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IN THE
COURT OF APPEALS OF INDIANA

WILLIAM L. BELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0808-CR-401
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0708-FA-00033

JULY 9, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Defendant-Appellant William L. Bell appeals his convictions of one count of possession of cocaine of three grams or more with intent to deliver (Ind. Code § 35-48-4-1(a)(2)(C)), a Class A felony; and three counts of dealing in cocaine (Ind. Code § 35-48-4-1(a)(1)(C), Class B felonies. Bell also appeals his sentence. We affirm in part and modify Bell's sentence.

Bell raises five issues for our review, which we restate as:

I. Whether the trial court correctly denied Bell's motion to sever the counts.

II. Whether there was sufficient evidence to support Bell's conviction for possession of cocaine of three grams or more with intent to deliver.

III. Whether the verdict form violated the Indiana Constitution's requirement that the jury decide the facts and law.

IV. Whether the trial court committed error by imposing a different sentence in its written sentencing order than the sentence imposed in the trial court's oral sentencing statement.

V. Whether the sentence is inappropriate.

On June 11, 2007, an undercover police officer working with the Elkhart County drug interdiction and covert enforcement unit ("ICE") took part in a controlled buy by working with a "cooperating source" ("CS"). When conducting controlled buys such as this one, the CS introduces the officers to the drug dealer in question or otherwise provides helpful information. In this controlled buy, and two others, the CS actually introduced the police to Bell, the drug dealer in question.

On June 11, 2007, the CS contacted the ICE to inform inform the officers that she could arrange a drug deal with Bell. Consistent with all of their controlled buy

operations, the ICE searched the CS before the transaction, provided her with an audio recording device, and provided her with previously photocopied money. The undercover officer then drove the CS to Bell's home, and once there, the CS went to the back door. The CS returned with Bell to the undercover officer, who asked Bell if he could have "two for thirty dollars," a discount referring to two twenty-rocks, usually twenty dollars each, for thirty dollars total. Bell agreed to make the discounted sale. The CS and Bell went into Bell's house, and she returned two minutes later with the agreed upon amount of crack cocaine. On June 19 and 25, 2007, the ICE made similar controlled buys from Bell.

On August 1, 2007, the ICE returned to Bell's house to execute a search warrant. During the execution of the search warrant, Bell ran from his front porch to the back of his house, where a police officer, Jeffrey Eaton, was positioned. Officer Eaton and the UC chased Bell and ultimately apprehended and handcuffed him. Officer Eaton saw a clear plastic baggy hanging out of Bell's front left pants pocket, and he retrieved it. The baggy contained thirteen individually-wrapped rocks of crack cocaine, along with one unwrapped rock. ICE also confiscated other baggies, digital scales, ammunition for a Winchester, $350 in cash, and receipts showing that Bell lived at the house where the various deals were conducted.

Bell was arrested and was charged with one count of possession of three grams or more of cocaine with intent to deliver, a Class A felony; and three counts of dealing

cocaine, Class B felonies.[1] Bell was tried before a jury, found guilty, and sentenced at the sentencing hearing to forty-two years executed. However, in a later written sentencing order, he was sentenced to fifty years executed. This appeal ensued.

I.

Bell contends that the court abused its discretion in failing to grant his motion to sever Count I from the other counts. He argues that Count I should have been severed as a matter of right. In the alternative, he argues that he was prejudiced by the trial court's refusal to grant his motion because the jury could have used the evidence of the other counts in its decision on Count I.

Two or more offenses may be joined in the same information when the offenses are (1) the same or similar character, even if not part of a single scheme or plan, or (2) based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan. Ind. Code § 35-34-1-9. If two or more offenses are joined for a trial in the same information solely upon the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses. Ind. Code § 35-34-1-11; *Ben-Yisrayl v. State*, 690 N.E.2d 1141, 1145 (Ind. 1997), *cert. denied*, 525 U.S. 1108, 119 S.Ct. 877, 142 L.Ed.2d 777 (Ind. 1999). In cases where severance is not a matter of right, then a trial court's denial of a motion to sever charges is reviewed for an abuse of discretion. *Craig v. State*, 730 N.E.2d 1262, 1265 (Ind. 2000).

Under Ind. Code § 35-34-1-9(a)(2), offenses may be sufficiently "connected together to justify joinder if the State can establish that a common *modus operandi* linked

[1] An additional dealing count was dismissed.

the crimes and that the same motive induced that criminal behavior. *Ben-Yisrayl*, 690 N.E.2d at 1145. In this case, it was Bell's *modus operandi* to sell cocaine from his house and his motive to make money in doing so. For Counts II, III, and IV, Bell was successful in using that *modus operandi*, even though the sale was to law enforcement. For Count I, Bell had the pre-packaged cocaine in his pocket while standing on the porch of his home, and he was apparently ready, willing, and able to make the sale and the money. The possession of the pre-packaged cocaine under Count I also shows that he had the motive of selling the cocaine. Because these facts are sufficient to show a "series of acts connected together," they were not joined solely because they were of a "same or similar character" and severance was not mandated as a matter of right. *See id*. Accordingly, "whether to sever multiple charges is a matter within the trial court's discretion, taking into account the three factors listed in [subsections 11(a)(1) through (3)], and a denial of severance will be reversed only upon a showing of clear error." *Id.*

Bell argues that the trial court abused its discretion in not granting his motion to sever "as [he] suffered prejudice by the offenses being tried together, rendering the trial fundamentally unfair." (Appellant's Brief at 15). Specifically, he argues that the trial court's decision allowed the jury to make the "forbidden inference" that Bell had the propensity to commit the charged offense in Count I based on the "prior bad acts" of Counts II, III, and IV. *Id.* (citing Ind. Evidence Rule 404; *Craun v. State*, 762 N.E.2d 230, 240 (Ind. Ct. App. 2002), *trans. denied*).

We cannot agree that the trial court committed clear error in this case. The evidence for each count was specific to that count, and, as we discuss below, the evidence

pertaining to Count I particularly and clearly established that Bell was in possession of three grams or more of cocaine with intent to deliver. Given the particularity and clarity of the evidence pertaining to Count I, there was no need for the jury to resort to the "forbidden inference." Thus, there is no basis for Bell's claim of prejudice.

II.

Bell contends that the evidence was insufficient to show that he possessed the cocaine with the intent to deliver. Our standard of review for sufficiency claims is well settled. In reviewing sufficiency of the evidence claims, this court does not reweigh the evidence or assess the credibility of witnesses. *Davis v. State*, 791 N.E.2d 266, 269 (Ind. Ct. App. 2003), *trans. denied.* We consider only the evidence most favorable to the judgment, together with all reasonable and logical inferences that can be drawn therefrom. *Id*. at 269-70. The conviction will be affirmed if there is substantial evidence of probative value to support the conclusion of the trier of fact. *Id*. at 270. A judgment may be sustained based on circumstantial evidence alone if that circumstantial evidence supports a reasonable inference of guilt. *Id*. Such circumstantial evidence includes possession of a large amount of cocaine and testimony by an expert that the amount possessed by the defendant is consistent with the amount possessed by a dealer. *Id.* Stated differently, evidence of the illegal possession of "a relatively large quantity of drugs" coupled with possession of an amount of cocaine "compared to the amount a drug user would typically use and the fact that the rocks were individually wrapped" is sufficient to sustain a conviction for possession of cocaine with intent to deliver. *Id.*

In the present case, Bell concedes that he was in possession of over four grams of cocaine and that all but one of the rocks was individually wrapped. Shawn Turner, a Lieutenant with the ICE unit, testified that the amount possessed was more than the one or two "twenty rocks" associated with personal use and that the separately wrapped rocks were indicative of dealing. This evidence, standing alone, is sufficient to support the conviction.

In addition, there is evidence that the house Bell shared with another person contained other baggies, digital scales, ammunition for a Winchester, and $350 in cash. Turner further testified that these are items also found connected with dealing. Although Bell insists that there is no evidence that these items were his, especially in light of his housemate's prior drug dealing, we believe that given Bell's possession of a large amount of individually wrapped rocks, the jury could have reasonably concluded that this additional evidence was indicative of Bell's intent. In short, the evidence is clearly sufficient to support the conviction.

III.

Bell contends that the verdict form for Count I violated Article I, Section 19 of the Indiana Constitution because it did not give the jury the option to find that he did not possess three grams or more of cocaine. Article I, Section 19 provides, "In all criminal cases whatever, the jury shall have the right to determine the law and the facts."

The verdict form at issue gave the jury three options: (1) guilty of the Class A felony of possession of cocaine weighing three grams or more; (2) guilty of the Class C felony of possession of cocaine weighing three grams or more; and (3) not guilty.

We initially note that Bell did not object to the verdict form upon the basis of a violation of Article I, Section 19 of the Indiana Constitution; instead, he made a non-constitutional argument about the jury's function. Such failure results in waiver of the issue. *See Pinkston v. State*, 836 N.E.2d 453, 456 (Ind. Ct. App. 2005), *trans. denied*. A party may not object on one ground at trial and raise a different ground on appeal. *Wentz v. State*, 766 N.E.2d 351, 358 (Ind. 2002).

Waiver notwithstanding, Bell's argument is unavailing. He relies on *Seay v. State*, 698 N.E.2d 732 (Ind. 1998) and similar cases for the proposition that verdict forms must respect the jury's province of determining the law and facts under the Indiana Constitution. In *Seay*, our supreme court held that pursuant to Article I, Section 19, a jury in a habitual offender proceeding is permitted to render a verdict that the defendant is not a habitual offender even if it finds that the State has proven beyond a reasonable doubt that the defendant has accumulated prior unrelated felonies. *Id*. at 734. That is, "even where the jury finds the facts of the prerequisite prior felony convictions to be uncontroverted, the jury still has the unquestioned right to refuse to find the defendant to be a habitual offender at law." *Id*.

In the present case, the verdict form fully complies with *Seay* by allowing the jury to find Bell "not guilty." This option is congruent with the trial court's jury instruction that "[u]nder the Constitution of Indiana, you have the right to determine both the law and the facts." (Tr. 305). The verdict form did not violate Article 1, Section 19 of our constitution.

IV.

Bell contends that the trial court erred in imposing a sentence in its sentencing statement that differs from the sentence imposed in its sentencing order and judgment. During the sentencing hearing, the trial court imposed an executed sentence of forty-two years, with the twelve-year sentence for Count II to run consecutive to the thirty years for Count I. The two ten-year sentences for the other counts were to run concurrently. However, in the sentencing order and the judgment, the trial court imposed an executed sentence of fifty years, with a twenty-year sentence for Count IV to run consecutive to the thirty years for Count I.

In *McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007), our supreme court held that the reviewing court will examine the oral statement alongside the written statement to assess the conclusions of the trial court. The reviewing court has the option of crediting the statement that accurately pronounces the sentence or remanding to the trial court for resentencing. *Willey v. State*, 712 N.E.2d 434, 446 n. 8 (Ind. 1999).

In the present case, the prosecutor asked for a forty-two year sentence, which the trial court pronounced in its oral statement. In doing so, the trial court stated that its "conclusion [is] that somewhere between 40 and 45 years is an appropriate sentence." (Sentencing Transcript at 34). We conclude that the oral statement is the accurate pronouncement of the sentence, and we modify the sentence to concur with the trial judge's oral pronouncement.

V.

Bell contends that the imposition of consecutive sentences is inappropriate. A sentence authorized by statute will not be revised unless the sentence is inappropriate in

light of the nature of the offense and the character of the offender. Indiana Appellate Rule 7(B). We must refrain from merely substituting our opinion for that of the trial court. *Sallee v. State*, 777 N.E.2d 1204, 1216 (Ind. Ct. App. 2002), *trans. denied*. In determining the appropriateness of a sentence, a court of review may consider any factors appearing in the record. *Roney v. State*, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), *trans. denied.* The "nature of the offense" portion of the appropriateness review concerns the advisory sentence for the class of crimes to which the offense belongs; therefore, the advisory sentence is the starting point in the appellate court's sentence review. *Anglemyer v. State*, 868 at 491. The "character of the offender" portion of the sentence review involves consideration of the aggravating and mitigating circumstances and general considerations. *Williams v. State*, 840 N.E.2d 433, 439-40 (Ind. Ct. App. 2006).

With regard to the nature of the offenses, we note that during one transaction Bell delivered the drugs in the presence of a minor. Furthermore, during the offense listed as Count I Bell fled from the police before he was apprehended and arrested.

With regard to the nature of the offender, we note that the trial court found that past alternatives to incarceration had failed to rehabilitate Bell. Furthermore, Bell's delivery of drugs in the presence of a child speaks to Bell's character.

Given the nature of the offenses and the offender, we cannot say the consecutive sentences are inappropriate.

Bell also challenges the sentences under the theory that the consecutive sentences run afoul of the rationale stated in *Beno v. State*, 581 N.E.2d 922 (Ind. 1991) and its progeny. In *Beno*, the court held it was improper to impose consecutive sentences for

multiple drug dealing convictions where the convictions were based on nearly identical State-sponsored sales to a police informant as part of an ongoing sting operation. 581 N.E.2d at 924. Here, as in *Iddings v. State*, 772 N.E.2d 1006, 1019 (Ind. Ct. App. 2002), *trans. denied*, the trial court imposed concurrent sentences for the convictions that arose from State-sponsored activities. Bell's criminal activity in Count I was not State sponsored in any way; indeed, the officers were on Bell's property to arrest him for previous State-sponsored activity, not to make another State-sponsored buy. *Beno* and its progeny have no application here.

Bell further argues that the trial court's denial of his motion to sever requires Count I to be so intertwined with the State-sponsored buys that *Beno* should apply. However, Bell's motion was denied because of the similar *modus operandi* of selling drugs from his residence, not because of the State-sponsored activity. Again, we note that Count I did not refer to State-sponsored activity.

We affirm in part and modify Bell's sentence to forty-two years.

NAJAM, J., and MATHIAS, J., concur.