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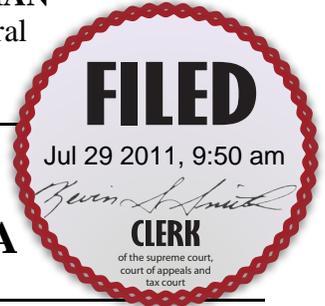
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**IN THE  
COURT OF APPEALS OF INDIANA**

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BILLY LEE MCKEEHAN,  
Appellant- Defendant,

vs.

STATE OF INDIANA,  
Appellee- Plaintiff,

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No. 84A01-1012-CR-666

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APPEAL FROM THE VIGO SUPERIOR COURT  
The Honorable Michael H. Eldred, Judge  
Cause No. 84D01-0904-FB-1026

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July 29, 2011

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Chief Judge**

## Case Summary and Issues

Following a jury trial, Billy Lee McKeehan, appeals his conviction of dealing in methamphetamine as a Class B felony and aggregate twelve-year sentence. McKeehan raises two issues, which we expand and restate as three: whether sufficient evidence was presented to sustain his conviction, whether the trial court abused its discretion in sentencing him, and whether his sentence is inappropriate in light of the nature of his offenses and his character. Concluding that sufficient evidence was presented to sustain his conviction of dealing in methamphetamine, the trial court did not abuse its discretion in sentencing him, and his sentence is not inappropriate, we affirm.

## Facts and Procedural History

On April 1, 2009, officers arrived at McKeehan's rental residence, a pull-behind trailer, pursuant to a narcotics complaint. Upon arrival, officers smelled a strong chemical odor emanating from McKeehan's trailer-residence. Officers observed McKeehan stand in the doorway of the trailer, enter it, and then exit. Officers entered the residence and later testified that they found what appeared to be an active laboratory for production of methamphetamine. Vapors and smoke flowed out of the trailer (at least one officer thought the trailer was on fire), and several items commonly found in methamphetamine labs were present – organic solvents, a pitcher containing an off-white liquid, glass jars, a hydrochloric acid gas generator, an empty Coleman fuel can, several used coffee filters, an altered propane tank, various specific chemicals, iodized salt, sulfuric acid, a lid with attached tubing, a half-gallon tank of Coleman fuel, a jar with white residue, and numerous other jars, pitchers, and containers.

McKeehan told officers that he had been staying in the trailer for about two weeks, and when he returned to the trailer earlier in the evening it smelled strange. On his person, McKeehan had a small key ring with a compartment that contained methamphetamine.

McKeehan was arrested and charged with dealing in methamphetamine as a Class B felony, and possession of methamphetamine as a Class D felony. The jury found McKeehan guilty of both charges. Following a sentencing hearing, the trial court entered a judgment of conviction as to both counts and sentenced McKeehan to concurrent sentences of twelve years for dealing in methamphetamine and one and one-half years for possession of methamphetamine. McKeehan now appeals.

### Discussion and Decision

#### I. Sufficiency of the Evidence

McKeehan does not challenge his conviction of possession of methamphetamine, but argues insufficient evidence was presented to sustain his conviction of dealing in methamphetamine. When reviewing the sufficiency of the evidence to support a conviction, we neither reweigh the evidence nor judge the credibility of witnesses. Wright v. State, 828 N.E.2d 904, 906 (Ind. 2005). When confronted with conflicting evidence, we consider it in a light most favorable to the conviction. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We must affirm the conviction if the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable trier of fact to find all elements of the crime proven beyond a reasonable doubt. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005).

To convict McKeehan of dealing in methamphetamine as a Class B felony, the State had to prove beyond a reasonable doubt that McKeehan 1) knowingly or intentionally manufactured methamphetamine, or 2) “possesse[d], with intent to” manufacture methamphetamine. Ind. Code § 35-48-4-1.1(a).

McKeehan argues evidence was insufficient because the manufacturing process was not complete, several essential ingredients for making methamphetamine were not present, no cash was found on McKeehan or in the trailer, and he did not have possession of the premises. We address each argument in turn.

McKeehan concedes that evidence was presented that the process of manufacturing methamphetamine had begun, but contends it was not completed and could not have been completed. But a conviction for manufacturing a controlled substance does not require that manufacturing be completed or that there be actual product. Bush v. State, 772 N.E.2d 1020, 1023 (Ind. Ct. App. 2002), trans. denied. In Bush, we referred to the statutory definition of “manufacture”:

the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container.

Ind. Code § 35-48-1-18.

We concluded in Bush that logical application of the above statute and our intention to avoid unjust or absurd results dictate that we not require a finished product for conviction. 772 N.E.2d at 1023. Here there were enough materials such that the only logical explanation was the manufacture of methamphetamine. Similarly, the fact that

officers did not find some key ingredients in McKeehan's trailer does not invalidate his conviction. The word "preparation" in the above statute clearly encompasses McKeehan's conduct as the officers found the items midway through the manufacturing process, even without all necessary ingredients.

The fact that no cash was found on McKeehan or near his methamphetamine lab does not invalidate his conviction, as additional evidence of the sale of methamphetamine was not necessary to support McKeehan's conviction for dealing. No cash arguably could weigh against his conviction, but other evidence presented is sufficient to sustain his conviction, and we do not reweigh evidence.

As to McKeehan's exclusive or constructive possession of the methamphetamine lab, we look to Floyd v. State, 791 N.E.2d 206, 210 (Ind. Ct. App. 2003), trans. denied, which describes the principle of constructive possession. The State may establish constructive possession by showing a defendant has both the intent and ability to maintain dominion and control over contraband. Id. When exclusive possession is lacking, fact-finders may infer intent and ability to maintain dominion and control only if some "additional circumstances" indicate such. Id.

Among the recognized "additional circumstances" are: (1) incriminating statements by the defendant; (2) attempted flight or furtive gestures; (3) a drug manufacturing setting; (4) proximity of the defendant to the contraband; (5) contraband is in plain view; and (6) location of the contraband is in close proximity to items owned by the defendant.

Id. at 210-11.

Here, evidence was presented of a drug manufacturing setting in close proximity to some of McKeehan's personal items inside the trailer, which McKeehan was renting. This reasonably supports the inference that McKeehan had the intent and ability to

maintain dominion and control over the contraband. Sufficient evidence was presented to sustain McKeehan's conviction of dealing in methamphetamine.

## II. Abuse of Discretion in Sentencing<sup>1</sup>

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. (quotations and citation omitted). A trial court may abuse its discretion by failing to enter a sentencing statement, entering findings of aggravating and mitigating factors unsupported by the record, omitting factors clearly supported by the record and advanced for consideration, or giving reasons that are improper as a matter of law. Id. at 490-91. “Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.” Id. at 491.

McKeehan contends the trial court abused its discretion in sentencing him by considering his prior record of similar types of offenses to be an aggravating circumstance, by not considering the lack of measurable harm to other persons or

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<sup>1</sup> In arguing that his sentence is inappropriate in light of the nature of the offenses and his character, McKeehan points to several decisions by the trial court and alleges the trial court abused its discretion in sentencing him. Although related, these are two separate analyses and we address separately the issues McKeehan raises in sections II and III of this opinion. See Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007).

property from his current offenses as a mitigating circumstance, and by not providing him with an alternative to prison.<sup>2</sup>

In determining McKeehan's sentence, the trial court is authorized to consider his criminal history as an aggravating circumstance. Ind. Code § 35-38-1-7.1(a)(2). To the extent that one's criminal history occurred long ago, is unrelated to the instant offense, or any other consideration is warranted, such consideration would affect the weight of this aggravator on the trial court's decision. However, on appeal, "[t]he relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse." Cardwell v. State, 895 N.E.2d 1219, 1223 (Ind. 2008).

In any event, McKeehan's 2004 convictions of possession of chemical reagents as a Class D felony and possession of a schedule II controlled substance as a Class D felony certainly support the trial court's consideration of McKeehan's criminal history to be a significant aggravating circumstance because they are related to his current offenses. An addiction to drugs, as opposed to "merely" possessing, using, or dealing drugs, does not warrant leniency.

A trial court "may" consider the lack of harm resulting from an offense to be a mitigating circumstance. Ind. Code § 35-38-1-7.1(b)(1). McKeehan argues, as he did at the sentencing hearing, that the trial court should have considered a lack of harm from his possession and incomplete manufacture of methamphetamine in determining his sentence. Upon review of the record, we conclude the trial court found this potential mitigating circumstance was not significant and would not influence the court's sentencing decision. See Anglemeyer, 868 N.E.2d at 493 (concluding that the trial court

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<sup>2</sup> McKeehan's other arguments regarding his sentence concern its appropriateness and are addressed below.

apparently determined the defendant's mental illness was not significant and would not be considered in sentencing). Similar to our supreme court's decision in Anglemyer, we hold that "[t]his was the trial court's call," and "[w]e find no error." Id.

McKeehan explicitly argues the trial court abused its discretion in not providing him with an alternative to prison for his crimes. While we consider this argument again below in determining whether his sentence is inappropriate, an alternative sentence is a "conditional liberty that is a favor, not a right," and is ordered at "the sole discretion of the trial court." Holmes v. State, 923 N.E.2d 479, 482 (Ind. Ct. App. 2010); Ind. Code § 35-38-2.6-3(a) ("The court may, at the time of sentencing, . . . order . . . an alternative to commitment to the department of correction.") (emphasis added). Accordingly, we conclude the trial court did not abuse its discretion in sentencing McKeehan.

### III. Inappropriateness of Sentence

This court has authority to revise a sentence "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." Ind. Appellate Rule 7(B). In making this determination, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. Nevertheless, the defendant bears the burden to persuade this court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). "[W]hether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." Cardwell, 895 N.E.2d at 1224. Our role is limited to "leaven[ing] the outliers, and identify[ing] some guiding principles for trial courts and those charged

with improvement of sentencing statutes”; it is not our role “to achieve a perceived ‘correct’ result in each case.” Id. at 1225.

The trial court sentenced McKeehan to twelve years for dealing in methamphetamine to be served concurrent with one and one-half years for possession of methamphetamine. The sentencing range for dealing in methamphetamine as a Class B felony is six to twenty years, and the advisory sentence is ten years. Ind. Code § 35-50-2-5.

As to the nature of the offense, we revisit McKeehan’s contention that his offense did not result in harm to another person or property. While technically true, this did not result from McKeehan’s careful avoidance or intention, but from the police apprehending McKeehan and his methamphetamine lab before manufacturing was completed and methamphetamine was distributed. Cf. Lawhorn v. State, 452 N.E.2d 915, 918 (Ind. 1983) (“The primary state interest served by drug dealing statutes is not simply the harm caused by a particular dosage, but the societal harm caused by the dealing itself.”). Therefore, while the lack of pecuniary loss or an actual victim was a fortunate result, it does not reflect positively on the nature of the offense. We do, however, agree with McKeehan that nothing about his dealing in methamphetamine was particularly egregious.

McKeehan fails to persuade us that his character makes his sentence inappropriate. McKeehan admits to his long-term drug addiction and multiple failed attempts to break his addiction. He notes that he has responded well to treatment in the past by completing a county drug treatment program and a period of in-home detention. While this moderate success and McKeehan’s repeated attempts to work through his addiction are

encouraging, McKeehan's present offenses make clear that he has more work to do to gain control of his addiction. In addition to the various drug treatment programs that may be available to McKeehan while incarcerated, incarceration alone will provide indirect drug treatment by effectually terminating McKeehan's means of obtaining or manufacturing drugs. The fact that McKeehan's prior convictions are drug related – two convictions of public intoxication, one conviction of disorderly conduct, one conviction of possession of chemical reagents as a Class D felony, and one conviction of possession of a schedule II controlled substance as a Class D felony – only buttresses the trial court's determination that McKeehan's sentence should be moderately enhanced.

As to McKeehan's argument that he deserves an alternative to prison, we note our reluctance to conclude that the placement of a defendant's sentence is inappropriate:

As a practical matter, trial courts know the feasibility of alternative placements in particular counties or communities. For example, a trial court is aware of the availability, costs, and entrance requirements of community corrections placements in a specific locale. Additionally, the question under Appellate Rule 7(B) is not whether another sentence is more appropriate; rather, the question is whether the sentence imposed is inappropriate.

Fonner v. State, 876 N.E.2d 340, 343-44 (Ind. Ct. App. 2007).

For this reason, regardless of whether McKeehan's placement elsewhere might be more appropriate, we defer to the trial court's decision not to provide McKeehan with an alternative to prison because, as discussed above, his twelve-year sentence is not inappropriate in light of the nature of his offenses and his character.

### Conclusion

Sufficient evidence was presented to sustain McKeehan's conviction for dealing in methamphetamine. Further, the trial court did not abuse its discretion in sentencing him, and his sentence is not inappropriate. We affirm.

Affirmed.

NAJAM, J., and CRONE, J., concur.