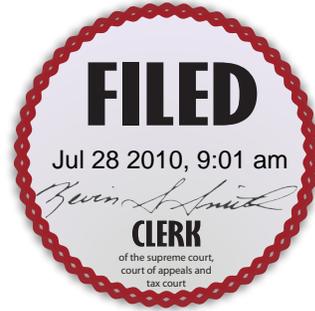


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

DONALD W. PAGOS
Michigan City, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

HENRY A. FLORES, JR.
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

THOMAS EUGENE FERRELL,

Appellant/Defendant,

vs.

STATE OF INDIANA,

Appellee/Plaintiff.

)
)
)
)
)
)
)
)
)
)
)

No. 46A03-0910-CR-471

APPEAL FROM THE LaPORTE SUPERIOR COURT
The Honorable Kathleen B. Lang, Judge
Cause No. 46D01-0610-FB-180

July 28, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Thomas Eugene Ferrell appeals following his conviction and twelve-year sentence for Dealing in Cocaine as a Class B felony.¹ Ferrell contends that the State produced insufficient evidence to support his conviction and that his due process rights were violated when the trial court allegedly failed to issue a timely sentencing order. We affirm.

FACTS AND PROCEDURAL HISTORY

In September of 2006, Steve Summerlin informed the Michigan City Police Department, Metro Narcotics Division (“MND”), that he could purchase crack cocaine from Ferrell in Michigan City, Indiana. Summerlin offered his services to act as confidential informant (“CI”) in a controlled purchase. The police agreed and arranged a controlled purchase. On September 14, 2006, Summerlin met with several MND detectives to discuss the details of the controlled purchase. Detectives searched Summerlin and his vehicle during this meeting, gave him sixty dollars, and outfitted him with an audio recording device. At some point during the meeting Ferrell called Summerlin and told him to “hurry up.” Tr. p. 104.

Summerlin drove to Ferrell’s house and parked his vehicle nearby. Detective Alton Bush, who was videotaping Ferrell and Summerlin at the time, saw Ferrell in the vicinity of the driver’s side rear tire of a vehicle at the scene. According to Detective Bush, at some point an object appeared beside that tire, which Ferrell kicked closer to the tire.

¹ Ind. Code § 35-48-4-1(a) (2006).

After a brief conversation, Ferrell indicated to Summerlin that he was in possession of “dimes.” Tr. p. 108. Summerlin provided Ferrell the sixty dollars given to him by the detectives. After receiving the money, Ferrell gestured at an object in a white paper towel by the rear driver’s side of his truck. Two other detectives listened to the transaction. MND Detective Marty Corley overheard Ferrell refer to “six stubs” or “six rocks” which were “over there in a piece of paper.” Tr. p. 134. MND Detective Brian Maxey heard Ferrell reference “tires” shortly after he referred Summerlin to a piece of paper on the ground. Tr. p. 147. Summerlin retrieved an object in the vicinity of the rear of the vehicle and conversed with Ferrell about a future purchase of a “quarter ounce.” Tr. p. 109. Detective Maxey similarly heard Ferrell reference an “additional” purchase of “crack cocaine.”² Tr. p. 148. Neither Summerlin nor Ferrell spoke to anyone else during this transaction. Summerlin left the location and met detectives at a “drop-off area.” Tr. p. 110. Summerlin handed the paper over to the detectives. Detectives later determined the paper contained six packages of cocaine with a net weight of .88 grams.

On October 27, 2006, the State charged Ferrell with dealing in cocaine, a Class B Felony. On May 12, 2009, a jury found Ferrell guilty as charged. On August 6, 2009, Ferrell was sentenced to twelve years with eight years executed in the Indiana Department of Correction, two years on work release, and two years suspended to probation. This appeal follows.

² An audio tape, while admitted as an exhibit, was not included in the record on appeal. Ferrell does not contest the record with respect to the audiotape.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

On appeal, Ferrell challenges the sufficiency of the evidence to support his conviction for dealing in cocaine as a Class B felony. When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We do not reweigh the evidence or judge the credibility of the witnesses. *Kien v. State*, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), *trans. denied*. If we are confronted with conflicting evidence, we consider the evidence most favorable to the trial court's verdict. *Drane*, 867 N.E.2d at 146. We must affirm if the probative evidence and reasonable inferences drawn from that evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. *See id.* at 147.

In order to convict Ferrell, the State had to prove that he knowingly delivered cocaine to Summerlin. *See* Ind. Code § 35-48-4-1(a). In challenging his conviction, Ferrell contends that (1) the State's video of the alleged controlled buy never shows him in actual possession of the white piece of paper that contained cocaine and (2) there are conflicting versions of facts such that the evidence is insufficient to support his conviction. We cannot agree.

As to Ferrell's video challenge, we note that the surrounding circumstances, eyewitness testimony, and Ferrell's conduct establish that he knowingly delivered cocaine in the instant case, whether or not the videotape shows him in actual possession

of the cocaine.³ According to Summerlin, he had arranged with Ferrell to purchase cocaine from him, and Ferrell called to tell him to “hurry up,” just prior to their transaction. Tr. p. 104. Summerlin further testified that he drove to Ferrell’s house, whereupon Ferrell referenced “dimes,” accepted sixty dollars in apparent exchange for them, pointed to a particular location by his truck, and instructed Summerlin to retrieve an object at the location. Tr. p. 108. Two other detectives listening to the transaction similarly overheard Ferrell refer Summerlin to an object near “tires” and plan a future transaction involving crack cocaine. Furthermore, another detective recording the transaction testified that he observed Ferrell, while in the vicinity of a vehicle’s tire, kick an object closer to the tire. The object Summerlin retrieved from this location was later determined to contain packages of cocaine. This evidence and the reasonable inferences drawn from this evidence support the conclusion that the “dimes” Ferrell said he possessed, and the object to which he referred Summerlin, were the cocaine packages.

To the extent there are conflicting versions of facts, the jury was in a better position to assess the credibility of the evidence, and we will not re-evaluate its factual conclusions. The factfinder bears the responsibility to determine whether the evidence given in a case is sufficient to satisfy each element of the offense. Here, the jury was within its discretion to find credible the testimony suggesting that Ferrell had referred Summerlin to the cocaine in exchange for Summerlin’s payment to Ferrell. The testimony, surrounding circumstances, and Ferrell’s conduct support this conclusion.

³ The video, which was also admitted as an exhibit, was not transmitted on appeal.

Ferrell relies on *Watson v. State*, 839 N.E.2d 1291 (Ind. Ct. App. 2005), in which a defendant's possession of money from a controlled purchase was held to be insufficient to support a conviction for dealing in cocaine. In *Watson*, the court held that because the CI was not searched before the controlled buy and did not testify about receiving the cocaine from the defendant, no reasonable factfinder could have concluded that the defendant originally possessed the cocaine found on the CI after the buy. *Id.* at 1293. The case before us is distinguishable from *Watson*. Unlike the CI in *Watson*, Summerlin and his vehicle were searched prior to the controlled purchase. Furthermore, Ferrell pointed at and instructed Summerlin to retrieve an object later determined to contain cocaine. Unlike the defendant in *Watson*, Ferrell linked himself to the cocaine when he pointed at it. There was sufficient evidence to support Ferrell's conviction for dealing in cocaine.

II. Due Process Violation

Ferrell also contends that his due process rights were violated when he was sentenced eighty-six days after being convicted, which Ferrell claims was untimely pursuant to Indiana Criminal Rule 15.1 and Indiana Code section 35-38-3-2(a)(2006). We conclude that Ferrell waived any challenge to timeliness of his sentencing by failing to object to the dates of sentencing before the trial court. It is well established that “[g]rounds for objection must be specific and any grounds not raised in the trial court are not available on appeal.” *Espinoza v. State*, 859 N.E.2d 375, 384 (Ind. Ct. App. 2006); *see also, Grace v. State*, 731 N.E.2d 442 (Ind. 2000) (recognizing that grounds not raised in trial court are not available on appeal).

Here, Ferrell made no objection to the court's proposed dates for holding a sentencing hearing. The jury convicted Ferrell on May 12, 2009. Subsequently, the trial court set a sentencing date for June 18, 2009, to which Ferrell did not object. On June 18, 2009, a sentencing hearing was conducted. The trial court took the matter under advisement and continued the sentencing hearing for July 16, 2009. Ferrell did not object to the July 16, 2009 date to. On July 16, 2009, the hearing was reset for August 6, 2009. On August 6, 2009, Ferrell was sentenced. There is nothing in the record to suggest that Ferrell objected to any of these dates. Without a proper objection, Ferrell has waived any challenge. Having found waiver, we do not address Ferrell's due process challenge.

The judgment of the trial court is affirmed.

RILEY, J., and MATHIAS, J., concur.