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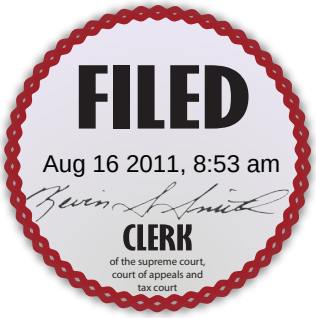

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IN THE
COURT OF APPEALS OF INDIANA

KENNY MONG,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 89A01-1012-CR-662
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WAYNE CIRCUIT COURT
The Honorable David A. Kolger, Judge
Cause No. 89C01-0909-FA-9

August 16, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Kenny Mong appeals his sentence for two counts of dealing in cocaine as a class A felony.[1] Mong raises one issue, which we revise and restate as whether his sentence is inappropriate in light of the nature of the offense and the character of the offender.[2] We reverse and remand.

The relevant facts follow. On April 28, 2009, a confidential informant ("CI"), while working with the Wayne County Drug Task Force, visited Mong's home and purchased cocaine. In effectuating the transaction, Mong made a phone call and after about fifteen or twenty minutes, Mong met "Snooky," who was "a regular visitor" to Mong's residence, at the back door. Transcript at 473. Mong then presented the CI with the cocaine for which the CI paid sixty dollars which had been provided by the Drug Task Force. Before leaving Mong's residence, the CI gave Mong a "hit" of the cocaine he had purchased which was "maybe the size of a pea." Id. at 467. The next day, April 29, 2009, the CI again visited Mong's residence to purchase cocaine, and the transaction followed "the same procedure." Id. at 276. The CI paid eighty dollars, which again had been provided by the Drug Task force, for the cocaine. Mong's residence is located within 1,000 feet of Toys and Tots Daycare, which is a licensed daycare facility.

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[1] Ind. Code § 35-38-4-1(a)(1)(C), (b)(3)(B)(iv) (Supp. 2006).

[2] In Mong's brief, he appears to argue that the court abused its discretion in sentencing him. Specifically, Mong discusses the aggravators and mitigators identified by the trial court and argues that, although the two aggravators were valid, "these two factors alone or together did not necessitate the imposition of any sentence in excess of the non-suspendable minimum sentence." Appellant's Brief at 8-9. However, since the 2005 sentencing amendments to Indiana's sentencing statutes, "the relative weight or value assignable to reasons properly found, or those that should have been found, is not subject to review for abuse of discretion." Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). Accordingly, we decline to address whether the court abused its discretion in sentencing Mong.

On September 30, 2009, the State charged Mong with Count I, dealing in cocaine as a class A felony; and Count II, dealing in cocaine as a class A felony. A jury trial began on October 19, 2010, and on October 21, 2010, the jury found Mong guilty as charged. On November 16, 2010, the trial court held a sentencing hearing in which the court recognized that Mong faced a mandatory minimum executed sentence of twenty years pursuant to Ind. Code § 35-50-2-2 because of a single prior class D felony conviction from 1984. In identifying aggravators, the court assigned "below average weight" to Mong's criminal history because he had not been convicted of a crime since 1996. Id. at 571. The court also identified the fact that a video entered as evidence during the trial depicting the April 29, 2009 transaction showed "an infant present walking through the room as [Mong was] conducting this drug transaction" as a non-statutory aggravator. Id. The court found a "substantial mitigating circumstance that [Mong] went at least . . . thirteen years without getting arrested." Id. at 574. The court found that "the mitigators and the aggravators are pretty much of the same weight," and stated it was giving Mong "the benefit of the break" and found that "the mitigators outweigh the aggravating circumstances." Id. The court sentenced Mong to thirty years with eight years suspended on Count I and thirty years with five years suspended on Count II and ordered the sentences to run concurrently.

The issue is whether Mong's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's

decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Mong argues that "there was nothing violent or dangerous concerning either transaction," that he "suffers from a variety of mental and physical health issues . . . which have resulted in him being found to be disabled," and that his most recent criminal conviction prior to the instant offenses was in 1993. Appellant's Brief at 7. Mong requests that we remand "with instructions to enter revised concurrent sentences that are consistent with the non-suspendable minimum sentences for Class A Felony convictions," which equates to "twenty (20) years imprisonment, and that said sentences continue to be ordered to be served concurrently." Id. at 9.

Our review of the nature of the offense reveals that on consecutive days in April 2009 Mong delivered cocaine to a CI working with the Wayne County Drug Task Force. There was a child present during the second transaction. Mong's residence is located within 1,000 feet of a local day care center, and there were children present at the day care center at the time of both transactions.

Our review of the character of the offender reveals that Mong has a modest criminal history. In 1980, he was found guilty of possession of marijuana and minor in possession of alcoholic beverage. In 1982, Mong was found guilty of driving while license suspended for which he was ordered to serve sixty days in jail. In 1984, he was found guilty of criminal recklessness as a class D felony and was ordered to serve two

years with sixty days suspended. In 1986, he was found guilty of possession of marijuana as a class A misdemeanor and ordered to serve one year with sixty days executed, and while on probation from this conviction his probation was revoked. In 1993, on two separate occasions Mong was found guilty of battery as a class A misdemeanor. Also, in 1993 Mong was found guilty of driving with a suspended license as a class A misdemeanor. In 1996, Mong was found guilty of driving under suspension and open container in a motor vehicle in Ohio. Besides these convictions, Mong's criminal history contains a number of other charges which were subsequently dismissed as well as certain juvenile offenses during the 1970s. Also, Mong admits that he abused marijuana for over thirty years and has used cocaine for the last eight years.

After due consideration of the sentence issued by the trial court, a number of facts considered in our review leaves us with the conclusion that Mong's sentence is inappropriate. We note that the underlying felony, which necessitated that Mong serve a mandatory minimum executed sentence of twenty years, was his 1984 conviction for criminal recklessness as a class D felony when the now forty-nine-year-old Mong was twenty-two. Mong's remaining criminal history consists of misdemeanors, and his last encounter with the criminal justice system prior to the instant offenses was in 1996. Also, we note the specific circumstances of the offenses, in which the C.I., whom Mong had known for twenty or thirty years, came to Mong's home to purchase cocaine on consecutive days and Mong made phone calls in order to effect each transaction. The C.I. paid sixty dollars in the first transaction and eighty dollars in the second transaction

to either Snooky or Mong, and it is unclear whether Mong was paid more than a "hit" of the cocaine the C.I. purchased for his services. Transcript at 467. There is no evidence that Mong was engaged in a large-scale drug dealing operation.

We particularly note the conflict between the trial court's statements at sentencing and the sentence it imposed. Indeed, regarding the mandatory minimum sentence, the trial court repeatedly stated that it did not like the result, and specifically stated that it "cannot sentence [Mong] to less than twenty years even if I wanted to. . . . I don't like the result," and that "I think when somebody goes twenty-five years without a felony conviction, there ought to be some provision in the law which allows me to take that into consideration, but I'm not allowed to." Id. at 574-575. Despite these statements, the court sentenced Mong to an executed term five years above the statutory minimum non-suspendable sentence. Thus, we conclude that the sentence imposed by the trial court is inappropriate in light of the nature of the offense and the character of the offender, and we remand for the court to resentence him to twenty years for each Count, and for those sentences to be served concurrently.

For the foregoing reasons, we reverse Mong's sentence for two counts of dealing in cocaine as class A felonies and remand for resentencing consistent with this opinion.

Reversed and remanded.

KIRSCH, J., concurs.

BAKER, J., dissents with opinion.

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STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

BAKER, Judge, dissenting.

I must respectfully dissent. I find the trial judge's frustration directed at the statutory penalty provided for the offense. That these offenses are class A felonies and are nonsuspendable are legislative determinations.

When one looks at the mitigating and aggravating circumstances of the offense and the offender, the sentence selected by the trial judge merits our deference. The defendant's record warrants something beyond the minimum and that is what was chosen here. I would affirm the trial court.