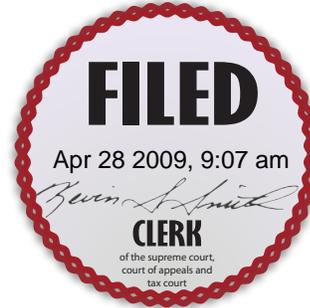


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

R. PATRICK MAGRATH
Alcorn Goering & Sage, LLP
Madison, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

ZACHARY J. STOCK
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

CHAS J. HARPER,)

Appellant-Defendant,)

vs.)

No. 40A01-0808-CR-361

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE JENNINGS CIRCUIT COURT
The Honorable Jon W. Webster, Judge
Cause No. 40C01-0710-FA-243

April 28, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Chas J. Harper appeals his convictions for Dealing in Methamphetamine, as a Class A felony; Dealing in a Narcotic Drug, as a Class B felony; and Receiving Stolen Property, as a Class D felony, and the sentences imposed following a jury trial. Harper presents four issues for review:

1. Whether the evidence is sufficient to support his convictions.
2. Whether the trial court abused its discretion when it admitted evidence of Harper's character.
3. Whether the trial court abused its discretion when it issued a warrant to search Harper's home.
4. Whether the trial court abused its discretion when it sentenced Harper.

We affirm.¹

FACTS AND PROCEDURAL HISTORY

On October 15, 2007, Officer Jason Allen of the North Vernon Police Department arrested Matt Mullins for attempting to steal lithium batteries from Walmart. After his arrest, Mullins told Officer Allen that he did not want to go to jail and that he had seen drugs that afternoon at Harper's home. Mullins then told Officer Allen how to get to the home and what kind of car was parked outside the home, and he drew a general map of the inside of the home.

Based on that information, Officer Allen obtained a warrant to search Harper's home. With other officers, Officer Allen executed the search warrant on October 15. In

¹ We observe that Harper's brief does not contain a copy of the judgment of conviction and sentencing order. Although both are properly included in the appellant's appendix, we remind counsel also to include a copy of the judgment from which the appeal is taken and a sentencing order, if applicable, in the back of the appellant's brief in compliance with Indiana Appellate Rule 46(A)(10).

the search, the officers found Harper's wife, Jennifer, in the bathroom. She said she had just returned from Texas and had not seen Harper since October 11. In the bar of a towel rack within reach of the toilet, the officers found a pen, an empty pen barrel, "aluminum foil with residue[,]"² and a lighter. Transcript at 229.

The back bedroom of the house contained identification cards for Harper. In the same room, officers found a ladies' hand mirror with a white powdery residue that tested positive for methamphetamine and a lockbox or fire safe, about the size of a laptop computer, partially under the bed. The lockbox contained a firearm in a black holster, a bag of "a crystal-like substance," two sandwich bags containing a total of twenty foil bindles, and a camouflage-colored scale. Id. at 232. Field-testing showed that the crystal-like substance contained methamphetamine, and subsequent testing revealed that it had a net weight of 109.9 grams. Testing showed that the foil bindles contained heroin and the net weight of the bags were .18 grams and .43 grams respectively.

In the living room of the home, officers found a monitor below the television. The monitor was connected to a video surveillance camera that was mounted on the outside of the home. On the monitor the officers could see a live transmission from the camera of anyone coming to and going from the home.

On October 22, the State filed an information charging Harper with seven counts. The State later amended that information to charge Harper with dealing in methamphetamine, as a Class A felony; dealing in a narcotic drug (heroin), as a Class B

² The parties do not describe the nature of the residue. But Officer Allen testified that the only drug paraphernalia found in the search consisted of the pen and the foil. Drug "[p]araphernalia is any item that is used to introduce a substance, an elicit or illegal substance, into the human body." Transcript at 258.

felony, possession of heroin, as a Class D felony; possession of methamphetamine, as a Class C felony; and receiving stolen property, as a Class D felony. The amended information also alleged two sentence enhancements: that Harper possessed a handgun while committing the offenses of dealing in a controlled substance and dealing in methamphetamine and that he was an habitual offender.³

At trial, Officer Allen testified that the amount of methamphetamine found in the lockbox was enough for approximately 400 individual uses and was worth over \$10,000. He also testified that the foil bundles of heroin found in that lockbox had a value between \$200 and \$300. Based on the amount of drugs found, Officer Allen testified that the drugs were most likely for sale, not for personal use.

A jury found Harper guilty as charged in the amended information and found Harper to be an habitual offender. The trial court entered judgment of conviction for dealing in methamphetamine, as a Class A felony; dealing in a narcotic drug, as a Class B felony, and receiving stolen property, as a Class D felony.

On July 14, the court sentenced Harper as follows:

The Court, having reviewed the Pre-sentence Investigation Report prepared by the Probation Department, having heard evidence, and having heard the arguments of counsel finds the following aggravating factors: the extremely large quantity of methamphetamine involved in the offense; the Defendant has two (2) formal juvenile delinquency adjudications; four (4) prior felony convictions, three (3) prior misdemeanor convictions and three (3) prior successful revocations of probation; and the Defendant is not gainfully employed[.] The Court finds the following mitigating factors: the Defendant has his GED certificate and incarceration will be a hardship on his dependent child. The Court in weighing the aggravating factors and mitigating factors, finds the aggravating factors outweigh the mitigating

³ The trial court later dismissed the sentence enhancement charging that Harper possessed a firearm while committing the offenses of dealing in a controlled substance and dealing in methamphetamine.

factors and justify the imposition of a sentence in excess of the advisory sentence.

Appellant's App. at 191-92. The court sentenced Harper to forty years for dealing in methamphetamine and fifteen years for dealing in a narcotic drug, to be served concurrently. The court also sentenced him to two years for receiving stolen property, to be served consecutive to the drug charges and enhanced the aggregate sentence by thirty years for being an habitual offender. The total sentence is seventy-two years, with credit for time served. Harper now appeals.

DISCUSSION AND DECISION

Issue One: Sufficiency of Evidence

Harper contends that the evidence is insufficient to support his convictions for dealing in methamphetamine, dealing in a narcotic drug, and receiving stolen property. Specifically, he argues that the State failed to prove that he constructively possessed the methamphetamine, the heroin, or the handgun. We must disagree.

When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences that may be drawn from that evidence to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

To prove that Harper was dealing in methamphetamine, as a Class A felony, the State was required to prove beyond a reasonable doubt that he knowingly or intentionally

possessed, with intent to deliver, methamphetamine in an amount weighing greater than three grams. See Ind. Code § 35-48-4-1.1(a)(2)(C), (b)(1). To prove that he was dealing in a narcotic drug, as a Class B felony, the State was required to show beyond a reasonable doubt that he knowingly or intentionally possessed, with the intent to deliver, heroin. See Ind. Code § 35-48-4-1(a)(2)(c). And to prove that Harper received stolen property, as a Class D felony, the State was required to prove beyond a reasonable doubt that he knowingly or intentionally received, retained, or disposed of a .22-caliber Walther P22 pistol that belonged to Darrin Ginn and had been the subject of a theft. See Ind. Code § 35-43-4-2(b).

Harper had not been home for some time when officers executed the search warrant, and the State does not argue that he actually possessed any of the contraband underlying his convictions. Thus, the convictions hinge on Harper's constructive possession of the drugs and handgun. We have explained the proof necessary to show constructive possession as follows:

In the absence of actual possession of drugs, our court has consistently held that constructive possession may support a conviction for a drug offense. In order to prove constructive possession, the State must show that the defendant has both (1) the intent to maintain dominion and control and (2) the capability to maintain dominion and control over the contraband.

Jones v. State, 807 N.E.2d 58, 65 (Ind. Ct. App. 2003) (internal quotations and citations omitted), trans. denied. Control in this sense concerns the defendant's relation to the place where the substance is found: whether the defendant has the power, by way of legal authority or in a practical sense, to control the place where, or the item in which, the substance is found. Id.

To prove the intent element of constructive possession, the State must demonstrate a defendant's knowledge of the presence of the contraband. See Armour v. State, 762 N.E.2d 208, 216 (Ind. Ct. App. 2002), trans. denied. "This knowledge may be inferred from either the exclusive dominion and control over the premise containing the contraband or, if the control is non-exclusive, evidence of additional circumstances pointing to the defendant's knowledge of the presence of the contraband." Id. (citations omitted). "[A] substance can be possessed jointly by the defendant and another without any showing that the defendant had actual physical control thereof." Id. (citing Godar v. State, 643 N.E.2d 12, 14 (Ind. Ct. App. 1994), trans. denied).

But when possession is non-exclusive, additional circumstances must be present to support the inference that the defendant intended to maintain dominion and control over the contraband and that the defendant had actual knowledge of its presence and illegal character. Macklin v. State, 701 N.E.2d 1247, 1251 (Ind. Ct. App. 1998). Such additional circumstances include, but are not limited to, the following: (1) incriminating statements by the defendant; (2) attempted flight or furtive gestures; (3) location of substances like drugs in settings that suggest manufacturing; (4) proximity of the contraband to the defendant; (5) location of the contraband within the defendant's plain view; and (6) the mingling of the contraband with other items owned by the defendant. Id.

Here, Harper does not deny that the contraband was found in his home. But, because he did not have exclusive possession of the home, he argues that the State failed to establish his constructive possession of the drugs and the handgun. Harper shared the

home with his wife and, previously, their children. Officers found the lockbox in a bedroom that contained men's and women's adult clothing and photo identification cards belonging to Harper. The only other bedroom in the home contained bunk beds and children's items. Such evidence supports the inference that the lockbox was found in Harper's bedroom.

Moreover, the home was monitored by a video surveillance system. A camera was mounted on the outside of the home, and occupants could watch anyone approaching or leaving the home via a monitor in the living room. Harper had been in the home within a week before the warrant was executed, possibly as late as the day before, and his wife had arrived home only two hours before the search warrant was executed. There was no evidence to show that the video surveillance system was newly installed. On such facts, it can reasonably be inferred that Harper knew about the surveillance system. Harper's use of a surveillance system, when combined with the presence of a controlled substance or other contraband, implies knowledge of the existence of the contraband.

In sum, the gun, the heroin, and the methamphetamine were found in the home he shared with his wife. Thus, Harper had the capability to maintain dominion and control over the contraband. See Jones, 807 N.E.2d at 65. Further, the State showed that the lockbox was found in Harper's bedroom and that occupants of the home could monitor everyone who approached or left the front of the home via a video surveillance system. Such evidence supports an inference that Harper knew that the contraband was there and intended to maintain dominion and control over it. See Macklin, 701 N.E.2d at 1251. Harper's emphasis of the fact that he did not have exclusive possession of the home is

merely a request that we reweigh the evidence, which we cannot do. Jones, 783 N.E.2d at 1139. Thus, Harper’s argument that the State failed to prove that he constructively possessed the methamphetamine, the heroin, and the handgun is without merit.

Issue Two: Admission of Evidence

Harper next contends that the trial court abused its discretion when it admitted evidence of past crimes contrary to Indiana Evidence Rule 404(b). Our standard of review of a trial court’s findings as to the admissibility of evidence is an abuse of discretion. Roush v. State, 875 N.E.2d 801, 808 (Ind. Ct. App. 2008). An abuse of discretion occurs if a trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court. Id.

Harper argues that the “State, over the defendant’s objection[,] was allowed to present evidence regarding the underlying reasons for a CHINS proceeding involving Chas Harper’s children, and an implication that Chas Harper has been convicted of battery against a child in a prior case.” Appellant’s Brief at 10. The State counters that Harper did not object to that testimony under Rule 404(b) and, therefore, he has waived the issue for review. Implicitly conceding waiver, Harper contends that the admission of this evidence was fundamental error. In order to qualify as fundamental error, an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible.⁴ Sauerheber v. State, 698 N.E.2d 796, 804 (Ind. 1998) (citation omitted).

⁴ In his brief, Harper states that “[i]f the [S]tate offers the defendant’s character and prior acts as evidence that the defendant is guilty of the crime he is being tried for, then the improper admission of the evidence rises to the level of fundamental error.” Appellant’s Brief at 10. In support, Harper cites Oldham v. State, 779 N.E.2d 1162 (Ind. Ct. App. 2002), trans. denied. But Harper misstates the law. In Oldham, this court held that the admission of character and prior bad acts as evidence of guilt of the current offense “implicates” but does not always equate to fundamental error. Id. at 1173.

Indiana Evidence Rule 404(b) limits the admission of prior bad acts into evidence and reads in relevant part: “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Evidence is excluded under Rule 404(b) only when it is introduced to prove the “forbidden inference” of demonstrating the defendant’s propensity to commit the charged crime. Pavey v. State, 764 N.E.2d 692, 704 (Ind. Ct. App. 2002) (citing Sanders v. State, 724 N.E.2d 1127, 1130-31 (Ind. Ct. App. 2000)), trans. denied.

Here, on direct examination, the State questioned Harper’s wife about the events leading up to the day that law enforcement officers executed the search warrant. Briefly, Harper’s wife testified that, on the day in question, she had just returned from a four-day trip to Texas. On cross-examination, defense counsel questioned Harper’s wife as follows:

Q: Was there something that was of major concern to you on that day, on October 15th as you were flying back?

A: Me and Angel Bennett had had a conversation about why I was upset about my kids and the money situation. I’m getting a lawyer to get my kids back.

Q: Okay let me interrupt you and go back. Your children, what are their names and ages please?

A: There’s Clayton Harper, he’s nine, and there’s Brian Harper, four years old.

Q: Where [sic] was custody of those children given [to] some relatives of yours?

A: They were, [sic] gave custody to my sister-in-law.

Q: Now that was part of a case brought by the DCS, the Division of Child Services, is that right?

A: Yes.

Q: And was the case all the way completed at that time or was it still pending?

A: No, they had given temporary custody to my sister-in-law and then the next thing we know, before we could go to the permanency hearing, the arrest had been made.

Transcript at 370-71. Harper's wife then testified that Angel Bennett had given her the name of someone to help her sell drugs in order to raise the money to hire an attorney for the CHINS proceeding.

On redirect examination, the State then questioned Harper's wife as follows:

Q: What was the reason for this CHINS action or the thing with the kids living in Texas?

[Defense Counsel]: I'm going to object to that. Those are private proceedings and not particularly germane to what we're doing here, not relevant, Your Honor.

THE COURT: Well, they are private proceedings, but it's obvious by now that [Mr. Dickerson, the District Attorney,] is impeaching this witness. Overruled.

Q: Why'd you guys lose the kids?

A: Because of Chas not getting up and getting my son off the bus, on the bus.

Q: Because he didn't, because your kid didn't make the bus?

A: Yes.

Q: Wasn't [sic] any other reasons?

A: Supposedly there was I don't know how to say obligations [sic] that we were fighting.

Q: There were allegations that you were fighting?

A: Yes.

Q: Well, what's that got to do with the kids?

A: I have no idea.

Q: Were there allegations of fighting involving the kids?

A: No. They were fighting with each other.

[Mr. Dickerson]: Judge, I think I may need to approach before I ask this next question.

CONFERENCE AT BENCH – INAUDIBLE.

THE COURT: You may continue with your questions Mr. Dickerson.

Q: Wasn't one allegation involving this CHINS proceeding[,] didn't it have to do with a conviction for battery one [sic] on these kids?

A: We got the kids back on that already, on May.

Transcript at 391-93.

Harper's counsel introduced the CHINS issue on cross-examination, but Harper now complains that the State's redirect examination on that issue exceeded its scope. The scope and extent of re-direct examination is a matter within the trial court's discretion, which will not be disturbed absent an abuse of discretion. Jones v. State, 600 N.E.2d 544, 547 (Ind. 1992) (citing Dooley v. State, 428 N.E.2d 1, 6 (Ind. 1981)). Generally, the scope of re-direct is limited to answering new matters addressed during cross-examination. Id. (citing Kimp v. State, 546 N.E.2d 1193, 1195 (Ind. 1989)). A party, however, is entitled to address an issue on re-direct examination to avoid a false or

misleading impression once the opposing party inquires into a subject on cross-examination. Id. (citing Ratcliffe v. State, 553 N.E.2d 1208, 1211 (Ind. 1990); Kimball v. State, 451 N.E.2d 302, 306 (Ind. 1983)).

Here, in his cross-examination of Harper's wife, defense counsel elicited testimony that introduced the subject of the CHINS proceeding involving Harper's children. The defense counsel was presenting a theory that Harper and his wife were desperate to raise money to hire an attorney to represent them in the CHINS proceeding. In redirect examination, the State was entitled to address that theory. In doing so, the State questioned Harper's wife about the nature of the CHINS proceedings and specifically asked her if one of the allegations in those proceedings was that Harper had been convicted of battery on one of the children. Because Harper's counsel introduced the issue of the unrelated CHINS proceedings, Harper cannot now claim that the admission of testimony elicited by the State on redirect examination regarding the CHINS proceedings constituted error, let alone fundamental error. Brown's contention in this regard must fail.

Issue Three: Search Warrant

Harper next contends that the trial court abused its discretion when it found probable cause to issue a search warrant for his home. Specifically, he argues that the State's failure to timely file the affidavit and search warrant constitutes fundamental error⁵ and, in any event, that the trial court abused its discretion in finding the existence of probable cause to issue a search warrant. We address each contention in turn.

⁵ Harper did not object at trial to the admission of evidence obtained upon execution of the search warrant. As a result, again, Harper is entitled to relief only if he shows that the admission of that

Harper first alleges that the trial court committed fundamental error by admitting evidence obtained upon execution of the search warrant because the warrant was not timely filed. Indiana Code Section 35-33-5-2(a) provides that “no warrant for search or arrest shall be issued until there is filed with the judge an affidavit” in the format prescribed by the statute. Harper alleges irregularities in the date the affidavit was filed. Specifically, he observes that the affidavit was notarized and the warrant was issued on October 15, 2007, but the “Clerk[']s file[]stamp date indicates that the affidavit was filed on October 9, 2007, six full days prior to the date the affidavit and warrant were allegedly drafted.” Appellant’s Brief at 12.

Harper does not provide any citation to the affidavit in the appendix, nor has our review of the appendix disclosed any affidavits with a filestamp date of October 9, 2007. Moreover, Harper does not explain how the alleged irregularities that he describes show that the affidavit was not filed in accordance with Section 35-33-5-2(a). In any event, even if the warrant had not been timely filed under that statute, Harper has not shown, nor can we discern, how such an error was so prejudicial to Harper’s rights that made a fair trial impossible. Thus, Harper has not shown that the trial court committed fundamental error. See Krumm v. State, 793 N.E.2d 1170, 1178 (Ind. Ct. App. 2003) (“The standard for fundamental error is whether the error was so prejudicial to the rights of the defendant that a fair trial was impossible.”).

Harper next contends that the trial court abused its discretion in finding probable cause to support the issuance of a warrant to search Harper’s home. As a result, he

evidence constitutes fundamental error. See Bunting v. State, 854 N.E.2d 921, 925 (Ind. Ct. App. 2006), trans. denied.

argues, the trial court abused its discretion in admitting evidence obtained upon execution of that warrant. But Harper did not object to the admission of that evidence at trial. The admission of evidence obtained in violation of a defendant's constitutional right to be protected against unlawful searches and seizures is not necessarily fundamental error. See Covelli v. State, 579 N.E.2d 466, 471 (Ind. Ct. App. 1991) (citing Swinehart v. State, 268 Ind. 460, 376 N.E.2d 486, 491 (Ind. 1978)), trans. denied. And Harper does not cogently demonstrate how the admission of that evidence made a fair trial for him impossible. Therefore, we will not review Harper's allegation for fundamental error.

Issue Four: Sentence

Harper contends that the trial court abused its discretion when it sentenced him. In particular, he argues that the trial court found an improper aggravator and failed to give weight to mitigators and that his sentence is inappropriate in light of the nature of the offenses and his character. However, "even if the trial court is found to have abused its discretion in the process it used to sentence the defendant, the error is harmless if the sentence imposed was not inappropriate." Mendoza v. State, 869 N.E.2d 546, 556 (Ind. Ct. App. 2007), trans. denied; see also Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007) (holding that in the absence of a proper sentencing order, we may either remand for resentencing or exercise our authority to review the sentence pursuant to Indiana Appellate Rule 7(B)). Accordingly, we need not discuss Harper's contentions that the trial court abused its discretion in sentencing him if we determine that his sentence is not inappropriate.

Indiana Appellate Rule 7(B) provides that this court “may review 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.” Although Rule 7(B) does not require us to be “very deferential” to a trial court’s sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. “Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate.” Id.

The entirety of Harper’s argument under Appellate Rule 7(B) is as follows:

This Court has the authority to revise or set aside a sentence authorized by statute if such sentence is inappropriate in light of the nature of the offense and the character of the offender. Nelson v. State, 792 N.E.2d 588, 596 (Ind. Ct. App. 2003), trans. denied; Ind. Appellate Rule 7(B). When evaluating the appropriateness of a sentence, this Court considers both the executed portion and the suspended portion. Pagan v. State, 809 N.E.2d 915, 916 n.9 (Ind. Ct. App. 2004), trans. denied.

“To enhance a sentence based on the particular individualized circumstances of the offense, there generally should be some indication that the manner in which the crime was committed was particularly egregious, beyond what the legislature contemplated when it prescribed the presumptive sentence for that offense.” Id. at 927 (quoting Jimmerson v. State, 751 N.E.2d 719, 724 (Ind. Ct. App. 2001)). There is no such indication here.

Appellant’s Brief at 15.

Harper sets out the standard for reviewing whether a sentence is inappropriate under Appellate Rule 7(B). But his brief is devoid of an argument supported by cogent reasoning, citations to the authorities, and citations to the record. As such, he has not

only failed to meet his burden of persuasion but has waived this issue for review. See
Ind. Appellate Rule 46(A)(8)(a).

Affirmed.

VAIDIK, J., concurs.

FRIEDLANDER, J., concurs in part and dissents in part with separate opinion.

**IN THE
COURT OF APPEALS OF INDIANA**

CHAS J. HARPER)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 40A01-0808-CR-361
)	
STATE OF INDIANA)	
)	
Appellee-Plaintiff.)	

FRIEDLANDER, Judge, concurring in part, dissenting in part

I agree with the Majority on all issues except for the last. Although Harper's argument concerning his sentence is decidedly threadbare, I believe it is sufficient, although perhaps barely so, to escape waiver.

Harper's criminal history is not insubstantial, but he is held accountable for that criminal record via the thirty-year habitual offender enhancement. Added to the advisory thirty-year sentence for a class A felony, Harper's executed sentence would be sixty years. That, I think, is enough in this case. The quantity of drugs involved is not so great as to cause me to believe otherwise. I would reduce the forty-year sentence for dealing in methamphetamine to thirty years, which is the advisory sentence for a class A felony. In all other matters, I agree with the majority.