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# IN THE
# COURT OF APPEALS OF INDIANA

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| LARRY L. TOOPS, SR., | ) | |
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| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 22A01-0902-CR-100 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

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APPEAL FROM THE FLOYD SUPERIOR COURT
The Honorable Susan L. Orth, Judge
Cause No. 22D01-0311-FA-829

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**December 17, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## Case Summary

Larry L. Toops, Sr., appeals his convictions and two consecutive fifty-year terms for dealing in cocaine, dealing in a narcotic drug, and possession of a narcotic drug. Toops contends that the trial court denied his right to compulsory process, the trial court abused its discretion in sentencing him, and his sentence is inappropriate. We find the trial court did not deny Toops's right to compulsory process nor did it abuse its discretion in sentencing him. However, given Toops's character and the nature of his offenses, we find his aggregate 100-year sentence inappropriate and revise it to concurrent fifty-year terms. We therefore affirm in part, reverse in part, and remand with instructions.

## Facts and Procedural History

On October 11, 2003, officers in the Southern Indiana Drug Task Force performed two controlled buys of cocaine from Toops by using a confidential informant ("CI"). In the first buy, the CI purchased fifty dollars' worth of cocaine from Toops in a bar. The second buy occurred later that night, when the CI returned to the same bar and purchased twenty dollars' worth of cocaine from Toops. Officers performed two more controlled buys from Toops on November 8, 2003. In the first buy, the CI went to Toops's house and purchased fifty dollars' worth of cocaine from Toops. The CI then left the house and returned with Officer Humphrey, undercover, who paid Toops $425 for methamphetamine later determined to have a weight of 3.62 grams.

On November 20, 2003, the State charged Toops with Class A felony dealing in methamphetamine and two counts of Class B felony dealing in cocaine. On that same day, officers from the Southern Indiana Drug Task Force, with the assistance of the Floyd

County SWAT Team, executed a search warrant for Toops's house and served Toops with an arrest warrant. During the search, the officers found, among other things, baggies, scales, and an array of controlled substances, including oxycodone, clonazepam, hydrocodone, marijuana, methamphetamine, and cocaine. The charging information was amended on November 21, 2003, December 11, 2003, and May 9, 2008. The May 9, 2008, information charged Toops with the following crimes: Count I, Class B felony dealing in cocaine; Count II, Class A felony dealing in a narcotic drug; Count III, Class B felony dealing in cocaine; Count IV, Class A felony dealing in cocaine; Count V, Class C felony possession of a narcotic drug; and Count VI, Class A misdemeanor possession of marijuana. Counts I and II are based on the buys on November 8, 2003. Count III is based on the buys on October 11, 2003. Counts IV, V, and VI are based on the search executed on November 20, 2003.

The trial court permitted Toops to proceed *pro se* at trial with an attorney as co-counsel. On the first day of the jury trial, Toops submitted his witness list. The list indicated nine specific people as well as anyone on the prosecutor's witness list. In part because of difficulties in locating witnesses, Toops called only four of the witnesses on his list at trial. Toops was convicted of Counts I through V.

The trial court sentenced Toops to concurrent terms of twenty years on Count I, fifty years on Count II, and twenty years on Count III, for a total of fifty years for Counts I through III, and concurrent terms of fifty years on Count IV and eight years on Count V, for a total of fifty years on Counts IV and V. Counts IV and V were ordered to run

consecutive to Counts I through III for an aggregate sentence of 100 years to be served at the Indiana Department of Correction. Toops now appeals.

## Discussion and Decision

Toops contends that the trial court denied his right to compulsory process, the trial court abused its discretion in sentencing him, and his sentence is inappropriate.

### I. Compulsory Process

Toops first contends that he was denied his constitutional right to compulsory process for obtaining witnesses. Generally, a party may not present an argument or issue to an appellate court unless the party raised the same argument or issue before the trial court. *Crafton v. State*, 821 N.E.2d 907, 912 (Ind. Ct. App. 2005). As Toops failed to raise this issue before the trial court, it is waived.

Waiver notwithstanding, given our preference for resolving a case on its merits, we review Toops's claim. The Sixth Amendment of the United States Constitution and Article 1, Section 13 of the Indiana Constitution guarantee a criminal defendant the right to have compulsory process for obtaining witnesses in his or her favor. Although the right to compulsory process is of utmost importance, it is not absolute. *See Klagiss v. State*, 585 N.E.2d 674, 681 (Ind. Ct. App. 1992), *trans. denied*. When the denial of compulsory process is alleged, we make two determinations: (1) whether the trial court arbitrarily denied the Sixth Amendment rights of the person calling the witness and (2) whether the witness is competent to testify and whether his or her testimony would have been relevant and material to the defense. *Davis v. State*, 529 N.E.2d 112, 114-15 (Ind. Ct. App. 1988) (citing *Washington v. Texas*, 388 U.S. 14, 23 (1967)).

Toops contends that Turner Corn, Terry Justice, and Paula Essery were vital witnesses on his witness list and that he "should have had the full force of the court system to compel [their] attendance at trial."[1] Appellant's Br. p. 11. With regards to these three people, the following colloquy occurred at trial:

> [STATE]: There's Turner Corn, is he here? Did you serve him?
> MR. TOOPS: I-I don't know. I can't, I mean, I don't, I'm in jail, Your Honor, I don't know.
> THE COURT: I know, but Larry, I'll tell you, I-I've given you full access to free phone calls, uh, your attorney has helped get people together, the Court has helped find people for you.
> MR. TOOPS: Your Honor, they must have misunderstood you about the phone calls. I mean, yes, I have got a couple free ones, but I haven't got a hold of Turner Corn or none of 'em that, you know, when I get in there there's two or three phone calls and, are you done, let's go.
> THE COURT: Okay. But have you subpoenaed anyone?
> MR. TOOPS: Uh…
> [TOOPS'S CO-COUNSEL]: Your Honor, we delivered su- uh, had subpoenas delivered, uh, I had subpoenas delivered to the addresses or places that I knew of given to me by Mr. Toops. I didn't, I don't know that any of them were correct. I don't know that any of them were directed correctly.
> THE COURT: Okay.
> [TOOPS'S CO-COUNSEL]: Uh, as far as Mr. Corn is concerned, uh, there was, we were able to get a, uh, a contact number for him from the Probation Department, he had been on probation, his probation was closed out.
> THE COURT: That was something I forgot that we had talked about at one point, to contact probation.
> [TOOPS'S CO-COUNSEL]: Yeah, that number was, uh, that number was called and the people answering at that number said that they had no, uh, no knowledge of-of him at all. Um, as far as Terry Justice is concerned, uh, we were able to confirm that he is in the Louisville Metro Jail and being held by the Federal Authorities. And it's my understanding that this Court has no authority to, uh, the Federal custody trumps our subpoena, uh, from his county, from-from any county. So I don't, I don't think it'll be possible to get Mr. Ju- I, it will not be possible to get Mr. Justice. Uh, and-and I've done the best that I could do.

[1] Although Toops wanted to call other witnesses at trial, the argument section in his appellate brief refers only to the importance of Corn, Justice, and Essery as witnesses. To the extent that Toops may have intended us to address other witnesses, we find any such argument waived for failure to present a cogent argument. *See* Ind. Appellate Rule 46(A)(8)(a).

> [STATE]: If I may? There was a Paula Essery.
> MR. TOOPS: I couldn't get a hold of her, I tried.
> THE COURT: And that was the other thing I forgot until you reminded me [ ] that we did, too. We provided the cell phone numbers of the Probation Officers to contact them after hours and try to find some of these people as well. If their probation has been terminated then that's the extent of their contact with them. Uh . . .
> [STATE]: So is it my understanding that those three individuals, Terry Justice, Turner Corn and Paula—
> MR. TOOPS: Yes.
> [STATE]: --Essery will not be here today?
> MR. TOOPS: No, they won't.
> [STATE]: Could we, for the record, at least put a brief synopsis of what the Defendant thought would've been their testimony.
> MR. TOOPS: I don't know.
> [STATE]: Well, you're calling 'em for something and I would like just at least for the record['']s purpose, uh, to put on what you thought they were going to be.
> THE COURT: Had you talked to them?
> MR. TOOPS: No, I haven't.
> THE COURT: So you hadn't talked to 'em before the case? Were any of them present during any transactions or alleged transactions?
> MR. TOOPS: No, they knew the informant. I have, you know. . .
> [STATE]: They knew the. . .
> THE COURT: May or may not have contact with 'em.
> MR. TOOPS: Yeah, back in 2003 they said they knew him, they did dope with him, shot, you know. I was just. . . Oh, I was calling them to question the credibility of [the CI].
> THE COURT: All right. Thank you.

Tr. p. 517-20. As to whether the trial court arbitrarily denied Toops's rights, the record reflects that the trial court issued subpoenas, gave Toops access to free phone calls, and provided cell phone numbers for probation officers. The subpoenas issued for Corn and Justice and directed to the Floyd County Jail were both returned by the Floyd County Sheriff because neither Corn nor Justice was incarcerated there. Although Justice was eventually located, he was unavailable to testify due to being held by federal authorities.

Toops never found Corn or Essery. The trial court did not arbitrarily deny Toops's right to compulsory process.

Turning to the second step of the analysis, the State does not contest the competency of Corn, Justice, and Essery to testify. We must therefore determine whether their testimony would have been both material and relevant to Toops's defense. A witness's testimony is material if it is sufficient to create a reasonable doubt about a verdict which, based on the entire record, is already of questionable validity. *Hunt v. State*, 546 N.E.2d 1249, 1251 (Ind. Ct. App. 1989), *trans. denied*. Because the right to compulsory process guarantees a defendant a means of obtaining witnesses in his or her favor, the defendant must also show the witness's testimony would have been favorable to his or her defense. *Id.* Although Toops stated that he wanted to call Corn, Justice, and Essery to undermine the credibility of the CI, he had not talked to any of them and did not know what they would say if they testified. He thus failed to show that their testimony would have been favorable to him. The trial court did not deny Toops's right to compulsory process.[2]

## II. Abuse of Discretion

Toops contends that the trial court abused its discretion in sentencing him when it negated as a mitigator that he is unlikely to reoffend and when it used his criminal history

[2] Toops attempts to persuade us that he was denied his right to compulsory process by comparing his case with *Ferguson v. State*, 670 N.E.2d 371 (Ind. Ct. App. 1996), *trans. denied*. In *Ferguson*, the defendant sought to subpoena the deputy prosecutor to elicit testimony regarding any agreement the State had made with an uncharged co-conspirator in exchange for that co-conspirator's testimony, and another panel of this Court held that the trial court's quashing of the defendant's subpoena was reversible error. The facts of the instant case are plainly distinguishable. While in *Ferguson* the trial court prevented the deputy prosecutor from testifying by granting a motion to quash, here, the trial court did nothing to prevent Corn, Justice, or Essery from testifying.

as an aggravating factor. At the outset, we note that the crimes in this case occurred in 2003. It is well settled that the sentencing statute in effect at the time the crime is committed governs the sentence for the crime. *Gutermuth v. State*, 868 N.E.2d 427, 431 n.4 (Ind. 2007). At the time of the offenses in this case, the legislature had not yet amended Indiana's sentencing statute, and consequently, the presumptive sentencing scheme applies. Under that scheme, sentencing determinations are within the trial court's discretion and are reviewed on appeal only for an abuse of that discretion. *Padgett v. State*, 875 N.E.2d 310, 316 (Ind. Ct. App. 2007), *trans. denied*.

We also note that the United States Supreme Court has held that the Sixth Amendment requires a jury to determine beyond a reasonable doubt the existence of aggravating factors used to increase the sentence for a crime above the presumptive sentence assigned by the legislature. *Blakely v. Washington*, 542 U.S. 296, 301 (2004). Our Supreme Court has since held that the rule announced in *Blakely* applies to Indiana's presumptive sentencing scheme. *Smylie v. State*, 823 N.E.2d 679, 690-91 (Ind. 2005). Thus, under *Blakely* and Indiana's former sentencing scheme, an aggravating circumstance is proper when it is: (1) a fact of prior conviction; (2) found by a jury beyond a reasonable doubt; (3) admitted by a defendant; or (4) in the course of a guilty plea where the defendant has waived his or her Sixth Amendment rights and stipulated to certain facts or consented to judicial factfinding. *Sullivan v. State*, 836 N.E.2d 1031, 1034 (Ind. Ct. App. 2005).

Here, Toops contends that "evidence found during execution of a search warrant used to convict Mr. Toops should not [ ] be used to negate a possible mitigator" since "[a]

factor constituting an element of the offense cannot be used as an aggravating circumstance." Appellant's Br. p. 13. The trial court failed to find as a mitigator that Toops is unlikely to reoffend. In explaining this finding, the court stated,

> At the execution of the November 20th search warrant police located a hidden compartment in the house used to hide drugs and contraband. In it police found cocaine, methamphetamine, oxycontin, other prescription drugs and several gram scales with residue. They also located over nineteen hundred dollars ($1,900.00) in cash, which all clearly show an ongoing operation of dealing of a variety of drugs on a large scale, obviously a long standing, ongoing operation that indicates to me a criminal operation likely to reoccur.

Tr. p. 729-30. The trial court was merely observing the nature and circumstances of Toops's drug operation, which does not constitute an element of the offense. Toops's argument thus fails. The trial court did not abuse its discretion in failing to find as a mitigator that Toops is unlikely to reoffend.

Toops also contends that the trial court abused its discretion when it used his criminal history as an aggravating factor. Specifically, he states that the convictions "are either too unrelated or too remote to the instant convictions to justify their use as aggravators." Appellant's Br. p. 14. The extent, if any, that a sentence should be enhanced turns on the weight of an individual's criminal history, which is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability. *Duncan v. State*, 857 N.E.2d 955, 959 (Ind. 2006). However, we will not say that remoteness in time, to whatever degree, renders a prior conviction irrelevant. *Corbett v. State*, 764 N.E.2d 622, 631 (Ind. 2002). The remoteness

of prior criminal history does not preclude the trial court from considering it as an aggravating circumstance. *Id.*

Toops has convictions in Florida for manufacturing of cannabis, possession of cannabis less than twenty grams, and possession of drug paraphernalia. He also has a conviction for violation of the Georgia Controlled Substance Act. The trial court stated,

> The point being that not only are two of your prior convictions crimes involving illegal drugs, but the level and seriousness and the amount and variety of drugs has increased, ending with the crimes that you were tried for here. You now have drug convictions in three separate states.

Tr. p. 727. Given Toops's previous drug convictions, the trial court did not abuse its discretion in finding his criminal history to be a significant aggravating factor.

**III. Appropriateness of the Sentence**

Finally, Toops contends that his aggregate 100-year sentence is inappropriate. Although a trial court may have acted within its lawful discretion in imposing a sentence, Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a court "may revise a sentence 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." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007)). The defendant has the burden of persuading us that his or her sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

At the time of Toops's offenses, the presumptive sentence for a Class A felony was thirty years, with no more than twenty years added for aggravating circumstances and no more than ten years subtracted for mitigating circumstances. Ind. Code Ann. § 35-50-2-4 (West 1998). The presumptive sentence for a Class B felony was ten years, with no more than ten years added for aggravating circumstances and no more than four years subtracted for mitigating circumstances. *Id.* § 35-50-2-5. The presumptive sentence for a Class C felony was four years, with no more than four years added for aggravating circumstances and no more than two years subtracted for mitigating circumstances. *Id.* § 35-50-2-6.

Toops was sentenced to the maximum term of twenty years for Class B felony dealing in cocaine, the maximum term of fifty years for Class A felony dealing in a narcotic drug, and the maximum term of twenty years for Class B felony dealing in cocaine, to run concurrently for a total of fifty years. Toops was sentenced to the maximum term of fifty years for Class A felony dealing in cocaine and the maximum term of eight years for Class C felony possession of a narcotic drug, to run concurrently for a total of fifty years. Counts IV and V were ordered to run consecutive to Counts I through III for an aggregate sentence of 100 years to be served at the Indiana Department of Correction.

As for Toops's character, the trial court noted his criminal history:

> [Y]ou have a criminal history that dates back over twenty-five years. In 1981 you were convicted of and sentenced for resisting law enforcement and criminal recklessness. In 1982 convicted of criminal conversion. In 1991 sentenced to driving while suspended in Marion County, Florida. In 1995 sentenced to ten years of probation for a violation of the Georgia controlled substance act, which the Court finds is a felony out of Georgia.

> Which means you were on probation at the time you committed the crimes you were tried for here. You also were using another name or an alias, which shows deception. In 1996 convicted of manufacturing cannabis and possession of cannabis in Marion County, Florida, and sentenced to two and a half years. Again, another crime, another drug offense while on probation, which demonstrates, again you are not a good candidate for probation. In 1997 you were convicted to two separate offenses, and looks like they were sentenced consecutively then for felony non-support, sentenced to a total of six years. And that suspended sentence was revoked due to a probation violation, which again shows you are unable to comply with terms of probation and not a candidate for probation as well. In 2000 you were sentenced in driving while suspended here in Floyd County. That sentenced was revoked again, showing an inability to comply with probation.

Tr. p. 726-27. While extensive, Toops's criminal history does not justify his aggregate 100-year sentence.

As for the nature of the offenses, Toops dealt cocaine and methamphetamine to a confidential informant and an undercover officer, and a search of his house revealed baggies, scales, and an array of controlled substances. There is nothing about the nature of his offenses that would distinguish them from other crimes of dealing in cocaine, dealing in a narcotic drug, and possession of a narcotic drug. Given the nature of Toops's offenses, which stem from a series of State-sponsored buys, and his character, a 100-year sentence is not warranted. We therefore direct that his sentences be served concurrently for a reduced aggregate fifty-year sentence. The trial court may issue an amended sentencing order and any other entries necessary to impose a revised sentence without a hearing.

Affirmed in part, reversed in part, and remanded with instructions.

BRADFORD, J., concurs.

BAILEY, J., concurs in part and dissents in part with separate opinion.

# IN THE
# COURT OF APPEALS OF INDIANA

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| LARRY L. TOOPS, SR., | ) | |
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| Appellant-Defendant, | ) | |
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| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

**BAILEY, Judge, concurring in part and dissenting in part**.

I agree with the majority that Toops' convictions should be affirmed. However, I dissent from the order to the trial court to impose a revised sentence because I believe that the trial court acted within its discretion. As Toops committed his crimes in 2003, his sentence was imposed under the presumptive sentencing scheme. The trial court had within its discretion the ability to determine whether a presumptive sentence would be increased or decreased because of aggravating or mitigating circumstances. Bacher v. State, 722 N.E.2d 799, 801 (Ind. 2000). The trial court's sentencing order was subject to reversal only upon a showing of manifest abuse of discretion. Id.

The majority reasons that "[g]iven the nature of Toops's offenses, which stem from a series of State-sponsored buys, and his character, a 100-year sentence is not

warranted." Slip op. at 12. We are not, however, required to reverse the order for consecutive sentences because of State activity. Here, we are not presented with a series of virtually identical offenses involving the same drug for which the defendant ultimately received maximum and consecutive sentences. See Beno v. State, 581 N.E.2d 922, 924 (Ind. 1991) (finding maximum, consecutive sentences for multiple drug dealing convictions manifestly unreasonable where the convictions were based on nearly identical State-sponsored sales to a police informant in an ongoing sting operation).

Arguably, the confidential informant, acting at the behest of police, enticed Toops to make drug sales. However, Toops was fully immersed in the enterprise of drug dealing, wholly independent of police enticement. He had constructed a hidden compartment in his home and equipped himself with scales. He had a cornucopia of illegal and prescription drugs with a bankroll to transact distribution. Moreover, as the trial court observed, Toops had a lengthy criminal history, had violated probation on multiple occasions, and ultimately acquired felony drug-related convictions in three states. I would affirm the sentence imposed by the trial court.