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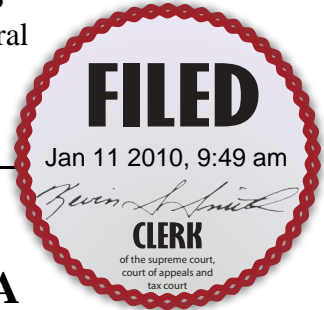
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**IN THE
COURT OF APPEALS OF INDIANA**

STEVEN MATHENY,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 49A02-0904-CR-358

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jose D. Salinas, Judge
Cause No. 49G14-0809-FD-220284

January 11, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Following a bench trial, Steven Matheny appeals his conviction for possession of a controlled substance¹ as a Class D felony and his sentence for failing to stop at a stop sign,² a Class C infraction. He raises three issues, which we restate as:

- I. Whether the State presented sufficient evidence to sustain Matheny's conviction for possession of a controlled substance; and
- II. Whether the trial court erred by sentencing Matheny to 180 days for the Class C traffic infraction.

We affirm in part, vacate in part, and remand.

FACTS AND PROCEDURAL HISTORY

In September 2008, Matheny was twenty-six years old. He lived with his grandmother, Mamie Montgomery, and regularly ran errands for her, including refilling her prescription medications. He used her car because he did not own a vehicle.

On September 22, 2008, Matheny and his grandmother were riding in her car, and she asked Matheny to refill her prescription for hydrocodone (generic name for Vicodin). Her prescription pill bottle had five remaining tablets in it, so she removed them, placed them in her vehicle's cup holder, and handed the empty pill bottle to Matheny to take to the pharmacy and use to refill the prescription.

Later that day, Matheny went to the pharmacy (without his grandmother) and refilled the prescription. When he went to place a drink in the cup holder, he noticed the pills. He

¹ See Ind. Code § 35-48-4-7.

² See Ind. Code §§ 9-21-8-32, 9-21-8-49.

placed them in a netted pocket on the outside of his backpack, which was on the passenger seat.

At or near 11:00 p.m. the following night, September 23, Indianapolis Metropolitan Police Officer Jacob Snow stopped Matheny for failure to stop at a stop sign. A records search revealed that Matheny's license was suspended and that he had an outstanding warrant for his arrest; although there were other passengers in the vehicle with Matheny, none possessed a valid driver's license, so Officer Snow prepared the vehicle to be towed. Pursuant to police procedure, the contents of the vehicle were inventoried, and during that process, Officer Snow discovered the five hydrocodone tablets in Matheny's backpack. Matheny told Officer Snow that the pills belonged to his grandmother, and he had intended to return them to her.

The State charged Matheny with possession of a controlled substance as a Class D felony, driving while suspended as a Class A misdemeanor, and failure to stop at a stop sign as a Class C traffic infraction. Matheny waived his right to a jury trial, and during the bench trial, he testified that he had forgotten about the pills in the cup holder until he was placing a drink in the cup holder on September 22, after he had filled his grandmother's prescription. He removed the tablets from the cup holder and placed them in his backpack so that they would not get wet. Matheny testified that he saw his grandmother everyday and that he had intended to give the pills back to her on September 23, but he forgot to do so. His grandmother Mamie also testified at trial, and she explained that she forgot about the tablets after she placed them in the cup holder on September 22.

Ultimately, the trial court found Matheny guilty as charged. It sentenced him to 180 days on each count to be served concurrently, with credit time of sixteen days for time served, and it suspended the remainder. Matheny now appeals his possession conviction and the sentence for the traffic infraction.³

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

Matheny claims that the evidence was insufficient to convict him of possession of a controlled substance. When we review challenges to the sufficiency of the evidence, we may neither reweigh the evidence nor assess the credibility of the witnesses. *State v. Matthews*, 792 N.E.2d 934, 935 (Ind. Ct. App. 2003). Rather, we look at the evidence most favorable to the conviction together with reasonable inferences from that evidence. *Id.* Where there is substantial evidence of probative value to support the judgment, it will not be disturbed. *Id.*

Indiana Code section 35-48-4-7(a) provides that “a person who, without a valid prescription or order of a practitioner acting in the course of his professional practice, knowingly or intentionally possesses a controlled substance (pure or adulterated) classified in schedule I, II, III, or IV, except marijuana or hashish, commits possession of a controlled substance, a Class D felony.” Matheny does not dispute that he possessed the hydrocodone pills. His arguments are that the Indiana Legislature created exceptions to allow for family members or other persons to pick up prescriptions for those that are unable to do so and that

³ Matheny conceded to the driving while suspended charge at trial and does not appeal that conviction.

his possession fits within one of those exceptions; alternatively, he argues, the controlled substance possession statute is void as unconstitutionally vague.

With regard to the first claim, regarding the applicability of statutory exceptions to the controlled substance possession statute, Matheny refers us to Indiana Code section 35-48-7-7, which defines a “recipient representative” as “an individual to whom a controlled substance is dispensed if the recipient is ... unavailable to receive the controlled substance” and Indiana Code section 35-48-1-27, which defines “ultimate user” as “a person who lawfully possesses a controlled substance for ... the use of a member of the person’s household[.]” However, considering the circumstances of Matheny’s case, we conclude neither applies to his situation. Matheny was not arrested and charged for having in his possession his grandmother’s prescription and failing to give it to her. Rather, Matheny was charged with being in possession of a controlled substance, namely five hydrocodone pills that his grandmother emptied from a pill bottle and placed in a cup holder in her car, and Matheny removed them from the cup holder and placed them in his backpack. As a result, he was knowingly in possession of a controlled substance. Matheny maintains that “[t]here is not substantial evidence of probative value sufficient to prove [that he] did not intend to return his grandmother’s medication to her.” *Reply Br.* at 1. However, this skews the State’s burden. The State was not required to prove that Matheny did not intend to return the pills; it had to prove that he knowingly or intentionally possessed a controlled substance. Ind. Code § 35-48-4-7.

In his appeal, Matheny devotes some attention to this hypothetical inquiry: How long is too long for someone to possess a controlled substance that they were obtaining and eventually delivering to a family member? Following the evidence, but prior to reaching its verdict, the trial court likewise expressed its concern with the time factor, noting that, “taken to the extreme ... someone could hold the pills for a week or a year, ... and still have that same caveat well I was just doing an errand. So tell me [where] the happy median is here.” *Tr.* at 47. After further exchanges with counsel, the trial court ultimately concluded that while a “Good Samaritan” exception does exist for persons who run an errand or do a favor, the court was not willing to extend that beyond the same day or twenty-four hours, at most. *Id.* at 51-52. We decline Matheny’s invitation to identify how long is too long to possess a family member’s prescription, because those are not the facts before us. As said, Matheny’s offense was not about possession of the prescription that he filled for Mamie on September 22. Rather, it was about his possession of five loose hydrocodone tablets in his backpack. Accordingly, we find that he did not qualify for any “Good Samaritan” exception. Assuming without deciding that the trial court erred in applying a twenty-four-hour time period to the exception, any error was harmless in light of our decision that the exception has no application here.

Matheny also argues that the controlled substance possession statute, Indiana Code section 35-48-4-7 is unconstitutionally vague and void when applied to him. The State points out that Matheny did not move to dismiss the possession charge and argues that, therefore, his claim is waived. We agree that, generally, the failure to file a proper motion to dismiss

raising a constitutional challenge waives the issue on appeal. *Baumgartner v. State*, 891 N.E.2d 1131, 1135 (Ind. Ct. App. 2008) (citing Ind. Code §§ 35-34-1-6 and -4). Thus, Matheny’s claim is waived. However, even considering Matheny’s vagueness argument on the merits, his claim fails.

Whether a statute is unconstitutional is a question of law and is reviewed *de novo*. *Shepler v. State*, 758 N.E.2d 966, 968 (Ind. Ct. App. 2001), *trans. denied* (2002). Initially, we observe that statutes are presumed constitutional. *Baumgartner*, 891 N.E.2d at 1136; *Shepler*, 758 N.E.2d at 969. The party challenging the statute, here Matheny, bears the burden of proving otherwise. *Shepler*, 758 N.E.2d at 969 (challenger has burden to rebut presumption).

In this case, Matheny maintains that Indiana Code section 35-48-4-7 “is not drawn in sufficiently narrow terms and foreseeably prohibits legitimate conduct.” *Appellant’s Br.* at 12. The “void for vagueness” doctrine requires a penal statute to define an offense with sufficient definitiveness that ordinary people can understand what conduct is prohibited. *Baumgartner*, 891 N.E.2d at 1136. A statute is also void for vagueness if its terms invite arbitrary or discriminatory enforcement. *Id.* (citing *Klein v. State*, 698 N.E.2d 296, 299 (Ind. 1998)).

Matheny urges that, here, “The statute is constitutionally vague because ordinary people would not know what conduct is prohibited under the controlled substance statute[.]” *Appellant’s Br.* at 14. Matheny explains that the statute does not provide a length of time when one must return another household member’s medication to him or her and thereby

criminalizes any possession of a schedule I-IV substance that is not one's own. "Those who handle other's prescription medications should not face uncertainty or a prosecutor's whim as to whether their behavior subjects them to a potential criminal conviction." *Id.* at 13.

However, Matheny's argument fails to recognize the proposition that a statute is void for vagueness "only if it is vague as applied to the precise circumstances of the instant case." *W.C.B. v. State*, 855 N.E.2d 1057, 1061 (Ind. Ct. App. 2006), *trans. denied* (2007). The precise circumstances before us today are that Matheny was convicted for possessing five loose tablets in his backpack—not for possessing Mamie's prescription pill bottle that he filled on September 22 and apparently delivered to her that day or the next. Stated otherwise, he was not charged and convicted because he did not return Mamie's filled prescription to her quickly enough. As such, Matheny's conduct was within the range prohibited by the legislature, and Matheny has failed to persuade us that the statute is unconstitutionally vague as applied to him.

II. Sentence for Traffic Infraction

Matheny claims that the trial court erred in sentencing him to 180 days for the Class C traffic infraction for failure to stop at a stop sign; he is correct. Indiana Code section 34-28-5-4(c) states that a judgment of up to \$500 may be entered for a violation constituting a Class C infraction. Jail time may not be imposed for a traffic infraction. *State ex rel. City of New Haven v. Allen Superior Court*, 699 N.E.2d 1134, 1136 (Ind. 1998). We find, and the State concedes, that a remand of the infraction conviction is appropriate for correction of the

sentence. We therefore remand with instructions to the trial court to vacate the 180-day sentence and determine an appropriate sanction for the violation.

We affirm in part, vacate in part, and remand.

DARDEN, J., and MAY, J., concur.