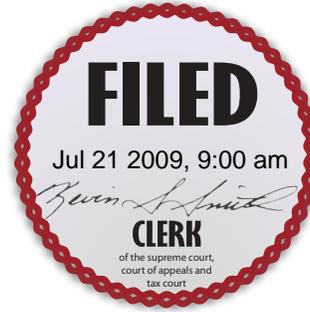


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ANTONIO LAMON SESSIONS,)

Appellant-Defendant,)

vs.)

No. 79A05-0812-CR-713

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0710-FA-43

July 21, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Antonio Lamon Sessions challenges his sixty-year sentence following his conviction for Class A felony dealing in cocaine and his habitual offender adjudication. Specifically, Sessions contends that the State did not present sufficient evidence to support a habitual offender enhancement. Sessions also contends that the court abused its discretion in attaching the habitual offender enhancement to the Class A felony dealing in cocaine conviction and that his sentence is inappropriate. Concluding that the State did not present sufficient evidence, that the trial court did not abuse its discretion in attaching the habitual offender enhancement, and that Sessions has failed to persuade us that his sentence is inappropriate, we affirm.

Facts and Procedural History

On October 3, 2007, the Tippecanoe County Drug Task Force was investigating drug trafficking in Country View Estates, a residential apartment complex in Lafayette, Indiana. Detective Bradley Curwick and a confidential informant were located in one of the Country View Estates apartment units anticipating a potential drug transaction. Sessions approached the apartment on his bicycle at approximately 10:00 p.m. He reached the apartment and had a conversation with the informant on the front stoop of the apartment. Detective Curwick identified Sessions as a black male wearing a white tee shirt and blue jeans. Sessions returned to his bicycle and left the apartment.

Anticipating a drug purchase, Detective Curwick placed eighty dollars of “buy money” in his pocket. Tr. p. 38. He and the informant went to the front of the apartment building and stood on the stoop. Approximately ten minutes later, Sessions returned on

his bicycle and the three men went inside the apartment. While Sessions was speaking with the informant, Detective Curwick overheard Sessions say, “I got one for forty.” *Id.* at 37. Sessions then handed the bag to the informant, and the informant handed the bag to Detective Curwick. Detective Curwick testified that the bag contained a “cream colored rock like substance in it, known to [him] as crack cocaine.” *Id.* at 38. Detective Curwick gave the informant forty dollars of the buy money to give to Sessions. *Id.* After Sessions received the payment, he exited the apartment and rode away on his bicycle. Detective William Dempster, who was performing surveillance in the upstairs portion of the apartment, notified the other units within the task force “that a deal had occurred.” *Id.* at 155. He then decided to have Sessions stopped because “[they] didn’t have any identification on [Sessions].” *Id.*

Officer Robert Petillo was assisting in the investigation and was notified that “there was a black male wearing a white tee shirt riding a bicycle northbound on Westchester.” *Id.* at 99. While driving, he saw a person who fit the description of Sessions and pulled up next to him. Officer Petillo “rolled down the window and asked [Sessions] what he was doing.” *Id.* at 101. Officer Petillo testified that “[Sessions] had just left the location of a drug deal and Drug Task Force informed [him] that they had probable cause to arrest [Sessions].” *Id.* at 99. Sessions engaged in conversation with Officer Petillo and reached into his pockets after Officer Petillo asked for identification. Officer Petillo then instructed Sessions to leave his hands in his pockets. Nevertheless, Sessions removed his hands from his pockets as Officer Petillo exited his car. However,

as Officer Petillo approached Sessions, he was unable to “see what he did with his hand.” *Id.* at 102.

Lieutenant Thomas Davidson worked with the Drug Task Force and was parked thirty feet or less from Officer Petillo and Sessions. Lieutenant Davidson testified that as Officer Petillo exited his car to approach Sessions, Sessions pulled his “right hand out and then [threw] something under the car.” *Id.* at 126. Lieutenant Davidson approached the scene and noticed two twenty dollar bills under the car. Sessions denied throwing the money under the car when asked by Lieutenant Davidson. When asked a second time, Sessions admitted that the money belonged to him. Officer Petillo and Lieutenant Davidson arrested Sessions. Lieutenant Davidson confirmed that the serial numbers from the money “matched the ones they used in the controlled buy.” *Id.* at 129. He then turned the money over to Detective Dempster.

The State charged Sessions with Class A felony dealing in cocaine,¹ Class B felony possession of cocaine,² and Class A misdemeanor possession of marijuana.³ The State also alleged that Sessions was a habitual substance offender⁴ and a habitual offender.⁵ In a bifurcated trial, Sessions was found guilty by a jury of dealing in cocaine and possession of cocaine. The jury was hung with respect to the possession of marijuana charge, and the court declared a mistrial as to that charge. The court merged

¹ Ind. Code § 35-48-4-1(b)(3)(B)(iii) (The offense is a Class A felony if the person delivered the drug within 1000 feet of a family housing complex).

² Ind. Code § 35-48-4-6(b)(2).

³ Ind. Code § 35-48-4-11.

⁴ Ind. Code § 35-50-2-10.

⁵ Ind. Code § 35-50-2-8.

the lesser included offense of Class B felony possession of cocaine with Class A felony dealing in cocaine. In the habitual offender proceeding, Sessions waived his right to a jury trial and was adjudicated by the trial court as both a habitual substance offender and a habitual offender. The court merged the habitual substance offender enhancement into the habitual offender enhancement. The court gave Sessions a thirty-year sentence on the dealing in cocaine conviction, enhanced by thirty years for the habitual offender adjudication. Sessions now appeals.

Discussion and Decision

On appeal, Sessions contends that the State failed to produce sufficient evidence to support the habitual offender enhancement for a drug related offense. He also contends that the trial court abused its discretion and that his sentence is inappropriate.

I. Sufficiency of the Evidence

Sessions contends that the State presented insufficient evidence to support the habitual offender adjudication because the State failed to prove that Sessions was convicted of two prior unrelated dealing felonies. When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the factfinder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. *Id.* To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider only the evidence most favorable to the trial court's ruling. *Id.* Appellate courts affirm the conviction unless no reasonable factfinder

could find the elements of the crime proven beyond a reasonable doubt. *Id.* The evidence is sufficient if an inference may be reasonably drawn from it to support the verdict. *Id.* at 147. We use the same standard when reviewing the sufficiency of the evidence to support a habitual offender adjudication. *See Toney v. State*, 715 N.E.2d 367, 369 (Ind. 1999).

To establish that the defendant is a habitual offender, the State must prove beyond a reasonable doubt that the defendant has been previously convicted of two separate and unrelated felonies as specified in Indiana Code § 35-50-2-8. *Lewis v. State*, 769 N.E.2d 243, 246 (Ind. Ct. App. 2002), *aff'd on reh'g*, 774 N.E.2d 941 (Ind. Ct. App. 2002), *trans. denied*. In order to be adjudicated a habitual offender based on the evidence presented by the State in this case, Sessions must have had two prior dealing convictions as specified within Indiana Code § 35-50-2-8(b)(3)(C)(ii). This provision provides that the State may seek to have a person sentenced as a habitual offender for a felony offense if the total number of unrelated convictions that the person has for dealing a narcotic, legend drug, or controlled substance exceeds one. To prove that Sessions has been convicted of two prior unrelated felony dealing convictions, the State presented State's Exhibits Eight,⁶ Nine,⁷ and Ten.⁸

⁶ State's Exhibit Eight contains an indictment for delivery of a controlled substance, an order for sentence of probation, a jury verdict, and the probation termination order. Appellant's App. p. 74–80.

⁷ State's Exhibit Nine contains an indictment for possession of controlled substance with intent to deliver and delivery of a controlled substance, a jury verdict, and sentencing order. *Id.* at 81–87.

⁸ State's Exhibit Ten contains the information for possession of cocaine, a sentencing order, and the abstract of judgment to the Indiana Department of Correction. Appellant's App. p. 88–93. However, this conviction does not support a habitual offender finding because it is for possession, not dealing. *See* Indiana Code § 35-50-2-8(b)(3)(C)(ii).

First, Sessions challenges the validity of State's Exhibit Eight, which the State alleges demonstrates a prior conviction for dealing in a controlled substance in Cook County, Illinois. Appellant's App. p. 74. Sessions contends that a "close examination of the letters D.C.S. reveals that in fact, it could be P.C.S., meaning possession of a controlled substance." Appellant's Br. p. 12. If Exhibit Eight reveals a conviction for *possession* of a controlled substance, then the conviction would not support a habitual offender enhancement for dealing in cocaine. I.C. § 35-50-2-8(b)(3)(C)(ii).

However, State's Exhibit Eight contains an indictment for *delivery* of a controlled substance as a Class 2 felony, a termination of probation order, and a certification of each document in Exhibit Eight as "a true, perfect and complete copy" by Dorothy Brown, Clerk of the Circuit Court of Cook County, Illinois. Appellant's App. p. 74. Each of the documents in Exhibit Eight references case number 98CR17922. Finally, Sessions's contention that "D.C.S.", as written on the probation order, could be "P.C.S." is not supported by the contents of Exhibit Eight, as the first letter is clearly a "D". State's Exhibit Eight evidences a prior conviction for delivery of a controlled substance. This conviction qualifies as a prior unrelated dealing felony under Indiana Code § 35-50-2-8.

Second, Sessions contends that State's Exhibit Nine "requires imagination" to demonstrate a second prior dealing offense. Appellant's Br. p. 11. State's Exhibit Nine contains an order of commitment and sentence and shows Sessions was convicted of Class 1 felony "MFG/DEL 01-15 GR COCAINE /ANGL" and sentenced in 2003 to three years in the Illinois Department of Corrections. Sessions intimates that, "MFG/DEL 01-15 GR COCAINE /ANLG" as written on the order of commitment and sentence offered

in State's Exhibit Nine does not demonstrate a prior unrelated felony dealing conviction. Appellant's App. p. 87. However, it does not require imagination to determine that the offense listed on the sentencing order is for manufacturing/delivery of cocaine. This conviction counts as a prior unrelated dealing felony under Indiana Code § 35-50-2-8.

Therefore, there is sufficient evidence of two prior unrelated dealing felonies to support a habitual offender enhancement. Sessions's challenge to the sufficiency of the evidence fails.

II. Sentencing

Next, Sessions contends that the trial court abused its discretion by electing to apply the habitual offender enhancement to the conviction for Class A felony dealing in cocaine rather than Class B felony possession of cocaine. Sessions also contends that his sentence is inappropriate based on the nature of his offense and his character.

A. Abuse of Discretion

Sessions contends that the trial court abused its discretion by concluding that only the dealing in cocaine conviction could be enhanced by the habitual offender adjudication. Specifically, he contends that the trial court is not required to "attach the enhancement to the most severe underlying felony." Appellant's Br. p. 17. Further, Sessions contends that the trial court "could have imposed concurrent sentences on the Class A felony dealing offense and the Class B felony possession offense without violating double jeopardy concerns." *Id.*

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 reh'g*, 875 N.E.2d 218 (Ind. 2007). An abuse of discretion occurs if 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.* We review the presence or absence of reasons justifying a sentence for an abuse of discretion, but we cannot review the relative weight given to these reasons. *Id.* at 491.

At sentencing, the trial court merged the possession of cocaine conviction into the dealing in cocaine conviction. Where the same cocaine supports convictions for both possession of cocaine pursuant to Indiana Code § 35-48-4-6 and dealing in cocaine pursuant to Indiana Code § 35-48-4-1, possession of cocaine is a lesser included offense of dealing in cocaine. *Harrison v. State*, 901 N.E.2d 635, 643 (Ind. App. Ct. 2009), *trans. denied*. Where the conviction of a greater crime cannot be had without conviction of the lesser crime, the double jeopardy clause of the United States Constitution and the Indiana Constitution bars a separate conviction and sentencing on the lesser crime when sentencing is imposed on the greater one. *Id.* Additionally, Indiana Code § 35-38-1-6 provides that where a defendant is found guilty of a greater and lesser included offense, judgment and sentence may not be entered on the lesser included offense. *Id.* Therefore, the trial court properly merged the possession and dealing convictions.

Because the trial court properly entered judgment of conviction only on the Class A felony dealing charge, the court did not err by attaching the habitual offender enhancement to this conviction, the only one available for sentence enhancement. The court also applied only the general habitual offender enhancement to the sentence for

Class A felony dealing in cocaine.⁹ The trial court identified Sessions’s lengthy criminal history as the sole aggravating factor and identified the hardship to Sessions’s dependents and the relatively small amount of drugs involved as mitigating factors. The trial court concluded that the aggravating and mitigating factors balanced.¹⁰ The trial court then sentenced Sessions to thirty years on the dealing in cocaine conviction and enhanced the sentence by thirty years for the habitual offender adjudication. We conclude that the trial court did not abuse its discretion in sentencing Sessions.

B. Inappropriateness

Sessions also contends that his sixty-year sentence is inappropriate in light of the nature of his offense and his character pursuant to Indiana Appellate Rule 7(B). In reviewing the imposition of a trial court’s decision, Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a court “may revise a sentence

⁹ An individual who is convicted of three felony dealing convictions will, by definition, meet the criteria for being both a habitual offender and a habitual substance offender. *Hendrix v. State*, 759 N.E.2d 1045, 1047 (Ind. 2001). Where two criminal statutes overlap, such that both are appropriate, the prosecutor has the discretion to charge under either statute. *Id.* However, “a defendant’s sentence is not to be twice enhanced on the basis of different habitual offender statutes.” *Burp v. State*, 672 N.E.2d 439, 441 (Ind. Ct. App. 1996). Therefore, though the State may present evidence that Sessions qualifies under both habitual offender statutes, Sessions’s conviction can only be enhanced by one habitual offender statute. There was no error in this regard.

¹⁰ Sessions alleges that the sentencing order conflicts with the oral statement from the sentencing hearing. At sentencing the trial court said the aggravating and mitigating factors balanced. Tr. p. 235. However, the sentencing order specifies that the aggravating factors outweigh the mitigating factors. Appellant’s App. p. 71. In non-capital cases, Indiana appellate courts reviewing sentences may examine both the written and oral sentencing statements to discern the findings of the trial court. *McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007). The Indiana Supreme Court has instructed that “rather than presuming the superior accuracy of the oral statement, we examine it alongside the written sentencing statement to assess the conclusions of the trial court.” *Dowell v. State*, 873 N.E.2d 59, 60 (Ind. 2007). Here, we conclude that the trial court’s oral statements accurately reflect the true sentence because the trial court imposed the advisory 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." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemeyer*, 868 N.E.2d at 491). The burden is on the defendant to persuade us that his or her sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

Sessions contends a sixty-year sentence for delivering forty dollars worth of cocaine that was less than .5 grams is inappropriate. Although the crime involved a minimal amount of drugs, Sessions received the advisory sentence of thirty years for his Class A felony dealing conviction. Ind. Code § 35-50-2-4. This conviction was enhanced by thirty years, which was the minimum sentence under the habitual offender statute. I.C. § 35-50-2-8(h) ("The court shall sentence a person found to be a habitual offender to an additional fixed term that is not less than the advisory sentence for the underlying offense nor more than three (3) times the advisory sentence for the underlying offense.").

As for the character of the offender, Sessions has a serious criminal history. In Illinois, he was convicted of Class 2 felony burglary, Class 2 felony robbery, and Class 1 manufacturing/delivery cocaine. Sessions was sentenced to serve three years for each of his three Illinois convictions. He was also convicted of Class 2 felony delivery of controlled substance, for which he was sentenced to eighteen months probation. In Indiana, Sessions was convicted of Class D felony possession of cocaine and sentenced in 2006 to two and a half years in the Indiana Department of Correction for that conviction.

Less than three months after his release, Sessions was again arrested for dealing cocaine. Sessions's affinity for criminal activity, as indicated by the record, does not reflect positively upon his character.

Sessions's immediate offense may have involved a minimal amount of drugs. However, he has committed multiple felonies. In sum, Sessions has failed to persuade us that his sixty-year sentence is inappropriate in light of the nature of his offense and his character.

Affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.