

Case Summary

David M. Hughes (“Hughes”) appeals his convictions and sentence for possession of paraphernalia and dealing in cocaine. Finding that Hughes has waived any argument regarding Article I, § 11 of the Indiana Constitution, that the trial court did not abuse its discretion in its consideration of aggravating circumstances, and that Hughes’s sentence is not inappropriate, we affirm the judgment of the trial court.

Facts and Procedural History

On November 20, 2004, Indiana State Trooper James Stanley (“Trooper Stanley”) initiated a traffic stop after observing Hughes cross the skip line (the center line) and the solid white fog line on the Indiana Toll Road in St. Joseph County. While requesting Hughes’s driver’s license, Trooper Stanley observed a smoking device between Hughes’s legs. Based on Trooper Stanley’s training, he believed the device to be a pipe used for smoking cocaine. Trooper Stanley ordered Hughes to exit his vehicle, patted him down, and called for backup. While waiting for backup to arrive, Trooper Stanley required Hughes to stand outside his vehicle.

After a backup trooper arrived at the scene, Trooper Stanley searched Hughes’s vehicle. During the search, Trooper Stanley saw a wrapped package on the front passenger-side floorboard in Hughes’s vehicle. Finding it odd that a nicely wrapped package was on Hughes’s dirty passenger-side floorboard, Trooper Stanley removed the package from the vehicle, opened it, and found two bags containing a substance that he believed to be cocaine. Subsequent testing identified the substance in the package as

powder cocaine weighing 1026.50 grams with a street value of approximately \$200,000.00.

The State charged Hughes with Count I, possession of paraphernalia as a Class A misdemeanor,¹ Count II, possession of over three grams of cocaine as a Class C felony,² and Count III, dealing in cocaine, possession with intent to deliver over three grams as a Class A felony.³ Before trial, Hughes filed a Motion to Suppress alleging that:

The defendant's vehicle was improperly searched by the police and all evidence discovered by the police as the result of the illegal search namely two plastic bags containing a substance believed to be cocaine should be suppressed and the State prohibited from introducing this evidence during the trial of this cause.

Appellant's App. p. 12. At the suppression hearing, Hughes orally amended his motion to include statements he made to Trooper Stanley before being advised of his *Miranda* rights. After the hearing, the trial court granted the motion as to any statements obtained from Hughes after Trooper Stanley's traffic stop and denied the motion as to Trooper Stanley's warrantless search and seizure of the wrapped package and its contents. The court considered the search a permissible inventory search. The trial court certified the suppression issue for an interlocutory appeal that was later denied by this Court. After being tried *in absentia*, a jury found Hughes guilty of all three counts. Because the trial court found Count II—possession of over three grams of cocaine—to be a lesser included offense of Count III—dealing in cocaine, possession with intent to deliver over three grams—the court entered judgments of conviction on Counts I and III only.

¹ Ind. Code § 35-48-4-8.3(b).

² Ind. Code § 35-48-4-6(b)(1)(A).

³ Ind. Code § 35-48-4-1(b)(1).

In sentencing Hughes, the trial court identified as aggravating circumstances Hughes's failure to appear at trial, Hughes's failure to surrender on the arrest warrant, and the fact that Hughes's possession of such a large amount of cocaine "points to a middle level or higher position in the chain in dealing this stuff." Sent. Tr. p. 21. The court found Hughes's lack of a criminal history at age fifty-eight as a mitigating factor. The trial court's Sentencing Order provides:

On Count III, Dealing in Cocaine, Possession With Intent to Deliver Over Three Grams, Class A Felony, Defendant sentenced to 40 years incarceration. Execution of 20 years suspended. Defendant has no pre-sentence jail credit to apply to Count III. Probationary period is for 20 years from today. As a condition of probation, the Defendant is to serve 20 years in the DOC. Defendant may request a modification of probation after the Defendant completes 20 year executed sentence.

On Count I, Possession of Paraphernalia, Class A misdemeanor, the Defendant is sentenced to 122 days which is satisfied by pre-sentence jail credit of 61 days. This sentence is completed.

Appellant's App. p. 26. This appeal ensued.

Discussion and Decision

Hughes raises three issues on appeal. First, Hughes asserts that the trial court abused its discretion by admitting into evidence the cocaine found by Trooper Stanley because it was discovered as part of an unreasonable search and seizure of his vehicle in violation of Article I, § 11 of the Indiana Constitution.⁴ Second, Hughes argues that the trial court improperly considered the quantity of cocaine and his absence from trial as aggravators. Third, Hughes challenges the appropriateness of his sentence.

I. Search and Seizure

⁴ Hughes actually argues that the trial court erred by not suppressing this evidence. However, given the procedural posture of this case—i.e., the court admitting the evidence over his objection at trial—the appropriate inquiry is whether the trial court abused its discretion in admitting the cocaine into evidence at trial. *See, e.g., Packer v. State*, 800 N.E.2d 574, 578 (Ind. Ct. App. 2003), *trans. denied*.

Hughes asserts that the trial court abused its discretion by admitting into evidence the cocaine found by Trooper Stanley because it was discovered as part of an unreasonable search and seizure of his vehicle in violation of Article I, § 11 of the Indiana Constitution. A trial court has broad discretion in ruling on the admissibility of evidence. *Stokes v. State*, 828 N.E.2d 937, 939 (Ind. Ct. App. 2005), *trans. denied*. We will only reverse a trial court's ruling on the admissibility of evidence when the trial court has abused its discretion. *Id.* at 940. A trial court abuses its discretion when it makes a decision that is clearly against the logic and effect of the facts and circumstances before the court. *Id.*

Though Hughes argues on appeal that the search violated Article I, § 11 of the Indiana Constitution, his argument at the trial court level was that the police violated his rights under the Fourth Amendment to the United States Constitution. It is axiomatic that a party may not object on one ground at trial and raise a different ground on appeal. *White v. State*, 772 N.E.2d 408, 411 (Ind. 2002). We therefore agree with the State that Hughes has waived any argument regarding Article I, § 11 under the Indiana Constitution. Waiver notwithstanding, Hughes's argument still fails.

Initially, we note that the trial court admitted the cocaine into evidence on the basis that Trooper Stanley's search and seizure of the cocaine from Hughes's vehicle was the result of a valid inventory search, a well-recognized exception to the warrant requirement. *See Taylor v. State*, 842 N.E.2d 327, 331 (Ind. 2006). Hughes does not challenge the validity of the impoundment of the car. Rather, Hughes questions whether the police officer exceeded the scope of his authority when opening the wrapped package

located on the passenger floorboard. Hughes argues that in opening the wrapped package, the police officer violated Article I, § 11 of the Indiana Constitution.⁵

Article I, § 11 of the Indiana Constitution supports “the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures[.]” Although Article I, § 11 is nearly identical to the Fourth Amendment, our analysis of claims arising under § 11 is separate and distinct from a Fourth Amendment analysis. *Penn-Harris-Madison Sch. Corp. v. Joy*, 768 N.E.2d 940, 947 (Ind. Ct. App. 2002).

Article I, § 11 must be liberally construed in its application to guarantee that people will not be subjected to an unreasonable search and seizure. *Brown v. State*, 653 N.E.2d 77, 79 (Ind. 1995). Under Article I, § 11, the State carries the burden to prove that the search was reasonable under the totality of the circumstances. *Mitchell v. State*, 745 N.E.2d 775, 786 (Ind. 2001). Thus, rather than focusing on the defendant’s reasonable expectation of privacy, our analysis under Article I, § 11 focuses on the actions of the police officer to determine whether the search was reasonable given the totality of the circumstances. *Trimble v. State*, 842 N.E.2d 798, 803 (Ind. 2006). We consider the following factors in assessing reasonableness: (1) the degree of concern, suspicion, or knowledge that a violation has occurred, (2) the degree of intrusion the method of the search or seizure imposes on the citizen’s ordinary activities, and (3) the extent of law enforcement needs. *Litchfield v. State*, 824 N.E.2d 356, 361 (Ind. 2005).

⁵ In his appellate brief, Hughes does not argue that the search violated the Fourth Amendment of the United States Constitution. We, therefore, address his claims based upon Article I, § 11.

Several factors support the reasonableness of Trooper Stanley's search and seizure of the wrapped package. First, the package was wrapped in paper, not locked. *See Abran v. State*, 825 N.E.2d 384, 388-89 (Ind. Ct. App. 2005) (holding, in part, that a police officer's search of an unlocked wooden box in a truck and seizure of its contents was reasonable under the totality of the circumstances.), *reh'g denied, trans. denied; Peete v. State*, 678 N.E.2d 415, 421 (Ind. Ct. App. 1997) (holding, in part, that the search and seizure of cocaine obtained from a 35 mm film canister within a vehicle was reasonable and remained within the scope of a lawful inventory search.), *trans. denied; but cf. State v. Lucas*, 859 N.E.2d 1244, 1251 (Ind. Ct. App. 2007) (holding "that the warrantless search of the locked metal box was unreasonable under Article I, Section 11 of the Indiana Constitution."), *reh'g denied, trans. pending.*

Second, Trooper Stanley's opening of the package was in compliance with the Indiana State Police inventory policy allowing officers during an inventory search of vehicles to open up packages "[t]o make sure there's nothing of value in [the] package, and so I know what's there and what to write down." Trial Tr. p. 170.

Third, immediately after pulling Hughes over for crossing the skip line and fog line on the Indiana Toll Road, Trooper Stanley saw, in plain view, a smoking device between Hughes's legs that he believed, based on his training, was a pipe used for smoking cocaine. This smoking pipe provided Trooper Stanley with reasonable suspicion that there was likely cocaine inside the vehicle. Finally, based on Trooper Stanley's training, he was suspicious of the wrapped and concealed nature of the package and considered it odd that a nicely wrapped package would be placed on a dirty

floorboard. Also, Trooper Stanley indicated that some drug offenders conceal drugs in wrapped packages.

Upon review of the totality of the circumstances, particularly considering that when Trooper Stanley approached Hughes's vehicle he saw in plain view a smoking pipe used for cocaine, we find that Trooper Stanley's search of the vehicle was reasonable under Article I, § 11. The evidence seized was admissible, and we find no abuse of discretion.

II. Sentencing

Hughes makes two arguments related to the propriety of his sentence. First, Hughes asserts that the trial court abused its discretion in finding certain aggravating circumstances. Second, he asserts that his sentence is inappropriate.⁶

A. Aggravators

Sentencing lies within the discretion of the trial court. *Patterson v. State*, 846 N.E.2d 723, 727 (Ind. Ct. App. 2006). If a trial court uses aggravating or mitigating circumstances to enhance or reduce the presumptive sentence, it must: (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate its evaluation and balancing of the circumstances. *Id.* The trial court's assessment of the proper weight of mitigating and aggravating circumstances is entitled to great deference on appeal and will be set aside only upon a showing of a manifest abuse of discretion. *Id.*

⁶ Because Hughes committed his offenses before the 2005 amendments to the sentencing statutes, we operate under the former presumptive scheme. See *Walsman v. State*, 855 N.E.2d 645, 650-51 (Ind. Ct. App. 2006), *reh'g denied*; *Weaver v. State*, 845 N.E.2d 1066 (Ind. Ct. App. 2006), *trans. denied*; but see *Samaniego-Hernandez v. State*, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005).

Hughes first argues that because no other evidence, outside of the large quantity of cocaine seized, was introduced at trial to support the theory that Hughes was involved in a drug dealing criminal enterprise, the trial court abused its discretion in considering this as an aggravating circumstance. We cannot agree.

It is true that this court has consistently held that it is error for a trial court to use the amount of drugs involved in an incident as an aggravating circumstance when the amount of drugs is a material element of the offense charged. *Donnegan v. State*, 809 N.E.2d 966, 978 (Ind. Ct. App. 2004) (possession of nearly fifty grams of cocaine not a valid aggravator in prosecution for possession of three or more grams of cocaine with intent to deliver), *trans. denied*; *Smith v. State*, 780 N.E.2d 1214, 1219 (Ind. Ct. App. 2003) (holding that the trial court could not use the fact that the defendant had eighty-five grams of cocaine as an aggravator because he was convicted of dealing three or more grams), *trans. denied*.

But here, the trial court did not rely solely on the large quantity (over 1000 grams) of cocaine as an aggravating factor. Rather, the trial court considered the possession of this amount of cocaine, the quality of the cocaine (powder), and the fact that Hughes was apparently returning from the Chicago area when he was pulled over as circumstances that point to “a middle level or higher position in the chain in dealing this stuff.” Sent. Tr. p. 20-21. The trial court may consider the circumstances of a crime that suggest involvement in a substantial drug operation as a valid aggravating factor. *Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005). Therefore, the trial court did not abuse its discretion in considering this aggravator.

Next, Hughes argues that the trial court abused its discretion by considering Hughes's absence from trial as an aggravator. Hughes claims that he was unable to appear at trial due to a lack of transportation. Because Hughes was provided with adequate notice prior to the trial date, he had ample time to schedule transportation to and from the proceedings. Thus, the trial court did not abuse its discretion by considering his absence from trial as an aggravator.

B. Appropriateness

Hughes also argues that his forty-year sentence is inappropriate in light of the nature of his offenses and his character. *See* Appellant's Br. p. 16. Initially we note that the presumptive sentence for a Class A felony is thirty years to which twenty years may be added for aggravating circumstances and from which ten years may be subtracted for mitigating circumstances. *See* Ind. Code § 35-50-2-4 (2004). The trial court sentenced Hughes to a forty-year sentence with twenty years suspended to probation with a condition of probation that Hughes remain in custody. Effectively, this was a forty-year executed sentence.

Indiana Rule of Appellate Procedure 7(B) states: "The Court may revise 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 appellate review of sentences must give due consideration to the trial court's sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." *Purvis v. State*, 829 N.E.2d 572,

587 (Ind. Ct. App. 2005) (internal citations omitted), *trans. denied*. After due consideration of the trial court's decision, we cannot say that Hughes's sentence is inappropriate.

Regarding the nature of his offense, the record reflects that the circumstances surrounding the crime suggest a middle or high level of involvement in the drug business on the part of Hughes. We cannot ignore the fact that the drugs involved had a street value of approximately \$200,000.00 and were of high quality and that Hughes was apparently transporting the cocaine from the Chicago area. Regarding Hughes's character, the trial court properly factored in his lack of criminal history at the age of fifty-eight as a mitigating aspect of his case. However, Hughes's failure to appear at trial reflects poorly on Hughes's character. Given the nature and circumstances of this crime, we cannot say that the sentence is inappropriate.

Affirmed.

BAILEY, J., and BARNES, J., concur.