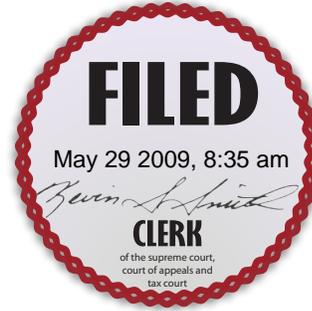


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ARTURO SALINAS GALLARDO,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 20A03-0811-CR-531

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Senior Judge
Cause No. 20C01-0710-FA-45

May 29, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Arturo Salinas Gallardo appeals following his conviction for Dealing in Cocaine as a Class A felony.¹ Specifically, Gallardo asserts that his trial counsel rendered ineffective assistance because he failed to raise an entrapment defense at trial. Gallardo additionally asserts that the trial court abused its discretion in imposing a forty-two-year executed sentence and that his sentence is inappropriate in light of the nature of his offense and his character. We affirm.

FACTS AND PROCEDURAL HISTORY

On June 19, 2007, Elkhart Police Officer Brian Chomer, who was working undercover for the Elkhart Interdiction and Covert Enforcement Unit, was informed by a cooperating source (“C.S.”) that the C.S. could arrange for Officer Chomer to buy cocaine from Gallardo. The C.S. arranged for himself and Officer Chomer to go to Gallardo’s Elkhart home to purchase cocaine.

At approximately 5:00 p.m., Officer Chomer pulled into the alley that was located next to Gallardo’s residence and parked “right next to the front porch.” Tr. p. 34. Gallardo walked out of his residence and conversed with the C.S. Gallardo handed the C.S. a piece of paper on which the name “Carlos” and a phone number were written. The C.S. asked Officer Chomer for his cellular phone, dialed the phone number written on the piece of paper, and handed the phone to Gallardo. After speaking with the man referred to as “Carlos,” Gallardo informed Officer Chomer that he would sell Officer Chomer fourteen grams, or half an ounce, of cocaine for \$375.

¹ Ind. Code § 35-48-4-1(a)(1)(C) & (b)(1) (2006).

Gallardo instructed Officer Chomer and the C.S. to follow him to another location where the sale would be completed. Officer Chomer followed Gallardo's vehicle to a grocery store parking lot and parked "on the passenger side of [Gallardo's] vehicle." Tr. p. 38. After a few minutes, Gallardo, who remained in his vehicle, again asked to use Officer Chomer's phone. Gallardo "called someone again; and then advised [Officer Chomer and the C.S.] that the person he talked to was right around the corner and was on his way." Tr. pp. 38-39.

A few minutes later, Gallardo indicated that the car they were waiting for had arrived. Gallardo approached Officer Chomer, who met him in front of their vehicles, and took \$380 from Officer Chomer. Officer Chomer indicated that he did not need change and that "the extra \$5 could be used to make it right next time." Tr. p. 39. Gallardo then approached the vehicle that had parked a few rows from Officer Chomer's and Gallardo's vehicles. Gallardo "got into the passenger seat" of the other vehicle and engaged in a conversation with the "older Hispanic male" driving the other vehicle. Tr. pp. 41 & 42. After a few moments, Gallardo exited the other vehicle with "a plastic baggy" in his hand. Tr. p. 42. Gallardo returned to Officer Chomer's vehicle and handed him the "plastic baggy" which contained fourteen grams of cocaine. Tr. p. 42.

On October 24, 2007, the State charged Gallardo with Class A felony dealing in cocaine. Gallardo was found guilty of this charge following a jury trial. The trial court sentenced Gallardo to forty-two years of incarceration in the Department of Correction. Gallardo now appeals.

DISCUSSION AND DECISION

I. Ineffective Assistance of Trial Counsel

Gallardo asserts that his trial counsel was ineffective because he failed to investigate and present an entrapment defense at trial. The right to effective counsel is rooted in the Sixth Amendment to the United States Constitution. *Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006). “The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results.” *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 685 (1984)). “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper function of the adversarial process that the trial court cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686.

A successful claim for ineffective assistance of counsel must satisfy two components. *Reed v. State*, 866 N.E.2d 767, 769 (Ind. 2007). First, the petitioner must establish that counsel’s performance was deficient by demonstrating that counsel’s representation “fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the ‘counsel’ guaranteed by the Sixth Amendment.” *Id.* “Second, the petitioner must show that the deficient performance resulted in prejudice. *Id.* A petitioner may show prejudice by demonstrating that there is “a reasonable probability (*i.e.* a probability sufficient to undermine confidence in the outcome) that, but for counsel’s errors, the result of the proceeding would have been different.” *Id.* A petitioner’s failure to satisfy either prong will cause the ineffective assistance of counsel claim to fail. *See Williams v. State*, 706

N.E.2d 149, 154 (Ind. 1999). Therefore, if we can resolve a claim of ineffective assistance of counsel based on lack of prejudice, we need not address the adequacy of counsel's performance. *See Wentz v. State*, 766 N.E.2d 351, 360 (Ind. 2002).

Indiana Code section 35-41-3-9(a) (2006) provides that it is a defense that “(1) the prohibited conduct of the person was the product of a law enforcement officer, or his agent, using persuasion or other means likely to cause the person to engage in the conduct; and (2) the person was not predisposed to commit the offense.” However, “[c]onduct merely affording a person an opportunity to commit the offense does not constitute entrapment.” Indiana Code § 35-41-3-9(b).

Here, although the C.S. initially arranged for Officer Chomer to purchase narcotics from Gallardo, the record establishes that Gallardo exhibited a predisposition to sell narcotics. When Officer Chomer arrived at Gallardo's residence, Gallardo walked out of his residence and conversed with the C.S. The C.S. asked Officer Chomer for his cellular phone, dialed a number which Gallardo had provided to him on a piece of paper, and handed the phone to Gallardo. After speaking with a man referred to as “Carlos,” Gallardo informed Officer Chomer that he would sell Officer Chomer fourteen grams, or half an ounce, of cocaine for \$375. Gallardo instructed Officer Chomer and the C.S. to follow him to another location where the sale would be completed. Officer Chomer followed Gallardo's vehicle to a grocery store parking lot and parked next to Gallardo's vehicle. Gallardo took \$380 from Officer Chomer and approached a vehicle that had parked a few rows from Officer Chomer's and Gallardo's vehicles. Gallardo “got into the passenger seat” of the other vehicle, engaged

in a conversation with the “older Hispanic male” driving the vehicle, exited the other vehicle, returned to Officer Chomer’s vehicle, and handed him “a plastic baggy” containing fourteen grams of cocaine. Tr. pp. 41 & 42.

These facts suggest that Gallardo, at the very least, had knowledge of drug prices as well as knowledge of drug sources and suppliers. This court has previously determined that such knowledge indicates a predisposition to sell drugs. *See Young v. State*, 620 N.E.2d 21, 24 (Ind. Ct. App. 1993) (providing that factors which indicate a predisposition to sell drugs include knowledge of drug prices and knowledge of drug sources and suppliers), *trans. denied*. The instant facts also suggest that Gallardo knew how to contact a drug supplier and the proper channels by which one could obtain the drugs from this supplier. Thus, we conclude that these facts establish that Gallardo was predisposed to sell narcotics and that the C.S.’s conduct merely afforded Gallardo the opportunity to do so. Having concluded that Gallardo was predisposed to sell narcotics, we further conclude that Gallardo has failed to demonstrate that the result of his trial would have been different had his counsel raised an entrapment defense at trial. Gallardo, therefore, has failed to show that he was prejudiced by his trial counsel’s representation and we need not address the adequacy of counsel’s performance. *See Wentz*, 766 N.E.2d at 360.

Furthermore, to the extent that Gallardo claims that his trial counsel’s performance was deficient because counsel allegedly failed to investigate an entrapment defense prior to trial, we note that the record on direct appeal is silent as to whether trial counsel investigated such a defense and Gallardo has failed to present any argument supporting this claim.

Gallardo has failed to demonstrate that the outcome of his trial could have been different but for counsel's alleged failure to investigate an entrapment defense and therefore has failed to show that he suffered any prejudice as a result of trial counsel's actions. Gallardo's claim of ineffective assistance of trial counsel therefore fails.

II. Sentencing

A. Abuse of Discretion

Gallardo next asserts that the trial court abused its discretion in imposing an executed forty-two-year sentence. Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *modified on other grounds on reh'g*, 875 N.E.2d 218 (Ind. 2007). "An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Id.* (quotation omitted).

In sentencing Gallardo, the trial court found the following aggravating circumstances: (1) Gallardo's criminal history consisting of two prior felonies, at least eight prior misdemeanors, and two probation violations; (2) that this offense was committed while Gallardo was placed in a home detention program; (3) that Gallardo is an illegal alien; (4) that Gallardo had used marijuana since the age of thirteen, although he allegedly stopped using marijuana in 1999; and (5) that numerous other sanctions imposed upon Gallardo had proven to be ineffective in causing Gallardo to cease violating the criminal laws of Indiana. Gallardo does not challenge the existence of four valid aggravating circumstances, arguing

only that the trial court abused its discretion in finding his status as an illegal alien to be an aggravating circumstance.

We observe, however, that this court recently concluded in *Sanchez v. State*, 891 N.E.2d 174 (Ind. Ct. App. 2008), that the defendant's status as an illegal alien was a valid aggravating circumstance. In attempting to distinguish this court's conclusion in *Sanchez*, Gallardo admits that he is an illegal alien from Mexico, but claims that, unlike the defendant in *Sanchez*, he did not demonstrate a predisposition for dealing drugs. However, we observe that nothing in *Sanchez* suggests that the defendant's predisposition to sell drugs influenced the court's conclusion that the defendant's illegal alien status was a valid aggravating circumstance. *See id.* at 176. Nevertheless, to the extent that Gallardo's predisposition to sell drugs may be relevant, we find this argument unavailing in light of our conclusion above that Gallardo was predisposed to sell cocaine. The trial court did not abuse its discretion in sentencing Gallardo.

B. Appropriateness

Gallardo also asserts that we should exercise the authority granted to this court by Appellate Rule 7(B) and revise his forty-two-year sentence, which he believes is inappropriate in light of the nature of his offense and his character. This court has the constitutional authority to revise a sentence pursuant to Appellate Rule 7(B) if we find that it is inappropriate in light of the nature of the offense and the character of the offender; however, our review of any sentence is deferential to the trial court's decision. Ind. Appellate Rule 7(B); *Martin v. State*, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003). If the

sentence imposed is lawful, we will not reverse unless the sentence is inappropriate based on the character of the offender and the nature of the offense. *Boner v. State*, 796 N.E.2d 1249, 1254 (Ind. Ct. App. 2003). The burden lies with the defendant to persuade this court that his sentence is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007) (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

Gallardo claims that the nature of his offense, dealing in cocaine, does not justify the imposition of his forty-two-year sentence because he was not involved in an ongoing criminal drug operation and also because no violence was involved in the instant drug transaction. The record, however, establishes that Gallardo arranged the instant drug sale with the State's C.S., procured the cocaine, and delivered fourteen grams of cocaine to Officer Chomer in the parking lot of a public grocery store. We believe that the manner in which these facts occurred suggests that Gallardo was involved in an ongoing criminal drug operation. Moreover, in our view, Gallardo's mere luck that the transaction was completed without any violence does not mitigate the seriousness of his offense.

With respect to Gallardo's character, the presentence report admitted by the trial court at sentencing establishes that Gallardo has an escalating criminal history which includes two felony convictions, including convictions for operating while intoxicated and identity deception, and at least eight misdemeanor convictions, including two convictions for operating having never received a valid license and operating while intoxicated, as well as convictions for battery, public intoxication, operating without insurance, and fleeing a police

officer.² (Appellant's App. 82-83) In addition, the presentence report indicates that Gallardo had previously violated probation and that prior periods of probation had been revoked. We also observe that Gallardo was on house arrest at the time the instant offense occurred. Gallardo's history clearly suggests that he has had numerous opportunities to reform his behavior, but thus far has refused to do so. Gallardo has failed to persuade us that his sentence was inappropriate in light of the nature of his offense and his character.

Having concluded that Gallardo's trial counsel did not render ineffective assistance, that the trial court did not abuse its discretion in sentencing Gallardo, and that Gallardo's forty-two-year sentence was appropriate based on both the nature of Gallardo's offense and his character, we now affirm the judgment of the trial court.

The judgment of the trial court is affirmed.

CRONE, J., and BROWN, J., concur.

² We respectfully remind Appellant's counsel that presentence investigation reports are to be excluded from public access pursuant to Ind. Administrative Rule 9(G)(1) and filed in accordance with Trial Rule 5(G) and Appellate Rule 9(J).