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IN THE
COURT OF APPEALS OF INDIANA

KEITH D. BLAKE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A04-0902-CR-88
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0706-FB-49

September 11, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Keith D. Blake ("Blake") was convicted in Elkhart Circuit Court of two counts of Class B felony dealing in cocaine and one count of Class B felony possession of cocaine with intent to deliver and sentenced to an aggregate term of twenty-five years. Blake appeals and presents three issues, which we restate as:

I. Whether the State presented sufficient evidence to support Blake's convictions;

II. Whether Blake was denied the effective assistance of trial counsel;

III. Whether the trial court erred in sentencing Blake.

We affirm.

Facts and Procedural History

On May 24, 2007, an undercover officer working for the Elkhart Police Department, referred to by the parties as "UC 122," worked with a paid "cooperating source," referred to as "CS 7024," to conduct a controlled drug buy at an apartment on Union Street in Elkhart, Indiana. CS 7024 told UC 122 that he could purchase cocaine from a man he knew as "Mike." Prior to the controlled buy, UC 122 searched CS 7024 and gave him buy money and a recording device. UC 122 watched CS 7024 go to an apartment with a man, a woman, and a young child. Inside the apartment, CS 7024 gave the man, later identified as defendant Blake, forty dollars. In exchange, Blake gave him two rocks of cocaine. CS 7024 then returned to UC 122 and gave him the cocaine he had purchased from Blake.

On May 30, 2007, another undercover officer working for the Elkhart Police Department, referred to as "UC 120," conducted another controlled buy with a female

confidential informant ("CI"). The CI told UC 120 that she could purchase cocaine from an individual she knew as "Mike" at the same Union Street apartment the previous controlled buy had taken place. An undercover officer known as "UC 340" searched the CI for contraband and money, and finding none, gave the CI sixty dollars for the buy. UC 120 drove the CI to the apartment and saw a man, later identified as Blake, standing outside. UC 120 watched as the CI went to Blake and spoke with him. Blake then went inside while the CI spoke with two children playing outside. Blake returned a few minutes later and spoke with the CI. When the CI returned to UC 120, she gave him three rocks of cocaine worth twenty dollars each. A subsequent search of the CI revealed no money or contraband.

At approximately 3:00 a.m. the following morning, Elkhart Police Sergeant Todd Thayer ("Sergeant Thayer") and two other officers were patrolling a section of Marion Street in Elkhart in an area known for drug activity and prostitution. Sergeant Thayer walked down an alley to better observe an area that had a high volume of pedestrian and vehicle traffic. In the alley, he noticed the smell of burning marijuana coming from a particular house. As he went to the front of this house, he met Blake riding a bicycle on the sidewalk. Blake smelled of alcohol, had bloodshot eyes, and was acting nervous. Blake appeared to be underage, and when Sergeant Thayer began to search Blake for weapons, Blake pulled away. When questioned, Blake indicated that he was eighteen years old and admitted that he had been drinking alcohol. Sergeant Thayer then arrested Blake for illegal consumption of alcohol. When Blake was searched incident to arrest, the police found several small, individually-packaged rocks of cocaine in the pocket of

Blake's pants. No money or drug paraphernalia was found on Blake. The cocaine found on Blake weighed 1.86 grams.

As a result of these incidents, the State charged Blake on June 4, 2007 as follows: Count I, Class B felony dealing in cocaine stemming from the controlled buy that took place on May 24, 2007; Count II, Class B felony dealing in cocaine stemming from the controlled buy that took place on May 30, 2007; and Count III, Class B felony possession of cocaine with intent to deliver based on the cocaine found in Blake's pocket on May 31, 2007. Blake was eventually released on bond. At a pre-trial conference held on February 28, 2008, Blake appeared in person and by counsel and acknowledged a trial date of September 15, 2008. At another pre-trial conference held on June 26, 2008, Blake failed to appear. The bail bondsman was unable to locate Blake. On July 17, 2008, the trial court issued a bench warrant for Blake's arrest. Blake was still not located and failed to appear when his jury trial began. Blake was tried *in absentia*, and on September 16, 2008, the jury found Blake guilty as charged.

Blake was eventually arrested on the bench warrant on November 17, 2008, and the trial court held a sentencing hearing on January 15, 2009. Concluding that the aggravating factors outweighed the mitigating factors, the trial court sentenced Blake to fifteen years on Count I, fifteen years on Count II, and ten years on Count III. The trial court ordered the sentences imposed on Counts I and II to be served concurrently but ordered the sentence imposed on Count III to be served consecutively to the sentences imposed in Counts I and II. Blake now appeals.

I. Sufficiency of the Evidence

Blake first argues that there was insufficient evidence to support his convictions in Counts II and III. In reviewing a challenge to the sufficiency of the evidence, we neither reweigh the evidence nor judge witness credibility. Klaff v. State, 884 N.E.2d 272, 274 (Ind. Ct. App. 2008). Instead we consider only the evidence which supports the conviction, along with the reasonable inferences to be drawn therefrom. Id. We will affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. Id.

A. *Count II*

To prove Blake's guilt in Count II, Class B felony dealing in cocaine, the State had to establish that Blake knowingly or intentionally delivered cocaine to the CI. See Ind. Code § 35-48-4-1(a)(1)(C) (2004). Blake claims that the State failed to prove this because there was "no evidence establishing the physical exchange, and no evidence of what was said or discussed between 'Mike' and the [CI] on May 30[.]" Appellant's Br. p. 13. However, undercover officer UC 120 directly observed the CI during the entire controlled buy. Undercover officer UC 340 searched the CI prior to the buy and found no contraband. Blake makes much of the fact that the police did not search the CI's underwear prior to the buy. However, the CI did not reach into her clothing during the buy. Thus, there was no reason for the police to search the CI's underwear. Moreover, any doubt this may have cast upon the reliability of the CI was for the jury to determine.

The facts most favorable to the jury's verdict reveal that the police searched the CI prior to the buy, except for her underwear, and found no money or contraband. The police then gave the CI sixty dollars, and the CI spoke with Blake, who went inside the apartment and returned a few minutes later and spoke with the CI. The CI then returned to the police without the money but with three twenty-dollar rocks of cocaine. From this information, the jury could reasonably conclude that Blake knowingly or intentionally delivered cocaine to the CI. Blake's argument to the contrary is simply a request that we reweigh the evidence, which we will not do.

B. *Count III*

To convict Blake as charged in Count III, the State had to prove that he possessed cocaine with the intent to deliver. See I.C. § 35-48-4-1(a)(2)(C). Blake claims that the State failed to prove that he intended to deliver the cocaine found in his possession. Blake admits that the amount of cocaine found in his pocket was inconsistent with personal use, but claims that because he had no cash, there was insufficient evidence of intent to deliver. We disagree.

Because intent is a mental state, the trier of fact must generally resort to the reasonable inferences arising from the surrounding circumstances in order to determine whether the requisite intent exists. Love v. State, 741 N.E.2d 789, 792 (Ind. Ct. App. 2001), trans. denied. Circumstantial evidence showing possession with intent to deliver may support a conviction. Id. Possessing a large amount of a narcotic substance may be considered as circumstantial evidence of intent to deliver. Id. The more narcotics a

person possesses, the stronger the inference that he intended to deliver it and not personally consume it. Id.

Here, Blake possessed a relatively large amount of cocaine, which is inconsistent with personal use. Additionally, the cocaine was packaged in seven smaller, individually-wrapped pieces. This too supports an inference that he intended to deliver the cocaine. See Washington v. State, 902 N.E.2d 280, 289 (Ind. Ct. App. 2009) (intent to deliver supported by evidence police found nine rocks of cocaine in defendant's pocket individually wrapped in "baggie corners," which is a common way dealers package cocaine), trans. denied. Although the State found no money on Blake, this does not prove that he did not intend to deliver; it could simply mean that Blake had yet to sell any of the cocaine. Furthermore, Blake did not possess any means of smoking the cocaine, which further supports an inference that he did not intend to use cocaine for personal use. We therefore conclude that the State presented sufficient evidence from which the jury could have concluded that Blake possessed cocaine with the intent to deliver.

II. Effective Assistance of Trial Counsel

Blake next claims that he was denied the effective assistance of trial counsel.[1] To prevail upon a claim of ineffective assistance of trial counsel, a defendant must

[1] We note that Blake brings his claim of ineffective assistance of trial counsel on direct appeal. While this is not prohibited, post-conviction proceedings are generally the preferred forum for adjudicating claims of ineffective assistance of counsel, because presenting such claims often requires the development of new facts not present in the trial record. See McIntire v. State, 717 N.E.2d 96, 101 (Ind. 1999); Woods v. State, 701 N.E.2d 1208, 1219 (Ind. 1998). If a defendant chooses to present a claim of ineffective assistance of counsel on direct appeal, the issue will be foreclosed from collateral review. Id. at 102; Woods, 701 N.E.2d at 1220. This rule should "likely deter all but the most confident appellants from asserting any claim of ineffectiveness on direct appeal." Woods, 701 N.E.2d at 1220. "'It is no surprise

demonstrate both that his trial counsel's performance was deficient and that he was prejudiced by such deficient performance. Polk v. State, 822 N.E.2d 239, 244 (Ind. Ct. App. 2005), trans. denied (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). Counsel's performance is deemed deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. Id. at 245. To establish the resulting prejudice, a defendant must show that there is a reasonable probability that, but for counsel's allegedly unprofessional errors, the result of the proceeding would have been different. Id. Failure to satisfy either prong will cause the ineffectiveness claim to fail. Id.

When considering the deficient performance prong of the Strickland test, the question is not whether the attorney could, or even should, have done something more. Reed v. State, 866 N.E.2d 767, 769 (Ind. 2007). "Rather, the question is whether the attorney's performance amounted to a reasonably competent defense or did not." Id. As a result, the inquiry must focus on what the attorney actually did. Id. "[I]solated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." Id. (quoting Timberlake v. State, 753 N.E.2d 591, 603 (Ind. 2001)). Moreover, because counsel is afforded considerable discretion in choosing strategy and tactics, "'[a] strong presumption arises that counsel rendered adequate assistance.'" Id. (quoting Timberlake, 753 N.E.2d at 603); see also Dullen v. State, 721

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that such claims [based solely on the trial record] almost always fail.'" Id. at 1216 (quoting United States v. Taglia, 922 F.2d 413, 418 (7th Cir. 1991)).

N.E.2d 241, 243 (Ind. 1999) (counsel is presumed competent, and the defendant must present clear and convincing evidence to rebut this presumption).

Here, Blake claims that his counsel was ineffective for failing to move to sever Count III from Counts I and II. Two or more offenses may be joined for the same trial when the offenses are: (1) of the same or similar character; or (2) are based on the same conduct or on a series of acts connected together constituting parts of a single scheme or plan. Ind. Code § 35-34-1-9(a) (2004). If two or more offenses have been joined for trial solely on the ground that they are of the same or similar character, "the defendant *shall* have a right to a severance of the offenses." Ind. Code § 35-34-1-11(a) (2004) (emphasis added). In such cases, this right to severance is automatic, and the trial court has no discretion to deny the defendant's motion for severance. Maymon v. State, 870 N.E.2d 523, 528 (Ind. Ct. App. 2007), modified on other grounds on reh'g, 875 N.E.2d 375, trans. denied. If, however, the offenses are joined as being part of a single scheme or plan, the trial court has discretion to grant a severance when such is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense. Id.

Blake claims that the charges against him were joined solely on the grounds that they were of the same or similar character and that he therefore had a right to severance of the charges. Blake further claims his trial counsel was ineffective because he did not move for severance as of right. The State argues that Blake's charges were joined because they were part of a single scheme or plan, and that severance was therefore left to the discretion of the trial court. We need not decide whether Blake had a right to severance or whether severance was discretionary because we disagree with Blake that

simply because he may have had the right to severance, the failure to request severance, in and of itself, proves that his counsel was ineffective.

The joinder statute clearly permits charges to be joined simply because they were of the same or similar character. The defendant then has the choice of moving to sever the charges. The statutes are written in such a manner as to acknowledge that, under certain circumstances, the defendant may have no objection to the joinder of similar charges, otherwise such joinder would not be permitted at all. Here, Blake's trial counsel may have had a strategic reason for not requesting severance. However, because Blake has presented his claim of ineffective assistance of trial counsel on direct appeal, the record is silent with regard to the reason his trial counsel did not request severance. Because Blake's claim is based solely on the trial record, "'every indulgence will be given to the possibility that a seeming lapse or error by defense counsel was in fact a tactical move, flawed only in hindsight.'" Woods, 701 N.E.2d at 1216 (quoting Taglia, 922 F.2d at 417-18).

Given this indulgence, and the fact that the record is silent with regard to the reason Blake's trial counsel failed to request severance, we must conclude that Blake has failed to establish by clear and convincing evidence that his trial counsel's performance fell below an objective standard of reasonableness. Further, the present case is distinguishable from those cases cited by Blake in support of his argument that the failure to request severance as a matter of right establishes ineffective assistance of trial counsel.

In Wilkerson v. State, 728 N.E.2d 239 (Ind. Ct. App. 2000), the defendant's trial counsel testified by way of affidavit that he could recall no strategic reason for not

requesting severance and that he did not know that this failure could have adverse sentencing repercussions. Id. at 249. Here, however, we have no indication as to why Blake's trial counsel did not move for severance as of right because of the procedural posture of this case. Further, the prejudice resulting from counsel's failure in Wilkerson had to do with a provision in the consecutive sentence statute that limited a trial court's authority to impose consecutive sentences only when it was contemporaneously imposing two or more sentences, a provision which has since been amended to eliminate such restrictions. See id. at 247-48.

In Maymon, supra, the court held that the defendant was denied the effective assistance of trial counsel where counsel had failed to request severance as of right of four counts of burglary. 870 N.E.2d at 528. The court held that counsel's failure amounted to ineffective assistance because the only evidence of Maymon's intent to commit theft in two of the burglaries was the fact that, in the other two burglaries, he had also committed theft. Id. at 528-29. Because the evidence of the two burglaries where theft did occur would have been inadmissible at separate trials for the two burglaries where thefts did not occur, the court concluded that Maymon was prejudiced by his trial counsel's failure to move for severance of the burglary charges. Id. at 529.

In contrast, here Blake's intent to distribute in Count III was readily established by the fact that he possessed an amount of cocaine that was inconsistent with personal use and that was packaged in a manner consistent with distribution. His intent to distribute in Count III was not established solely through the evidence admitted to establish his convictions in Counts I and II. Thus, even if we assume that trial counsel's failure to

seek severance constituted deficient performance, Blake has not established that he was prejudiced.

In this sense, the present case is similar to Clark v. State, 695 N.E.2d 999 (Ind. Ct. App. 1998), trans. denied. In Clark, the court held that although trial counsel's failure to request severance as of right amounted to deficient performance, the court nevertheless held that the defendant had not established that he was prejudiced by this failure due to the "considerable evidence" of the defendant's guilt.[2] Id. at 1003-04. Similarly, here, there was considerable evidence of Blake's intent to distribute the cocaine found in his possession as alleged in Count III, i.e., his possession of amount of cocaine that was inconsistent with personal use and which was individually packaged for sale.

Blake has not established that his trial counsel's failure to request severance constituted deficient performance, and even if it did constitute deficient performance, Blake has not established that he was prejudiced thereby. Blake's claim of ineffective assistance of counsel therefore fails.

III. Sentencing

Lastly, Blake claims that the trial court erred in sentencing him. Blake claims that the trial court abused its discretion in imposing consecutive sentences and also claims that his sentence is inappropriate in light of the nature of the offense and the character of the offender. We address each claim in turn.

[2] The Clark court did not discuss the deficient performance prong at length, and instead focused on the prejudice prong of the Strickland analysis. We do not read Clark as holding that the failure to request severance as of right, by itself, establishes deficient performance regardless of other circumstances.

A. *Consecutive Sentences*

Blake claims that the trial court abused its discretion in ordering consecutive sentences. Specifically, Blake claims that his convictions arose out of a single episode of criminal conduct, and that pursuant to Indiana Code section 35-50-2-1.3 (Supp. 2009), "if the trial court wished to impose consecutive sentences without abusing its discretion, it needed to impose the advisory sentence on Counts I and II." Appellant's Br. p. 26.

However, in Robertson v. State, 871 N.E.2d 280, 285 (Ind. 2007), our supreme court concluded that Indiana Code section 35-50-2-1.3(c) does not "represent a general requirement that a consecutive sentence be for the advisory term." Instead, subsection 1.3(c) imposes no additional restrictions on the ability of trial courts to impose enhanced or reduced consecutive sentences but "retains the fixed maximum sentences permissible under the episode [i.e., Indiana Code section 35-50-1-2] and repeat offender provisions." Id.

The relevant portion of Indiana Code section 35-50-1-2 (Supp. 2009) provides that, subject to certain exceptions not applicable here, the trial court's discretion to impose consecutive sentences for non-violent crimes arising out of a single episode of criminal conduct is limited such that the total of the consecutive sentences cannot exceed the advisory sentence for the felony which is one class of felony higher than the most serious of the felonies for which the defendant has been convicted. Fight v. State, 768 N.E.2d 881 (Ind. 2002) (citing I.C. § 35-50-1-2(c)).

Here, all of Blake's convictions were Class B felonies, and none of his convictions are for "crimes of violence," as that term is defined by section 35-50-1-2(a). Assuming

arguendo that Blake's convictions did arise out of a single episode of criminal conduct, the total of Blake's consecutive sentences could not exceed the advisory sentence for a Class A felony, which is thirty years. See Ind. Code § 35-50-2-4 (2004). Here, the total of Blake's consecutive sentences is twenty-five years. Therefore, the trial court did not violate the statutory limits on consecutive sentences when it ordered Blake's sentence in Count III be served consecutively to his concurrent sentences in Counts I and II.

B. Appellate Rule 7(B)

Blake finally claims that his sentence is inappropriate. Pursuant to Indiana Appellate Rule 7(B), this court 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). On appeal, it is the defendant's burden to persuade us that the sentence imposed by the trial court is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

With regard to the nature of the offense, although Blake did not possess an exceedingly large amount of cocaine, he did deal drugs in a residential area and in the presence of children. Blake's sentence is further justified by his character as demonstrated by his repeated inability to conform his behavior to the requirements of the

law. Blake was only nineteen years old at the time of sentencing but had six true findings as a juvenile for acts that would have been misdemeanors if committed by an adult. In addition to failing to appear for his trial in the present case, Blake had previously failed to appear for court six times. Blake was out on bond when he committed the instant offenses. As noted by the trial court, while out on bond, Blake was also charged with Class C felony criminal recklessness with a deadly weapon. Blake admitted to using marijuana since he was eight years old and cocaine since he was fifteen years old. Under these facts and circumstances, Blake has not met his burden of establishing that his sentence is inappropriate in light of the nature of the offense and the character of the offender.

Conclusion

The State presented sufficient evidence to support Blake's convictions, and Blake has failed to establish that he was denied the effective assistance of trial counsel. The trial court did not abuse its discretion in imposing consecutive sentences, and Blake's aggregate sentence of twenty-five years is not inappropriate.

Affirmed.

DARDEN, J., and ROBB, J., concur.