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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL SWEATT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0612-CR-742
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Amy Barbar, Judge
Cause No. 49G01-0412-MR-216344

August 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Michael Sweatt appeals his conviction for Murder,[1] a felony. Specifically, Sweatt contends that his conviction must be reversed because the trial court abused its discretion in admitting evidence that the police seized from his aunt's garage, and that the evidence was insufficient to support the conviction. Sweatt also argues that the trial court erred in enhancing his sentence and ordering it to run consecutively to a sentence that had been previously imposed on a burglary conviction stemming from the same episode. Finding no error, we affirm the judgment of the trial court.

FACTS

The facts as reported in Sweatt's prior appeal are as follows:

> On the evening of November 29, 2004, Sweatt arrived at the apartment shared by Rochester Milam, III and Milam's father. The three drank beer and a fifth of gin brought by Sweatt. During the evening, Sweatt and Milam drove a female neighbor to Wal-Mart. The three rode in Sweatt's black Geo Metro, and, from the back seat, Milam saw Sweatt remove a .380 silver handgun from "his person somewhere" and put it in the glove compartment. Transcript at 136. The female neighbor went into the store by herself, and, upon her return, Sweatt and Milam drove her back to her apartment. From there Sweatt and Milam drove to a bar to drink and watch football.
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> After the football game concluded, Sweatt and Milam left. While driving down Pendleton Pike in Marion County, they saw Jason Hamm alongside his broken down green Neon under the I-465 overpass. Despite not knowing Hamm, Sweatt and Milam stopped, unsuccessfully attempted to help Hamm with the car, and took Hamm to a gas station. Hamm phoned his friend, Fred Read, from the gas station. Read and Hamm had spent the evening together, and Read had watched Hamm from his own car. Read did not stop to help because he had believed the area was unsafe, and he did not approach after Sweatt and Milam stopped to help because he did not know Sweatt or Milam.
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> Sweatt, Milam, and Hamm drove back to Hamm's car, put gas in it, and again unsuccessfully attempted to start it. From there, they drove to a liquor store, where Sweatt bought beer, and then drove to Milam's apartment. While

[1] Ind. Code § 35-42-1-1.

there, Hamm called Read again. Sweatt, Milam, and Hamm drank the beer and then drove to a nearby strip club. Sweatt and Hamm attempted to enter the club while Milam waited in the car. When Sweatt and Hamm were denied entry into the club, the three men left.

After driving around for a while, Sweatt stated that he knew of a house that they could "hit" to make some money. Transcript at 151. Milam and Hamm agreed, and Sweatt drove to the home of Kenneth Clarkson at 10907 Players Drive in Marion County. When Sweatt received no answer to his knock at the front door, Sweatt, Milam, and Hamm entered the garage. Milam and Hamm carried computer equipment form Clarkson's garage to Sweatt's car, and Sweatt entered the house. Milam then entered the house through the garage and looked around. Milam saw Sweatt downstairs and went upstairs to explore.

When Milam heard someone else moving upstairs, he tried to go back downstairs, but Clarkson "grabbed" him. Appellant's Brief at 7. Milam asked to be released but was unable to get away. Milam then heard a gunshot from behind him. Clarkson released Milam, who fled out the front door. Milam ran to Sweatt's car, which was parked by the garage. Hamm was waiting in the front seat. At about the same time, Sweatt arrived at the car from the direction of the garage. Milam sat in the back seat, and Sweatt drove away. In the back seat, Milam saw DVD's that had not been in the car before they went to Clarkson's house. Milam asked what happened, and Sweatt said he intended to pull over so they could talk about it.

Sweatt drove for a while and eventually pulled the car over on a dark road. Milam exited the car and opened the door for Hamm to exit because the inside handle on the front passenger door was broken. Milam went to the back of the car to urinate, and Sweatt and Hamm went to the front of the car. Milam heard a gunshot and then saw Sweatt standing over Hamm.

Sweatt told Milam to get back in the car. After Milam and Sweatt re-entered the car, Milam saw a handgun on Sweatt's lap. Sweatt drove Milam back to his father's apartment. During the drive and at the apartment, Milam repeatedly asked Sweatt what happened, but Sweatt did not reply. Sweatt left the apartment a short time later.

The State charged Sweatt with murder, a felony; burglary, as a Class B felony; possession of a firearm by a serious violent felon ("SVF"), as a Class B felony; carrying a handgun without a license, as a Class A misdemeanor; and being an habitual offender. After a trifurcated trial, the jury could not reach a verdict on the murder charge, but it found Sweatt guilty of burglary, as a Class B felony, and carrying a handgun without a license, as a Class C felony, and found him to be an SVF in possession of a firearm and an habitual offender.

The trial court entered judgment of conviction for burglary, as a Class B felony; firearm possession by an SVF, as a Class B felony; and being an

> habitual offender. On March 3, 2006, the court sentenced Sweatt to twenty years on the burglary count, enhanced by thirty years for being an habitual offender, and twenty years on the SVF count. The court then ordered those sentences to be served consecutively. The total aggregate sentence is seventy years.

Sweatt v. State, No. 49A02-0604-CR-303, slip op. at 2-5 (Ind. Ct. App. June 15, 2007). Sweatt appealed his convictions to this court, challenging the sufficiency of the evidence. Sweatt also raised various evidentiary issues and claimed that the trial court erred in enhancing the sentences and ordering them to run consecutively to each other. We affirmed the judgment and sentence in all respects. Id. at 20-21.

The State refiled the murder charge, and on September 1, 2006, Sweatt moved to suppress evidence that the police had seized from his aunt's garage, including computer equipment and some DVDs. Following a hearing, the trial court denied the motion to suppress, and a subsequent trial on that count resulted in a hung jury on October 4, 2006.

The State again refiled the murder count. Additional facts developed at that trial, which commenced on November 13, 2006, revealed that Hamm suffered two gunshot wounds to the head. Both shots were fatal, and both bullets that were recovered were fired from the same gun. The bullets recovered from the burglary were also fired from that weapon. Milam told several police officers that Sweatt had shot Hamm.

While conducting an investigation, Detective Garth Schwomeyer, an investigator with the Marion County Sheriff's Department, arrived at the residence where Sweatt was living and set up a surveillance position. Approximately one hour later, Delonda Watson—Sweatt's aunt—arrived at the house. Detective Schwomeyer approached Watson and learned

that she owned the residence and lived there. Watson then acknowledged to Detective Schwomeyer that Sweatt was also living there. Thereafter, Watson and Detective Schwomeyer went inside. Watson was cooperative, and she told Detective Schwomeyer that Sweatt had been staying in a small room on the lower level of the house. Detective Schwomeyer then asked if he could "take a look around." Tr. p. 696. Watson agreed and Detective Schwomeyer asked if "she was sure" that he could "search [the] house." Id. at 696-97. Watson again agreed, and Detective Schwomeyer testified at the suppression hearing that

> I was very specific about that because I work narcotics. I do a lot of knock and talks. I do a lot of consensual searches of both vehicles and the residences, and I always make sure that I say it in that fashion, and she said yes, I could look around.

Id. at 697.

Detective Schwomeyer walked into the room where Sweatt had been staying and opened an unlocked door to the garage, which was next to the television. When Detective Schwomeyer opened the door, he saw a parked vehicle, some computer equipment, and a stack of DVDs. Knowing about the items stolen in the burglary, and observing that they were the only items that were not covered with a layer of dust, Detective Schwomeyer believed that he had found the items that were taken during the burglary of Clarkson's residence. As a result, Officer Schwomeyer took the property and placed it in his vehicle. It was later determined that Sweatt's right ring fingerprint was found on one of the DVDs.

Sweatt renewed his motion to suppress, claiming that the DVDs and computer equipment should not be admitted at trial because Watson did not consent to the search of the

garage. The trial court denied the motion, and on November 15, 2006, the jury found Sweatt guilty of murder. Thereafter, the trial court sentenced Sweatt to sixty years of incarceration. That sentence was ordered to run consecutively to the seventy-year sentence that had been imposed on the other offenses. Sweatt now appeals.

DISCUSSION AND DECISION

I. Standard of Review

We initially observe that the standard used to review rulings "on the admissibility of evidence is effectively the same whether the challenge is made by a pre-trial motion to suppress or by a trial objection." Burkes v. State, 842 N.E.2d 426, 429 (Ind. Ct. App. 2006), trans. denied. We will not reweigh the evidence, and we consider the conflicting evidence most favorable to the trial court's ruling. Id. However, we will also consider any uncontested evidence in favor of the nonmovant. Id. We will affirm the decision if it is supported by substantial evidence of probative value. Id. Moreover, the trial court's ruling will be upheld if it is sustainable on any legal theory supported by the record, even if the trial court did not use that theory. Gonser v. State, 843 N.E.2d 947, 950 (Ind. Ct. App. 2006).

II. The Search

Sweatt challenges the admissibility of the evidence that Detective Schwomeyer seized from Watson's garage. Specifically, Sweatt claims that Watson did not consent to the search of the garage and, therefore, Sweatt's rights under the Fourth Amendment to

the United States Constitution and Article I Section of 11 of the Indiana Constitution were violated.[2]

In resolving this issue, we initially observe that the Fourth Amendment to the United States Constitution generally prohibits warrantless searches. Edwards v. State, 762 N.E.2d 128, 132 (Ind. Ct. App. 2002). The purpose of the Fourth Amendment is to protect the privacy and possessory interests of individuals by prohibiting unreasonable searches and seizures. Barfield v. State, 776 N.E.2d 404, 406 (Ind. Ct. App. 2002). If a warrantless search is conducted, the burden is on the State to prove that, at the time of the search, an exception to the warrant requirement existed. Id. That is, searches conducted without a warrant are per se unreasonable, subject to a few well-delineated exceptions. Johnson v. State, 766 N.E.2d 426, 432 (Ind. Ct. App. 2002).

Under the Indiana Constitution, the focus is on whether the police acted reasonably under the circumstances. Thus, "the purpose of Article [I], section 11 is to protect from unreasonable police activity, those areas of life that Hoosiers regard as private." Moran v. State, 644 N.E.2d 536, 540 (Ind. 1994). This court considers, as the trial judge must, each case on its own facts to decide whether the police behavior was reasonable. The provisions must receive a liberal construction in its application to guarantee the people against unreasonable search and seizure. Brown v. State, 653 N.E.2d 77, 79 (Ind. 1995). The validity of a search by law enforcement officers turns on an evaluation of the reasonableness

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[2] As an aside, we note that Sweatt only argues that the search exceeded the permissible scope of consent. Appellant's Br. p. 8. He makes no argument that Watson's purported consent was coerced or otherwise involuntary.

of officer conduct under the totality of the circumstances. State v. Keller, 845 N.E.2d 154, 169 (Ind. Ct. App. 2006). It is the State's burden to show that under the totality of the circumstances, the police officers' intrusion was reasonable. State v. Gerschoffer, 763 N.E.2d 960, 965 (Ind. 2002).

One exception to the warrant requirement occurs when consent is given to the search. Sellmer v. State, 842 N.E.2d 358, 362 (Ind. 2006). A valid consent to search may be given by the person whose property is to be searched or a third party who has common authority or an adequate relationship to the premises to be searched. Norris v. State, 732 N.E.2d 186, 188 (Ind. Ct. App. 2000). The scope of a consent to search is determined by what a typical reasonable person would have understood by the express language used by the person consenting. Krise v. State, 746 N.E.2d 957, 964 (Ind. 2001). In other words, an individual providing consent may limit or restrict the search as he or she chooses. Id.

In considering Watson's authority to consent to the search of the residence—including the garage—it is undisputed that Watson owned and shared the residence with Sweatt. Tr. p. 708-09. Hence, Sweatt assumed the risk that Watson would permit a search of common areas in the home. See Krise, 746 N.E.2d at 967. Even more telling, the evidence presented at the suppression hearing established that Detective Schwomeyer informed Watson that he was looking for Sweatt. Tr. p. 433-34, 695. Watson expressly stated that she did not mind if Detective Schwomeyer took "a look around." Id. at 696. After receiving Watson's permission to do so, Detective Schwomeyer repeated, "Are you sure that you don't mind if I

search your house?" Id. at 696-97. In response, Watson again stated that it was okay for him to search. Id.

Contrary to Sweatt's argument, the trial court could reasonably conclude from the evidence that Watson gave Detective Schwomeyer her general consent to look for Sweatt in the area "where he stayed." Id. at 709-10. The undisputed evidence is that the door leading to the garage was next to the television in the area where Sweatt was living. Id. at 436-37. Hence, once Detective Schwomeyer was inside the garage, he could lawfully seize the stolen items because Sweatt did not have a reasonable expectation of privacy that the items in the garage would remain private. See Krise, 746 N.E.2d at 967. Indeed, Sweatt apparently decided to store the products of the burglary in a garage that contained numerous other personal items and was, presumably, accessible to Watson and any other occupant of the home. Id. at 439-40. As a result, Sweatt's claim that Detective Schwomeyer improperly searched the garage and unlawfully seized the computer equipment and DVDs fails.

We also reject Sweatt's argument that the search was improper under Article I, Section 11 of the Indiana Constitution. As noted above, the State must demonstrate that each relevant intrusion was reasonable in light of the totality of the circumstances. Keller, 845 N.E.2d at 169. The determination of reasonableness turns on a balance of: "1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and 3) the extent of law enforcement needs." Holder v. State, 847 N.E.2d 930, 940 (Ind. 2006).

In this case, there is hardly a question that a violation had occurred, inasmuch as Detective Schwomeyer was investigating the location of a murder/burglary suspect whom he had very good reason to believe was living at Watson's residence. With regard to the second factor, Detective Schwomeyer's entry into the garage was in accordance with the consent given by Watson—the owner and a resident of the home. Hence, any alleged degree of intrusion was slight. Finally, the need for the search was great. Indeed, the police suspected that Sweatt had shot a man in the face following a botched burglary. Therefore, it was reasonable for Detective Schwomeyer to believe that the individual was armed, dangerous, and undoubtedly hiding from the police. In short, searching Sweatt's known residence in an attempt to locate his whereabouts was the reasonable course of action for the police to follow under the circumstances. Finally, as discussed above, it was reasonable for Detective Schwomeyer to seize the items from the garage that he believed were products of the burglary. See Peterson v. State, 674 N.E.2d 528, 535 (Ind. 1996) (recognizing that under Section 11, a police officer's observation of an item in open view is not a search). Thus, we conclude that the totality of the circumstances demonstrates that Detective Schwomeyer's actions were proper.

III. Sufficiency of the Evidence

Sweatt maintains that the evidence was insufficient to support his conviction. Specifically, Sweatt argues that the verdict must be set aside because the conviction was based solely on Milam's uncorroborated testimony that was contradictory and inconsistent on its face. Moreover, Sweatt claims that because Milam "received a very generous plea

agreement in exchange for his testimony, . . . there can be no more appropriate circumstance to invoke the rule of incredible dubiosity." Appellant's Br. p. 14.

When reviewing challenges to the sufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of witnesses. Vasquez v. State, 741 N.E.2d 1214, 1216 (Ind. 2001). Rather, we will examine the evidence and the reasonable inferences that may be drawn therefrom that support the verdict and will affirm a conviction if there is probative evidence based on which a jury could find the defendant guilty beyond a reasonable doubt. Id. Put another way, we will affirm unless "no rational fact-finder" could have found the defendant guilty beyond a reasonable doubt. Clark v. State, 728 N.E.2d 880, 887 (Ind. Ct. App. 2000).

In Murray v. State, 761 N.E.2d 406, 408 (Ind. 2002), our Supreme Court observed that an appellate court will impinge upon the responsibility of the fact-finder to judge the credibility of witnesses only when confronted with inherently improbable, coerced, equivocal, or wholly uncorroborated testimony of incredible dubiosity. The application of this rule is limited to cases where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the appellant's guilt. Id. Thus, the rule is rarely applied, and it is limited to cases in which "the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it." Fajardo v. State, 859 N.E.2d 1201, 1208 (Ind. 2007).

Here, Sweatt contends that his conviction must be reversed under the incredible dubiosity rule because Milam acknowledged that he lied to police officers when he gave an

initial statement to avoid any trouble. Tr. p. 204. Notwithstanding this claim, the incredible dubiosity rule applies to conflicts in trial testimony rather than conflicts that exist between trial testimony and statements made to the police prior to trial. Buckner v. State, 857 N.E.2d 1011, 1018 (Ind. Ct. App. 2006).

Milam testified at trial that he was urinating near the rear of the vehicle when he heard a gunshot. Milam then "ducked" and immediately looked around. Tr. p. 166. He saw Sweatt standing over Hamm's body that was lying on the ground. Id. at 166-67. Milam's version of events did not change during his in-court testimony, and it was entirely consistent with both the direct and circumstantial evidence in the case. Also, contrary to Sweatt's contention, the circumstantial evidence showed that Sweatt was in possession of a .38 caliber weapon on the night of the shooting and that he had fired that weapon only a few minutes before the murder. Id. at 144-45, 163-64, 304-07, 334. In light of the direct and circumstantial evidence, Sweatt's attempt to have his conviction vacated under the incredible dubiosity rule fails. It was for the jury to decide whether Milam was a credible witness and we decline Sweatt's invitation to reweigh the evidence. As a result, we conclude that the evidence was sufficient to support Sweatt's conviction for murder.[3]

IV. Sentencing

Finally, Sweat argues that he was improperly sentenced. Specifically, Sweatt contends that the "trial court erred when it ordered that the sentence should be in excess of

[3] As an aside, we note that Sweatt's counsel cross-examined Milam with regard to the terms of a plea agreement that Milam had negotiated with the State. Tr. p. 200-01.

the advisory and that it should be served consecutive to the sentence for burglary that had previously been imposed." Appellant's Br. p. 21.

At the outset, we note that in the first appeal, Sweatt argued that the trial court violated Indiana Code Section 35-50-2-1.3, the advisory sentencing statute, when it imposed enhanced, consecutive sentences on the burglary and serious violent felon charges. Sweatt, slip op. at 17. We upheld the sentence, and concluded that the rationale announced in White v. State, 849 N.E.2d 735, 743 (Ind. Ct. App. 2006), trans. denied. controlled:

> Indiana Code § 35-50-2-1.3 instructs: "In imposing consecutive sentences in accordance with IC 35-50-1-2[,] a court is required to use the appropriate advisory sentence in imposing a consecutive sentence[.]" We conclude that when the General Assembly wrote "appropriate advisory sentence," it was referring to the total penalty for "an episode of criminal conduct," which, except for crimes of violence, is not to exceed "the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted." See Ind. Code § 35-50-1-2(c). In other words, the advisory sentence for a felony which is one class of felony higher than the most serious of the felonies for which the person has been convicted is the "appropriate advisory sentence" for an episode of non-violent criminal conduct. Indiana Code § 35-50-1-2 in no other way limits the ability of a trial court to impose consecutive sentences. In turn, Indiana Code § 35-50-2-1.3, which references Indiana Code § 35-50-1-2, imposes no additional restrictions on the ability of trial courts to impose consecutive sentences.

(Emphasis added).[4] In arriving at this result, we also expressly disapproved of the holding in Robertson v. State, 860 N.E.2d 621, 624-25 (Ind. Ct. App. 2007), trans. granted, where a

[4] We also noted that even though the trial court sentenced Sweatt in 2006, Sweatt committed the offenses in 2004, and the advisory sentence statute was not enacted until 2005. Hence, we pointed out that the advisory sentencing statute applied to Sweatt's sentence only if such application would result in a more lenient sentence under the doctrine of amelioration. Sweatt, slip op. at 17. However, we further observed that because one of Sweatt's convictions was for a "crime of violence" as defined by Indiana Code section 35-50-1-2, the consecutive sentencing statute, that issue did not need to be addressed. Id. at 18.

different panel concluded that the advisory sentencing statute prohibited trial courts from deviating from the advisory sentence for any sentence ordered to run consecutively. Sweatt, slip op. at 19.

Because Sweatt already challenged the propriety of the manner in which the trial court sentenced him on this basis in his first appeal, he may not relitigate the issue now. Ben-Yisrayl v. State, 738 N.E.2d 253, 259 (Ind. 2000) (recognizing that when a defendant chooses to raise on direct appeal a claim of ineffective assistance of trial counsel, the doctrine of res judicata precludes him from relitigating the issue in post-conviction proceedings).

Finally, we note that even though Sweatt is precluding from raising the issue at this juncture, we continue to adhere to the rationale set forth in White and those subsequently-decided cases that follow that rationale,[5] and conclude that the trial court did not err in enhancing Sweatt's sentence for murder and also ordering it to run consecutively to the sentences imposed on the prior offenses.

The judgment of the trial court is affirmed.

BAILEY, J., and VAIDIK, J., concur.

[5] Geiger v. State, 866 N.E.2d 830, 840 (Ind. Ct. App. 2007); Barber v. State, 863 N.E.2d 1199, 1209-11 (Ind. Ct. App. 2007).