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IN THE
COURT OF APPEALS OF INDIANA

JOSE S. CONTRERAS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0812-CR-588
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0803-FA-9

July 29, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Jose S. Contreras (Contreras), appeals his conviction for three Counts of dealing in cocaine, Class A felonies, Ind. Code § 35-48-4-1(a)(1)(C); (b)(1).

We affirm.

ISSUES

Contreras raises four issues on appeal, which we restate as follows:

(1) Whether the State presented sufficient evidence to support Contreras' convictions beyond a reasonable doubt;

(2) Whether he was denied effective assistance of counsel pursuant to the Sixth Amendment of the United States Constitution and Article I, Section 13 of the Indiana Constitution;

(3) Whether the entrapment defense can be established as a matter of law; and

(4) Whether he was properly sentenced.

FACTS AND PROCEDURAL HISTORY

On February 28, 2008, a confidential informant (C.I.) contacted Undercover Officer 193 (UC 193), an officer with the Interdiction and Covert Enforcement Unit of the Elkhart County Sheriff's Department, informing him that Contreras was dealing large amounts of cocaine. Pursuant to UC 193's instructions, the C.I. phoned Contreras advising Contreras that his friend, UC 193, was interested in buying a half-ounce of cocaine. UC 193 and the C.I. met Contreras at an apartment complex in Elkhart, Indiana. Contreras placed a call to his supplier and all three then traveled to the parking lot of a pizza parlor in Goshen.

Eventually, a white van arrived at the parking lot. UC 193 handed Contreras $400, who then walked over to the van. A minute later, Contreras returned with approximately a half-ounce of cocaine. UC 193 and the C.I. returned Contreras to his apartment.

On March 10, 2008, the C.I. arranged another purchase of a half-ounce of cocaine. UC 193 and the C.I. met Contreras at a local fast food restaurant. Contreras entered the car and instructed UC 193 to drive to a shoe store. Arriving at the location, UC 193 noticed the same van he had seen during the previous transaction. UC 193 gave Contreras $400. Contreras walked into the shoe store at the same time that a man, who had exited the van, entered the store. Both men then walked out of the store again and entered the van. Shortly thereafter, Contreras ran back to UC 193's vehicle. He gave UC 193 approximately a half-ounce of cocaine. UC 193, the C.I. and Contreras then drove back to the fast food restaurant where they dropped off Contreras.

The final buy took place on March 25, 2008. That day, UC 193 and another undercover officer went to Contreras' apartment and inquired if they could purchase two ounces of cocaine. Contreras asked them to return later. When UC 193 returned to Contreras' residence, he was told to drive to a local grocery store. Once they arrived, Contreras received a phone call and instructed UC 193 to drive to Wal-Mart in Goshen. After arriving at the Wal-Mart and giving Contreras the money, UC 193 told Contreras that he only wanted to buy one ounce, not two. Contreras left for a short time and when he returned to the car, he explained to UC 193 his supplier could not break the cocaine into two separate ounces. Contreras repeatedly asked UC 193 to buy both ounces instead of one. UC

193 eventually agreed and gave Contreras cash for two ounces of cocaine. Contreras returned with two ounces of cocaine. UC 193 then drove Contreras to a convenience store where he was arrested.

On March 31, 2008, the State filed an Information, charging Contreras with three Counts of dealing in cocaine, Class A felonies, I.C. § 35-48-4-1(a)(1)(C); (b)(1). On October 6, 2008, a jury trial was held. At the conclusion of the evidence, the jury found Contreras guilty as charged. On October 30, 2008, after conducting a sentencing hearing, the trial court sentenced Contreras to forty-five years executed on each Count, with the sentences to be served concurrent.

Contreras now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Sufficiency of the Evidence*

Contreras contends that the State failed to present sufficient evidence to sustain his convictions for dealing in cocaine. In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007), *trans. denied*. We will consider only the evidence most favorable to the verdict and the reasonable inferences to be drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id*. at 213. A conviction may be based on circumstantial evidence alone. *Id*. Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id*.

Dealing in cocaine, a Class A felony, is defined in I.C. § 35-48-4-1(a)(1)(C); (b)(1) as knowingly or intentionally delivering cocaine weighing three (3) grams or more. Contreras now claims that the State failed to present sufficient evidence that establishes beyond a reasonable doubt that he was the individual who sold UC 193 cocaine on three separate occasions. He disputes UC 193's unequivocal trial testimony, identifying him as the dealer who sold UC 193 the cocaine, on the ground that the officer had not seen Contreras since he was arrested or had selected him from a photo array.

However, the identity of the accused is a question of fact. *Rhodes v. State*, 290 N.E.2d 501, 506 (Ind. Ct. App. 1972). The weight to be given to identification evidence and any determination of whether it is satisfactory and trustworthy is a function of the trier of fact. *Richardson v. State*, 333 N.E.2d 918, 920 (Ind. Ct. App. 1975). This court will not reweigh the evidence nor determine the credibility of witnesses.

II. *Effective Assistance of Counsel*

Next, Contreras asserts that he received ineffective assistance of trial counsel because his counsel failed to tender a jury instruction on entrapment. A defendant claiming a violation of the right to effective assistance of counsel must establish the two components set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the defendant must show that counsel's performance was deficient. *Id*. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness, and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed the defendant by the Sixth Amendment. *Id*. at 687. Second, the

defendant must show that the deficient performance prejudiced the defense. *Id*. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Id*. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. The two prongs are separate and independent inquiries, and if a court can "dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Wentz v. State*, 766 N.E.2d 351, 360 (Ind. 2002). While it is not prohibited to bring an ineffective assistance of counsel claim on direct appeal, post-conviction proceedings are the preferred method of addressing ineffective claims because of the ability to present new facts not developed at trial. *See McIntire v. State*, 717 N.E.2d 96, 101 (Ind. 1999). If a defendant decides to bring the claim on direct appeal, he is precluded from re-raising the issue in any subsequent post-conviction proceedings. *See Jewell v. State*, 887 N.E.2d 7939, 941 (Ind. 2008).

Few points of law are as clearly established as the principle that tactical or strategic decisions will not support a claim of ineffective assistance. *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002). Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. *Id*. Even the best and brightest criminal defense attorneys may disagree on the ideal strategy or the most effective approach in any given case. *Id*. Therefore, we afford great deference to counsel's discretion to choose strategy and tactics, and strongly presume that counsel provided adequate assistance and exercised reasonable professional judgment in all significant decisions. *Id*.

Contreras now contends that his trial counsel failed to properly investigate all matters in his case and as a result failed to raise an entrapment defense. However, we determined in *Crocker v. State*, 563 N.E.2d 617, 624 (Ind. Ct. App. 1990), that "whether or not to argue entrapment is a strategic decision which will not be second-guessed by a reviewing court."

Moreover, we agree with the State that Contreras' trial counsel's decision to attack an element of the charged offense rather than present the affirmative defense of entrapment or to argue both defenses alternatively was a reasonable professional judgment. A review of the record indicates that trial counsel's primary strategy was to challenge the element of identification by using a theory of misidentification based on race. On the other hand, entrapment is a defense of justification where a defendant admits that the facts of the crime occurred, but contends rather that the acts were excused or justified. *Moon v. State*, 823 N.E.2d 710, 716 (Ind. Ct. App. 2005), *reh'g denied, trans. denied*. Raising the entrapment defense in the alternative to misidentification could have confused the jury or eroded the strength of either defense. *See Timberlake v. State*, 753 N.E.2d 591, 606 (Ind. 2001) (trial counsel's decision not to pursue a voluntary intoxication defense and instead attempt to negate an element of the crime charged was a reasonable professional decision to avoid seemingly inconsistent defenses). Therefore, we find Contreras' ineffective assistance of counsel claim to be without merit.

III. *Entrapment Defense*

As an alternative argument, Contreras contends that, if trial counsel was found effective, the entrapment defense was raised as a matter of law even though trial counsel did

not explicitly place it before the court. Contreras maintains that the defense was introduced at the moment the State first offered evidence that he was arrested as part of a controlled buy. As a result, Contreras claims that the burden of proof shifted to the State to establish that UC 193's conduct did not persuasively affect the free will of the defendant and that the defendant was predisposed to commit the offense.

In the well-researched opinion of *Townsend v. State*, 418 N.E.2d 554 (Ind. Ct. App. 1981), this court reasoned that

> [i]n [a previous case], the [c]ourt characterized entrapment as 'an affirmative or positive defense, and one that [the] defendant must prove.' At the same time we are cognizant of the rule followed in this State that entrapment need not be affirmatively pleaded. Reconciling these two apparently conflicting stances, and summarizing the case law on this issue, we conclude that although the defendant need not raise an entrapment issue before trial, he must indicate, at some point in the proceedings, his intention to rely upon the defense. The defendant's 'affirmative burden' is met by establishing police inducement. Only at this point, after the defendant has established police inducement and has indicated an intention to rely on entrapment, is the burden of showing predisposition imposed upon the State. In [an earlier case], the evidence of inducement was presented on direct examination of the State's witnesses, and the defendant's intentions were revealed on cross examination. The indicia of entrapment can thus be demonstrated by the State unilaterally, but entrapment can not rise to the level of an issue, requiring rebuttal by the State, until the defendant makes it an issue.
>
> The position [] that the State must rebut entrapment every time police inducement is shown by its evidence even though, as here, the defendant made it clear he was not relying on the defense, is highly problematic. From the defendant's viewpoint, it could be used to effectively wrest control of the defense away from the defendant and his counsel. A minimal showing of inducement could be followed by highly prejudicial and otherwise irrelevant character evidence to prove predisposition. From the State's viewpoint, it is unnecessarily encumbered with a premature burden.

> We therefore opine that the defendant must in some manner affirmatively raise the defense of entrapment before rebuttal by the State is either necessary or desired.

Id. at 558 (internal citations omitted).

Here, the record reflects that Contreras' counsel elected to challenge Contreras' identification as the dealer by the officers. Trial counsel did not affirmatively place the defense of entrapment at issue. Therefore, because the defense was not raised at trial, Contreras cannot litigate the issue for the first time on appeal.

IV. *Sentence*

Contreras contends that the trial court abused its discretion when it imposed a forty-five year sentence for each of his three Class A felonies, with the sentences to run concurrent. A person who commits a Class A felony shall be imprisoned for a fixed term of between twenty and fifty years, with the advisory sentence being thirty years. I.C. § 35-50-2-4.

As long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *aff'd 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*. One way in which a trial court may abuse its discretion is by failing to enter a sentencing statement at all. Another example includes entering a sentencing statement that explains reasons for imposing a sentence, including aggravating and mitigating factors, which are not supported by the record. *Id*. at 490-91.

Because the trial court no longer has any obligation to weigh aggravating and mitigating factors against each other when imposing a sentence, a trial court cannot now be said to have abused its discretion by failing to properly weigh such factors. *Id*. at 491. This is so because once the trial court has entered a sentencing statement, which may or may not include the existence of aggravating and mitigating factors, it may then impose any sentence that is authorized by statute and permitted under the Indiana Constitution. *Id*.

This does not mean that criminal defendants have no recourse in challenging sentences they believe are excessive. *Id*. Although a trial court may have acted within its lawful discretion in determining a sentence, Appellate Rule 7(B) provides that the appellate court may revise a sentence authorized by statute if the appellate court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Id*. It is on this basis alone that a criminal defendant may now challenge his sentence where the trial court has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing the particular sentence that is supported by the record, and the reasons are not improper as a matter of law. *Id*.

A. *Aggravator*

Contreras asserts that the trial court improperly increased his sentence above the advisory sentence because it used the amount of the cocaine as an aggravator. During the sentencing hearing, the trial court specifically considered his young age to be a mitigator and took the following aggravators into account: (1) Contreras was in the country illegally; (2)

he was found guilty of multiple Counts; and (3) he failed to accept responsibility for his actions. With respect to the multiple Counts aggravator, the trial court elaborated

> There are multiple counts. [The] [c]ourt considers that to be a rather severe aggravator, and that is especially true in light of the substantial quantities involved. A person would have to be familiar with the drug trade to be able to acquire the quantities you acquired. In that sense, the fact that there are substantial quantities involved is a more serious aggravator than it would appear.

(Appellant's App. p. 113).

Regardless of the appropriateness of this aggravator, the trial court still found two aggravators which are not challenged by Contreras. As the weight of the aggravating and mitigating factors is no longer available for appellate review and there were two other unchallenged aggravators, we conclude that the trial court did not abuse its discretion by imposing an aggravated sentence.

B. *Nature and Character*

Furthermore, we find Contreras' sentence appropriate in light of the nature of the offense and character of the offender. With regard to the nature of the offense, we note that Contreras dealt in cocaine amounts that were significantly larger than the minimum three grams required under the statute. There were multiple buys, including one where Contreras asked UC 193 to buy more than he wanted. Based on the quantity and organized approach of the transaction, it can be reasonably inferred that Contreras was involved in a large scale drug enterprise.

With respect to his character, we observe that Contreras entered the United States illegally and was illegally employed by at least three employers. He was not remorseful and declined to accept responsibility for his actions. Specifically, during the sentencing hearing, he told the trial court that he never received any money from the drug deals and instead was "just getting [cocaine] for them." (Appellant's App. p. 110). However, when he was arrested after the third buy, officers found $400 of the marked bills that UC 193 had given to Contreras to purchase the cocaine in Contreras' wallet. Thus, we find that Contreras' sentence was not inappropriate.

CONCLUSION

Based on the foregoing, we conclude that (1) the State presented sufficient evidence to support Contreras' convictions beyond a reasonable doubt; (2) he was not denied effective assistance of trial counsel; (3) because trial counsel failed to affirmatively raise the entrapment defense, it is not available for our review; and (4) Contreras was properly sentenced.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.