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**IN THE
COURT OF APPEALS OF INDIANA**

JESUS LEAL,)
)
Appellant-Defendant,)
)
vs.) No. 45A03-0612-CR-584
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane Ross Boswell, Judge
Cause No. 45G03-0510-FA-52

July 24, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Jesus Leal appeals the trial court's imposition of a presumptive ten-year sentence after he pleaded guilty to dealing in cocaine as a Class B felony.¹ The sole issue for our review is whether Leal's constitutional right to due process was violated when the trial court relied on incorrect information in its statement of aggravating factors.

We affirm.

FACTS AND PROCEDURAL HISTORY

In February 2005, Leal sold 28.7 grams of cocaine to an informant at a bar in East Chicago, Indiana. Several weeks later, Leal sold 137 grams of cocaine at the same bar. In October 2005, the State charged Leal with two counts of dealing in cocaine each as a Class A felony. In June 2006, Leal pleaded guilty to one count of dealing in cocaine as a Class B felony in exchange for the State dropping one of the counts and reducing the other to a Class B felony.

After a sentencing hearing, the trial court found the following aggravating factors: 1) Leal had two prior felony convictions; and 2) Leal was on probation at the time he committed the instant offense. In addition, the court found the following mitigating factor: Leal pleaded guilty. The court found that the mitigating and aggravating factors were balanced and sentenced Leal to ten years.

Leal's criminal history, however, consisted of one felony conviction for dealing in a controlled substance in 1977 and one misdemeanor conviction for possession of cocaine in 2004, not two felony convictions. In addition, Leal was out on bond, not probation, when he committed the offense in this case. Leal appeals.

¹ See IC 35-48-4-1.

DISCUSSION AND DECISION

Leal argues that his constitutional right to due process was violated when the trial court relied on incorrect information in its statement of aggravating factors. Leal is correct that a sentence based on materially untrue assumptions violates due process. *See Gardner v. State*, 388 N.E.2d 513, 520 (Ind. 1979). However, where the sentence is supported by permissible grounds sufficient to persuade this court that the original sentencing decision would have been the same had the trial court not relied on the impermissible factor, we will affirm the sentence. *Day v. State*, 560 N.E.2d 641, 642 (Ind. 1990). When we cannot reach that decision with confidence, we will remand for a new sentencing or revise the sentence on appeal. *Id.*

Here, the trial court found that Leal had two prior felony convictions when he had one felony conviction for dealing in a controlled substance in 1977 and one recent misdemeanor conviction for possession of cocaine. Although the felony conviction was in 1977, the remoteness of a prior criminal history does not preclude the trial court from considering it as an aggravating factor, especially when the prior offense is similar to the current offense. *See Corbett v. State*, 764 N.E.2d 622, 631 (Ind. 2002). Leal's prior conviction of dealing in a controlled substance is similar to the instant offense of dealing in cocaine. In addition, Leal's 2004 misdemeanor conviction for possession of cocaine, which was reduced from a Class D felony to a misdemeanor when Leal pleaded guilty, is also similar to the instant offense.

Further, although Leal was not on probation when he committed the instant offense, the fact that he was on bond is also an aggravating factor. *See Field v. State*, 843 N.E.2d 1008, 1011 (Ind. Ct. App. 2006), *trans. denied*.

Lastly, where the defendant receives a substantial benefit from pleading guilty, the court is not required to give the defendant's guilty plea substantial mitigating weight. *Vazquez v. State*, 839 N.E.2d 1229, 1234 (Ind. Ct. App. 2005), *trans. denied*. Here, Leal was charged with two Class A felonies, one for selling 28.7 grams of cocaine and the second for selling 137 grams of cocaine. In exchange for Leal pleading guilty, the State reduced one of the A felonies to a B felony and dropped the other A felony. Because Leal received a substantial benefit for pleading guilty, the trial court was not required to give Leal's guilty plea substantial weight as a mitigating factor.

Based upon the foregoing, the trial court's errors were not material. Further, the sentence is supported by grounds sufficient to persuade us that the original sentencing decision would have been the same had the trial court not relied on the improper factors. We therefore affirm Leal's ten-year presumptive sentence.

Affirmed.

DARDEN, J., and MATHIAS, J., concur.