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IN THE
COURT OF APPEALS OF INDIANA

ANTHONY ARNOLD,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 31A01-1012-CR-689
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE HARRISON SUPERIOR COURT
The Honorable Glenn Hancock, Special Judge
Cause Nos. 31D01-0305-FD-353, 31D01-0510-FB-853 and 31D01-0808-FD-643

September 1, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Anthony Arnold ("Arnold") was convicted in Harrison Superior Court of Class B felony dealing in methamphetamine, Class D felony maintaining a common nuisance, Class D felony neglect of a dependent, and Class A misdemeanor possession of paraphernalia. Arnold then pleaded guilty to Class D felony possession of methamphetamine, Class D felony maintaining a common nuisance, and Class A misdemeanor possession of paraphernalia. For these seven crimes, the trial court sentenced Arnold to an aggregate term of fourteen years incarceration. Arnold also admitted to violating the conditions of his probation for his previous conviction for Class D felony possession of methamphetamine. The trial court revoked Arnold's probation and ordered him to serve his previously-suspended three-year sentence, for a total sentence of seventeen years.

Arnold appeals and presents three issues, which we restate as:

I. Whether the information charging Arnold with Class B felony dealing in methamphetamine alleged a non-existent offense;

II. Whether the State presented sufficient evidence to support Arnold's conviction for Class B felony dealing in methamphetamine; and

III. Whether the sentences imposed by the trial court are inappropriate.

We affirm.

Facts and Procedural History

On May 6, 2003, the State charged Arnold in Cause No. 31D01-0305-FD-353 ("Cause FD-353") with Class D felony possession of methamphetamine and Class D maintaining a common nuisance. As a result of a plea agreement, Arnold pleaded guilty

to Class D felony possession of methamphetamine on August 28, 2003. Pursuant to the plea agreement, the trial court sentenced Arnold to three years suspended to probation.

On September 28, 2005, Arnold's probation officer received information that Arnold was using and manufacturing methamphetamine at his residence in Harrison County. The probation officer and Indiana State Police Trooper Joshua Banet ("Trooper Banet") went to Arnold's residence, where Arnold lived with his girlfriend and their young child. Arnold admitted that he had used methamphetamine at his residence within the last two days and admitted that there was "stuff" in the back of his house. Tr. p. 141. Arnold also admitted that he had allowed a man named Joe Dunn ("Dunn") to manufacture methamphetamine at Arnold's residence within the last two weeks. Arnold signed a form indicating his consent to search his home and helped the officers locate drug pipes, aluminum foil with burnt residue, hemostatic clamps, a pencil torch, and other paraphernalia.

Indiana State Police Trooper Katrina Smith ("Trooper Smith"), who was a certified processor of clandestine laboratories, assisted in the search of the methamphetamine lab in Arnold's house. Trooper Smith discovered: multiple packages of ephedrine; a jar used for soaking pills; red phosphorus in a coffee filter; latex gloves stained with iodine; hydrogen peroxide; propane cylinders; lye, rubber tubing; denatured alcohol; a plastic bottle; lighter fluid; paint thinner; canning salt; a glass jar with white crystals used to generate hydrochloric acid; a Pyrex beaker; a canning lid; a metal container with red phosphorus stains; digital scales; razor blades, scissors, a glass smoking device; and a total of 8.7 grams of ephedrine and pseudoephedrine. Trooper

Smith later testified that the presence of these items "indicated the manufacturing of methamphetamine at this location." Tr. p. 234.

Accordingly, on October 3, 2005, the State charged Arnold in Cause No. 31D01-0510-FB-853 ("Cause No. FB-853") with Class B felony dealing in methamphetamine, Class D felony possession of precursors, Class D felony possession of precursors with intent to manufacture, Class D felony maintaining a common nuisance, Class D felony neglect of a dependent, and Class A misdemeanor possession of paraphernalia. And on October 13, 2005, the State filed a petition to revoke Arnold's probation in Cause No. FD-353.

Thereafter, on August 18, 2008, the State charged Arnold in Cause No. 31D01-0808-FD-643 ("Cause No. FD-643") with Class D felony possession of methamphetamine, Class D felony maintaining a common nuisance, and Class A felony possession of paraphernalia, all stemming from a separate incident.

Following a bench trial held on April 27, 2010, the court found Arnold guilty in Cause No. FB-853 of Class B felony dealing in methamphetamine, Class B maintaining a common nuisance, Class D felony neglect of a dependent, and Class A misdemeanor possession of paraphernalia. Arnold then admitted that he had violated the terms of his probation in Cause No. FD-353 and also pleaded guilty to the charges in Cause No. FD-643.

At a consolidated sentencing hearing held on May 20, 2010, the trial court ordered Arnold to serve the three years that was previously suspended in Cause No. FD-353. In Cause No. FB-853, the trial court sentenced Arnold to twelve years on the Class B felony

conviction, three years on both Class D felony convictions, and one year on the Class A misdemeanor conviction, to be served concurrently. In Cause No. FD-643, the trial court sentenced Arnold to two years on each Class D felony conviction and one year on the class A misdemeanor conviction, to be served concurrently. The trial court also ordered that the aggregate sentences in each cause be served consecutively to each other, for a total aggregate sentence of seventeen years. Arnold now appeals.

I. Charging Information

Arnold first claims that the manner in which the State charged him with Class B felony dealing in methamphetamine was improper. Specifically, he claims that the State charged him with the non-existent offense of Class B felony possession of precursors with intent to manufacture[1] instead of properly charging him with Class B felony dealing in methamphetamine.

The contents of a charging information must include, *inter alia*, "the nature and elements of the offense charged in plain and concise language without unnecessary repetition[.]" Ind. Code § 35-34-1-2(a)(4) (2004). "The . . . information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged[.]" I.C. § 35-34-102(d). "A statement informing the defendant of the statutory offense with which he or she is charged, the time and the place of the commission of the offense, the identity of the victim of the crime (if any), and the weapon used (if any) generally is sufficient." Laney v. State, 868 N.E.2d 561, 566-67 (Ind. Ct. App. 2007)

[1] Possession of precursors with intent to manufacture is a Class D felony. See Ind. Code § 35-48-4-14.5(e) (2006).

(citing Moody v. State, 448 N.E.2d 660, 662 (Ind. 1983)). The State is not, however, required to include detailed factual allegations in a charging information. Id. at 567 (citing Richardson v. State, 717 N.E.2d 32, 51 (Ind. 1999)). Unnecessary descriptive material in a charge is merely surplusage and may be disregarded. Mitchel v. State, 685 N.E.2d 671, 676 (Ind. 1997); Laney, 868 N.E.2d at 567.

At the time that Arnold committed his crime, the crime of dealing in methamphetamine was defined by statute as follows:

> (a) A person who:
> (1) knowingly or intentionally:
> (A) manufactures;
> (B) finances the manufacture of;
> (C) delivers; or
> (D) finances the delivery of;
> cocaine, a narcotic drug, or methamphetamine, pure or adulterated, classified in schedule I or II; or
> (2) possesses, with intent to:
> (A) manufacture;
> (B) finance the manufacture of;
> (C) deliver; or
> (D) finance the delivery of;
> cocaine, a narcotic drug, or methamphetamine, pure or adulterated, classified in schedule I or II;
> commits dealing in cocaine, a narcotic drug, or methamphetamine, a Class B felony[.]

Indiana Code section 35-48-4-1 (2004).[2]

Here, the information charging Arnold with Class B felony dealing in methamphetamine provides in relevant part:

[2] This statute was amended in 2006 to remove reference to methamphetamine. See P.L. 151-2006, Sec. 22. At the same time, our General Assembly added Indiana Code section 35-48-4-1.1, which defines dealing in methamphetamine as a separate crime. See P.L. 151-2006, Sec. 23.

> [O]n or about the 28th day of September, 2005, in Harrison County, one ANTHONY A. ARNOLD did *knowingly or intentionally possess with the intent to manufacture methamphetamine, pure or adulterated*, classified in schedule I or II, to-wit: Police found coffee filters and/or tubing and/or glassware and/or precursors and/or other chemicals needed to make methamphetamine on the property ANTHONY A. ARNOLD occupied,
>
> which is contrary to the form and the statute in such cases made and provided against the peach and dignity of the State of Indiana.

Appellant's App. p. 79 (emphasis added).

Arnold contends that this information "makes no allegation that [he] possessed methamphetamine; rather, it alleges that he possessed precursors and manufacturing equipment." Appellant's Br. p. 11. We disagree. The first part of the charging information, emphasized above, clearly tracks the language of governing statute. Indiana Code section 35-48-4-1(a)(2)(A) provides that a person who possesses, with intent to manufacture, methamphetamine, pure or adulterated, commits dealing in methamphetamine. This is precisely what the first part of the charging information alleges, i.e. that Arnold knowingly or intentionally possessed, with the intent to manufacture, methamphetamine, pure or adulterated.

Arnold's argument seems to focus on the part of the charging information following the "to-wit," that is, the list of the items found in Arnold's home, but he ignores the plain language of the first part of the information, which simply tracks the language of the relevant statute. Moreover, the more detailed description of the materials found in Arnold's home are unnecessary to a valid charge. Indeed, this description could have been omitted entirely without affecting the validity of the charge. As such, it was

mere surplusage which may be disregarded. See Mitchem, 685 N.E.2d at 676; Laney, 868 N.E.2d at 567.

We therefore reject Arnold's claim that the information charged him with the non-existent offense of possession of precursors as a Class B felony. It did no such thing. The charging information clearly, but perhaps inartfully, charged him with possession of methamphetamine with intent to manufacture. And this charge is clearly defined by the relevant statute as a Class B felony. See I.C. § 35-48-4-1 (2004).

II. Sufficiency of the Evidence

Arnold also argues that the State presented insufficient evidence to support a conviction for Class B felony dealing in methamphetamine. Upon a challenge to the sufficiency of evidence to support a conviction, we neither reweigh the evidence or judge the credibility of the witnesses. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the verdict. Id. We will affirm if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. Id.

In arguing that the evidence is insufficient to support his conviction, Arnold notes that the police recovered no actual methamphetamine from his home. Instead, all they found were various reagents and precursors needed to make methamphetamine. Thus, Arnold claims that "[t]he closest the State came to proving possession of methamphetamine was testimony that the manufacturing process was underway . . . and

had already produced 'pill soak,' from which ephedrine or pseudoephedrine could have been extracted." Appellant's Br. p. 18.

In respone to Arnold's argument, the State cites, Bush v. State, 772 N.E.2d 1020, 1022-23 (Ind. Ct. App. 2002), in which we held that evidence that the production of methamphetamine had begun but not yet completed was sufficient to support the defendant's conviction for dealing in methamphetamine. The Bush court concluded:

> Clearly, there was evidence that Bush was producing, preparing, and processing methamphetamine, all of which are encompassed in the definition of "manufacture." The statute does not state that the process must be completed or that there must actually be a final product before it applies.

Id. at 1023.

Arnold notes, however, that the defendant in Bush was charged with knowingly or intentionally *manufacturing* methamphetamine. Id. at 1022 (citing I.C. § 35-48-4-2(a)(1)). In contrast, Arnold was not charged with manufacturing, but with *possession* of methamphetamine with intent to manufacture. See I.C. §. 35-48-4-1(a)(2)(A). We agree with Arnold that here, unlike Bush, the State was required to present some proof that Arnold actually possessed methamphetamine. And we acknowledge that there is no indication in the record before us that the police recovered any actual methamphetamine from Arnold's home. We nevertheless conclude that there was evidence supporting a reasonable inference that Arnold did possess methamphetamine.

Both Arnold's probation officer and Trooper Banet testified that Arnold readily admitted to them that he had recently used methamphetamine. Trooper Banet testified that Arnold admitted to using methamphetamine "within the last two days." Tr. p. 153.

This testimony was further corroborated by the testimony of Arnold's live-in girlfriend, who testified that Arnold and his cohort Dunn had been making methamphetamine and that Arnold had used methamphetamine the day before the police search.

Thus, in addition to a functional methamphetamine lab that was in the process of making methamphetamine, the police found paraphernalia used to smoke methamphetamine, including foil with a burned residue, in Arnold's home. And there was testimony that Arnold admitted to using methamphetamine and was seen by his girlfriend using methamphetamine the day before the search. We think that the trial court, acting as the trier of fact, could reasonably infer from this evidence that Arnold did, in fact, possess methamphetamine within the meaning of the crime charged. See Thompson v. State, 728 N.E.2d 155, 158 (Ind. 2000) (confession of a crime to a third person is direct evidence); Cox v. State, 475 N.E.2d 664, 668 (Ind. 1985) ("Direct evidence of a crime includes the confession and admissions of the accused.")).

Moreover, the evidence regarding Arnold's intent to manufacture methamphetamine is exceedingly strong: the police discovered a methamphetamine lab where the manufacture of methamphetamine appeared to be in progress, and there was testimony that Arnold and his cohort had already used the lab to manufacture methamphetamine. We therefore conclude that the State did present evidence sufficient to establish that Arnold possessed methamphetamine with the intent to manufacture.

III. Sentencing

Lastly, Arnold challenges the various sentences imposed on his convictions and the revocation of his probation. Arnold first argues that the sentences imposed on his

convictions in Cause No. FB-853 and Cause No. FD-643 are inappropriate. Pursuant to Indiana Appellate Rule 7(B), we may revise a sentence otherwise 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." Although we have the power to review and revise sentences, "[t]he principal role of appellate review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived 'correct' result in each case." Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008). It is on the basis of Appellate Rule 7(B) 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 a particular sentence that is supported by the record, and the reasons are not improper as a matter of law, but has imposed a sentence with which the defendant takes issue." Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). It is the defendant's burden on appeal to persuade the reviewing court that the sentence imposed by the trial court is inappropriate. Id. at 494.

In considering the nature of the offense, we note that Arnold possessed not only methamphetamine, a dangerous drug by itself, but he also was involved with the manufacture of this substance at his home, using dangerous chemicals. In fact, Trooper Smith testified that the process used by Arnold and his cohort produced toxic vapors. And Arnold engaged in this process in the same residence shared by his girlfriend and

young child. Thus, Arnold endangered not only himself, but others, including his own child, in his drive to obtain methamphetamine.

Arnold further claims that his character does not support the trial court's sentence, noting that he cares for his aging father. However, Arnold's father has four daughters who appear to be capable of assisting their father. In fact, Arnold's father testified that his daughters had avoided him simply because they did not approve of Arnold's criminal behavior. To the extent Arnold argues that his incarceration would impose a hardship on this father, we note that a trial court is not required to find that a defendant's incarceration would result in undue hardship on his dependents. Roney v. State, 872 N.E.2d 192, 204 (Ind. Ct. App. 2007), trans. denied. Indeed, many persons convicted of serious crimes have one or more dependents and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship. Id. at 204-05.

We further note that Arnold has a notable criminal history that includes several probation violations. In January 2002, he was convicted of Class A misdemeanor domestic battery and sentenced to one year suspended to probation and a no-contact order was issued. Then in March 2002, he was convicted of Class B misdemeanor invasion of privacy and again given probation. Arnold later violated the terms of his probation in that case and his probation was terminated. Shortly thereafter, in May 2002, Arnold was convicted of Class A misdemeanor battery and again given one year probation. And again, in October 2002, Arnold was convicted of Class A misdemeanor trespass and given a year probation. Arnold's probation in that case was later revoked. We further

note that after pleading guilty to possession of methamphetamine in Cause No. FD-535, and being again shown the grace of probation, Arnold yet again violated the terms of his probation—this time by using and manufacturing methamphetamine in his own home.

Arnold argues that much of his criminal behavior stems from his substance abuse problem. Arnold told the pre-sentence investigation officer that he has smoked marijuana since the age of fourteen and was using marijuana daily by the age of seventeen. Arnold also told the pre-sentence investigation officer that he was sentenced to the Indiana Boys' School after being caught growing marijuana. Arnold then began to experiment with cocaine until he began using methamphetamine. He eventually began to use methamphetamine daily.

Arnold, however, does not explain how he has taken any steps to treat his addiction. The pre-sentence investigation report indicates that Arnold completed a court-ordered outpatient program, but Arnold testified at his sentencing hearing that he refused to attend A.A. or N.A. meetings because, "[a]ll they are is hypocrites that goes to it." Tr. p. 338.

Under these circumstances, we cannot say that Arnold's behavior is in any way excused by his untreated addiction. See Hape v. State, 903 N.E.2d 977, 1002 (Ind. Ct. App. 2009) (trial court did not err in failing to consider defendant's substance abuse as a mitigating factor), trans. denied; Bryant v. State, 802 N.E.2d 486, 501 (Ind. Ct. App. 2004) (trial court did not err in finding substance abuse as an aggravating factor where defendant was aware of his problem with drugs and alcohol yet did not take any positive steps to treat his addiction); Bennet v. State, 787 N.E.2d 938, 948 (Ind. Ct. App. 2003)

(trial court did not err in failing to consider defendant's alcohol abuse problem as mitigating, and could properly have considered such as aggravating, where defendant was aware of problem yet never sought help). Although Arnold's instant offense may have been motivated by his substance abuse, it is not an excuse for his behavior.

Under these facts and circumstances, Arnold has not met his burden of demonstrating that his aggregate sentence of seventeen years is inappropriate. For similar reasons, we conclude that the trial court did not abuse its discretion in revoking Arnold's probation and ordering him to serve his previously-suspended three year sentence.

Conclusion

The information charging Arnold with dealing in methamphetamine did not allege the non-existent crime of Class B felony possession of precursors; rather, it tracked the statutory language in alleging that Arnold possessed methamphetamine with the intent to manufacture. The remaining, unnecessary factual details of the charging information were mere surplusage. Moreover, the State presented sufficient evidence to establish that Arnold had possessed methamphetamine as recently as the day before the search of his home, even though no actual methamphetamine was found during that search. And Arnold's intent to manufacture can be readily inferred from the methamphetamine lab found in his home. Lastly, Arnold's aggregate sentence of seventeen years is not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

BAILEY, J., and CRONE, J., concur.