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IN THE
COURT OF APPEALS OF INDIANA

ROBERT DUPREE WHITE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A02-0809-CR-853
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CIRCUIT COURT OF DELEWARE COUNTY, COURT II
The Honorable Richard A. Dailey, Judge
Cause No. 18C02-0612-FA-23

June 16, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Robert Dupree White appeals his convictions for dealing in cocaine, a class A felony, and possession of cocaine, a class B felony, and his sentence thereon.

We affirm.

ISSUES

1. Whether the trial court erred when it dismissed White's motion to dismiss for failure to prove venue.

2. Whether the trial court erred in denying White's motion to suppress and admitting Exhibits 2 and 3.

3. Whether the trial court abused its discretion in sentencing White.

FACTS

In 2006, Michael Mueller of the Muncie Police Department was assigned to the Delaware County Drug Task Force and responsible for investigations of "illegal controlled substances in Delaware County." (Tr. 114). In late November of 2006, he was contacted by Michael Davis, who offered to assist the police in making a drug buy -- as a means of addressing his addiction ("to get off the crack") and because his girlfriend, Amanda Hayes, threatened to leave him unless he "g[o]t off drugs." (Tr. 139, 177).

At approximately 2:30 p.m. on November 29, 2006, Davis and Hayes met Mueller at a truck stop on 29th Street. Mueller searched Davis and Hayes for controlled substances, weapons, and money. He gave Davis $40 as "buy money" and gave Hayes an electronic transmitter, which she placed between her breasts. Davis and Hayes walked to the residence at "the address of 2600 South Mock . . . in Muncie." (Tr. 133).

Officers observed White, who was standing by the front door, enter the residence with Davis and Hayes. Inside, White expressed concern about being "set up," and said that if he was, he would "kill" them. (Tr. 216; 184). White patted down Davis and Hayes but did not find the transmitter on Hayes; she had distracted him by commenting that what he really wanted to do was "touch [her] butt," and he then did so. (Tr. 215). In the bedroom of the residence, Davis gave White $40.00 in exchange for "forty dollars worth" of crack cocaine. (Tr. 186).

Davis and Hayes walked from the residence back to the truck stop, and Mueller again searched both Davis and Hayes. Davis gave Mueller a plastic bag containing an off white rock-like substance (Exhibit 1), "crack cocaine that [he] purchased" from White. (Tr. 189). A field test of the substance indicated positive for cocaine. Davis reported to Mueller that the purchase had taken place in the bedroom and that White "had some on him still." (Tr. 187). Mueller gave Davis and Hayes $60.00 for their assistance.

Mueller prepared an affidavit for a warrant to search the residence. The warrant was granted, and at approximately 5:10 p.m. it was served. Nathan Sloan, a Muncie Police Department officer participating in the search, recovered two baggies from White's pocket – Exhibits 2 and 3. A $20.00 bill was also found in White's pocket, but it was not part of the "buy money."

On December 5, 2006, the State charged White with Count I: dealing cocaine within 1,000 feet of a family housing complex, a class A felony; Count II, possessing

cocaine with the intent to deliver within 1,000 feet of a family housing complex, a class A felony.[1]

The trial court conducted a jury trial on July 21-23, 2008, and evidence as to the foregoing was heard. The initial witness, a forensic scientist with the Indiana State Police, testified that Exhibit 1 weighed .24 g. and contained cocaine; Exhibit 2 weighed .06 g. and contained cocaine; and Exhibit 3 weighed .46 g. and contained cocaine. Exhibit 1 was admitted without objection.[2] Officers testified to having watched Davis and Hayes walk from the truck stop to the residence and back, without interacting with any other person. Officers also testified to having monitored the transmissions from the device worn by Hayes. The video-recording of the officers during the search of the residence was played for the jury and showed the baggies found in White's pocket.[3] The recording of transmissions from the device worn by Hayes was played for the jury[4], and several officers, as well as Davis and Hayes, identified the voices as those of Davis, Hayes, and White during their interaction inside the residence.

At this point, going on the third day of trial, White's counsel argued that the "affidavit and search warrant" were "defective," and that the trial court should "exclude

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[1] White was also charged with Count III: possession of cocaine with intent to deliver, a class B felony; however, the trial court granted the State's motion to dismiss this charge on July 17, 2008.

[2] In fact, White's counsel stated that he "d[id]n't mind if that exhibit comes in that was retrieved from Michael Davis," and he "wouldn't object to that." (Tr. 237-38).

[3] White's appellate record does not contain the digital video disc that was played. The transcript reflects that after the video was played, Mueller testified that the "two bags" shown on the video were recovered from White's pocket and field-tested positive for cocaine. (Tr. 252).

[4] Although the transcript clearly reflects that it was played for the jury, White's appellate record does not contain the compact disc of the digital recording.

that by its suppression" of Exhibits 2 and 3.[5] (Tr. 313).[6] The trial court admitted the exhibits over White's objection.

Thereafter, Kyle Johnson testified that as GIS coordinator for Delaware County, he was in charge of geographic mapping information for the county. He further testified that GIS "is the standard that all government units here in Delaware County rely upon." (Tr. 347). Johnson prepared Exhibit 6, a map that depicted the area around 3600 South Mock Avenue. The exhibit was admitted without objection.[7] Johnson testified that the residence at 3600 South Mock Avenue "was approximately 473 feet" in distance "from Earthstone Terrace Apartments," a "Muncie Housing Authority property" containing "apartments owned by a governmental unit or political subdivision." (Tr. 344, 345).

The State then rested, and White moved

> to dismiss both counts. There's been no jurisdiction established for Counts 1 or 2. The offenses occurred in Delaware County State of Indiana.

(Tr. 349). The trial court was "not sure whether Delaware County State of Indiana ha[d] been mentioned" and offered to allow the State to reopen its case. (Tr. 350). Over

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[5] No pretrial motion to suppress had been filed.

[6] White's counsel did not offer into evidence the probable cause affidavit. However, he asserted to the trial court that the affidavit contained Mueller's statements that White "resides at 3600 South Mock"; that he had "thoroughly searched the informant"; and that Davis "stated that White had gotten the substance from a plastic bag inside a first floor bedroom . . . [w]hich was still there when [Davis] left." (Tr. 317, 318). White's counsel argued that trial testimony had shown Mueller should have known White "did not reside there"; that there were <u>two</u> informants, Davis and Hayes, and there had not been a complete body search of Hayes; and that no cocaine was found in the bedroom but rather allegedly found on White's person. (Tr. 317). Therefore, counsel argued, Mueller had not given "accurate information under oath" about what he "knew at the time" he prepared the affidavit, and the search warrant was "defective." (Tr. 318).

[7] Again, the exhibit itself is not included in White's appellate record.

White's objection, Mueller then testified that 3600 South Mock Avenue was located "in Delaware County State of Indiana." (Tr. 352).

The jury returned verdicts finding White guilty of Count I, dealing in cocaine, as a class A felony; and Count II, possession of cocaine, as a class B felony. The trial court held the sentencing hearing on September 11, 2008. It imposed a sentence of thirty years on Count I, and fifteen years on Count II, with the sentences to run concurrently.

DECISION

1. White's Motion to Dismiss

White's argument on his first issue, lacking any citation to authority, is as follows:

> At the conclusion of the State's case, the Defendant moved for dismissal due to the fact that the State failed to prove venue, that is, that the events occurred in Delaware County, State of Indiana. In a bench conference, the Judge agreed that the State had failed to prove one of its elements. Instead of dismissing the case due to lack of evidence, the Judge told the State to move to reopen its case after the Defendant had made its Motion for verdict on the evidence. When the State moved to reopen, and the Defendant objected, the Court followed its own suggestions and granted the State's motion.
>
> Although no case was discovered which was directly on point, the entire criminal judicial process is based on having an unbiased hearing officer to make rulings on objections and motions. Instead of ruling on Defendant's motion, this Judge described to the State a way to save their defective case. Defendant would ask that this procedure be remedied by reversal.

White's Br. at 11.

We initially note that the trial court did not "agree that the State had failed to prove one of its elements," *id.*, but rather was "not sure whether Delaware County State of Indiana ha[d] been mentioned." (Tr. 350). Moreover, White's argument to the trial

court included an assertion that "no jurisdiction [was] established." (Tr. 349). Further, authority establishes that White is not entitled to a reversal on this issue.

Our Supreme Court observed, when addressing a similar argument, that it

> confuse[d] the concepts of "venue" and "jurisdiction," which are separate and distinct. Under our venue statute, Ind. Code § 35-32-2-1, criminal actions shall be tried in the county where the offense was committed. . . . if it appears at any time before the verdict or finding that the prosecution was brought in an improper county, the court shall order that the case be transferred to the county of proper venue. Thus, it would have been proper for the defendant to have moved to transfer but not to dismiss in this case.

Kindred v. State, 540 N.E.2d 1161, 1166 (Ind. 1989) (internal citations omitted), *abrogated on other grounds by Fajardo v. State*, 859 N.E.2d 1201 (Ind. 2007).

If White's motion is considered one for a directed verdict, to grant it required that the record be devoid of evidence of one or more elements of the offense <u>or</u> without conflict and subject to only one inference, which is favorable to the defendant. *Espinoza v. State*, 859 N.E.2d 375, 385 (Ind. Ct. App. 2006) (citing *Farris v. State*, 753 N.E.2d 641, 647 (Ind. 2001), and Ind. Trial Rule 50). Venue is <u>not</u> an element of the criminal offense, and the State need prove proper venue only by a preponderance of the evidence. *Smith v. State*, 835 N.E.2d 1072, 1074 (Ind. Ct. App. 2005); *Weiss v. State*, 735 N.E.2d 1194, 1196 (Ind. Ct. App. 2000). Moreover, venue may be established by circumstantial evidence. *Wurster v. State*, 715 N.E.2d 341, 348 (Ind. 1999) (citing *Evans v. State*, 571 N.E.2d 1231, 1233 (Ind. 1991), and *Boze v. State*, 514 N.E.2d 275, 278 (Ind. 1987)). Finally, when the defendant challenges venue at the conclusion of the State's case, the question becomes one of the sufficiency of the evidence to support the conclusion that the defendant was tried in the proper county. *Smith*, 835 N.E.2d at 1074 (citing *Kindred*, 540

N.E.2d at 1166). In reviewing a claim of insufficient evidence of venue, we neither reweigh the evidence nor assess witness credibility, and we only consider the evidence and reasonable inferences drawn therefrom which support the conclusion of requisite venue. *Id.* (citing *Chavez v. State*, 722 N.E.2d 885, 895 (Ind. Ct. App. 2000)).

Mueller had testified that as a Muncie Police Department officer assigned to the Delaware County Drug Task Force, he investigated "illegal controlled substances in Delaware County." (Tr. 114). He further testified that Davis and Hayes went to the residence at "the address of 2600 South Mock . . . in Muncie." (Tr. 133). Johnson testified that he was the GIS coordinator for Delaware County, and he prepared Exhibit 6 using the GIS standard relied upon by "all government units . . . in Delaware County." (Tr. 347). The transcript indicates that Johnson directed jurors' attention to the location of 2600 South Mock on the map that was Exhibit 6, and he testified that the residence was approximately 473 feet from apartments owned by the Muncie Housing Authority. This is sufficient evidence to support the reasonable conclusion that 2600 South Mock was in Delaware County, Indiana. Accordingly, Delaware County was proper venue for White's offenses committed at 2600 South Mock, and the trial court's denial of his motion was not erroneous.

2. <u>Admission of Evidence</u>

White next argues that statements in Mueller's probable cause affidavit in support of the warrant to search 2600 South Mock "disregard[ed] the truth and should not be rewarded with a search warrant and the fruit of that search should be excluded from evidence." White's Br. at 14. However, as the State correctly observes, White "failed to

preserve any record that this Court can review to establish his claim," in that "neither the warrant nor affidavit was admitted for the purpose of [his] motion to suppress." State's Br. at 8. Further, White's scant authority[8] addresses pretrial rulings on motions to suppress, and he directs us to no authority for the proposition such (1) would apply where, as here, the motion to suppress is made during trial and (2) would require suppression of evidence that testimony had already established to have been in White's possession and to contain cocaine.

In reviewing the claim that a search warrant was "illegally obtained," we focus on "whether a 'substantial basis' existed for a warrant authorizing a search or seizure." *Jones v. State*, 783 N.E.2d 1132, 1136 (Ind. 2003) (quoting *Houser v. State*, 678 N.E.2d 95) (Ind. 1997)). The burden is on the defendant to overturn the presumption that the warrant was invalid. *Id.* If the evidence is conflicting, we consider only the evidence favorable to the ruling, and will affirm if the ruling is supported by substantial evidence of probative value. *Id.* Without the probable cause affidavit, this review cannot be undertaken. Nevertheless, we briefly note White's two claims of defect.

White claims Mueller's affidavit stated that White resided at 3600 South Mock but Mueller's report indicated that White "resided at 615 West Charles." *Id.* at 13. The report address was elicited during White's cross-examination of Mueller; the report is not in evidence; and Muller expressly testified that at the time he prepared the affidavit, his

[8] *Jaggers v. State*, 687 N.E.2d 180, 182 (Ind. 1997) ("Jaggers moved unsuccessfully before trial to suppress the evidence seized as a result of the search."); *Mason v. State*, 532 N.E.2d 1169, 1170 (Ind. 1989) ("Mason argues the trial court erred by denying his motion to suppress" after a "motion to suppress hearing."), *cert. denied* 490 U.S. 1049; *Stephenson v. State*, 796 N.E.2d 811 (Ind. Ct. App. 2003) (motion to suppress denied after pretrial suppression hearing).

knowledge was based on information from Davis and Hayes – to wit: "that Mr. White lived at . . . 3600 South Mock." (Tr. 144). A search warrant "is not invalid because it contains slightly inaccurate material that is immaterial to the warrant's validity." *Jones*, 783 N.E.2d at 1136. That White's actual residence was not at 3600 South Mock was immaterial to whether there was probable cause to believe that he was dealing cocaine at that address on November 29, 2006.

He next claims Mueller's affidavit stated that Mueller had "thoroughly searched the informant," but the evidence established that there were two informants and that his search of Hayes did not include "body cavities." White's Br. at 14. Mueller testified that he searched "both the informant and the informant's wife." (Tr. 118). He acknowledged that the search of Hayes "was not a strip search," but testified that he did "pat[] her up and down the legs, . . . had her pull out her pants pockets, . . . checked the top that she was wearing," including its "pockets, . . . did a touch pat down on her arms and her torso," and "checked her shoes and checked her socks." (Tr. 146). Mueller testified that he was "extremely confident" that Hayes had no "contraband hidden in her underwear, in her crotch, in her breasts, [or] inside her bra," and that it was "not required . . . that we do a strip search on every informant" prior to a controlled buy. (Tr. 147, 148). Hayes also testified that Mueller had "patted [her] down" before they went to 3600 South Mock, and that she did not have any drugs on her. (Tr. 209). The evidence favorable to the grant of the search warrant provides substantial evidence that Mueller's search of Hayes established that she had no contraband on her person. Further, the party arguing that a probable cause affidavit was deficient for containing "false statements" that were not

"innocent . . . mistakes . . . must make a substantial showing that the facts were included in reckless disregard for the truth." *Mitchell v. State*, 745 N.E.2d 775, 784, 785 (Ind. 2001). Given the testimony presented, we find no substantial showing that a statement by Mueller that he had thoroughly searched the informant "reckless[ly] disregarded the truth." *Id.*

3. Sentence

Finally, White argues that the trial court abused its discretion in sentencing him. Specifically, he contends that the trial court failed to consider his positive changes in attitude and his constructive activities during his nearly two years of incarceration prior to sentencing, and that such "should outweigh his past illegal activities." White's Br. at 12. We disagree.

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), *clarified on re'hg on other grounds*, 875 N.E.2d 218 (Ind. 2007). An abuse of discretion occurs if the decision is clearly against the logic and effect of the circumstances before the trial court. *Id.* A trial court may abuse its discretion by (1) failing to enter a sentencing statement of its reasons for the sentence imposed; (2) finding reasons not supported by the record or not finding reasons that the record does support; or (3) citing reasons that are improper as a matter of law. *Id.* at 490-91. White does not argue that the trial court failed with respect to any of these three considerations.

Moreover, *Anglemyer* made clear that the trial court has no obligation to "'weigh' aggravating and mitigating circumstances against each other when imposing a sentence."

Id. at 491. "The relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse." *Id.*

The trial court explained that it was required "to begin at 20 years as the minimum mandatory" sentence -- given White's previous conviction for dealing in cocaine, as a class B felony. (Tr. 534). *See* I.C. § 35-50-2-2; and PSI at 127-28. The trial court found as aggravating circumstances White's "history of criminal behavior"; that he was on parole at the time of the instant offenses[9]; that based on his "prior pattern of behavior," it was "high likely that" he would commit another offense; and that his "jail conduct" had been "poor." (App. 175). White does not challenge any of these, and the record supports the trial court's findings. As White notes, the trial court also found a number of mitigating factors, but the law does not require that these be weighed against proper aggravating circumstances.

White has failed to demonstrate that the trial court abused its discretion when sentencing him.

Affirmed.

BAILEY, J., and ROBB, J., concur.

[9] At sentencing, the trial court specified that this was "the most aggravating circumstance of any." (Tr. 532).