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**IN THE
COURT OF APPEALS OF INDIANA**

JOE WADE,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A04-0610-CR-554

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Michael Jensen, Magistrate
Cause No. 49G20-0601-FA-13073

August 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Joe Wade (“Wade”) appeals from his convictions, after a bench trial, of dealing in cocaine, as a class A felony; possession of cocaine and a firearm, as a class C felony; dealing in marijuana, as a class D felony; and possession of a controlled substance, as a class D felony.

We affirm.

ISSUES

1. Whether sufficient evidence exists to support Wade’s convictions for possession of and dealing in controlled substances.
2. Whether the sentence imposed by the trial court is inappropriate.

FACTS

On December 1, 2005, a confidential informant told Indianapolis Police Department Officer Dale Young (“Officer Young”) that Wade was both in possession of and dealing cocaine from a residence in Marion County. After conducting a series of police-controlled cocaine buys from Wade, the informant advised Officer Young that Wade was also in possession of several weapons, including an assault rifle. On January 23, 2006, Officer Young requested and was granted a no-knock¹ search warrant to enter and search 427 North Tibbs Avenue.²

On January 24, 2006, at approximately 2:00 p.m., a Special Weapons and Tactics (SWAT) team entered and secured the residence and its occupants – Wade, Nikita

¹ Officer Young requested a no-knock search warrant because of the informant’s assertions about weapons, including an assault rifle, in the residence.

² The owner of the residence, Steve Williams, lived on the premises in the rear upstairs bedroom.

Brooks, Ethel Buckley, and Michael Robinson. Thereafter, Officer Young took over the search. He gathered the occupants, read them the search warrant, and advised them of their *Miranda* rights. Officer Young then performed a walk-through and observed the following items lying in plain view: a digital scale coated with white residue and a spoon; a laser-equipped spotting scope; large quantities of powder cocaine, crack cocaine and marijuana divided into individual packets. After Officer Young had delegated search areas to his officers and began his search, Wade asked to speak with him privately. Wade tried to avoid arrest by offering to expose and testify against his supplier.

Officer Young and his supervisor discussed the viability of Wade's offer. As they spoke, Wade provided specific details such as his supplier's address; the extent of his supplier's holdings; that Wade sold approximately an ounce of cocaine each week; and, that he received four ounces of cocaine every month from his supplier. Officer Young declined Wade's offer, but did not foreclose the possibility of later working with him. Officer Young invited Wade to contact him after his arrest. Wade, Brooks, Buckley, and Robinson were arrested and Officer Young proceeded with his search.

However, before Wade and the other subjects were transported to jail, Officer Young confronted Wade about contraband that had been found thus far in the search. Wade admitted that the cocaine, marijuana, handgun and pump action shotgun were his. Based upon his informant's tip, Officer Young suspected that additional weapons, including an assault rifle, were on the premises. When asked whether there were any more weapons in the house, Wade denied any such knowledge. After Wade and the

others were en route to jail, the officers discovered the semi-assault rifle, another shotgun and 55.85 grams of marijuana in a concealed trap door above the basement stairs.

Ultimately, the search yielded the following evidence:

1. Front upstairs bedroom – two digital scales; a handgun, its case and two magazines; twenty hydrocodone pills; two pieces of mail addressed to Wade at the subject address; a pistol grip twelve gauge shotgun loaded with eight rounds; and several boxes of ammunition.
2. Rear upstairs bedroom – a smoking device fashioned from a beer can; a foil marijuana pipe; and a handheld scale for weighing marijuana.
3. Living room – a shell; a laser-equipped spotting scope; and 0.07 grams of marijuana.
4. Dining room – a scale with white residue and a spoon.
5. Landing at the top of the basement stairs – 34.7260 grams of powdered cocaine; and 26.5152 grams of crack cocaine and marijuana.
6. Concealed magnetic trap door above basement stairs – an assault rifle and clip; a pistol grip shotgun; and 55.85 grams of marijuana.
7. Kitchen cabinet – a possible cutting agent and a box containing six inches of ammunition.

On January 26, 2006, the State charged Wade as follows: Count I, dealing in cocaine, as a class A felony; Count II, possession of cocaine, as a class C felony; Count III, possession of cocaine and a firearm, as a class C felony; Count IV, dealing in marijuana, as a class D felony; Count V, possession of marijuana, as a class D felony; and Count VI, possession of a controlled substance, as a class D felony.

The trial court bifurcated Wade's trial, permitting the State to present its case on June 14, 2006, and the defense to do so on August 8, 2006. Officer Young testified for

the State, and Wade, Brooks and Natasha Fields³ testified for the defense. Wade testified that although he had resided at the 427 North Tibbs address “months earlier,” he was not living there at the time of his arrest. Tr. 143. He also denied ever asserting ownership of any drugs or guns or admitting that he dealt drugs.

At the close of the defense’s case, the trial court found Wade guilty on all counts and entered judgment of conviction on Counts I, III,⁴ IV, and VI. Wade was sentenced on September 19, 2006. As to Count I, the trial court imposed a fifty year sentence, with fifteen years suspended and five years of probation. As to Counts IV and VI, the trial court imposed two two-year sentences to run concurrently for a total sentence of fifty years. Wade now appeals.

Additional facts will be provided as necessary.

DECISION

Wade first contends that the evidence presented at trial was insufficient to support his conviction. Specifically, he argues that the State failed to prove beyond a reasonable doubt that he either possessed or intended to distribute the controlled substances.

Our standard of review for a sufficiency of the evidence claim is well settled. We will neither reweigh evidence nor judge witness credibility; but instead, considering only the evidence which supports the conviction along with the reasonable inferences to be drawn therefrom, we determine whether there is substantial evidence of probative value

³ Natasha Fields is the mother of Wade’s daughter.

⁴ The trial court later vacated the conviction on Count III.

from which a reasonable trier of fact could have concluded that the defendant was guilty of the charged crime beyond a reasonable doubt. *Lewis v. State*, 857 N.E.2d 449, 451 (Ind. Ct. App. 2006).

First, Wade contends that the evidence presented at trial was insufficient to establish that he possessed the controlled substances because “[n]o evidence was presented at trial that [he] was seen holding any of the controlled substances or that they were found on his person.” Wade’s Br. 8.

A conviction for possession of contraband may rest upon proof of either actual or constructive possession. *Ables v. State*, 848 N.E.2d 293, 296 (Ind. Ct. App. 2006). Actual possession occurs when the defendant has direct physical control over the item, while constructive possession involves the intent and capability to maintain control over the item even though actual physical control is absent. *Craft v. State*, 857 N.E.2d 1049, 1050 (Ind. Ct. App. 2006) (internal citations omitted). Here, because Wade did not have any drugs on his person when the police executed their search warrant, the State proceeded primarily on a theory of constructive possession.

In order to prove constructive possession, the State must show that the defendant has both (1) the intent and (2) the capability to maintain dominion and control over the contraband. *Armour v. State*, 762 N.E.2d 208, 216 (Ind. Ct. App. 2002). The State must demonstrate the defendant’s knowledge of the presence of the contraband to prove the intent element. *Id.* This knowledge may be inferred from either the defendant’s exclusive dominion and control over the premises containing the contraband or where, as

here, the control is non-exclusive, from evidence of additional circumstances pointing to the defendant's knowledge of the presence of the contraband. *Id.*

Wade, Buckley and her son, and their landlord, Steve Williams, resided together in the 427 North Tibbs Avenue residence. Therefore, Wade lacked exclusive control over the premises containing the contraband. Accordingly, in order to satisfy the "intent" element of constructive possession, the State was required to present evidence of additional circumstances indicating that Wade knew of the presence of the contraband.

"Additional circumstances" have been shown by various means: (1) incriminating statements made by the defendant; (2) attempted flight or furtive gestures; (3) location of substances like drugs in settings that suggest manufacturing; (4) proximity of the contraband to the defendant; (5) location of the contraband within the defendant's plain view; and (6) the mingling of the contraband with other items owned by the defendant. *Gee v. State*, 810 N.E.2d 338, 340-41 (Ind. 2004).

Here, Wade made a series of incriminating statements prior to his arrest. Officer Young testified that after the police observed cocaine and marijuana lying in plain view, Wade asked to speak with him privately. Faced with impending arrest, Wade attempted to negotiate a deal. Officer Young testified,

I had wanted to ask him questions about what [had been] found. How it came to be in his residence. Things like that. [Instead, Wade] wished to switch the conversation to possibly not getting arrested on that day. And maybe working on basically his source where . . . he had gotten the narcotics from [sic].

Tr. 22-23. As Officer Young pondered Wade's offer, Wade returned and

spoke to [Officer Young] some more, and [Officer Young] gathered more [specific] details . . . on [the] statements that [Wade] had made. The statement . . . detailed the location in town where his supplier was. How often he had received an amount similar to this. He stated about four times that he had received ounce amounts. He stated . . . how much his supplier would routinely have and was expected to have if we indeed did not arrest him on that day.

Tr. 25. Officer Young testified further that despite initially denying the fact, Wade ultimately admitted that he shared the front upstairs bedroom with Nikita Brooks.⁵ In that bedroom, the officers found two pieces of mail addressed to Wade at the 427 North Tibbs Avenue address; two digital scales in the dresser; a handgun; twenty hydrocodone pills; and a pistol grip shotgun under the bed, loaded with eight rounds of ammunition.

Before Wade was transported to jail, Officer Young confronted him with the narcotics and guns that the police had found thus far in their search.⁶ Officer Young testified that Wade admitted that all of the controlled substances and guns were his – with the obvious exception of the 55.85 grams of marijuana, pistol-grip shotgun and assault rifle that were later discovered in the concealed trap door while Wade was en route to the jail. Wade also identified the supplier of his cocaine and described the frequency with which he received comparable quantities of cocaine.

Based upon the foregoing evidence, we find that the State presented sufficient evidence that Wade had both the intent and the capability to maintain dominion and

⁵ At trial, Brooks initially testified that to her knowledge, Wade resided at 427 North Tibbs Avenue at the time of the incident. She later recanted, testifying that she had no idea where Wade lived. Brooks also denied having ever lived at the address, but acknowledged that she had kept several items of her clothing in the front upstairs bedroom.

⁶ Officer Young testified that the stairwell led to both the basement and the second floor, and that each of the bedrooms upstairs was accessible therefrom.

control over the controlled substances. Wade's admissions, coupled with the location of the controlled substances in plain view and in a common area of the house, provide a sufficient basis from which the trial court could infer Wade's intent to maintain dominion and control over the contraband. Further, Wade's admission that he shared the front upstairs bedroom with Brooks and evidence that his mail was delivered to the 427 North Tibbs address, constitute sufficient evidence of his capability to maintain dominion and control over the contraband. Thus, we find that the State presented sufficient evidence that Wade constructively possessed the controlled substances.

Next, Wade contends that the State failed to prove that he intended to distribute controlled substances. Circumstantial evidence showing possession with intent to deliver may support a conviction. *Richardson v. State*, 856 N.E.2d 1222, 1227-1228 (Ind. Ct. App. 2006). "Possession of a large amount of a narcotic substance is circumstantial evidence of intent to deliver." *Id.* "The more narcotics that a person possesses, the stronger the inference that he intended to deliver it and not consume it personally." *Id.* The record indicates that Wade constructively possessed approximately seventy-six grams of marijuana and sixty-one grams of cocaine. Based upon (1) the significant quantities of crack, powder cocaine and marijuana found, (2) the presence of digital and handheld scales, (3) the manner in which the drugs were individually packaged, presumably for resale, and (4) Wade's statement that he received and sold approximately four ounces of cocaine each month, we find that the State presented sufficient evidence from which the trial court could strongly infer that Wade intended to distribute, and not

merely to consume, the controlled substances that he constructively possessed on the premises.

Finally, Wade argues that his sentence is inappropriate in light of the nature of the offense and the character of the offender. Specifically, he argues that the sentence imposed by the trial court is inappropriate “[c]onsidering his age, the hardship on his family, his addiction, and his relatively benign prior criminal history.” Wade’s Br. 13.

Pursuant to Indiana Appellate Rule 7(B), we may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. “[A] defendant must persuade the appellate court that his or her sentence has met the inappropriateness standard of review.” *Anglemyer v. State*, No. 43S05-06060-CR-230, slip op. at 15 (Ind. June 26, 2007). Wade has not carried his burden.

Our review of the nature of the offense reveals that Wade possessed equipment used to prepare narcotics for sale – namely, digital scales, a possible cutting agent, and a handheld scale for weighing marijuana. He constructively possessed powdered cocaine, crack cocaine and marijuana in significant quantities, and packaged the drugs for sale. Finally, Wade admitted that he possessed a shotgun along with a box of bullets “about eighteen inches tall, nine inches wide, six inched [sic] full of ammunition.” Tr. 189. An assault rifle was later found at the scene.

Our review of the character of the offender reveals that as a juvenile, Wade was twice adjudicated as a delinquent for auto theft and receiving stolen parts. As an adult, he was convicted in 1999 of felony possession of marijuana in Texas. Wade has also been

convicted of class A misdemeanor possession of marijuana, resisting law enforcement, and operating a vehicle while intoxicated. He has violated the terms of court-ordered probation twice. As the State notes, the aforementioned “convictions do not take into account the multitude of contacts [Wade] has had with the criminal justice system where charges were either dismissed, not filed, or the disposition is unknown.” State’s Br. 11.

The evidence firmly established that Wade, a professed drug addict, had devolved from a drug abuser into a major drug dealer and had sold approximately an ounce of cocaine each week. In light of the foregoing and after due consideration of the trial court’s decision, we conclude that Wade’s sentence is not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.