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**IN THE  
COURT OF APPEALS OF INDIANA**

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EDGAR GALLARDO, )  
 )  
Appellant, )  
 )  
vs. ) No. 79A02-0812-CR-1123  
 )  
STATE OF INDIANA, )  
 )  
Appellee. )

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APPEAL FROM TIPPECANOE SUPERIOR COURT  
The Honorable Donald C. Johnson, Judge  
Cause No. 79D01-0801-FC-6

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**July 17, 2009**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Edgar Gallardo (“Gallardo”) pleaded guilty in Tippecanoe Superior Court to Class C felony dealing in a substance represented to be a controlled substance, Class D felony possession of marijuana, Class D felony escape, Class A misdemeanor possession of marijuana, Class A misdemeanor possession of paraphernalia, and Class A misdemeanor false informing. The trial court sentenced Gallardo to an aggregate term of six years incarceration. Gallardo appeals and claims that his sentence is inappropriate. We affirm.

### **Facts and Procedural History**

On January 19, 2008, two Lafayette Police Department officers went to a home in Lafayette to search for an individual wanted for arrest when they saw Gallardo and Michelle Sell (“Sell”) sitting in the front seat of Sell’s car, which was parked in the driveway. Gallardo got out of the car and approached the officers, who noticed a strong odor of burnt marijuana. While one of the officers obtained Sell’s consent to search the car, the other spoke with Gallardo. Sell admitted that she and Gallardo had been smoking marijuana. Gallardo initially told the officer his name was David Olivera. Further investigation, however, revealed that this was one of Gallardo’s aliases. The police also learned that there was an active warrant for Gallardo’s arrest.

Inside the passenger compartment of the car, the police found a marijuana pipe, plastic bags containing marijuana, rolling papers, and over \$200 in cash. In the trunk, they found hand scales, several plastic bags, and six cut bag corners containing a white, powdery substance. Field testing indicated that the substance was not cocaine, but most likely baking soda. Sell claimed that the substance was a mixture of baking soda and an

unknown pain killer. The police also found several pieces of paper containing phone numbers. The police arrested Gallardo, who eventually told the police his true name.

On January 24, 2008, the State charged Gallardo with Class C felony dealing in a substance represented to be a controlled substance, Class D felony possession of marijuana, Class A misdemeanor possession of marijuana, and Class A misdemeanor possession of paraphernalia. On September 19, 2008, the State added a charge of Class A misdemeanor false informing, which had originally been filed under a different cause number. On April 8, 2008, the State added a charge of Class D felony escape, which had also initially been filed under a different cause number. The escape charge alleged that Gallardo had failed to return to detention after having been granted a temporary leave.

On September 19, 2008, Gallardo entered into a plea agreement with the State whereby Gallardo pleaded guilty to all counts except for Class A misdemeanor possession of marijuana count, which was dismissed. The agreement also called for all of Gallardo's sentences to be served concurrently. Other than this provision, the trial court's sentencing discretion remained intact. The trial court accepted the plea agreement.

At a sentencing hearing held on October 31, 2008, the trial court identified as an aggravating factor that Gallardo had a criminal history, which included Class C felony convictions for criminal recklessness committed with a deadly weapon and battery resulting in serious bodily injury, and Class A misdemeanor convictions for criminal recklessness, possession of marijuana, and conversion. The trial court also found as aggravating that Gallardo had pending charges for possession of marijuana, had a long

history of substance abuse, and was in the country illegally. As mitigating, the court found that Gallardo had completed his GED and that imprisonment would result in undue hardship to his dependants. The court concluded that the aggravating factors outweighed the mitigating factors, and sentenced Gallardo as follows: six years for Class C felony dealing in a substance represented to be a controlled substance; one and one-half years for Class D felony possession of marijuana; one and one-half years for Class D felony escape; one year for Class A misdemeanor possession of paraphernalia; and one year for Class A misdemeanor false informing. Pursuant to the plea agreement, the trial court ordered all sentences to be served concurrently, for an aggregate term of six years. Gallardo now appeals.

### **Discussion and Decision**

Gallardo claims that the sentence imposed by the trial court is inappropriate. Pursuant to Indiana Appellate Rule 7(B), this court may revise a sentence otherwise 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.” On appeal, it is the defendant’s burden to persuade us that the sentence imposed by the trial court is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Gallardo has not met this burden.

Considering the nature of the offense, we note that Gallardo was caught in an obvious drug-dealing setting. He was found in a car with scales, bags of marijuana and bags a substance he intended to pass off as cocaine, cash, and phone numbers. The substance appearing to be cocaine was in fact a combination of baking soda and a

painkiller. Thus, the substance Gallardo was passing off as cocaine was not necessarily harmless. Although these might not be among the worst circumstances we can imagine, Gallardo's sentence is more than justified considering his character.

Gallardo's criminal history includes two violent felony convictions, i.e. criminal recklessness with a deadly weapon and battery causing serious bodily injury, in addition to misdemeanor convictions for criminal recklessness, possession of marijuana, and conversion. Further, Gallardo is an illegal immigrant and has accumulated a significant criminal history despite being only twenty-three years old at the time of sentencing.<sup>1</sup> Gallardo has also previously violated the terms of his probation.

Gallardo also claims that his sentence is "close the maximum," and that his sentence is inappropriate because his crimes were not the "worst offenses" and he is not the "worst offender." See Buchanan v. State, 767 N.E.2d 967, 973 (Ind. 2002) (noting that maximum possible sentences should generally be reserved for the worst offenses and offenders). Here, however, Gallardo sentence is two years less than the maximum eight-year sentence, and the "worst offense, worst offender" analysis is therefore inapplicable.

Gallardo's six year aggregate sentence is not inappropriate in light of nature of the offense and the character of the offender..

Affirmed.

RILEY, J., and KIRSCH, J., concur.

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<sup>1</sup> Although two of Gallardo's prior convictions occurred before he was eighteen years of age, he was waived into adult court and convicted as an adult.