

James A. Dobbs (“Dobbs”) appeals his conviction after a jury trial for dealing in cocaine,¹ a Class A felony. Dobbs presents the following restated issues for our review:

- I. Whether the trial court committed reversible error by admitting into evidence the cocaine found on Dobbs’s person during a warrantless search; and
- II. Whether the trial court erred in sentencing Dobbs.

We affirm.

FACTS AND PROCEDURAL HISTORY

On August 23, 2007, Indiana State Police Trooper James Wells came on duty at the Versailles post where he was briefed by State Police Detective Grant Martin and Trooper Chris Richey about an ongoing drug investigation involving Dobbs. Posing as a drug buyer, Detective Martin provided Dobbs with \$1,100.00 in buy money to obtain one ounce of cocaine. Detective Martin planned to allow Dobbs to purchase the cocaine, then conduct a traffic stop of his vehicle when he returned. Dobbs called Detective Martin to let him know that he had purchased the cocaine, and the two men agreed that Dobbs would deliver the drugs at a designated meeting place. Detective Martin alerted Troopers Wells and Richey about the place and time of the drug delivery.

Trooper Wells and Trooper Richey, who was a canine handler with the Indiana State Police, waited on Interstate 74 for Dobbs’s vehicle to arrive in the area. When the troopers saw Dobbs’s vehicle pass, they observed Rhonda Dobbs driving the vehicle while Dobbs was seated in the passenger seat. The troopers knew that Rhonda’s operator’s license had been

¹See Ind. Code § 35-48-4-1(b).

suspended. The troopers initiated the traffic stop, and separated Dobbs from Rhonda after she stopped the vehicle, with Rhonda standing at the back of the vehicle, and Dobbs remaining seated in the vehicle. Trooper Richey interviewed Rhonda while Trooper Wells interviewed Dobbs. Rhonda told Trooper Richey they were returning from Cincinnati after car shopping. Dobbs claimed that they had been in Cincinnati visiting Rhonda's friends.

Trooper Richey asked Rhonda for consent to search the vehicle, which she refused. Trooper Richey used his canine, Heico, to sniff around the vehicle, and Heico "alerted to the odor of narcotics or drugs coming from the passenger compartment of the vehicle at the driver's side door seam right near the window." *Tr.* at 438. While Heico was sniffing the vehicle, Trooper Richey saw Dobbs, who was still seated in the vehicle, make furtive hand movements. Trooper Wells removed Dobbs from the vehicle, handcuffed him, and patted him down for officer safety. Trooper Richey searched the trunk of the vehicle where he found digital scales, a butane torch, and Chore-Boy brillo pads consistent with the use of crack cocaine. Based on the canine alert, Trooper Wells conducted a second, more thorough search of Dobbs's person. Trooper Wells lifted Dobbs's shirt revealing a piece of plastic visible near Dobbs's waist, which another trooper pulled from Dobbs's pants. The item was a plastic bag containing a white, rock-like substance. Almost contemporaneously with that discovery, Dobbs gave the troopers a metal crack-pipe, stating to the troopers that it was "good dope." *Id.* at 409. The bag was later determined to contain 22.64 grams of cocaine.

The State charged Dobbs with dealing in cocaine, a Class A felony, and possession of cocaine, a Class C felony. Prior to trial, the State dismissed the count charging Dobbs with

possession of cocaine. After a jury trial, Dobbs was found guilty of dealing in cocaine, a Class A felony. The trial court sentenced Dobbs to forty years in the Department of Correction, with five years suspended to probation, and ordered the sentence to be served concurrently with Dobbs's sentence in another matter. Dobbs now appeals.

DISCUSSION AND DECISION

I. Admission of Evidence

Dobbs argues that the cocaine discovered in a bag near the waistband of his pants should not have been admitted into evidence because the search resulting in the discovery of the cocaine was illegal. The trial court denied Dobbs's motion to suppress the evidence, noting that the officers' actions in stopping and searching the vehicle and searching Dobbs's person were reasonable because Heico alerted to the presence of drugs, and the search occurred while Dobbs was being placed under arrest. The evidence was admitted at trial over Dobbs's objection. On appeal, Dobbs claims that the search violated his constitutional right to be free from unreasonable search and seizure both under the Fourth Amendment to the United States Constitution and Article 1, section 11 of the Indiana Constitution.

A trial court has broad discretion in ruling on the admissibility of evidence. *Scott v. State*, 855 N.E.2d 1068, 1071 (Ind. Ct. App. 2006). "Because we are considering the issue after a completed trial, we review the admission of evidence for an abuse of discretion." *Taylor v. State*, 891 N.E.2d 155, 158 (Ind. Ct. App. 2008), *trans. denied, cert. denied* (2009). We will 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 when 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. *Id.*

The Fourth Amendment protects persons from unreasonable search and seizure, 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). When a search or seizure is conducted without a warrant, the State bears the burden of proving that an exception to the warrant requirement existed at the time of the search or seizure. *Id.* Here, the trial court found that the search occurred while Dobbs was being arrested for dealing in cocaine, and after the canine alerted to the presence of narcotics.

“It is well-settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment.” *Klopfenstein v. State*, 439 N.E.2d 1181, 1186 (Ind. Ct. App. 1982) (citing *United States v. Robinson*, 414 U.S. 218, 224, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973)). “The scope of such a search is limited to a search of the person of the arrestee and the area within his immediate control.” *Klopfenstein*, 439 N.E.2d at 1186 (citing *Chimel v. California*, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969)).

Here, the troopers had already decided that they were going to arrest Dobbs, and initiated the traffic stop, in part, for that purpose. Detective Martin arranged to have Dobbs purchase cocaine as part of an ongoing investigation, provided the buy money, agreed to

meet Dobbs in order to obtain the cocaine, and met with other troopers for their assistance in the traffic stop and Dobbs's arrest. Consequently, the search of Dobbs's person arguably was incident to his arrest in the ongoing narcotics investigation.

Furthermore, the search was supported by probable cause. "A brief investigative stop may be justified by reasonable suspicion that the person detained is involved in criminal activity." *Finger v. State*, 799 N.E.2d 528, 532 (Ind. 2003) (citing *Terry v. Ohio*, 392 U.S. 1, 31, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). Reasonable suspicion is determined on a case-by-case basis by looking at the totality of the circumstances. *Castner v. State*, 840 N.E.2d 362, 366 (Ind. Ct. App. 2006). "When making a reasonable suspicion determination, reviewing courts examine the 'totality of the circumstances' of the case to see whether the detaining officer had a 'particularized and objective basis' for suspecting legal wrongdoing." *State v. Atkins*, 834 N.E.2d 1028, 1032 (Ind. Ct. App. 2005) (citing *United States v. Arvizu*, 534 U.S. 266, 273, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002)). We review the trial court's ultimate determination regarding reasonable suspicion de novo. *Id.* at 1032.

Here, the troopers properly stopped the vehicle that was being operated by Rhonda, whose operator's license had been suspended. The troopers were justified in using Heico for a canine sniff of the vehicle. Conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner. *Illinois v. Caballes*, 543 U.S. 405, 408 125 S. Ct. 834, 837-38, 160 L. Ed. 2d 842, 846, 848 (2005). A canine sweep of the exterior of a vehicle does not intrude upon a Fourth Amendment privacy interest. *Myers v. State*, 839 N.E.2d 1146, 1149-50 (Ind. 2005).

Moreover, probable cause is not a prerequisite to using the canine sniff investigative technique. *Id.* at 1150. Here, however, Heico's positive reaction to the exterior of the vehicle in which Dobbs remained, coupled with Dobbs's furtive movements, produced independent probable cause for the troopers to further search Dobbs's person. *See id.* (positive reaction of dog, defendant's dilated pupils, extreme nervous behavior, and heavy scent of cologne is probable cause for further search of interior of vehicle). The search resulted in the discovery of the cocaine, which was properly admitted at trial.

“While almost identical to the wording in the search and seizure clause of the federal constitution, Indiana's search and seizure clause is independently interpreted and applied.” *Baniaga v. State*, 891 N.E.2d 615, 618 (Ind. Ct. App. 2008). Under the Indiana Constitution, the legality of a governmental search turns on an evaluation of the reasonableness of the police conduct under the totality of the circumstances. *Litchfield v. State*, 824 N.E.2d 356, 359 (Ind. 2005). Although other relevant considerations under the circumstances may exist, our Supreme Court has determined that the reasonableness of a search or seizure turns on a balance of: 1) the degree of concern, suspicion, or knowledge that a violation has occurred; 2) the degree of intrusion the method of the search or seizure imposes on the citizens' ordinary activities; and 3) the extent of law enforcement needs. *Baniaga*, 891 N.E.2d at 618. The burden is on the State to show that under the totality of the circumstances, the intrusion was reasonable. *Id.*

Here, Dobbs argues that the search of his person was unreasonable because the cocaine was found in the waistband of his pants, “presumably in an area of heightened

privacy.” *Appellant’s Br.* at 16. However, a panel of this court has found that Article 1, section 11 of the Indiana Constitution was not violated where officers, who had a high degree of suspicion and concern that the defendant was in possession of cocaine with the intent to sell it, searched that defendant’s person by first shaking the defendant’s clothing, and then pulling out the waistband of his pants, where they observed a yellow napkin, in which 41.25 grams of cocaine was wrapped, protruding from the defendant’s buttocks. *See Hendricks v. State*, 897 N.E.2d 1208, 1213-14. This court held that the degree of intrusion was moderate, but when the totality of the circumstances was considered, the need for law enforcement to prevent cocaine from potentially making its way into jail, and the reasonableness of the search, weighed in favor of finding no violation of Article 1, section 11 of the Indiana Constitution. *Id.*

We find the same to be true here. In the present case, the intrusion was less than that in *Hendricks*, the troopers’ suspicion and concern that Dobbs was in possession of cocaine with the intent to sell it was high, and the search was reasonable. The trial court did not abuse its discretion in admitting the cocaine into evidence.

II. Sentencing

Dobbs was convicted of Class A felony dealing in cocaine. The sentencing range for a Class A felony is a fixed term of between twenty years and fifty years, with the presumptive sentence of thirty years. Ind. Code § 35-50-2-4. The trial court found that: (1) Dobbs’s seven arrests were indicative of a bad character and thus an aggravating factor; (2) Dobbs’s three prior misdemeanor convictions were an aggravating factor, but not worth substantial

weight; (3) Dobbs was without genuine remorse; and (4) while Dobbs was not mentally ill, he did have a personality disorder. Based on these findings, the trial court sentenced Dobbs to forty years in the Department of Correction, with five years suspended to probation.

Dobbs argues that the trial court abused its discretion when sentencing Dobbs by failing to take into consideration reasons supported by the record for a more lenient sentence. More specifically, Dobbs argues that the trial court failed to take into account Dobbs's long history of drug addiction.

Trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (2007). The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Id.* If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id.* Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Id.* An abuse of discretion occurs if 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.*

One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. *Id.* Other examples include entering a sentencing statement that explains reasons for imposing a sentence, including a finding of aggravating and mitigating factors if

any, but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. *Id.* at 490-91. Because the trial court no longer has any obligation to “weigh” aggravating and mitigating factors against each other when imposing a sentence, a trial court cannot now be said to have abused its discretion in failing to “properly weigh” such factors. *Id.* at 491. Once the trial court has entered a sentencing statement, which may or may not include the existence of aggravating and mitigating factors, it may then “impose any sentence that is . . . authorized by statute; and . . . permissible under the Constitution of the State of Indiana.” Ind. Code § 35-38-1-7.1(d).

Dobbs argues that the trial court abused its discretion by failing to take into consideration Dobbs’s history of substance abuse, the evidence of which Dobbs claims is clearly supported by the record. Dobbs advanced the argument that his drug addiction should be entitled to consideration as a mitigating factor.

An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Anglemyer*, 868 N.E.2d at 493. If the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist. *Id.* (quoting *Fugate v. State*, 608 N.E.2d 1370, 1374 (Ind. 1993)). Moreover, the trial court is not obligated to weigh or credit facts proffered as mitigating by the defendant in the way that the defendant suggests they should be weighed or credited. *Abel v. State*, 773 N.E.2d 276, 280 (Ind. 2002).

Furthermore, “[t]he 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) (citing *Corbett v. State*, 764 N.E.2d 622, 631 (Ind. 2002)).

In the present case, the trial court’s oral sentencing statement includes the following observation:

Mr. Dobbs has significantly, or was significantly less than honest in the interview. This indicates arrogant dishonesty or successful history of deceit or nearly delusional belief in his own innocense [sic] of all previous wrongdoing. That pretty much sums up the Court’s impression Mr. Dobb’s [sic] attitude throughout this proceeding as well as in others um, which then calls into question the sincerity of his remorse and the honesty of his letter. The letter says, I can’t remember ever losing total control around two and a half (2 ½) years ago someone gave me cocaine before that I never did know hard drugs I wasn’t perfect but I was functional. The convictions for battery and intimidation occurred in 2000 and 2003 before the two and a half (2 ½) years he claims he was taking cocaine, crack cocaine. . . .Throughout this proceeding, until conviction and time for sentencing, Mr. Dobbs has shown no remorse, no willingness to admit that he has any kind of a problem. . . .After, I will recommend that he receive drug treatment. . . .

Tr. at 635-36. We find that the trial court took into consideration Dobbs’s long-term drug problem, but found that it was not significant or clearly supported by the record as a mitigating factor. Dobbs’s repeated substance abuse instead illustrated a pattern of violation of the law and failure to voluntarily seek treatment. Indeed, a trial court may find drug addiction to be an aggravating circumstance. *Iddings v. State*, 772 N.E.2d 1006, 1018 (Ind. Ct. App. 2002). The trial court did not abuse its discretion by failing to identify Dobbs’s substance abuse as a mitigating circumstance.

Last, Dobbs argues that the sentence is inappropriate in light of the nature of the

offense and the character of the offender. He argues that he is not the worst of the worst offenders and that he should have received a more lenient sentence. Indiana Appellate Rule 7(B) provides that the court 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. Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

Here, assuming without deciding that the nature of Dobbs's crime was not remarkable, Dobbs's character, as shown by his criminal history, renders his slightly enhanced sentence appropriate. Even a limited criminal history can be considered an aggravating factor. *See Pagan v. State*, 809 N.E.2d 915, 928 (Ind. Ct. App. 2004) (single juvenile adjudication and single adult conviction warranted some aggravation). Dobbs's first arrest was in 1994 for battery, but that charge was dismissed. Dobbs was convicted of intimidation in 2000 and convicted of battery in 2001. Dobbs was charged with neglect of a dependent in 2002, which was resolved through a pre-trial diversion program. In 2006, Dobbs was charged with criminal recklessness, which was dismissed the same day he was convicted of criminal mischief. Dobbs was convicted of domestic battery in 2006 as well. We find that Dobbs's slightly enhanced sentence is not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

RILEY, J., and MATHIAS, J., concur.