

Jaconiah L. Fields (Fields) was convicted by a jury of Dealing in Cocaine, a Class A felony for which a judgment was entered and an enhanced sentence of thirty-nine years was imposed. He was also sentenced to an enhanced seventeen-year term for Possession of a Firearm by a Serious Violent Felon, a Class B felony. These two sentences were to be served consecutively. In addition, he was sentenced to one and one-half years for Maintaining a Common Nuisance, a Class D felony.¹ This sentence was to run concurrently with the other two sentences. The sentencing court on the same sentencing date also sentenced Fields to serve four years of a previously suspended sentence. The sentences in the two matters resulted in an aggregate sentence of sixty years.

Upon appeal, Fields presents four issues:

- I. Whether the trial court erroneously denied Fields' Motion To Suppress and erred in admitting the evidence seized pursuant to a search warrant issued as a result of a trash search.
- II. Whether the State presented sufficient evidence to support Fields' conviction of dealing in cocaine.
- III. Whether the State presented sufficient evidence to support Fields' conviction of possessing a firearm as a serious violent felon.

¹ Fields was also found guilty of a Class A misdemeanor, Possession of Marijuana, and the court entered a judgment of conviction upon that count. However, at sentencing the court purported to merge the Common Nuisance and the Marijuana convictions and did not impose a sentence upon the latter. This purported merger is inadequate. We order that the marijuana, Class A misdemeanor conviction be vacated and set aside. Morrison v. State, 824 N.E.2d 734 (Ind. Ct. App. 2005), trans. denied; Clark v. State, 752 N.E.2d 209 (Ind. Ct. App. 2001), trans. denied; Cohen v. State, 714 N.E.2d 1168 (Ind. Ct. App. 1999); See Carter v. State, 750 N.E.2d 778 (Ind. 2000).

IV. Whether the court erred in imposing consecutive sentences.

I.

Fields asserts that Richmond Police Officer Shake's affidavit for the warrant to search for marijuana at Fields' residence was a result of a trash search that was allegedly conducted without reasonable suspicion. Fields further charges the actual trash search was conducted upon information that was stale.

Officer Shake obtained a search warrant for the residence of Fields at 529 N. 19th St. in Richmond. The warrant was issued upon Officer Shake's affidavit. Police investigations had been conducted with regard to activity at two addresses. One involved a shooting at 815 S. 9th St., the residence of Marcia Phillips, where, at the time, Fields also lived. Fields was a suspect in the shooting. With Ms. Phillips's consent, Officer Shake searched the house and found evidence of marijuana. Some two months later, Fields was arrested for possession of cocaine and was bailed out of jail by Katherine Williams of 216 N. 17th Street. At the time of his arrest, Fields had given the 9th St. house as his residence. When Officer Shake went to that house the next day it was no longer occupied, but there were two vehicles present- one belonging to Katherine Williams and the other belonging to Fields. Officer Shake believed that he now had a reasonable suspicion that contraband would be found in the trash at Ms. Williams' residence. Shake searched a dumpster near the edge of an alley close to other dumpsters awaiting trash pick up by the City Sanitary District. Evidence of marijuana was found.

Five days later, Officer Shake learned that Fields now lived at 529 N. 19th St., and he set up surveillance at that location. Officer Shake observed Malcolm Russell enter the house. Mail addressed to Russell had been found in the trash at Williams' 17th St. address. Shake had reliable information that Fields lived at the 19th St. location and wanted to search the trash in the dumpster there. However, the dumpster was within the fenced in yard. Officer Shake therefore did not enter onto the property.

Officer Shake was then gone for approximately ten days. When he returned to work, he went to the 19th St. house and found evidence of marijuana in a trash bag protruding from the dumpster on a public throughway at the rear of the property. (Tr. at 459). He then sought and obtained the warrant.

Fields relies upon Litchfield v. State, 824 N.E.2d 356 (Ind. 2005) and Washburn v. State, 868 N.E.2d 594 (Ind. Ct. App. 2007) in support of his argument that Officer Shake did not have articulable, individualized reasonable suspicion that Fields was engaged in criminal activity so as to justify the search of his trash.

We hold that the previous investigations of residences with which Fields was connected as a co-resident revealed evidence of marijuana presence, which when coupled with his connection with the other co-residents of those premises, justified Office Shakes' belief that the trash in the alley behind Fields' new residence would likely contain evidence of contraband. The trash bags did so, and further justified Officer Shake's execution of the affidavit that led to the issuance of the search warrant. The seizure of evidence from the trash bags did not violate the constraints of Litchfield or Washburn. Our decision also comports with Eshelman v. State, 859 N.E.2d 744 (Ind. Ct. App. 2007),

trans. denied, cited in Washburn. In that case, a trash search was conducted pursuant to information received by the police officer from various sources. A search warrant for the defendant's property was obtained, resulting in seizure of contraband. We affirmed Eshelman's conviction.

The question remains whether the ten-day delay between obtaining the information derived from the various investigations and Officer Shake acting upon that information was so stale as to render his trash search invalid. We hold that the delay did not make the information possessed by Officer Shake impermissibly stale. Fields cites no authority for his argument except to assert that the trash seizure was a "fishing expedition" precluded by the reasonable suspicion requirement of Litchfield.

Furthermore, Washburn specifically held that information obtained two months prior to the challenged trash search was not impermissibly stale. The court said that allegedly stale information was not a "separate and independent factor to evaluate the reasonable suspicion requirement" but was to be assessed "as an element contributing to the totality of the circumstances. 868 N.E.2d at 601.

The evidence seized through the trash search was appropriately obtained and was permissibly referred to in the affidavit resulting in the search warrant. There was no error committed in this regard.

II.

Fields challenged the sufficiency of the evidence to support his conviction for Dealing in Cocaine. He claims that although his housemate, Angela Gilbert, had the intent and capability to maintain dominion and control over the contraband found in the

residence, the evidence does not connect Fields to the items seized pursuant to the search warrant.²

When the police effected a forced entry to execute the warrant three adults, two women and a man, were standing close by. The two women “went to the floor” (Tr. 230) and Fields “took off running” and went half-way up a stair-case where he was apprehended. Id.

Because Fields was not the sole occupant of the premises where the contraband was found, his Dealing conviction depends upon proof of constructive possession. As the jury was instructed, such proof requires the State to have demonstrated that Fields had the intent to maintain dominion and control over the cocaine. The intent must be shown by circumstances “pointing to the defendant’s actual knowledge of the nature of such item and its presence.” Such relevant circumstances may include “ (2) attempted flight or furtive gestures; (3) a drug manufacturing setting; [and] (4) proximity of the defendant to the drugs.” Donnegan v. State, 809 N.E.2d 966, 976 (Ind. Ct. App. 2004), trans. denied.

In Hardister v. State, 849 N.E.2d 563, 574 (Ind. 2006), the defendant was in a house containing “large quantities of cocaine, along with ammunition, weapons, . . . a scale and approximately \$1700 in small bills.” The Court noted that these items “are consistent with a cocaine manufacturing operation.” Id. In addition, Hardister and one

² The items seized in executing the search warrant included three baggies containing between 18 and 22.7 grams of crack cocaine located in the console area of a living room sectional sofa, a baggie containing a small amount of crack cocaine located in an adult upstairs bedroom closet, a .380 caliber automatic (Tr. 192) handgun with six rounds of ammunition and one fully loaded magazine found in the same upstairs bedroom closet, a set of electronic digital scales, \$1,136 in U.S. currency found on the person of Fields, and 2 cell-phones belonging to Fields, one of which was found on his person.

other individual fled to the rear of the house when the officers knocked on the door. The Court held that such evidence was sufficient for the jury to find beyond a reasonable doubt that Hardister constructively possessed the cocaine.

The facts of our case are in most respects strikingly similar. Fields was in close proximity to the cocaine located in the sectional couch. A weapon and ammunition were found in the adult bedroom closet along with a smaller quantity of cocaine. The police also found more than \$1100 and a cell-phone on the defendant's person. Within the house, an electronic digital scale was also found.

As in Hardister, we hold that the evidence was sufficient to permit the jury to find beyond a reasonable doubt that Fields had the requisite intent to maintain dominion and control over the cocaine and that he knew of the presence and nature of the substance in question.

III.

Fields makes a similar argument with respect to proof that he had knowledge that the firearm was in the home. His Firearm conviction, like the Cocaine conviction, is based upon constructive possession. Fields maintains that it was just as reasonable to conclude that Gilbert, the housemate of Fields, was the possessor of the handgun. Notwithstanding what the jury might have reasonably concluded as to Fields' purposes, the fact remains that they did not do so. They concluded that it was Fields who was in constructive possession of the handgun. As with the cocaine, this was not an unreasonable determination.

IV.

Fields argues that the trial court erroneously imposed consecutive sentences for an aggregate sentence of sixty years. In essence, he asserts that the fifty-six year aggregate for the Cocaine and the Firearm convictions is excessive because both those sentences are enhanced as well as ordered to be served consecutively.³

Without citation to authority, Fields asserts that he “is being punished twice for the same crime (sic) he was found guilty for” (Appellant’s Brief at 24) and that the sentences upon the two crimes should have been imposed concurrently. It should be first noted that the consecutive sentencing statute, I.C. 35-50-1-2, does not preclude the sentencing court, in its discretion, from imposing consecutive as well as enhanced sentences. Case law appears to permit such sentencing, at least when there are multiple aggravators. See Fields v. State, 825 N.E.2d 841 (Ind. Ct. App. 2005), trans. denied, in which the defendant was sentenced to three maximum fifty-year terms on Class A felonies, all to be served consecutively.

Here, as in Smith v. State, 655 N.E.2d 532 (Ind. Ct. App. 1995), trans. denied, there are multiple aggravators.⁴ Consecutive enhanced sentences are therefore permissible. We are not concerned with a situation in which there is but a single aggravating factor. As we stated in Smith, “ordinarily a single aggravating circumstance should not be used to impose both an enhanced sentence and consecutive sentences.” Id.

³ Fields does not make a specific and separate claim of error with respect to ordering the fifty-six year aggregate sentence consecutive to the four-year sentence for the probation violation.

⁵ The sentencing court found two significant aggravators--Fields had an extensive criminal record including five felonies and that he was on probation when he committed the instant offenses. The court found no mitigating circumstances.

at 542; Lockhart v. State, 671 N.E.2d 893, 903. But see Thorne v. State, 687 N.E.2d 604 (Ind. Ct. App. 1997), trans. denied. We discern no error in the sentences imposed.

We order the trial court to vacate the Class A Misdemeanor marijuana possession conviction. All other judgments of conviction and the sentences imposed upon those convictions are affirmed in all respects.

Affirmed in part; reversed and remanded in part.

NAJAM, J., and MATHIAS, J., concur.