Brazzel first contends the trial court erred in that it “did not issue a statement that includes reasonably detailed reasons or circumstances for imposing a particular sentence noting that the Trial Court failed to issue any sentence for his convictions for Dealing in Marijuana, a Class “C” Felony or of Receiving Stolen Property, a class “D” Felony[.]” *Appellant’s Brief* at 38. The State concedes that this is correct, i.e., that the trial court failed to enter a sentence for Brazzel’s convictions of dealing marijuana or receiving stolen property. We remand this cause to the trial court with instructions to account for those convictions in Brazzel’s sentence.

Brazzel’s second claim of sentencing error is that the trial court erroneously designated the amount of drugs discovered in his possession as an aggravating circumstance. According to Brazzel, “As the statutes had already contemplated a greater offense related to the quantity of illegal substances possessed, the consideration of the quantity was an inappropriate aggravator at sentencing and thus the Trial Court abused its discretion.” *Id.* at 39.

We have consistently held that it is error for a trial court to use the amount of drugs involved as an aggravating circumstance when, as here, the amount of drugs is a material element of the offense charged. *See, e.g., Donnegan v. State*, 809 N.E.2d 966 (Ind. Ct. App. 2004) (possession of nearly fifty grams of cocaine not a valid aggravator in prosecution for possession of three or more grams of cocaine with intent to deliver), *trans. denied; Smith v.*

State, 780 N.E.2d 1214 (Ind. Ct. App. 2003) (holding that the trial court could not use the fact that the defendant had eighty-five grams of cocaine as an aggravator because he was convicted of dealing three or more grams), *trans. denied*. We do not agree, however, that the trial court cited the amount of drugs as a significant aggravating circumstance. The following includes the trial court's comments on that subject at the sentencing hearing:

COURT: ... In terms of my looking at the offense, I think Benefield gives some support for that. I'm slightly hesitant to put a lot of stress on the offense itself but I think looking at the offense is warranted up to a point. This wasn't five hundred percent over the amount of methamphetamine or a thousand percent over, three grams were needed and this was a hundred and sixty-six grams. That is a phenomenal amount. Again, I'm not stressing that. I do think it bears, it bears mentioning. And the, if I recall, the marijuana is ten pounds or greater and I believe this was a hundred and sixteen - seventeen pounds if I recall correctly.

STATE: Well, it was...

COURT: Am I off?

STATE: It was like a hundred and, between a hundred and ten and a hundred and twenty. You misspoke; the methamphetamine was six hundred and sixty-six.

COURT: Six, sixty-six, I'm sorry. You're right, I, you're right. Six hundred, sixty-six which I think gets me to my fifty-five hundred percent, if I'm wrong the numbers still speak for themselves. So I do believe the Court can look at the nature of the offense. I guess it, it's similar if I can do an analogy, murder is murder, but I believe a court can look at the circumstances of the murder. I also believe then the court can look at the circumstances of the instant offenses in looking at a sentence. But I'm not stressing that, but it's there. I can't lose [sic] sight of it, I don't lose [sic] sight of it.

Transcript of Appeal, Vol. 4 at 819-21. On three separate occasions in the brief remarks addressing the subject, the court reiterated that although it was mindful of the unusually large

amount of drugs found in Brazzel's possession, it was not placing "a lot of stress" on it. *Id.* at 819. Our conclusion that the amount was not considered an aggravating circumstance, much less a significant one, is buttressed by a comment made by the court to the effect that it agreed with the probation department's recommendation with respect to aggravating circumstances, as reflected on the presentence investigation report. The only aggravating circumstance recommended by the probation department was Brazzel's criminal history. We conclude that the trial court did not identify the amount of drugs as an aggravator and therefore the sentence was not tainted by an improper aggravator.

As a final matter, Brazzel contends his sentence is inappropriate in light of the nature of the offense and his character. We have the constitutional authority to revise a sentence if, after considering the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B); *Corbin v. State*, 840 N.E.2d 424 (Ind. Ct. App. 2006). "We recognize, however, the special expertise of the trial courts in making sentencing decisions; thus, we exercise with great restraint our responsibility to review and revise sentences." *Scott v. State*, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006), *trans. denied*. Brazzel bears the burden on appeal of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006).

The record reveals that when Brazzel was fifteen years old, he was adjudicated delinquent for illegal consumption of alcohol, a class C misdemeanor if committed by an adult. Later that same year, he was adjudicated delinquent for another alcohol-related offense, i.e., public intoxication, a class B misdemeanor if committed by an adult. Brazzel

was sixteen years old when he received his first adult conviction by pleading guilty to possession of cocaine, as a class D felony. Approximately one year later, Brazzel pleaded guilty to carrying a handgun without a license, a class C felony. He was placed on probation for that offense and two years later, while still on probation Brazzel was convicted of assisting a criminal, a class A misdemeanor. On January 31, 2008, Brazzel was charged with dealing in methamphetamine. The counts relating to the instant appeal were added on February 27, 2008.

The foregoing reflects that although he was only twenty-three years old at the time he committed the offenses that are the subject of this appeal, he had already been, on several different occasions, adjudged a juvenile delinquent and found guilty of crimes involving alcohol, drugs, and guns. He had been granted the benefit of probation on a previous occasion, but did not take advantage of the grace thus extended to change his life for the better. Instead, it appears he was engaged in a major drug-dealing enterprise, as evidenced by the considerable sum of cash found in his safe and the “phenomenal” amount of drugs found in his possession. We note also that he apparently dealt drugs in the presence of small children, and that there were three small children in the house when the search warrant was served and a large quantity of marijuana was discovered.

In light of Brazzel’s character and the nature of the offenses of which he was convicted, we cannot say the sentence imposed upon his conviction of dealing methamphetamine was inappropriate.

Judgment affirmed in part, and remanded with instructions.

KIRSCH, J., and ROBB, J., concur.