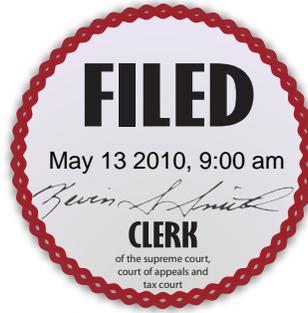


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

MARCUS A. THOMAS,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 49A04-0909-CR-536

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven Eichholtz, Judge
The Honorable Michael S. Jensen, Magistrate
Cause No. 49G20-0805-FA-102218

May 13, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

The trial court convicted Marcus A. Thomas of class A felony dealing cocaine, class B felony unlawful possession of a firearm by a serious violent felon, and class D felony dealing marijuana and imposed an aggregate sentence of fifty-seven years. On appeal, Thomas challenges his conviction for unlawful possession of a firearm by a serious violent felon and his aggregate sentence. We affirm his conviction and remand with instructions to resentence Thomas to fifty-five years.

Issues

We consolidate the issues as follows:

- I. Is the evidence sufficient to sustain Thomas's conviction for unlawful possession of a firearm by a serious violent felon?
- II. Did the trial court properly sentence Thomas?

Facts and Procedural History

On April 4 and April 28, 2008, the Indianapolis Metropolitan Police Department used a confidential informant to conduct two controlled buys of cocaine from Thomas. Police arrested Thomas on April 28, 2008, as he drove away from the second controlled buy. At the police station, Thomas told officers that he sold 1.5 ounces of cocaine per week and revealed his sources. He also indicated that he had drugs and some handguns at his house. After signing a consent to search his house, he accompanied Detective Shawn Winger and Sergeant Scott Brimer to his house. Once there, he showed the officers 73.23 grams of cocaine, 221.74 grams of marijuana, and two handguns. Detective Winger identified the handguns as a .357 caliber Ruger and a .357 caliber Smith and Wesson. Thomas told the

officers that he was the owner of the Ruger and that his girlfriend owned the Smith and Wesson.

On May 7, 2008, the State charged Thomas with three counts of class A felony dealing cocaine, two counts of class A felony cocaine possession, one count of class B felony cocaine possession, one count of class C felony possession of cocaine and a firearm, one count of class D felony marijuana dealing, and one count of class D felony marijuana possession. In addition, because Thomas had a prior class C felony conviction for attempted battery, the State charged him with class B felony unlawful possession of a firearm by a serious violent felon.

Thomas waived his right to a jury trial, and on July 31, 2009, a bench trial ensued. The State dismissed two of the class A felony charges, and the trial court found Thomas guilty of one count of class A felony dealing cocaine, class B felony cocaine possession, class C felony possession of cocaine and a firearm, class B felony unlawful possession of a firearm by a serious violent felon, class D felony dealing marijuana, and class D felony marijuana possession. The trial court entered judgment of conviction on one count of class A felony dealing cocaine, one count of class B felony unlawful possession of a firearm by a serious violent felon, and one count of class D felony dealing marijuana, for which he received consecutive sentences of forty years, fifteen years, and two years respectively. Thomas now appeals his conviction for unlawful possession of a firearm by a serious violent felon and his aggregate fifty-seven-year sentence.

Discussion and Decision

I. Sufficiency of Evidence

Thomas challenges the sufficiency of evidence to sustain his conviction for unlawful possession of a firearm by a serious violent felon. When reviewing a claim of insufficient evidence, we neither reweigh evidence nor judge witness credibility; rather, we look only to the probative evidence and reasonable inferences most favorable to the judgment to determine whether a reasonable trier of fact could conclude that the defendant was guilty beyond a reasonable doubt. *Craig v. State*, 883 N.E.2d 218, 222 (Ind. Ct. App. 2008). We will affirm if substantial evidence of probative value exists to support the judgment. *Id.*

To establish Thomas's guilt, the State was required to prove that as a serious violent felon, he knowingly possessed a firearm. Ind. Code § 35-47-4-5(c). Thomas disputes neither his status as a serious violent felon nor his possession of a handgun.¹ Instead, he disputes the trial court's determination that the handgun he possessed met the statutory definition of a firearm. Indiana Code Section 35-47-1-5 defines "firearm" as any weapon that is "capable of expelling; or ... designed to expel; or ... that may readily be converted to expel; ... a projectile by means of an explosion."

The record indicates that Thomas pointed out two handguns to police during the consensual search of his home. Nevertheless, he asserts that the evidence is insufficient to establish that the handguns were "firearms." Pursuant to statute, a handgun is a firearm. *See*

¹ Thomas stipulated that he met the definition of a serious violent felon based on his prior conviction for class C felony attempted battery. Tr. at 7-8; State's Ex. 1, 3-4.

Ind. Code § 35-47-1-6 (defining handgun as any firearm designed or adapted to be aimed and fired from one hand or any firearm under a certain barrel length or overall length). Essentially, Thomas claims that the State failed to prove that the handguns were real. Because neither of the two handguns was admitted at trial, the evidence supporting Thomas's firearms conviction is based on testimony provided by Detective Wininger and Sergeant Brimer. Detective Wininger testified on direct examination as follows:

Q: There was also—he pointed out at least one handgun?

A: Two handguns, sir.

Q: Okay. Do you remember what those were?

A: They were both 357s. One was a Ruger and one was a Smith and Wesson.

Q: Did Mr. Thomas indicate ownership of either one or both of the firearms?

A: The Ruger.

Tr. at 34-35.

Detective Wininger was a nine-year veteran of the police force, and his testimony was corroborated by Sergeant Brimer, a supervisor with the drug task force. As the trier of fact, the trial court was charged with making common-sense inferences. *Davis v. State*, 796 N.E.2d 798, 806 (Ind. Ct. App. 2003). One such inference was that the officers' training and experience equipped them to identify a real firearm that was capable of expelling, designed to expel, or could readily be converted to expel a projectile by means of an explosion. In this regard, we note that Detective Wininger specifically identified the make and caliber of both firearms. Each weapon was specifically identified as a "357" because that is the caliber of

the projectile it was designed to expel. In sum, Thomas invites us to reweigh evidence and judge witness credibility, which we may not do. As such, we conclude that the evidence is sufficient to support Thomas's conviction for unlawful possession of a firearm by a serious violent felon. *See Manley v. State*, 656 N.E.2d 277, 279 (Ind. Ct. App. 1995) (holding that to convict defendant of carrying handgun without a license State need only prove handgun is *designed* to expel a projectile by explosion, and need not prove handgun is operable).

II. Sentencing

Thomas challenges his fifty-seven-year aggregate sentence. To the extent he challenges it as exceeding the statutory limitations placed on consecutive sentencing, the State properly concedes that the maximum sentence allowable under Indiana Code Section 35-50-1-2 is fifty-five years.² As such, the sentence must be reduced accordingly.

Thomas also challenges the appropriateness of his sentence pursuant to Indiana Appellate Rule 7(B). We “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, [this] Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Ind. Appellate Rule 7(B). Our review focuses on the aggregate sentence rather than on the number of counts, the length of sentence on any individual count, or whether the sentence runs concurrently or consecutively. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). We do not look to see

² The State concedes that the acts constituted a single episode of criminal conduct and involved no “crimes of violence,” and that as such, the maximum allowable sentence is fifty-five years, the advisory sentence for murder. *See* Ind. Code § 35-50-1-2(c) (stating that total of consecutive terms of imprisonment for convictions not involving “crimes of violence” arising out of an episode of criminal conduct shall not exceed advisory sentence for felony one class higher than most serious for which person has been convicted).

whether the defendant's sentence is appropriate or if another sentence might be *more* appropriate; rather, the test is whether the sentence is "inappropriate." *Fonner v. State*, 876 N.E.2d 340, 344 (Ind. Ct. App. 2007). A defendant bears the burden of persuading this Court that his sentence meets the inappropriateness standard. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218; *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

In considering the nature of a defendant's offense, "the advisory sentence is the starting point the Legislature has selected as an appropriate sentence." *Id.* at 494. Here, the trial court convicted Thomas of one count of class A felony dealing cocaine and imposed a forty-year sentence on this conviction. The advisory sentence for such offenses is thirty years. *See* Ind. Code § 35-50-2-4 (setting sentencing range for class A felony at twenty to fifty years, with advisory sentence of thirty years). The trial court convicted Thomas of one count of class B felony unlawful possession of a firearm by a serious violent felon, for which he received a consecutive fifteen-year sentence. *See* Ind. Code § 35-50-2-6(a) (setting sentencing range for class B felony at six to twenty years, with advisory sentence of ten years). Finally, the trial court convicted Thomas of one count of class D felony dealing marijuana, for which he received a consecutive two-year sentence. *See* Ind. Code § 35-50-2-7(a) (setting sentencing range for class D felony at six months to three years, with advisory sentence of one and one-half years).

Here, the search of Thomas's home produced more than seventy-three grams of cocaine and more than 221 grams of marijuana. Indiana Code Section 35-48-4-1(b) elevates

cocaine dealing to a class A felony when the amount weighs at least *three* grams; Indiana Code Section 35-48-4-10(b) elevates marijuana dealing to a class D felony when the amount involved weighs more than *thirty* grams. Thus, Thomas possessed amounts of cocaine and marijuana well in excess of those necessary to convict him of these offenses, which indicates his involvement in a significant dealing operation.

Moreover, Thomas's criminal history and probation failures do not reflect well on his character. His record extends from the time he was a juvenile, with one true finding for an offense that would have been class D felony auto theft if committed by an adult to twelve adult convictions. His adult record includes three prior felony convictions, two of which are cocaine-related. Moreover, prior efforts at leniency have proven unavailing, as Thomas has three probation violations and was on probation when he committed the instant offenses. To the extent he cites his cooperation with police in the search and seizure of the contraband, we note that this was likely more a matter of pragmatism than remorse, given that he was caught in the act of dealing and knew that his prospects for acquittal were slim. As such, we find that Thomas has failed to meet his burden of establishing that his sentence is inappropriate. Except as noted with regard to the statutory cap on consecutive sentencing, we affirm his sentence. We remand with instructions to run his two-year sentence for marijuana dealing concurrent to his remaining sentence, thus reducing his aggregate sentence to fifty-five years.

Affirmed and remanded.

BAKER, C.J., and DARDEN, J., concur.