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IN THE
COURT OF APPEALS OF INDIANA

QUINTIN D. HOLMES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-1104-CR-161
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Wendy W. Davis, Judge
Cause No. 02D06-1010-FA-55

December 14, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Quintin D. Holmes ("Holmes") was convicted after a jury trial of dealing in cocaine[1] as a Class A felony, resisting law enforcement[2] as a Class A misdemeanor, and possession of marijuana[3] as a Class A misdemeanor and sentenced to an aggregate term of thirty years executed. He appeals, raising the following restated issues:

I. Whether the trial court abused its discretion when it admitted cocaine and marijuana found in the possession of Holmes;

II. Whether sufficient evidence was presented to support Holmes's conviction for dealing in cocaine; and

III. Whether the trial court abused its discretion when sentencing him because it failed to consider certain mitigating circumstances presented by Holmes.

We affirm.

FACTS AND PROCEDURAL HISTORY

On September 30, 2010, Officer David Klein ("Officer Klein") of the Fort Wayne Police Department received a call from dispatch regarding a 911 hang-up. Police protocol required officers to investigate 911 hang-ups, even if the police received a subsequent call explaining that the initial 911 call was a mistake. When a 911 hang-up occurs, the officers go to the nearest residence to verify that no problem exists, that no one needs medical attention, and that no criminal activity has occurred. Even if the 911 call is from a cell phone, the location of the call's origin can be determined, almost exactly, using the latitude and longitude of the call's origin.

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[1] *See* Ind. Code § 35-48-4-1.

[2] *See* Ind. Code § 35-44-3-3.

[3] *See* Ind. Code § 35-48-4-11.

The 911 hang-up on September 30 originated from a cell phone, located at 239 East Woodland Avenue ("239 East Woodland") in Allen County. At approximately 4:00 p.m., Officer Klein went to the residence at that address. Because he was responding to a 911 hang-up, Officer Klein considered it "an unknown situation" and did not "know what [he was] walking into." *Trial Tr*. at 119-120. Fort Wayne Police Sergeant Thomas Strausborger ("Sergeant Strausborger") also heard the dispatch and radioed Officer Klein to tell him that Holmes lived at that address. Sergeant Strausborger informed Officer Klein that, five-and-one-half years prior, Holmes had shot at Sergeant Strausborger during a foot chase and was subsequently convicted of criminal recklessness.

The residence at 239 East Woodland is divided into several apartments, and Officer Klein knocked on the two front doors and a side door, but no one answered. He then walked around to the back of the residence and saw Holmes standing outside. A female friend of Holmes had exited the apartment with him and was on her way to her car when Officer Klein approached. Holmes saw Officer Klein and, because he had heard his name on the police radio, said, "I'm Quintin Holmes." *Suppression Tr*. at 9. Officer Klein asked Holmes if he had any weapons, and Holmes said he did not. Holmes then raised his hands over his head, which Officer Klein took to mean, "go ahead and check." *Trial Tr*. at 122. Officer Klein approached Holmes to perform a patdown search, but before he could reach him, Holmes fled from the officer. Officer Klein yelled, "stop, police, get on the ground" and chased Holmes. *Id*. at 123. During his pursuit of Holmes, Officer Klein observed him reach into his front pants pocket, pull out a clear baggie containing a substance later identified as cocaine, and throw the baggie onto the ground.

The chase continued, and Holmes ran back to where the chase began, lay down on the ground, and said, "you can cuff me now." *Id*. at 126.

Sergeant Strausborger arrived at the scene and handcuffed Holmes, who was still lying on the ground. The baggie that Holmes had discarded during the chase was retrieved, and the Fort Wayne Police Department's vice and narcotics unit was contacted. A cash roll containing $195 was found in Holmes's pocket when he was arrested. Holmes was placed in a police vehicle and informed Sergeant Strausborger that he wanted to speak to an attorney. Holmes later called Sergeant Strausborger over and said he wanted to talk to Sergeant Strausborger. Sergeant Strausborger told Holmes that, because Holmes had requested an attorney, they were not allowed to talk about anything. Holmes insisted that he wanted to talk to Sergeant Strausborger. Sergeant Strausborger informed Holmes that, unless he re-engaged with the police, they could not talk to each other and that, since the case involved narcotics, Holmes should talk to a narcotics officer. Holmes then stated that he wanted to speak with a narcotics officer.

Detective Shane Pulver ("Detective Pulver") of the Vice and Narcotics Unit of the Fort Wayne Police Department arrived on the scene and was told that Holmes wished to re-engage in conversation with the police. Detective Pulver advised Holmes of his *Miranda*[4] rights, asked him if he wanted to speak to an attorney, and then read him his *Pirtle* rights.[5] Holmes then consented to a search of his apartment. When the officers searched Holmes's apartment, they found a delivery box containing plastic baggies with a

[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[5] *Pirtle v. State*, 263 Ind. 16, 323 N.E.2d 634 (1975).

white residue, later determined to be cocaine, and a gallon-size plastic bag containing pieces of what was later determined to be marijuana. During the search, an officer stayed with Holmes so that Holmes could withdraw his consent at any time.

On October 6, 2010, the State charged Holmes with dealing in cocaine as a Class A felony, resisting law enforcement as a Class A misdemeanor, and possession of marijuana as a Class A misdemeanor. Holmes filed a motion to suppress evidence, and a hearing was held on the motion. The trial court denied the motion. On March 8, 2011, a jury trial was held, at which the trial court admitted the cocaine and marijuana found in the possession of Holmes over the objection of Holmes. At trial, Detective Pulver testified that the cocaine that Holmes possessed weighed approximately 27.12 grams, with a street value of approximately $1,200. *Trial Tr*. at 160, 163, 165. Detective Pulver testified that such an amount was too much for personal use and would be for dealing. *Id*. at 170. He also stated that the gallon bag found would typically hold one pound of marijuana. *Id*. at 159. At the conclusion of the trial, the jury found Holmes guilty as charged.

A sentencing hearing was held on March 21, 2011. Holmes informed the trial court that the pre-sentence investigation report ("PSI") indicated that he had been diagnosed as bi-polar. *Sentencing Tr*. at 5. The trial court found as aggravating circumstances Holmes's criminal history, prior attempts at rehabilitation had failed, and the nature and circumstances of the case. *Id*. at 13-14. The trial court found no mitigating circumstances and imposed an aggregate sentence of thirty years executed. Holmes now appeals.

DISCUSSION AND DECISION

I. Admission of Evidence

Although Holmes frames his argument as a challenge to the trial court's denial of his motion to suppress, this appeal arises from a conviction after a trial and not an interlocutory appeal. Therefore, the issue on appeal is appropriately framed as whether the trial court abused its discretion in admitting the evidence and not whether the trial court properly denied the motion to suppress. *Lanham v. State*, 937 N.E.2d 419, 421-22 (Ind. Ct. App. 2010). A trial court is afforded broad discretion in ruling upon the admissibility of evidence, and we will reverse such a ruling only when the defendant has shown an abuse of discretion. *Id.* at 422. An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. *Id.* We do not reweigh the evidence, and we consider conflicting evidence in the light most favorable to the trial court's ruling. *Id.* We also must consider uncontested evidence favorable to Holmes. *Id.*

Holmes contends that the trial court abused its discretion when it admitted the evidence because the evidence was discovered in violation of the Fourth Amendment to the United States Constitution. He contends that, when Officer Klein initially approached him, the officer did not have reasonable suspicion to justify a patdown search. Holmes further claims that, when he was detained in the back of the police vehicle, he was questioned despite the fact he had requested an attorney, and therefore, his consent to search his apartment was tainted and any evidence discovered during the search of his apartment was found in violation of the Fourth Amendment.

The trial court admitted two relevant pieces of evidence over the objection of Holmes. First, the cocaine that Holmes discarded as he fled Officer Klein was admitted. Second, the trial court admitted the marijuana found in Holmes's apartment after he gave consent to search.

A. Cocaine

Initially, Officer Klein's approach to Holmes was a consensual encounter, as the officer was at the residence to investigate a 911 hang-up originating from that address. The United States Supreme Court has stated, "'Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions.'" *Cochran v. State*, 843 N.E.2d 980, 984 (Ind. Ct. App. 2006) (quoting *Florida v. Bostick*, 501 U.S. 429, 434 (1991)). There are three levels of police investigation, two of which implicate the Fourth Amendment and one of which does not: (1) an arrest or detention that lasts for more than a short period of time must be justified by probable cause; (2) the police may, without a warrant or probable cause, briefly detain an individual for investigatory purposes if, based upon specific and articulable facts, the officer has a reasonable suspicion that criminal activity has or is about to occur; and (3) when a police officer makes a casual and brief inquiry of a citizen, which involves neither an arrest nor a stop. *Powell v. State*, 912 N.E.2d 853, 859 (Ind. Ct. App. 2009) (citing *Overstreet v. State*, 724 N.E.2d 661, 663 (Ind. Ct. App. 2000), *trans. denied*). The third constitutes a consensual encounter in which the Fourth Amendment is not implicated. *Id.* In a consensual encounter, a person remains free to disregard the police officer and to

walk away. *Bovie v. State*, 760 N.E.2d 1195, 1198 (Ind. Ct. App. 2002). "Only when an individual no longer remains free to leave does an investigatory stop begin." *Id*.

Here, Officer Klein was responding to a 911 hang-up that originated from the address where Holmes resided. Officers from the Fort Wayne Police Department were required to investigate 911 hang-ups, because, although they could be innocuous, they often involved domestic disputes. Officer Klein, who arrived at the address alone, encountered Holmes outside of the residence, and Holmes volunteered his name as he had heard it mentioned on the police radio. Officer Klein recognized Holmes, and had been informed by Sergeant Strausborger over his radio that Holmes had previously shot at Sergeant Strausborger. After Holmes told Officer Klein his name, Officer Klein asked Holmes if he had any weapons, and Holmes said he did not. This encounter between Holmes and Officer Klein was consensual.

Holmes then raised his arms above his head, which Officer Klein interpreted to be consent to perform a patdown search. Officer Klein approached Holmes to conduct a patdown. An officer can conduct a limited search of an individual's outer clothing for weapons if the officer reasonably believes the individual is armed and dangerous. *Howard v. State*, 862 N.E.2d 1208, 1210 (Ind. Ct. App. 2007). The purpose of a patdown search is to allow the officer to continue his investigation without fearing violence, and therefore, it should be confined to its protective purpose. *Clenna v. State*, 782 N.E.2d 1029, 1033 (Ind. Ct. App. 2003). "The officer need not be absolutely certain that the suspect is armed; the issue is whether a reasonably prudent man in the circumstances

would be warranted in the belief that his safety or that of others was in danger." *Id.* (internal quotation omitted).

Officer Klein knew that a 911 hang-up had originated, and Holmes and his friend were the only people present at the address where the 911 call originated. Officer Klein was also aware that Holmes had shot at a police officer in the past. Officer Klein reasonably believed that Holmes may have been armed. However, no patdown search actually took place because Holmes fled before Officer Klein ever touched him. Therefore, Holmes is challenging a patdown search that never occurred.

Further, the cocaine was properly admitted because it was abandoned property. Abandoned property is subject to lawful seizure without a warrant and, therefore, not subject to Fourth Amendment protection. *Gooch v. State*, 834 N.E.2d 1052, 1053-54 (Ind. Ct. App. 2005), *trans. denied*. In *Wilson v. State*, 825 N.E.2d 49 (Ind. Ct. App. 2005), an officer ordered the defendant to stop, but he fled and dropped a bag of narcotics during the chase. *Id*. at 50. This court did not discuss reasonable suspicion to stop the defendant because he had not been seized and such discussion was not necessary because the defendant had abandoned the property. *Id*. In the present case, Holmes abandoned the baggie containing cocaine, and the Fourth Amendment was not applicable. The trial court did not abuse its discretion in admitting the cocaine at trial.

B. Marijuana

When an individual is subjected to custodial interrogation, he must be advised of his *Miranda* rights. *Payne v. State*, 854 N.E.2d 7, 13 (Ind. Ct. App. 2006). When a suspect invokes his right to counsel during custodial interrogation, the police must stop

questioning until counsel is present or the suspect reinitiates communication and waives his right to counsel. *Edmonds v. State*, 840 N.E.2d 456, 460 (Ind. Ct. App. 2006), *trans. denied, cert. denied*. If the accused has initiated further communication, then the subsequent inquiry is whether there is a valid waiver of the right to counsel; that is, whether the purported waiver was knowing and intelligent under the totality of the circumstances. *Storey v. State*, 830 N.E.2d 1011, 1018 (Ind. Ct. App. 2005). The "totality of the circumstances" test focuses on the entire interrogation, not on any single act by police or the condition of the suspect. *Id*. (citing *Light v. State*, 547 N.E.2d 1073, 1079 (Ind. 1989)).

In the present case, after being taken into custody, Holmes, who was experienced with dealing with law enforcement because of his prior interactions with the police, initially asked for an attorney. Shortly after, Holmes told Sergeant Strausborger that Holmes wanted to speak with the officer. Sergeant Strausborger advised Holmes that, because Holmes had requested an attorney, they could not speak to each other. Holmes repeated his desire to speak with Sergeant Strausborger, and Sergeant Strausborger told him that unless Holmes re-engaged in communication with the police, they could not talk to each other. Sergeant Strausborger also told Holmes that he would need to speak with a narcotics officer due to the nature of the case. Holmes stated that he wanted to speak with a narcotics officer. Detective Pulver came to speak with Holmes, read him both his *Miranda* and *Pirtle* rights, and again asked Holmes if wanted an attorney. Under the totality of the circumstances, we conclude that Holmes voluntarily waived his right to counsel, and Detective Pulver properly re-initiated communication with Holmes.

Holmes then consented to a search of his apartment. One of the well-recognized exceptions to the warrant requirement is a voluntary and knowing consent to search. *Temperly v. State*, 933 N.E.2d 558, 563 (Ind. Ct. App. 2010), *trans. denied*, *cert. denied* (citing *Krise v. State*, 746 N.E.2d 957, 961 (Ind. 2001)). The voluntariness of a consent to search is a question of fact to be determined from the totality of the circumstances. *Id*. A consent to search is valid except where it is procured by fraud, duress, fear, intimidation, or where it is merely a submission to the supremacy of the law. *Id*. Holmes, who had experience with law enforcement due to his previous convictions, was read both *Miranda* and *Pirtle* warnings before consenting to a search of his apartment. A police officer also stayed with him during the search in case he decided to withdraw his consent. We therefore conclude that Holmes voluntarily consented to the search, and the trial court did not abuse its discretion when it admitted the marijuana into evidence at trial.

II. Sufficient Evidence

Our standard of review for sufficiency claims is well-settled. When we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. *Parahams v. State*, 908 N.E.2d 689, 691 (Ind. Ct. App. 2009) (citing *Jones v. State*, 783 N.E.2d 1132, 1139 (Ind. 2003)). We look only to the probative evidence supporting the judgment and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. *Id*. If there is substantial evidence of probative value to support the conviction, it will not be set aside. *Id*. It is the function of the trier of fact to

resolve conflicts of testimony and to determine the weight of the evidence and the credibility of the witnesses. *Yowler v. State*, 894 N.E.2d 1000, 1002 (Ind. Ct. App. 2008).

Holmes argues that the State failed to present sufficient evidence to support his conviction for dealing in cocaine as a Class A felony. He contends that the evidence was insufficient because the search of his apartment did not yield baking soda or baking powder, which are often used in manufacturing crack cocaine, ledger books, or electronic scales, which are all items commonly used by individuals who deal drugs. He also asserts that he was not found in possession of large amounts of money. Holmes claims that the evidence presented at trial failed to prove that he had the intent to deliver the cocaine found.

To convict Holmes of dealing in cocaine as a Class A felony, the State was required to prove that he knowingly or intentionally possessed, with the intent to deliver or finance the delivery of, more than three grams of cocaine. Ind. Code § 35-48-4-1. Circumstantial evidence showing possession with intent to deliver may support a conviction. *Davis v. State*, 791 N.E.2d 266, 270 (Ind. Ct. App. 2003), *trans. denied*. "Possessing a large amount of a narcotic substance is 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 consume it personally." *Id.*

Here, Holmes was observed discarding a baggie that contained 27.12 grams of cocaine. Detective Pulver testified that the street value of such a quantity of cocaine was approximately $1,200. *Trial Tr*. at 165. Detective Pulver also testified that 27.12 grams

of cocaine "would be too much for personal use" and "[c]ould be two months' worth for personal use, which we don't find of users." *Id*. at 170. He instead believed that the amount found would be for dealing. *Id*. Additionally, when Holmes's apartment was searched, a delivery box was found that contained a one-gallon plastic bag with pieces of marijuana inside that typically would hold one pound of marijuana and smaller plastic baggies with cocaine residue. The amount of cocaine Holmes possessed, combined with Detective Pulver's testimony, was sufficient circumstantial evidence to support Holmes's conviction for dealing in cocaine as a Class A felony. Holmes's argument regarding the lack of other evidence of dealing is merely an invitation to reweigh the evidence, which we cannot do. *Parahams*, 908 N.E.2d at 691.

III. Sentencing

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*. One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. *Id.* Another example includes entering a sentencing statement that explains reasons for imposing a sentence, including mitigating and aggravating circumstances, which are not supported by the record. *Id.* at 490–91. A trial court may abuse its discretion by entering a sentencing statement that omits mitigating factors that are clearly supported by the record and advanced for

consideration. *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 in failing to "properly weigh" such factors. *Id*. at 491. 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 . . . permissible under the Constitution of the State of Indiana." Ind. Code § 35-38-1-7.1(d).

Holmes argues that the trial court abused its discretion when it sentenced him because it failed to consider any mitigating circumstances. Specifically, he contends that the trial court erred when it failed to consider his mental illness as a mitigating factor. Holmes asserts that this mitigating factor was significant and clearly supported by the record and should have been considered in sentencing him.

The finding of mitigating factors is not mandatory and rests within the discretion of the trial court. *Storey v. State*, 875 N.E.2d 243, 252 (Ind. Ct. App. 2007) (citing *O'Neill v. State,* 719 N.E.2d 1243, 1244 (Ind. 1999)), *trans. denied* (2008)). The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. *Id*. (citing *Gross v. State,* 769 N.E.2d 1136, 1140 (Ind. 2002)). An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to show that the mitigating evidence is both significant and clearly supported by the record. *Id*. (citing *Carter v. State,* 711 N.E.2d 835, 838 (Ind. 1999)). "However, 'if the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does

not exist.'" *Anglemyer*, 868 N.E.2d at 493 (quoting *Fugate v. State*, 608 N.E.2d 1370, 1374 (Ind. 1993)). When determining whether mental illness should be considered mitigating, factors to consider include: (1) the extent of the defendant's inability to control his or her behavior due to the disorder or impairment; (2) overall limitations on functioning; (3) the duration of the mental illness; and (4) the extent of any nexus between the disorder or impairment and the commission of the crime. *Weeks v. State*, 697 N.E.2d 28, 30 (Ind. 1998).

Here, during his sentencing, Holmes informed the trial court that his PSI report indicated that he had been diagnosed with bi-polar disorder. The PSI report contained information that Holmes had previously been admitted and treated for depression on three occasions and that he had been diagnosed with bi-polar disorder in 2007 and prescribed medication. No evidence was presented regarding the extent of Holmes's inability to control his behavior due to this mental illness, any overall limitations he suffered, or the extent of any nexus between the disorder and the commission of the crimes with which he was charged. *See Scott v. State*, 840 N.E.2d 376, 384 (Ind. Ct. App. 2006) (upholding sentence because although defendant received treatment for mental illness prior to offense, defendant did not indicate he committed offense due to lapsed treatment or failure of his medication), *trans. denied*. We therefore conclude that Holmes had failed to prove that his mental illness was significant and clearly supported by the record. The trial court did not abuse its discretion when it sentenced him.

Affirmed.

BAKER, J., and BROWN, J., concur.