



## STATEMENT OF THE CASE

Defendant-Appellant James M. Derenski (“Derenski”) is appealing from his conviction by a jury of maintaining a common nuisance and possession of methamphetamine, both Class D felonies, and the Class B felony of possession of methamphetamine with intent to manufacture.

Derenski was sentenced to an enhanced maximum of twenty years on the possession of methamphetamine with intent to manufacture conviction, five of those years suspended to probation, and a fine of \$500. Derenski was sentenced to a concurrent three-year sentence on the maintaining a common nuisance conviction. The other possession conviction was merged into the possession with intent to manufacture conviction.

We affirm.

## ISSUES

Derenski states the issues as:

- I. “The admission of State’s Exhibits 7, 8, 9, 10, and 11 violated Derenski’s rights against self incrimination and to counsel under both the federal and state constitutions, given that he did not knowingly, voluntarily and intelligently waive those rights at the time he signed those documents.”
  
- II. “The evidence was insufficient to support Derenski’s convictions for Possession of Methamphetamine with Intent to Manufacture, Possession of Methamphetamine, and Maintaining a Common Nuisance given that the State failed to prove beyond a reasonable doubt Derenski’s involvement with the methamphetamine manufacturing operation or his possession or ownership of the Sparks Road home.”

- III. “The trial court abused its discretion in sentencing Derenski, given that the sole aggravating circumstance did not justify the maximum sentences imposed by the trial court and those sentences were inappropriate in light of the nature of the offense and Derenski’s character.”

### FACTS

Sheriff’s department officers went to 3017 Sparks Road to execute a search warrant for stolen auto parts. While there the officers observed a compressed grill tank in the barn that had a fitting for anhydrous ammonia. Behind the barn they observed a still warm burn pile that contained items associated with the manufacture of methamphetamine. The officers obtained a search warrant for the house located at 3017 Sparks Road and returned later in the day to execute the warrant.

Experts from the state clandestine lab team helped execute the search warrant. The officers observed Jonathan Scott Derenski, later identified as Derenski’s brother, standing at the back door of the residence. He went inside and slammed the door. The officers ordered the occupants of the residence to come outside. Jonathan came out, and about ten to twenty minutes later, Derenski and two females came outside.

After being given his *Miranda*<sup>1</sup> rights, Derenski told the officers that he lived in the house with his brother, Jonathan. The lower part of the two-story house had a kitchen, bathroom, and two bedrooms. The second floor held a kitchen, bath, and

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

bedroom. Entrance to the second floor could only be achieved by going through the kitchen on the first floor.

During the search, the officers found some thirteen items associated with methamphetamine in the first floor kitchen, and four more items in the first floor bathroom. In the upstairs kitchen, officers found Derenski's wallet, cash, driver's license, and several other items including .07 grams of methamphetamine. The officers also found aluminum foil, folded in the shape of a boat, that contained residue.

Additional facts will be added as required.

## DISCUSSION AND DECISION

### Issue I.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Payne v. State*, 854 N.E.2d 7, 13 (Ind. Ct. App. 2006). An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.*

State's Exhibits 7, 9, and 10 are bail bond appearance forms that show Derenski's address as 3017 Sparks Road. State's Exhibit 8, also a bail bond appearance form, shows Derenski's address to be in Ohio. State's Exhibit 11 is the jail's personal property report showing Derenski's address as 3017 Sparks Road. Derenski had signed each of the exhibits. Derenski argues that the admission of these exhibits violated several of his federal and state constitutional rights.

Derenski filed a motion in limine to prevent jail records from being introduced as evidence because they were hearsay. The trial court denied the motion. The ruling on a

motion in limine does not determine the ultimate admissibility of evidence, rather the trial court in the context of the trial itself makes the determination. *McCarthy v. State*, 749 N.E.2d 528, 537 (Ind. 2001). At trial, Derenski made his objections to the introduction of the jail records saying that there was no foundation for the introduction of the records, and that he had not been given his *Miranda* advisements. No argument is made in his brief about hearsay or the lack of foundation. The question then becomes whether Derenski needed to be advised of those rights.

*Miranda* warnings are required only where a suspect is both in custody and subjected to interrogation. *State v. Necessary*, 800 N.E.2d 667, 670 (Ind. Ct. App. 2003). The *Miranda* warnings only apply to custodial interrogation because they are meant to overcome the inherently coercive and police dominated atmosphere of custodial interrogation. Payne, 854 N.E.2d at 13.

By allowing the introduction of the exhibits, the trial court ruled, in effect, that no custodial interrogation occurred. The forms were prepared at Derenski's request, and for his benefit. Insofar as the jail inventory is concerned, the information was not requested or required in an investigation, and Derenski was not under interrogation. The trial court said the forms were administrative and completed in good faith. Given the trial court's reasoning, we cannot say that the ruling was against the logic and effect of the facts and circumstances before the court. Such a finding on our part negates the several constitutional arguments made by Derenski.

## Issue II.

When reviewing a claim of insufficient evidence, we will not reweigh evidence or judge witnesses' credibility. *Ware v. State*, 859 N.E.2d 708, 724 (Ind. Ct. App. 2007). We will consider only the evidence favorable to the judgment and the reasonable inferences drawn therefrom. *Id.* We will affirm a conviction if the lower court's finding is supported by substantial evidence of probative value. *Id.* When a defendant is convicted on circumstantial evidence, we will not reverse if the trier of fact could reasonably infer from the evidence presented that the defendant is guilty beyond a reasonable doubt. *Id.* To affirm, we need not find the circumstantial evidence overcomes every reasonable hypothesis of innocence. *Id.* Instead, we must be able to say that an inference may reasonably be drawn from the circumstantial evidence to support the verdict. *Id.* We are also mindful that the jury is the trier of fact and is entitled to determine which version of the incident to credit. *Dishmon v. State*, 770 N.E.2d 855, 858 (Ind. Ct. App. 2002).

Derenski argues that the evidence fails to prove that he had a possessory or ownership interest in the Sparks Road residence. A review of the essential elements of the three felonies that Derenski was convicted of reveals that proof of ownership is not required. Perhaps a more accurate statement of this issue is whether Derenski constructively possessed methamphetamine.

Constructive possession occurs when one has the intent and capability to maintain dominion and control over the items. *Ables v. State*, 848 N.E.2d 293, 297 (Ind. Ct. App. 2006). Intent is shown if the State demonstrates the defendant's knowledge of the presence of the contraband. *Goliday v. State*, 708 N.E.2d 4, 6 (Ind. 1999). Knowledge

may be inferred from the exclusive dominion and control over the premises containing the contraband or, if the control is non-exclusive, evidence of additional circumstances pointing to the defendant's knowledge of the presence of the contraband. *Ables*, 848 N.E.2d at 297. Inferred knowledge has been found through a variety of means including a drug manufacturing setting; proximity of the contraband to the defendant; location of the contraband within the defendant's plain view; and, the mingling of the contraband with other items owned by the defendant. *Id.* The capability element is met when the State shows the defendant is able to reduce the controlled substance to the defendant's personal possession. *Id.*

Attributing inferred knowledge to Derenski, in that he and his brother shared the residence, as outlined in *Ables*, the jury heard or could infer from the evidence that Derenski listed the Sparks Road as his residence; that the residence was a drug manufacturing setting; proximity of the contraband to Derenski; location of the contraband in plain view of Derenski; the contraband was commingled with Derenski's personal possessions on the table on the second floor: Derenski had access to both levels of the residence where much of the methamphetamine precursors were in plain view; and, Derenski told police officers that the Sparks Road residence was his home.

Viewing the foregoing evidence and inferences to be drawn therefrom, and in applying the standard of review, we find that the evidence is sufficient to sustain the conviction.

### Issue III.

Derenski next argues that his enhanced sentence is not supported by his past criminal record, especially when considered against the mitigating circumstances. He also argues that his sentence is inappropriate in light of the nature of the offense and his character.

At the sentencing hearing Derenski, his future son-in-law, Jason Taylor, his former wife, and his current wife testified. Collectively they presented evidence that Derenski's incarceration would create a hardship on his dependents; his offense did not involve serious harm to persons or property; and, that Derenski would likely respond positively to probation or short term imprisonment.

It is well established that sentencing decisions lie within the discretion of the trial court. *Johnson v. State*, 855 N.E.2d 1014, 1016 (Ind. Ct. App. 2006). Sentencing decisions are given great deference on appeal and will only be reversed for an abuse of discretion. *Id.* The trial court is not required to find mitigating factors. *Id.* When a defendant offers evidence of mitigators, the trial court has the discretion to determine whether the factors are mitigating, and it is not required to explain why it does not find the proffered factors to be mitigating. *Id.*

Derenski's criminal history was a conviction for possession of marijuana as a class A misdemeanor, an Ohio conviction for illegal manufacturing of drugs (which was committed subsequent to the instant offense) and a felony conviction for operating a vehicle while intoxicated. The trial judge found that all of the offenses were drug-related. It is this criminal history that was used to enhance the sentence.



The trial court addressed the proffered mitigators in his sentencing colloquy by saying, among other things, that incarceration is a hardship that Derenski should have thought of, that Derenski failed at his probation in the Ohio case, and, that the financial hardship is downplayed because Derenski wasn't steadily employed.

Derenski seeks a revision of his sentence pursuant to Ind. Appellate Rule 7(B). The rule requires this court to determine the character of the offender and the nature of the offense. In essence Derenski's argument is a restatement of his prior argument in that the mitigating factors and the minimal nature of his prior criminal history do not warrant an enhanced sentence. Just as the trial judge rejected this argument we also reject the argument in that the mitigators and Derenski's criminal history do not satisfy the rule's requirements to revise the sentence.

#### CONCLUSION

The trial court did not abuse its discretion by admitting State's Exhibits 7, 8, 9, 10, and 11 into evidence. The evidence is sufficient to support the convictions. Derenski was properly sentenced.

Judgment affirmed.

FRIEDLANDER, J., and CRONE, J., concur.