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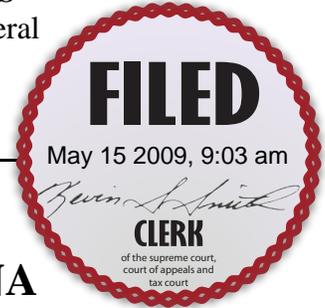
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**IN THE  
COURT OF APPEALS OF INDIANA**

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JAMES A. NELSON,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 26A05-0809-CR-515

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APPEAL FROM THE GIBSON SUPERIOR COURT  
The Honorable Earl G. Penrod, Judge  
Cause No. 26D01-0708-FA-4

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May 15, 2009

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## **Case Summary**

James A. Nelson appeals his convictions and sentence for five counts of methamphetamine-related offenses. We affirm.

## **Issues**

We restate the issues as follows:

- I. Did the trial court abuse its discretion in denying Nelson's motion for expert witness?
- II. Did the trial court commit fundamental error in admitting certain chemical test results?
- III. Is Nelson's eighteen-year aggregate term inappropriate in light of the nature of his offenses and his character?

## **Facts and Procedural History**

In August 2007, the Oakland City Police Department was conducting an investigation of Nelson for possible illegal drug activity. On August 29, 2007, Officer Michael Collins conducted a routine traffic stop of Mike Marvel, who was driving a semi-truck with a nonfunctioning taillight and had a suspended license. Officer Collins recognized Marvel as an associate of Nelson. Officer Collins asked to search the vehicle, and Marvel consented. During the search, Officer Collins found pseudoephedrine pills, glass pipes, and lithium batteries. Marvel informed Officer Collins that he was taking the pseudoephedrine to Nelson in exchange for methamphetamine. Marvel agreed to assist the police by wearing a recording device, making the delivery, and attempting to pinpoint the time Nelson would be manufacturing the methamphetamine. Officer Collins observed Marvel enter and exit

Nelson's home. During the visit, Marvel delivered the pills and learned that Nelson planned to "cook" the methamphetamine the next day. Tr. at 245-46.

At 8:30 a.m. on August 30, 2007, Officer Collins and Conservation Officer Duane Englert began surveilling Nelson's house. During this time, Nelson exited his home and walked the perimeter of the property. He then went inside and came back out with a gas can and tool box. He went inside and emerged again with a laundry basket, which he carried into the barn. He then emerged from the barn with the laundry basket, which now contained a tank and a hose covered by a blanket. He took the basket inside the house and came out with a cup with "frosting" on it.<sup>1</sup>

Officer Englert continued to surveil the property while Officer Collins obtained a search warrant. During this time, Officer Englert observed a man and woman enter Nelson's home. Officer Collins returned, and he, Officer Englert, and other officers executed the search warrant. During the search, Officer Collins observed a piece of burnt aluminum on the coffee table<sup>2</sup> and smelled camp fuel and anhydrous ammonia. He found methamphetamine under the couch where Nelson had been sitting and various jars of flammable solvents around the house. After the officers placed Nelson and his two guests in custody, Nelson showed them hydrochloric acid generators, "pill dough," and a tank containing anhydrous ammonia. *Id.* at 258-59. Police also found acetone and two bags containing a total of 8.26 grams of methamphetamine.

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<sup>1</sup> Frosting indicates the presence of anhydrous ammonia. Tr. at 250-51.

<sup>2</sup> Burnt aluminum indicates that methamphetamine has been smoked. Tr. at 254.

On August 31, 2007, the State charged Nelson with class A felony dealing in methamphetamine, class C felony possession of methamphetamine, class D felony possession of chemical reagents or precursors, class D felony possession of anhydrous ammonia with intent to manufacture, class A misdemeanor illegal storage or transport of anhydrous ammonia, class B felony manufacturing methamphetamine, and class D felony possession of a controlled substance. On May 22, 2008, Nelson filed a motion for an expert witness, which the trial court denied on May 28, 2008. On May 29, 2008, the State dismissed the class A felony dealing in methamphetamine count and the class C felony possession of methamphetamine count, and a jury found Nelson guilty on all remaining counts. On June 19, 2008, the trial court sentenced Nelson to an eighteen-year aggregate term. This appeal ensued. Additional facts will be provided as necessary.

## **Discussion and Decision**

### ***I. Motion for Expert Witness***

Nelson contends that the trial court abused its discretion in denying his motion for an expert witness at public expense. The appointment of an expert witness for an indigent defendant is left to the sound discretion of the trial court. *Booker v. State*, 790 N.E.2d 491, 495 (Ind. Ct. App. 2003), *trans. denied*. A defendant seeking to hire an expert at public expense must first demonstrate that he is indigent. *Id.* Next, he must demonstrate “a need for the expert in open court before public funds will be allotted to him.” *Id.* (citation and internal quotation marks omitted). He “cannot simply make a blanket statement that he needs an expert absent some specific showing of the benefits that the expert would provide.”

*Beauchamp v. State*, 788 N.E.2d 881, 888 (Ind. Ct. App. 2003). Instead, he must “show that the expert’s services are necessary to assure an adequate defense, and he must specify precisely how the requested expert services would benefit him.” *Id.* at 886. The trial court then makes its determination, considering the defendant’s demonstrated need and “the State’s compelling interest in ensuring that public funds are not spent needlessly, wastefully or extravagantly.” *Id.*<sup>3</sup>

Here, Nelson sought an expert witness to examine and verify the authenticity of the audio recording Marvel made in cooperation with the State. He asserts that the authenticity of an audio recording is a matter outside the expertise of a lay person or counsel and therefore requires expert testimony. *See Scott v. State*, 593 N.E.2d 198, 200 (Ind. 1992) (stating that trial court should consider whether the State’s evidence is sufficiently technical that it is commonly the subject of expert testimony). Technicality notwithstanding, the State never introduced the recording into evidence. As such, Nelson was not denied the opportunity to present an adequate defense when the trial court denied his motion to hire an expert witness at public expense. We find no abuse of discretion here.

## ***II. Evidence of Test Results***

Nelson challenges the trial court’s admission of certain chemical test results. We review the trial court’s decision to admit evidence based on a scientific process under an

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<sup>3</sup> To the extent Nelson argues that the trial court’s denial of his motion for funds to hire an expert discriminates against him based on his inability to pay, we note that *Beauchamp* stated, “[t]he requirements uniformly apply and funds are equally available to all individuals who are similarly situated. That is, any indigent defendant who comes before the court seeking public funds to hire an expert witness must satisfy the same requirements.” 788 N.E.2d at 888.

abuse of discretion standard. *West v. State*, 805 N.E.2d 909, 912 (Ind. Ct. App. 2004), *trans. denied*. To preserve error for review, the defendant must make a specific and timely objection to the admission of the evidence. *Tate v. State*, 835 N.E.2d 499, 505 (Ind. Ct. App. 2005), *trans. denied*. Nelson admits that he did not object to the admission of the evidence, but he now claims that it was fundamental error for the trial court to admit such evidence. “Fundamental error is a substantial, blatant violation of basic principles rendering the trial unfair and depriving the defendant of fundamental due process.” *Id.* “To qualify as fundamental error, an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible.” *Id.* (citation and quotation marks omitted). The fundamental error exception is very narrowly applied and, as such, will be available only in cases where the record indicates a blatant due process violation involving the undeniable potential for harm. *Id.*

Here, the State introduced evidence regarding the positive results of a Draeger test—a test performed to establish the presence of anhydrous ammonia. Nelson relies on *West* in asserting that the Draeger test lacks reliability and its results are therefore inadmissible. In *West*, we held that the State failed to establish the reliability of the Draeger test as required by Indiana Evidence Rule 702(b); however, because the State established the presence of anhydrous ammonia through means other than the Draeger test results, we held such error harmless notwithstanding the defendant’s objection. 805 N.E.2d at 913-14.

Here, Nelson made no contemporaneous objection. Moreover, as in *West*, the positive test result was just one of many indications that Nelson possessed anhydrous ammonia.

Officer Collins observed frosting on Nelson’s cup during his surveillance of the home and smelled anhydrous ammonia when he entered the house to execute the warrant. Finally, once Mirandized, Nelson told the officers where to find the anhydrous ammonia and admitted that he had made enough methamphetamine “to put him away for a long time.” Tr. at 257-58. As such, he has failed to establish fundamental error.

### ***III. Sentencing***

Finally, Nelson challenges the appropriateness of his eighteen-year aggregate sentence. At the outset, we note that although Nelson speaks in terms of mitigators and aggravators, his challenge is essentially an inappropriateness challenge pursuant to Indiana Appellate Rule 7(B). Also, to the extent Nelson argues that the trial court improperly assigned weight to his criminal history versus his family support obligation and his desire for rehabilitation, we note that “the relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse.” *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218.

On appeal, 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). A defendant bears the burden of persuading the reviewing court that his sentence meets the inappropriateness standard. *Anglemyer*, 868 N.E.2d at 494.

In addressing “the nature of the offense, the advisory sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed.” *Id.* Nelson

was convicted of five counts of methamphetamine-related offenses. The most serious was class B felony manufacturing methamphetamine. The trial court imposed an eighteen-year sentence on the class B felony count, which is more than the ten-year advisory term but within the statutory range of six to twenty years. Ind. Code § 35-50-2-5. The trial court imposed concurrent sentences on the remaining four counts.<sup>4</sup>

In imposing the enhanced sentence on the class B felony count, the trial court noted the extremely dangerous and volatile nature of the process of manufacturing methamphetamine and that Nelson engaged in this activity despite the fact that his girlfriend and her two-year-old son resided with him at the time. Moreover, Nelson engaged in this activity despite a prior conviction for dealing in the same substance, for which he received the ten-year advisory sentence.

Nelson's repeated and dangerous involvement with methamphetamine reflects poorly on his character. He expresses a desire to be rehabilitated and to support his family. However, his full-scale return to the world of meth demonstrates his lack of regard for his family's safety and his unwillingness to adhere to the law. Despite only one prior conviction, Nelson is a frequent flyer in the system. He has had numerous arrests and ensuing dismissals, some of which occurred pursuant to the plea agreement entered on the dealing conviction and some of which were due to the filing of new charges. Sent. Tr. at 32. As the trial court stated, "[p]art of the motivation of locking someone up is to rehabilitate them, to

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<sup>4</sup> Nelson received eighteen months for each of the three class D felony convictions and twelve months for the class A misdemeanor conviction.

understand the seriousness of their conduct. So that prior incarceration certainly did not have the desired effect as he stands convicted again.” *Id.* at 34-35. Nelson has failed to carry his burden of demonstrating that his eighteen-year aggregate sentence is inappropriate in light of the nature of his offenses and his character. Accordingly, we affirm.

Affirmed.

BRADFORD, J., and BROWN, J., concur.