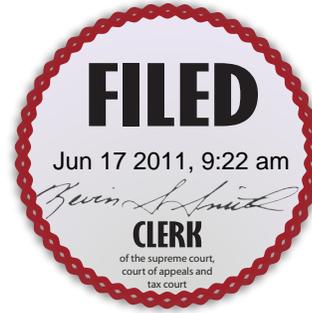


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DAMIAN A. ROSALES,)
)
Appellant-Defendant,)
)
vs.) No. 20A05-1010-CR-620
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0909-FA-39

June 17, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Damian Rosales appeals his convictions of Class A felony dealing in methamphetamine¹ and Class D felony possession of more than thirty grams of marijuana.² Rosales also appeals his aggregate sentence, which includes another count of Class A felony dealing in methamphetamine and a count of Class A misdemeanor dealing in marijuana.³ We affirm.

FACTS AND PROCEDURAL HISTORY

In July 2009, two cooperating sources (CS) made a controlled buy of methamphetamine from Rosales at a residence he called “the ranch.” (Tr. at 368.) The sale occurred near a chicken coop on the property. On September 24, Rosales contacted the CS and told them “something good” had arrived at the ranch. (*Id.* at 323.) The CS met Rosales at a supermarket parking lot, and Rosales gave them a sample of marijuana. The CS asked Rosales if they could buy two ounces of methamphetamine, and Rosales said he would sell it to them for \$2000 at the ranch later that day. He also told them if they wanted to buy marijuana, he would sell it to them for \$900 a pound if they bought more than ten pounds. Based on that information, the police obtained a search warrant for Rosales’ residence and the surrounding property.

Later that day, Rosales was a passenger in a vehicle pulled over for a traffic stop. When asked if he lived at the ranch, which was nearby, Rosales answered in the affirmative. During their search of the chicken coop at the ranch, police found 299.68 grams of

¹ Ind. Code § 35-48-4-1.1(b)(2).

² Ind. Code § 35-48-4-11(1).

³ Ind. Code § 35-48-4-10(a)(1).

methamphetamine, 2198.2 grams of marijuana, drug packaging supplies such as Ziploc bags and scales, and several firearms.

Rosales was charged with Class A felony dealing in methamphetamine for the July 2009 controlled buy, and Class A felony dealing in methamphetamine, Class D felony possession of over thirty grams of marijuana, and Class A misdemeanor dealing in marijuana based on the September 24 search. A jury found Rosales guilty on all charges, and the court sentenced Rosales to sixty-one and one half years.

DISCUSSION AND DECISION

1. Sufficient Evidence

When reviewing the sufficiency of the evidence to support a conviction, we consider only the probative evidence and reasonable inferences supporting the trial court's decision. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the fact-finder's role, and not ours, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. *Id.* To preserve this structure, when we are confronted with conflicting evidence, we consider it most favorably to the trial court's ruling. *Id.* We affirm a conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id.* It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence; rather, the evidence is sufficient if an inference reasonably may be drawn from it to support the trial court's decision. *Id.* at 147.

Rosales argues the evidence was insufficient to prove he possessed the methamphetamine and marijuana found in the chicken coop. Possession may be actual or

constructive. *Trigg v. State*, 725 N.E.2d 446, 450 (Ind. Ct. App. 2000). Because Rosales did not have physical possession of the drugs in the chicken coop at the time of their discovery, he did not have actual possession of the contraband. *See Tate v. State*, 835 N.E.2d 499, 511 (Ind. Ct. App. 2005) (defining actual possession as “direct and physical control over” the object), *trans. denied*. Therefore, the State needed to prove constructive possession.

“To show constructive possession, the State must show that the defendant had both (1) the intent to maintain dominion and control, and (2) the capability to maintain dominion and control over the contraband.” *Powell v. State*, 912 N.E.2d 853, 865 (Ind. Ct. App. 2009). To prove intent, the State must demonstrate the defendant knew of the presence of the contraband. *Goliday v. State*, 708 N.E.2d 4, 6 (Ind. 1999). When, as here, control is nonexclusive, intent may be inferred from additional circumstances that point to the defendant’s knowledge of the presence of contraband. *White v. State*, 772 N.E.2d 408, 413 (Ind. 2002). These additional circumstances include: (1) incriminating statements made by the defendant; (2) attempted flight or furtive gestures; (3) the presence of a drug manufacturing setting; (4) proximity of the defendant to the drugs; (5) the presence of drugs in plain view; and (6) location of the drugs in close proximity to items owned by the defendant. *Goffinet v. State*, 775 N.E.2d 1227, 1230 (Ind. Ct. App. 2002), *trans. denied*.

The evidence was sufficient to infer Rosales constructively possessed the drugs found in the chicken coop. When police pulled over Rosales on September 24, they asked him if he lived at the ranch, and Rosales said he did.⁴ Thus, Rosales could maintain dominion and

⁴ Rosales argues this exchange violated his *Miranda* rights. However, he did not object at trial, and thus the

control over the contraband. *See Ladd v. State*, 710 N.E.2d 188, 191 (Ind. Ct. App. 1999) (because Ladd lived at house where marijuana was found, he had the capability to maintain dominion and control over the marijuana).

Rosales previously had sold methamphetamine to the CS at the ranch. On September 24, Rosales called the CS and told them “something good” had arrived at the ranch. (Tr. at 323.) Later that day, the CS met Rosales in a supermarket parking lot, and Rosales gave them a sample of marijuana, indicating he was “selling [the marijuana for] \$900 a pound if you bought more than ten pounds at a time.” (*Id.* at 405.) During that same conversation, Rosales said he could sell two ounces of methamphetamine later that day at the ranch. These statements indicate Rosales knew of the presence of contraband at the ranch and intended to maintain dominion and control over the drugs. *See, e.g., Enamorado v. State*, 534 N.E.2d 740, 742 (Ind. 1989) (defendant’s knowledge of the location of the contraband and arrangement of drug deal was sufficient to establish constructive possession thereof). Thus, there was sufficient evidence from which a reasonable fact-finder could infer Rosales constructively possessed marijuana and methamphetamine.

2. Sentencing – Abuse of Discretion

When sentencing a defendant for a felony offense, the trial court must enter a sentencing statement that includes “a reasonably detailed recitation of the trial court’s reasons for imposing a particular sentence.” *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind.

issue is waived for our review. *See Kubsch v. State*, 784 N.E.2d 905, 923 (Ind. 2003) (failure to object to admission of evidence at trial results in waiver of that issue on appeal).

2007), *clarified on reh'g* 875 N.E.2d 218 (Ind. 2007). We review the sentencing decision for abuse of discretion. *Id.* at 490. An abuse of discretion occurs when 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.* A sentencing statement is adequate if it permits us to conduct a “meaningful appellate review.” *Id.* at 491.

If the statement includes aggravating or mitigating circumstances, then the statement must identify those and explain why each factor is designated as such. *Id.* at 490. On appeal, we may consider both the trial court’s written sentencing statement and its comments made at the sentencing hearing. *Gibson v. State*, 856 N.E.2d 142, 146 (Ind. Ct. App. 2006). The trial court is not required to find mitigating factors or give them the same weight that the defendant does. *Flickner v. State*, 908 N.E.2d 270, 273 (Ind. Ct. App. 2009). If the defendant claims the trial court overlooked a mitigating factor, he must establish that the mitigating evidence is both significant and clearly supported by the record. *Comer v. State*, 839 N.E.2d 721, 728 (Ind. Ct. App. 2005), *trans. denied*. In addition, the defendant must have raised the mitigator at sentencing for the trial court to consider. *Anglemyer*, 868 N.E.2d at 492.

In the sentencing statement, the trial court found the following aggravators:

[O]ther sanctions have proved ineffective in rehabilitating the Defendant; there were multiple guns located at the residence where the drugs were kept, stored, and dealt out of; the fact that the Defendant is an illegal alien; the fact that Defendant worked illegally in this country; the Defendant’s criminal history consisting of two misdemeanors; the fact that there are multiples [sic] counts and the fact that there are multiple types of drugs involved; the fact that the Defendant had armed guards at his home; the fact that photographs were uncovered and the photographs presented to the Court depict very young

children holding weapons as if they were toys. . . . the fact that the quantity of drugs involved were substantial in that there was over 300 grams of methamphetamine which is 100 times the amount required for a Class A Felony and there was approximately five pounds of marijuana.

(App. at 86-87.) As mitigators, the court found “all statements of the Defendant and the Defendant’s counsel.”⁵ (*Id.*)

Rosales was given the advisory sentence. “[T]he advisory sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed.” *Anglemyer*, 868 N.E.2d at 494. Rosales argues the trial court did not explain in the sentencing statement why each factor was designated as aggravating or mitigating. We disagree. Rosales has not told us what factors he thinks were “clearly overlooked,” and the trial court is not required to find mitigators. The court went into detail during the sentencing hearing regarding why each factor it identified as aggravating was considered as such. As we consider both the written and oral statements by the trial court in reviewing its sentencing decision, we cannot say the explanation was insufficient.

Rosales also argues the trial court improperly considered many of the aggravators. One aggravating factor can be a sufficient basis for enhancement of a sentence. *Smith v. State*, 908 N.E.2d 1251, 1253 (Ind. Ct. App. 2009). We may not review the weight given to any particular factor. *Anglemyer*, 868 N.E.2d at 491.

Rosales argues the trial court should not have considered his criminal history to be an

⁵ Rosales’ counsel argued as mitigating factors that Rosales was “not alone” in his crime, “this is his first drug conviction,” and “he’s going to be deported anyway . . . [and] I suspect from the rise of the Tea Party that it’s going to be tougher to get back in.” (Tr. at 645-46.) Rosales did not make a statement, except to confirm the accuracy of the pre-sentencing investigation.

aggravating factor, but our statutes allow the trial court to do so. *See* Ind. Code § 35-38-1-7.1(2) (“In determining what sentence to impose for a crime, the court may consider . . . the person has a history of criminal and delinquent behavior.”). Rosales has three prior convictions, one for false informing, and two for public intoxication.

Rosales also argues the trial court was precluded from considering the amount of drugs found in his possession. We disagree. While the trial court may not consider as an aggravator a material element of the offense for which it is imposing the sentence, the court can consider as an aggravating factor specific circumstances regarding how the crime was committed. *Stone v. State*, 727 N.E.2d 33, 37 (Ind. Ct. App. 2000). The trial court noted Rosales had one hundred times the amount of methamphetamine needed to enhance his crime to a Class A felony, and the amount of marijuana he possessed was also far above that needed to enhance his marijuana possession charge. Those aggravators are not based on the material element used to enhance the crime, but instead the particularly *massive* quantities Rosales possessed.

Rosales argues other aggravators found by the trial court were improper, but only one aggravator is required to enhance a sentence. *Stone*, 727 N.E.2d at 37. Rosales does not present any overlooked mitigators on appeal, and we cannot say the trial court abused its discretion in sentencing Rosales to sixty-one and one half years.

3. Inappropriate Sentence

We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. *Williams v. State*, 891 N.E. 2d 621, 633 (Ind. Ct. App. 2008)

(citing Ind. Appellate Rule 7(B)). We consider not only the aggravators and mitigators found by the trial court, but also any other factors appearing in the record. *Roney v. State*, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), *trans. denied*. The appellant bears the burden of demonstrating his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

When considering the nature of the offense, the advisory sentence is the starting point to determine the appropriateness of a sentence. *Anglemyer*, 868 N.E.2d at 494. Our review under App. R. 7(B) focuses on the aggregate sentence, rather than the length of the sentence on any particular count. *Webb v. State*, 941 N.E.2d 1082, 1088 (Ind. Ct. App. 2011), *trans. denied*. The advisory sentence for a Class A felony is thirty years, Ind. Code §35-50-2-4; the advisory sentence for a Class D felony is one and one half years, Ind. Code §35-50-2-7; and the sentence for a Class A misdemeanor may not exceed one year. Ind. Code §35-50-3-2. Rosales was sentenced to sixty-one and a half years.

Rosales makes no argument regarding his character or the nature of the offense, and thus his argument the sentence is inappropriate is waived. *See Matheney v. State*, 688 N.E.2d 883, 907 (Ind. 1997) (failure to make a cogent argument supported by citation to authority results in waiver of issue on appeal). Waiver notwithstanding, we agree with the State's assessment of Rosales' character and nature of the offense. Rosales' illegal alien status and criminal history reflect poorly on his character. Regarding the nature of the offense, the presence of multiple weapons and armed guards at the ranch, and the large quantities of drugs discovered made the crime more egregious than typical drug dealing. Based on those

factors, we cannot hold the trial court's imposition of the advisory sentence inappropriate.

CONCLUSION

The State presented sufficient evidence Rosales constructively possessed large quantities of methamphetamine and marijuana. The trial court entered a sufficient sentencing statement and did not abuse its discretion by considering certain aggravators. Rosales has not demonstrated his sentence was inappropriate based on his character or the nature of the offense. Accordingly, we affirm.

Affirmed.

BAKER, J., and BRADFORD, J., concur.