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ATTORNEY FOR APPELLANT:

SUSAN SCHULTZ
Corydon, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

CONNIE CUMMINGS,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee.

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No. 13A04-0501-CR-43

APPEAL FROM THE CRAWFORD CIRCUIT COURT
The Honorable K. Lynn Lopp, Judge
Cause No. 13C01-0302-FA-002

May 17, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Following a jury trial, Appellant, Connie Cummings, was convicted of Conspiracy to Deal in Methamphetamine, a Class A felony,¹ Possession of Methamphetamine, a Class C felony,² Maintaining a Common Nuisance, a Class D felony,³ and Possession of Chemical Reagents or Precursors with Intent to Manufacture, a Class C felony.⁴ Upon appeal, Cummings presents six issues for our review, which we consolidate and restate as the following four:

- I. Whether the search warrant was supported by probable cause.
- II. Whether the trial court erred in denying Cummings's motion for a directed verdict.
- III. Whether the evidence is sufficient to support the possession of methamphetamine and conspiracy to deal in methamphetamine convictions.
- IV. Whether the convictions for conspiracy and possession of methamphetamine violate double jeopardy principles.

We affirm in part, reverse in part, and remand with instructions.

The facts most favorable to the convictions reveal that on February 18, 2003, Indiana State Police Trooper Mark Green testified at a probable cause hearing and requested the issuance of a search warrant for the residence of Coy and Connie Cummings. At the conclusion of the hearing, the trial court found probable cause and issued a search warrant for the Cummingses' property. Later that same day, Trooper Green and other officers executed the search warrant. After receiving no response to

¹ Ind. Code § 35-41-5-2 (Burns Code Ed. Repl. 2004); Ind. Code § 35-48-4-1 (Burns Code Ed. Repl. 2004).

² Ind. Code § 35-48-4-6(a), (b)(1)(A) (Burns Code Ed. Repl. 2004).

³ Ind. Code § 35-48-4-13(b) (Burns Code Ed. Repl. 2004).

⁴ Ind. Code § 35-48-4-14.5(c)(1) (Burns Code Ed Supp. 2005).

their knocks at the back door to the residence, the officers made entry through the door, which happened to be unlocked.⁵ The officers found Coy asleep on the living room couch and Cummings asleep in the master bedroom. The officers directed Coy and Cummings to have a seat at a table in the kitchen area and then advised them of their Miranda rights and explained that the officers' purpose in the residence was to execute a search warrant. After one of the officers discovered a small amount of marijuana in the master bedroom, the officers placed Coy and Cummings under arrest.

The officers continued with their search of the residence and the premises.⁶ In the master bedroom, the officers located three baggies of suspected methamphetamine, two handguns, burnt marijuana roaches, \$626 in cash, a package of cigarette rolling papers, a billfold which contained a small baggie of suspected methamphetamine and Coy's business card, drug paraphernalia, and a purse which contained a loaded handgun, strips of aluminum foil,⁷ drug paraphernalia, and Cummings's driver's license. In the living room area of the residence, the officers found a plastic bag containing fifty blister packs of pseudoephedrine, additional drug paraphernalia, and four long guns. In the utility room, the officers discovered a Pledge canister with a screw-off bottom which contained twenty-four baggies of suspected methamphetamine.

⁵ The troopers approached and knocked on the back door because it appeared to be the door which was most frequently used.

⁶ The warrant authorized the search of the residence and the premises, including any and all vehicles and outbuildings located thereon. A barn and a shed located on the property were particularly described in the warrant.

⁷ Strips of aluminum foil are commonly used to facilitate the ingestion of methamphetamine.

In a small barn located south of the house, the officers located a locked tool box which was emitting an odor of ether or anhydrous ammonia. Coy stated that he did not know where a key to unlock it could be found. Once the troopers broke open the tool box, they found two thermos jugs containing a chemical substance, which upon testing was confirmed to be anhydrous ammonia. In the back of a truck which was registered to the Cummingses, the troopers found seven cans of starting fluid which had been punched and emptied. In a metal pole barn also located on the property, the officers discovered glassware, a container of "liquid fire," digital scales, aluminum foil, measuring spoons, plastic baggies, coffee filters, and starting fluid.

On February 20, 2003, the State charged Cummings with Count I, dealing in methamphetamine, a Class A felony; Count II, attempted dealing in methamphetamine, a Class A felony; Count III, conspiracy to deal in methamphetamine, a Class A felony; Count IV, possession of methamphetamine, a Class C felony; Count V, illegal possession of anhydrous ammonia or ammonia solution, a Class C felony; Count VI, maintaining a common nuisance, a Class D felony; Count VII, possession of marijuana, a Class A misdemeanor; Count VIII, illegal possession of anhydrous ammonia or ammonia solution, a Class C felony; and Count IX, damaging, removing, covering, or altering identification numbers, a Class C felony.

On May 29, 2003, Cummings moved to suppress the evidence seized as a result of the search of her residence. After a hearing held on September 2, 2003, the trial court denied Cummings's motion to suppress on September 9, 2003. Cummings renewed her

motion at the commencement of the trial and continued to object to the admission of evidence seized pursuant to the search warrant throughout the trial.

Before trial, the State moved to amend several Counts and to dismiss Counts II and IX.⁸ The case proceeded to a jury trial on August 16, 2004 as to Counts I, III, IV, V, VI, VII, and VIII. After the State presented its case-in-chief, Cummings moved for a directed verdict on all counts. The trial court denied the motion except as to Count VII, which the court dismissed. On August 19, 2004, the jury returned guilty verdicts on Counts III, IV, VI, and VIII, a not-guilty verdict on Count V, and hung on Count I. On September 16, 2004, the trial court sentenced Cummings to an aggregate sentence of twenty years with five years suspended.⁹ Cummings filed a motion to correct error on October 14, 2004, which the trial court denied on December 14, 2004, after a hearing on the motion held November 18, 2004. Cummings filed the instant appeal on January 7, 2005.

I

Validity of Search Warrant

Cummings first argues that the search warrant was not supported by probable cause, and thus, the evidence seized pursuant to the warrant should not have been admitted at trial. Our standard of review of rulings on the admissibility of evidence is

⁸ Cummings did not object to amendment of Counts I, and IV through VIII. Count III was not amended.

⁹ Specifically, the trial court sentenced Cummings to twenty years with five years suspended on Count III, four years with one year suspended on Counts IV and VIII, and eighteen months with six months suspended on Count VI, all sentences to run concurrently.

effectively the same whether the challenge is made by a pre-trial motion to suppress or by a trial objection. Burkes v. State, 842 N.E.2d 426, 429 (Ind. Ct. App. 2006). We look for substantial evidence of probative value to support the trial court's decision. Id. We consider the evidence most favorable to the court's decision and any uncontradicted evidence to the contrary. Id. See also Kelley v. State, 825 N.E.2d 420, 426 (Ind. Ct. App. 2005) (when ruling upon the admissibility of evidence at trial, the court should consider evidence from a motion to suppress hearing which is favorable to the defendant and which has not been countered or contradicted by foundational evidence offered at trial).

Both the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution require that a search warrant be supported by probable cause. The requirement that a warrant be supported by probable cause is also codified at Indiana Code § 35-33-5-1 (Burns Code Ed. Supp. 2005). Probable cause is a fluid concept which has no precise definition. Edwards v. State, 832 N.E.2d 1072, 1077 (Ind. Ct. App. 2005). The determination of probable cause is to be made on a fact by fact basis. Id. The task of the issuing magistrate is to make a practical commonsense decision whether given all the circumstances presented to the magistrate, there is a fair probability that contraband or evidence of a crime will be found in a particular place. Id.; Illinois v. Gates, 462 U.S. 213, 238 (1983). When a defendant questions the validity of a search warrant, the task of the reviewing court is to determine whether the magistrate had a substantial basis for concluding that probable cause existed. Edwards, 832 N.E.2d at 1077. In determining whether a substantial basis existed, the reviewing court must focus

on whether reasonable inferences drawn from the totality of the evidence support the determination of probable cause while giving significant deference to the magistrate's decision. Id. Reviewing courts should consider only evidence presented to the magistrate and not post hoc justifications for the search. Id.

Cummings contends that the search warrant was invalid for lack of probable cause because the factual basis consisted of totally unsupported hearsay. Cummings's challenge to the search warrant is based upon Indiana Code § 35-33-5-2 (Burns Code Ed. Supp. 2005); she does not assert any claim under either the Fourth Amendment or Article 1, Section 11.

The Indiana legislature has set forth requirements to ensure that hearsay used to support a probable cause finding is reliable. Lloyd v. State, 677 N.E.2d 71, 73 (Ind. Ct. App. 1997), trans. denied. Indiana Code § 35-33-5-2(b) provides that when based upon hearsay, an affidavit must either:

- “(1) contain reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information furnished; or
- (2) contain information that establishes that the totality of the circumstances corroborates the hearsay.”

In Jaggers v. State, 687 N.E.2d 180, 183 n.3 (Ind. 1997), our Supreme Court noted that Indiana Code § 35-33-5-2 in effect codified changes in Fourth Amendment doctrine on the use of informants to establish probable cause. It has been held that the police, when requesting a search or an arrest warrant, must follow Indiana Code § 35-33-5-2 as it sets forth the minimum information necessary to establish probable cause. Id. See also Esquerdo v. State, 640 N.E.2d 1023, 1029 (Ind. 1994).

Here, the search warrant was issued based upon the sworn testimony of Trooper Green.¹⁰ At the probable cause hearing held on February 18, 2003, Trooper Green testified that while serving a search warrant the previous evening, he received information from Ricky Smitson, the target of that search warrant, about the Cummingses. Trooper Green explained that Smitson was being investigated on a methamphetamine-related charge, and during the course of the investigation, Smitson, after being advised of his constitutional rights, advised Trooper Green that “on Friday evening, between 3:00 and 4:00 p.m. that he had traded several pills to be used in the manufacturing of methamphetamine for actual finished product methamphetamine.” Transcript at 359. Trooper Green further testified that Smitson told him that the exchange occurred at the Cummingses’ residence, located at 1815 South Eckerty Doolittle Road, Eckerty, Crawford County, Indiana. Trooper Green also testified that Smitson had informed him that during the exchange “he observed three glass jars with liquid in them and put coffee filters on top of them.”¹¹ Transcript at 359. Trooper Green testified that he believed Smitson to be a credible witness. In response to questions from the trial court, Trooper Green reaffirmed that Smitson’s statements were made after he had been read his Miranda rights and that they were against his own interest.

¹⁰ Indiana Code § 35-33-5-8 (Burns Code Ed. Repl. 1998) provides that “[a] judge may issue a search or arrest warrant without the affidavit required under [I.C. § 35-33-5-2], if the judge receives sworn testimony of the same facts required for an affidavit” Thus, the requirements for affidavits based upon hearsay also apply in the case where the warrant is issued pursuant to sworn testimony. Jagers, 687 N.E.2d at 183 n.3.

¹¹ It is unclear whether Smitson placed the coffee filters on top of the glass jars himself or if he merely observed that there were coffee filters on top of three glass jars containing the unidentified liquid.

To further support his request for a warrant, Trooper Green testified that he had received information “multiple times” about Coy and that Coy “ha[d] been known to cook methamphetamine.” Transcript at 359. Trooper Green also testified that Cummings “ha[d] also been associated with running precursors for manufacturing of methamphetamine” Transcript at 359. Trooper Green informed the court that his information about Coy and Cummings had been corroborated by multiple sources, but he did not specifically identify any such sources. Based upon Trooper Green’s oral testimony, the trial court found sufficient probable cause to issue the search warrant for the Cummingses’ residence.

We think it clear that Trooper Green’s testimony regarding unsubstantiated reports from unidentified sources that Coy was known to cook methamphetamine and that Cummings was associated with running precursors could not establish the probable cause necessary for issuance of the search warrant. Nevertheless, we conclude that Trooper Green’s testimony regarding the information received from his informant, i.e. Smitson, was sufficient to establish probable cause. Smitson’s basis of knowledge is clear from the record. Smitson admitted to being present at the Cummingses’ residence, to personally trading several pills to be used in the manufacturing of methamphetamine for actual finished product methamphetamine, and that during the exchange, he observed implements for the manufacture of methamphetamine around the residence.

Trooper Green’s testimony also contained information from which it could be concluded that Smitson was a credible source and that the information he provided was reliable. It has been held that declarations against penal interest may furnish sufficient

basis for establishing the credibility of an informant within the meaning of Indiana Code § 35-33-5-2(b)(1). Houser v. State, 678 N.E.2d 95, 100 (Ind. 1997); Iddings v. State, 772 N.E.2d 1006, 1013-14 (Ind. Ct. App. 2002), trans. denied. As confirmed by the trial court at the suppression hearing, Smitson's statements incriminated Smitson, as well as the Cummingses, because they specifically implicated Smitson in a crime, i.e. possession of methamphetamine, and suggested a possible conspiracy between Smitson and the Cummingses for the manufacture of methamphetamine, i.e. trading pills to be used in the manufacture of methamphetamine for the finished product and possibly helping to manufacture it by putting coffee filters on containers of liquid. See Creekmore v. State, 800 N.E.2d 230 (Ind. Ct. App. 2003). But see Newby v. State, 701 N.E.2d 593 (Ind. Ct. App. 1998). From our review of the record, we conclude that there was sufficient evidence before the trial court to establish Smitson's credibility.¹²

Cummings also argues that the warrant was invalid because the information provided by Smitson was too indefinite to provide a basis for probable cause. Specifically, Cummings asserts that because Smitson did not provide the exact date of the exchange, but rather stated only that it occurred on "Friday," the information was stale. "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." Frasier v. State, 794 N.E.2d 449, 457 (Ind. Ct. App. 2003) (quoting Breitweiser v. State, 704 N.E.2d 496, 499 (Ind. Ct. App. 1999)), trans. denied. Stale information gives rise to a mere suspicion and not a reasonable belief, especially when the items to be obtained in a

¹² The trial court judge in this case was also the magistrate who issued the search warrant.

search are easily concealed and moved. Id. 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. Id. Instead, whether the information is tainted by staleness must be determined by the facts and circumstances of each particular case. Id.

We disagree with Cummings that the information provided by Trooper Green at the probable cause hearing was stale. The probable cause hearing was held on Tuesday, February 18, 2003. Trooper Green explained that he acquired his information from Smitson while executing a search warrant the previous evening, which would have been a Monday. During the course of the investigation of Smitson on methamphetamine-related charges, Smitson informed Trooper Green that “on Friday” he had been to the Cummingses’ residence and traded pills to be used in the manufacture of methamphetamine for finished product methamphetamine. While Smitson did not provide an exact date, we think that his statement that the exchange occurred “on Friday,” without further modification, is most commonly understood to be referring to the most recent Friday. Taken in context, it is obvious that Smitson was referring to Friday, February 14, 2003, that is, four days before the probable cause hearing.

Further, the information provided by Smitson, that he traded pills to be used in the manufacture of methamphetamine and that he observed implements for the manufacture of methamphetamine, suggested an ongoing manufacturing setting at the Cummingses’

residence. This evidence concerns criminal activity which is of a continuing or protracted nature. In such cases, the age of the evidence is of less significance. See Breitweiser, 704 N.E.2d at 500. Given the nature and content of the information, and the context in which the statement was made, we conclude that the information provided to the magistrate by Trooper Green for the purpose of obtaining a search warrant was not stale.

II

Directed Verdict

Cummings complains that the trial court erred in denying her motion for a directed verdict, also known as a judgment on the evidence. See Ind. Trial Rule 50. That Rule states in part:

“Judgment on the Evidence—How Raised—Effect. Where all or some of the issues in a case tried before a jury or an advisory jury are not supported by sufficient evidence or a verdict thereon is clearly erroneous as contrary to the evidence because the evidence is insufficient to support it, the court shall withdraw such issues from the jury and enter judgment thereon or shall enter judgment thereon notwithstanding a verdict. . . .” T.R. 50(A).

A motion for judgment on the evidence is also referred to in the caption of the Rule as a “directed verdict.” It may be presented at various stages in the proceedings, including the following: after another party carrying the burden of proof or of going forward with the evidence upon any one or more issues has completed presentation of his evidence thereon; after all the parties have completed presentation of the evidence upon any one or more issues; or after all the evidence in the case has been presented and before judgment. T.R. 50(A)(1)-(3).

In the present case, Cummings moved for a directed verdict at the close of the State's case-in-chief, which the trial court denied after hearing arguments from counsel. Cummings then proceeded with presentation of evidence in her defense. At the conclusion of all of the evidence, Cummings renewed her motion for a directed verdict, which the trial court again denied. It is well settled that a judgment on the evidence is properly granted only where there is a total absence of evidence as to the guilt of the accused or where the evidence is without conflict and susceptible to only one inference and that inference is in favor of the defendant. Lovell v. State, 813 N.E.2d 393, 398 (Ind. Ct. App. 2004), trans. denied.

A. Identification

Cummings argues that the trial court erred in denying her motion for directed verdict because the State failed to present evidence to identify Cummings during the trial. Where the State fails to present any evidence identifying the defendant as the person who committed the offense, the defendant is entitled to a directed verdict. Caudle v. State, 404 N.E.2d 57, 58-59 (Ind. Ct. App. 1980). In Indiana, it is sufficient to identify a defendant at trial by name. O'Brien v. State, 422 N.E.2d 1266, 1271 (Ind. Ct. App. 1981) (citing State v. Schroepfel, 240 Ind. 185, 187, 162 N.E.2d 683, 684 (1959)). Identification may also be established by circumstantial evidence alone if the evidence meets the required burden of proof. Caudle, 404 N.E.2d at 58.

Here, the record does not indicate that any witness for the State pointed to Cummings at trial to identify her as the person who committed the crimes. However, as part of the State's case-in-chief, Trooper Stailey identified "Connie Cummings" by name

and testified that he found her asleep in the master bedroom, brought her into the kitchen, read her and her husband their Miranda rights, and then placed her and her husband under arrest. The majority of the State's evidence focused upon the items and contraband found within and around the residence which was repeatedly identified as belonging to Cummings and her husband. The record also reveals that during the trial Cummings was present in the courtroom with her attorney, and no mention was made of any person other than the defendant bearing that name. See Schroepfel, 240 Ind. at 187, 162 N.E.2d at 684. From the record before us, we conclude that Cummings was sufficiently identified by name, and that the identification is further buttressed by circumstantial evidence and the fact that Cummings was present in the courtroom. The trial court did not err in denying Cummings's motion for directed verdict based upon identification.

B. Venue

Cummings also argues that the State failed to establish venue, and thus, the trial court should have granted her motion for a directed verdict.¹³ Sufficiency-of-the-

¹³ The State argues that Cummings has waived this issue for review because she presented evidence on her own behalf after the trial court denied her motion for a directed verdict. Indeed, there is case law precedent stating that any alleged error in the denial of a motion for a directed verdict is waived if the defendant proceeds to present evidence on his own behalf. See Lowery v. State, 547 N.E.2d 1046, 1051 (Ind. 1989), cert. denied, 498 U.S. 881 (1990); Lacey v. State, 670 N.E.2d 1299, 1304 (Ind. Ct. App. 1996). As noted above, a directed verdict is properly granted only where there is a total absence of evidence as to the guilt of the accused or where the evidence is without conflict and susceptible to only one inference and that inference is in favor of the defendant. Lovell, 813 N.E.2d at 398. Conversely, it would seem to be a truism that where the party with the burden of proof wholly fails to sustain that burden in its case-in-chief, it is error for the trial court to deny a T.R. 50 motion. DeWhitt v. State, 829 N.E.2d 1055, 1063 (Ind. Ct. App. 2005), reh'g denied. It would thus seem to follow that a defendant need not sit silently and risk a jury conviction in such circumstance but should be permitted to present a defense without waiving a valid argument that he was entitled to a judgment on the evidence when he made his motion at the conclusion of the State's case. Id. An erroneous denial of a motion for judgment on the evidence would appear to be just as erroneous at the conclusion of the trial as it was when the motion was overruled. Id. Notwithstanding these procedural difficulties, we choose to address

evidence claims regarding venue are reviewed in the same manner as any other sufficiency claim. Weiss v. State, 735 N.E.2d 1194, 1196 (Ind. Ct. App. 2000), trans. denied. Thus, we will neither reweigh the evidence nor reassess the credibility of witnesses. Id. Rather, we will consider the evidence most favorable to the trial court's determination together with all reasonable inferences to be drawn therefrom. Id. The trial court's determination will be upheld if there is evidence of probative value from which a reasonable trier of fact could conclude that the defendant was tried in the proper venue. Id.

Although the State is required to prove venue, venue is not an element of the offense. Cutter v. State, 725 N.E.2d 401, 408 (Ind. 2000). Accordingly, the State need prove venue only by a preponderance of the evidence, not beyond a reasonable doubt. Id. Circumstantial evidence may be sufficient to establish proper venue. Mullins v. State, 721 N.E.2d 335, 337 (Ind. Ct. App. 1999), trans. denied. The State meets its burden of proving venue if the facts and circumstances permit the trier of fact to infer that the crime occurred in the given county. Id.

During the trial, Trooper Stailey testified that he identified the owners of the property to be searched by obtaining a certified copy of the warranty deed for the subject property from the Crawford County Recorder's Office.¹⁴ The warranty deed, which was admitted into evidence, listed Coy and Connie Cummings as the owners of record for the

Cummings's claims with regard to the trial court's denial of her motion for a directed verdict on the issue of venue.

¹⁴ Indiana Code § 32-21-2-11(b) (Burns Code Ed. Repl. 2002) provides that "[t]he recorder of the county in which the land included in a conveyance or other instrument is situated shall record the deed or other instrument"

property and provided that the described real estate was located in Crawford County. Additionally, the State introduced into evidence the search warrant which identified the property to be searched as being in Crawford County. We conclude that the State presented sufficient evidence from which the trier of fact could conclude by a preponderance of the evidence that the crimes occurred in Crawford County. The trial court did not err in denying Cummings's motion for directed verdict with regard to venue.

III

Sufficiency of Evidence

Cummings argues that the State did not present sufficient evidence to support her convictions for possession of methamphetamine or conspiracy to deal in methamphetamine. When reviewing a challenge to the sufficiency of the evidence, this court will neither reweigh evidence nor judge witness credibility, but instead, considering only the evidence which supports the conviction along with the reasonable inferences to be drawn therefrom, we determine whether there is substantial evidence of probative value from which a reasonable jury could have concluded that the defendant was guilty of the charged crime beyond a reasonable doubt. Kien v. State, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), trans. denied.

A. Possession of Methamphetamine

Cummings argues that the evidence does not establish that she constructively possessed the methamphetamine. A conviction for possession of contraband may rest upon proof of either actual or constructive possession. Tardy v. State, 728 N.E.2d 904,

908 (Ind. Ct. App. 2000). Actual possession of contraband occurs when a person has direct physical control over contraband. Grim v. State, 797 N.E.2d 825, 831 (Ind. Ct. App. 2003). Constructive possession occurs when an individual has “the intent and capability to maintain dominion and control over the [contraband].” Id. (quoting Henderson v. State, 715 N.E.2d 833, 835 (Ind. 1999)).

To establish that the defendant had capability to maintain dominion and control over the contraband, the State must demonstrate that the defendant was able to reduce the contraband to his personal possession. Id. A possessory interest in the premises or area is generally sufficient to show that a defendant had the capability to exercise control over the drugs found therein. Davenport v. State, 464 N.E.2d 1302, 1307 (Ind. 1984), cert. denied, 469 U.S. 1043; Martin v. State, 175 Ind.App. 503, 507, 372 N.E.2d 1194, 1197 (1978). In other words, the law infers that the party in possession of the premises is capable of exercising dominion and control over all items on the premises. Gee v. State, 810 N.E.2d 338, 340-41 (Ind. 2004).

In the present case, Cummings does not dispute that she held a possessory interest in the residence where the contraband was found. Thus, she does not challenge the inference that she had the capability to maintain dominion and control over the methamphetamine in the residence. The gist of Cummings’s argument is that there were no additional circumstances demonstrating that she had knowledge of the methamphetamine or where it was located, i.e. that she had the requisite intent.

Our Supreme Court has repeatedly stated that knowledge of the contraband is a key element in proving that the defendant had the intent to maintain dominion and control

over contraband. Gee, 810 N.E.2d at 341. Knowledge may be inferred from either exclusive dominion and control over the premises 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. Knowledge of contraband may be inferred through a variety of means: (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) mingling of contraband with other items owned by the defendant. Id.

The record demonstrates that Cummings was an admitted methamphetamine user and that she admitted that "we [i.e., she and her husband] had to sell drugs." Transcript at 142. Additionally, several firearms, drug paraphernalia, and precursors for the manufacture of methamphetamine were found in parts of the home and in a barn located on the property, some of which were in plain view. The jury was free to disbelieve Cummings's testimony that her husband maintained a great deal of privacy in his actions and activities in the outbuildings. Considering all of these additional circumstances, the jury could reasonably have concluded that Cummings had knowledge of the presence of methamphetamine in her home and thus had the ability and intent to maintain control. We therefore conclude that there was sufficient evidence to support Cummings's conviction for possession of methamphetamine.

B. Conspiracy to Deal in Methamphetamine

As a preliminary matter, we address Cummings's claim that the information charging her with conspiracy to deal methamphetamine was defective because it failed to allege the requisite intent to commit a crime. In relevant part the State charged Cummings as follows:

“[O]n or about February 18, 2003 in Crawford County, State of Indiana, Connie Cummings conspired with Coy Cummings to commit dealing in a narcotic drug, to-wit: Connie Cummings and Coy Cummings performed an overt act in furtherance of the agreement by possessing 28 grams of methamphetamines, individually packaged in corner baggies with twist ties, containing one gram each of methamphetamines” Appendix at 37.

As Cummings correctly notes, a challenge to a defective charging information must be made within twenty days of the omnibus date and failure to do so results in waiver of the issue upon appeal. Johnson v. State, 749 N.E.2d 1103, 1109 n.2 (Ind. 2001); Townsend v. State, 632 N.E.2d 727, 730 (Ind. 1994); Ind. Code § 35-34-1-4(a) (Burns Code Ed. Repl. 2004). Cummings did not challenge the information prior to trial, nor does she assert upon appeal that there was fundamental error. Cummings's claim is therefore waived.

Turning to the merits of Cummings's sufficiency claim, we note that to convict Cummings of conspiracy to deal methamphetamine the State was required to prove that Cummings: (1) with the intent to commit dealing in methamphetamine; (2) agreed with Coy to commit dealing in methamphetamine; and (3) that an overt act was performed by either Cummings or Coy in furtherance of that agreement. See I.C. § 35-41-5-2. Indiana Code § 35-48-4-1 provides that a person who possesses with the intent to deliver

methamphetamine in an amount in excess of three grams or more commits dealing in methamphetamine as a Class A felony.

Cummings argues that the State failed to prove the overt act alleged to have been committed by Coy and Cummings—“possess[ion] [of] 28 grams of methamphetamine, individually packaged in corner baggies with twist ties, containing 1 gram each of methamphetamines.” App. At 37. At trial, Trooper Stailey testified that twenty-eight baggies containing suspected methamphetamine were found in Cummings’s home: twenty-four baggies in a false container located in the utility room, three baggies on a nightstand in the master bedroom, and one baggie in a card case containing Coy’s business card. The lab technician who tested the substances found that the total estimated weight of twenty-three baggies was 9.05 grams. This total estimate was made after the lab technician found the weight of eight of the twenty-three baggies to be 3.38 grams. Cummings argues that this evidence does not support the overt act alleged in the charging information in that it does not prove that she possessed twenty-eight grams of methamphetamine. Cummings is essentially making a variance argument.

A variance is an essential difference between the pleading and the proof. Tucker v. State, 725 N.E.2d 894, 896 (Ind. Ct. App. 2000), trans. denied. Not all variances between allegations in the charging information and the evidence at trial are fatal. Id. To determine whether a variance between the proof at trial and the charging information is fatal, we consider the following: (1) was the defendant misled by the variance in the evidence from the allegations and specifications in the charge in the preparation and maintenance of her defense, and harmed or prejudiced thereby; and (2) whether the

defendant will be protected in the future criminal proceeding covering the same event, facts, and evidence against double jeopardy. Id.

Here, the charging information fully informed Cummings of the material elements of the charge of conspiracy to deal methamphetamine. Further, Cummings makes no claim that she was misled by the allegations in the charging information or that it impacted the preparation or maintenance of her defense. As we concluded above, the evidence was sufficient to prove that Cummings was in constructive possession of the methamphetamine found in the false container discovered in the utility room. The State presented evidence that the total estimated weight of the methamphetamine found in this container was 9.04 grams, well in excess of the three grams necessary to support a finding of intent to deal in methamphetamine. Cummings has not demonstrated how the variance in this case was material. We therefore find no error and conclude that there was sufficient evidence to prove the overt act of the conspiracy.

Cummings also argues that the evidence is insufficient to establish an agreement between her and Coy. In proving the existence of an agreement, the State is not required to show an express formal agreement. Stokes v. State, 801 N.E.2d 1263, 1273 (Ind. Ct. App. 2004), trans. denied. Proof of the conspiracy may rest entirely upon circumstantial evidence. Id. However, the relationship and mere association with alleged co-conspirators, standing alone, is insufficient to establish a conspiracy. Id.

At trial, the State's evidence showed that Cummings was found asleep in her master bedroom where methamphetamine was hidden about the home and where precursors for the manufacture of methamphetamine were found in outbuildings on the

property. About the house and in Cummings's purse, Troopers discovered several firearms and drug paraphernalia. Most importantly, Cummings admitted that she and her husband "had to sell drugs" to make money to start a business. This statement, in conjunction with the other evidence, is ample evidence from which the jury could have concluded that Cummings agreed with her husband to sell methamphetamine.

IV

Double Jeopardy

Cummings argues that her convictions for conspiracy to deal in methamphetamine and possession of methamphetamine violate Indiana's prohibition against double jeopardy.¹⁵ The State agrees.

In Count III, the State charged Cummings as follows:

"[O]n or about February 18, 2003 in Crawford County, State of Indiana, Connie Cummings conspired with Coy Cummings to commit dealing in a narcotic drug, to-wit: Connie Cummings and Coy Cummings performed an overt act in furtherance of the agreement by possessing 28 grams of methamphetamines, individually packaged in corner baggies with twist ties, containing one gram each of methamphetamines" Appendix at 37.

In Amended Count IV, the State charged Cummings as follows:

"[O]n or about February 18, 2003 in Crawford County, State of Indiana, Connie Cummings, a person who without a valid prescription or order of a practitioner acting in the course of his professional practice, did knowingly or intentionally possess methamphetamine, pure or adulterated and was also in possession of a firearm, to-wit: A Taurus 9 mm semi-automatic handgun, serial #TLG64833D, Lamma 45 caliber, semi-automatic handgun, serial #07041255398, with two loaded magazines, a Smith & Wesson .38 Caliber revolver, serial #J929382, with 5 rounds of ammo, and six other long guns" Appendix at 27.

¹⁵ Cummings does not raise a federal double jeopardy claim.

Article 1, Section 14 of the Indiana Constitution provides, “No person shall be put in jeopardy twice for the same offense.” Our Supreme Court has concluded that this provision “was intended to prevent the State from being able to proceed against a person twice for the same criminal transgression.” Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999). In addition to the traditional notion that double jeopardy bars subsequent prosecution, our Supreme Court has construed Indiana’s Double Jeopardy Clause as also prohibiting multiple punishments. Id.

Under Indiana’s double jeopardy analysis, two or more offenses are the “same offense” in violation of Article 1, Section 14 of the Indiana Constitution, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. Alexander v. State, 768 N.E.2d 971, 973 (Ind. Ct. App. 2002), clarified upon reh’g 772 N.E.2d 476 (citing Richardson, 717 N.E.2d at 49). In addition to instances covered by the constitutional test, we also adhere to a series of rules of statutory construction and common law which are often described as double jeopardy. As our Supreme Court noted in Guyton v. State, 771 N.E.2d 1141, 1143 (Ind. 2002), one such rule is that conviction and punishment for the crime of conspiracy where the overt act that constitutes an element of the conspiracy charge is the very same act as another crime for which the defendant has been convicted and punished constitutes a double jeopardy violation.

Here, the overt act which supported Count III, conspiracy, is the offense of possession of methamphetamine alleged in Count IV. Inasmuch as the conspiracy

conviction was founded upon the overt act of possession of methamphetamine, for which Cummings was also convicted, such violates Indiana's prohibition against double jeopardy. When we determine that two convictions violate double jeopardy principles, we may eliminate the violation by vacating either conviction. Jenkins v. State, 726 N.E.2d 268, 271 (Ind. 2000). In deciding which conviction to vacate, we consider the penal consequences that the trial court found appropriate. Id. Here, we choose to vacate Cummings's conviction for C felony possession of methamphetamine because it has less severe penal consequences. See id.

In conclusion, the search warrant was supported by probable cause, and thus the evidence seized pursuant to the warrant was admissible. The trial court properly denied Cummings's motion for directed verdict in that Cummings was sufficiently identified and the State presented sufficient evidence to establish proper venue. Sufficient evidence supported Cummings's convictions for possession of methamphetamine and conspiracy to deal in methamphetamine; however, because conviction for both of those offenses offends double jeopardy principles, we reverse the conviction for possession of methamphetamine.

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions to vacate the conviction and sentence for possession of methamphetamine.

KIRSCH, C.J., concurs.

DARDEN, J., dissents with opinion.

**IN THE
COURT OF APPEALS OF INDIANA**

CONNIE CUMMINGS,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 13A04-0501-CR-43
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

DARDEN, Judge, dissenting

I respectfully dissent, finding that the testimony provided by Trooper Green to the trial court was not sufficient to establish the fair probability that contraband or evidence of a crime would be found in the Cummings' home. See Illinois v. Gates, 462 U.S. 213, 238 (1983). The majority has concluded that the information provided by Smitson -- without conducting an independent investigation or without any other evidence adduced to establish Smitson's credibility¹⁶ -- is sufficient to provide a basis for probable cause because Smitson's statements were against his penal interest. I cannot agree.

¹⁶ I do not find Trooper Green's testimony "that he believed Smitson to be a credible witness," slip op. at *8, without any elaboration as to why Trooper Green held this belief, to constitute such evidence. There is no evidence that Trooper Green had used Smitson as a confidential information before.

In Snover v. State, 837 N.E.2d 1042, 1049 (Ind. Ct. App. 2005), we reviewed cases in which we had held that an informant's statement was sufficiently against his penal interest to demonstrate credibility.

An informant was credible when, while informing police that drugs could be found at the defendant's house, he implicated himself in the manufacture of methamphetamine with the defendant at the defendant's house. Iddings v. State, 772 N.E.2d [1006,] 1014 [(Ind. Ct. App. 2002), trans. denied]. An informant had credibility when he implicated himself in conspiracy to commit robbery with the defendant. Houser v. State, 678 N.E.2d [95,] 100 [(Ind. Ct. App. 1997)]. Hearsay was reliable when the informant admitted committing burglary and delivering the stolen goods to the defendant's house. Nash v. State, 433 N.E.2d 807, 810 (Ind. Ct. App. 1982). An informant who possessed drugs provided credible information about his source when he implicated himself in a plan to deliver to someone else the drugs he obtained from the source, making himself guilty of possession with intent to deliver rather than just possession. Creekmore v. State, 800 N.E.2d 230, 235 (Ind. Ct. pp. 2003).

Snover, 837 N.E.2d at 1049. However, we found this indicia of credibility to be lacking in Snover. When the Snover informant was searched incident to his arrest on a warrant, methamphetamine was found. *After* the drugs were found in his possession, the informant "volunteered the information that Snover was his source for the drugs." Id. We observed that "by revealing his alleged dealer," the informant "did not implicate himself in any additional crimes." Id. Therefore, we held, his statement "was not against his penal interest and thus did not demonstrate he was a credible source of information." Id.

The majority first observes that Smitson's statements "implicated Smitson in a crime, i.e. possession of methamphetamine" Slip op. at *10. However, unlike the informant in Snover, Smitson was not found in possession of methamphetamine, and the

record reflects no other evidence that would subject Smitson to liability for possession of methamphetamine. Next, the majority appears to have found Smitson's statements to be similar to those in Iddings, as it finds them to "suggest[] a possible conspiracy between Smitson and the Cummingses for the manufacture of methamphetamine for the finished product and possibly helping to manufacture it by putting coffee filters on containers of liquid." Id. However, in Iddings, the trial court heard testimony that the informant had informed law enforcement that (1) he knew Iddings was involved in the manufacture and sale of methamphetamine at a certain location, *and* that (2) the informant had himself participated in this manufacture of methamphetamine there. 772 N.E.2d at 1013. In my opinion, the inference that Trooper Green's testimony conveyed such an admission of participation by Smitson in methamphetamine manufacturing by the Cummingses is far too tenuous to be the basis of establishing the reasonable probability that evidence of methamphetamine manufacturing would be found in the Cummings' home.

I find that Smitson's statements were more akin to those in Snover than any of those found to constitute a statement "sufficiently against [the informant's] penal interest to demonstrate credibility" for the purpose of establishing probable cause for the issuance of a search warrant. 837 N.E.2d at 1049. Accordingly, I would find that the trial court erred in denying Cummings' motion to suppress the evidence seized pursuant to the warrant.