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IN THE COURT OF APPEALS OF INDIANA

KEITH MCCOY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0907-CR-700
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Teresa Hall, Judge Pro-Tempore
Cause No. 49G17-0902-FD-27663

February 8, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Keith McCoy appeals his conviction and sentence for possession of marijuana as a class A misdemeanor.[1] McCoy raises three issues, which we revise and restate as:

I. Whether the evidence is sufficient to sustain McCoy's conviction;

II. Whether the trial court violated McCoy's right to fundamental due process when it relied upon its own background knowledge in assessing McCoy's credibility; and

III. Whether McCoy's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

The facts most favorable to the conviction follow. During the early morning hours of February 24, 2009, Indianapolis Metropolitan Police Officer James Carver and another officer were dispatched to an apartment in Marion County regarding a domestic disturbance. When Officer Carver arrived at the scene, he could smell marijuana "coming from the door." Transcript at 18. Officer Carver knocked on the door, and McCoy answered the door. Officer Carver told McCoy why they were there and observed marijuana on the coffee table. Officer Carver also smelled more marijuana coming from the apartment.

McCoy stepped back and allowed the police to enter the apartment. Officer Carver stepped into the apartment and noticed a "heavy odor" of marijuana and that a part of the smell "went with" McCoy. Id. at 21-22. McCoy was "extremely agitated."

[1] Ind. Code § 35-48-4-11 (2004).

Id. at 21. At some point, Brandy Hunter came out of one of the back rooms of the apartment.

One of the police officers read McCoy his Miranda rights, and McCoy stated that he understood his rights. Officer Carver asked McCoy when the last time that he smoked marijuana was, and McCoy stated that he had "just smoked" marijuana "just prior" to the arrival of the police. Id. at 25. Officer Carver asked McCoy why there was only what appeared to be a half a baggie of marijuana, and McCoy stated, "yes, that is what [I] smoked." Id.

The State charged McCoy with possession of marijuana as a class A misdemeanor.[2] During the bench trial, Damon Moore, McCoy's cousin, testified that he drove McCoy to Scarborough Lake Apartments. McCoy testified that he knew Hunter, the other person in the apartment, and that he was at her apartment "[p]robably an hour" before the police arrived. Id. at 45. McCoy testified that he was in the bedroom with Hunter at some point, and that the police pushed the door in his face, threatened him, pulled a gun on him, threw him on the table, and arrested him without telling him why he was being arrested. McCoy then testified that he had been at the apartment for "[p]robably about thirty, forty minutes before the officers came." Id. at 49. McCoy then testified that he could smell marijuana when he arrived at the apartment and left the door wide open "for about an hour and a half." Id. at 52.

After the presentation of the evidence, the trial court stated:

[2] The State also charged McCoy with criminal recklessness as a class D felony, domestic battery as a class A misdemeanor, and battery as a class A misdemeanor, but later dismissed these charges.

> After hearing all of the evidence, and the witnesses, and admitted exhibits that we have before the Court, these are the things that I've come up to, first of all I do believe that there is a possession issue. But let me explain what I mean by that. If you had just came into somebody's house and a half an hour later the police show up, and you're just visiting and that's one thing. But here's my issues, Defense, is the fact that it's one forty-five in the morning and he goes over to this apartment. Apartment that is in the vicinity of where he works. He goes over there and his cousin leaves him there at one forty-five in the morning. And then we have some problems with what Mr. McCoy has stated. First of all he stated during his open testimony here in court that when the officer came in, he said my house. . . . That means he believed that it was his house. He answered the door at one forty-five in the morning . . . or I'm sorry, three fifteen in the morning. Not Brandy. There's [sic] discrepancies on the fact that whether he admitted to things, whether there was Miranda, whether he admitted to things . . . I have to weigh the credibility of all the witnesses. I don't believe that Mr. Moore is lying. Matter of fact he said he smelled the marijuana. Mr. McCoy said, he said he smelled the marijuana. But then Mr. McCoy said well, I was in the back bedroom with Brandy, but yet I left the door open an hour and a half. Now you don't, you don't leave the door open in your apartment at one forty-five at Scarborough Lakes for an hour and a half. I know where that is, you don't do that. And that's because unfortunately I believe that there's a little bit of covering up going on here. With that in mind, I'm going to find that Mr. . . . first of all I find that the State has met their burden of proof beyond a reasonable doubt.

Id. at 57-58.

The trial court found McCoy guilty of possession of marijuana as a class A misdemeanor. The trial court sentenced McCoy to 365 days which was suspended but for time served. The trial court placed McCoy on probation for 180 days.

I.

The first issue is whether the evidence is sufficient to sustain McCoy's conviction. When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict.

Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess witness credibility or reweigh the evidence. Id. We consider conflicting evidence most favorably to the trial court's ruling. Id. We affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." Id. (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)). It is not necessary that the evidence overcome every reasonable hypothesis of innocence. Id. at 147. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. Id.

The offense of possession of marijuana as a class A misdemeanor is governed by Ind. Code § 35-48-4-11, which provides that "[a] person who . . . knowingly or intentionally possesses (pure or adulterated) marijuana, hash oil, or hashish . . . commits possession of marijuana, hash oil, or hashish, a Class A misdemeanor." Thus, to convict McCoy of possession of marijuana as a class A misdemeanor, the State needed to prove that McCoy knowingly or intentionally possessed marijuana.

McCoy argues that the evidence is insufficient because he did not have exclusive possession of the premises. McCoy also argues that his "alleged admission to consuming some of the marijuana was not an admission to possessing or having a possessory interest in the remaining marijuana; any marijuana he may have had contact with no longer existed." Appellant's Brief at 8.

A conviction for possession of contraband may be founded upon actual or constructive possession. Goodner v. State, 685 N.E.2d 1058, 1061 (Ind. 1997). Actual possession of contraband occurs when a person has direct physical control over the item.

Gee v. State, 810 N.E.2d 338, 340 (Ind. 2004). To show constructive possession, the State must show that the defendant had both (1) the intent to maintain dominion and control, and (2) the capability to maintain dominion and control over the contraband. Goliday v. State, 708 N.E.2d 4, 6 (Ind. 1999). Control in this sense concerns the defendant's relation to the place where the substance is found: whether the defendant has the power, by way of legal authority or in a practical sense, to control the place where, or the item in which, the substance is found. Jones v. State, 807 N.E.2d 58, 65 (Ind. Ct. App. 2004), trans. denied. Where a person's control is nonexclusive, intent to maintain dominion and control may be inferred from additional circumstances that indicate that the person knew of the presence of the contraband. Allen v. State, 798 N.E.2d 490, 501 (Ind. Ct. App. 2003). Those additional circumstances include: (1) incriminating statements by the defendant; (2) attempted flight or furtive gestures; (3) a drug manufacturing setting; (4) proximity of the defendant to the drugs; (5) drugs in plain view; and (6) location of the drugs in close proximity to items owned by the defendant. Id.; Jones, 807 N.E.2d at 65.

The record reveals that the Officer Carver smelled marijuana "coming from the door." Transcript at 18. When McCoy answered the door, Officer Carver smelled more marijuana and noticed that part of the smell "went with" McCoy. Id. at 21-22. Officer Carver saw marijuana on the coffee table and noticed that McCoy was "extremely agitated." Id. at 21. Officer Carver asked McCoy when the last time that he smoked marijuana was, and McCoy stated that he had "just smoked" marijuana "just prior" to the

arrival of the police. Id. at 25. Officer Carver asked McCoy why there was only what appeared to be a half a baggie of marijuana, and McCoy stated, "yes, that is what [I] smoked." Id.

Based upon the record, we conclude that evidence of probative value existed from which the trial court could find that McCoy possessed marijuana. See Pryor v. State, 260 Ind. 408, 410-411, 296 N.E.2d 125, 126 (1973) (holding that the evidence was sufficient to support a conviction of possession of marijuana where a witness testified that they observed the defendant smoking marijuana); Ables v. State, 848 N.E.2d 293, 296 (Ind. Ct. App. 2006) (holding that the defendant had constructive possession where she was in the vehicle in which the gun was found, was in close proximity to the gun, and admitted that the gun was in the center console with her cell phone).

II.

The next issue is whether the trial court violated McCoy's right to fundamental due process when it relied on its own background knowledge in assessing McCoy's credibility. McCoy cites the Fifth Amendment of the United States Constitution which provides that "[n]o person . . . shall be . . . deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend V. McCoy argues that the trial court's actions "denied [him] fundamental due process and a fair trial." Appellant's Brief at 13. In support of his argument, McCoy points to the following statements of the trial court:

> But then Mr. McCoy said well, I was in the back bedroom with Brandy, but yet I left the door open an hour and a half. Now you don't, you don't leave the door open in your apartment at one forty-five at Scarborough Lakes for

> an hour and a half. I know where that is, you don't do that. And that's because unfortunately I believe that there's a little bit of covering up going on here. With that in mind, I'm going to find that Mr. . . . first of all I find that the State has met their burden of proof beyond a reasonable doubt.

Transcript at 58.

McCoy argues that the trial court "interjected its own opinion and negative observation about the location of the apartment to make an assumption about whether Mr. McCoy truthfully left his apartment door open at all." Appellant's Brief at 12. McCoy also argues that "the trial court's personal observation and opinion that the apartments are located in what she perceived to be a bad area was not based upon any evidence submitted by either party." Id.

The Indiana Supreme Court has held that "[i]t is certainly true that when determining whether an element exists, the jury may rely on its collective common sense and knowledge acquired through everyday experiences." Halsema v. State, 823 N.E.2d 668, 673 (Ind. 2005) (citing Robert Lowell Miller, Jr., *Indiana Evidence* § 201.101 (1995) ("[J]urors are instructed to use their own knowledge, experience and common sense in weighing evidence. . . ."); 27 Charles A. Wright & Victor J. Gold, *Federal Practice & Procedure* § 6075, at 450 (1990) ("Obviously, no juror can or should approach deliberations with an entirely clean cognitive slate. Humans can make intelligent decisions only by drawing upon their accumulated background knowledge and experience. Jurors are not only permitted to make decisions in this manner, it is expected of them[.]")). See also Morgan v. State, 496 N.E.2d 400, 401 (Ind. 1986) (holding that

jurors are permitted to apply their everyday experiences and common sense). Similarly, the trial court as the trier of fact cannot approach deliberations, weigh evidence, or make decisions with an entirely clean cognitive slate. Here, the trial court applied its accumulated background knowledge and common sense in determining McCoy's credibility. We conclude that McCoy's right to fundamental due process was not violated when the trial court relied in part upon its background knowledge in assessing McCoy's credibility.

III.

The next issue is whether McCoy's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that 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." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). McCoy argues that his sentence should be reduced to time served.

As an initial matter, McCoy contends that his 365-day sentence, although the entire sentence was suspended but for time served, must be treated as a "maximum" sentence for purposes of Ind. Appellate Rule 7(B). This is a question that has generated a split of opinion on this court, namely, whether in this context a fully executed sentence is equivalent to a sentence of equal length but partially suspended to probation. We agree

with those of our colleagues who have concluded that the two are not equivalent for purposes of an appropriateness challenge.

"Common sense dictates that less executed time means less punishment." Jenkins v. State, 909 N.E.2d 1080, 1084 (Ind. Ct. App. 2009), trans. denied. "That is why almost any defendant, given the choice, would gladly accept a partially suspended sentence over a fully executed one of equal length." Id. We agree with Judge Kirsch's statement that "[a] year is, indeed, a year, but a suspended sentence is not the same as an executed sentence[.]" Eaton v. State, 825 N.E.2d 1287, 1291 (Ind. Ct. App. 2005) (Kirsch, C.J., dissenting) (disapproved of on other grounds by Childress v. State, 848 N.E.2d 1073, 1077 n.2 (Ind. 2006)). "Most would agree that prison is worse than probation, and it is simply not realistic to consider a year of probation, a year in community corrections, and a year in prison as equivalent." Jenkins, 909 N.E.2d at 1084. In Jenkins, we held:

> Of course, we acknowledge that probations can be, and often are, revoked, and that the result of those revocations frequently is a fully executed sentence. We agree that "[i]mposition of a suspended sentence leaves open the real possibility that an individual will be incarcerated for some period before being released from his penal obligation." Weaver v. State, 845 N.E.2d 1066, 1072 n.4 (Ind. Ct. App. 2006), trans. denied. While this is true, as far as it goes, this view seemingly fails to take into account that whether the suspended time is eventually served depends entirely on the defendant. The "real possibility" that the suspended portion of a sentence will be ordered executed is not random or dependent on the whim of a judge; a defendant can ensure that it will never become reality simply by abiding by the terms of his probation.
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> Although we are unaware of any Indiana Supreme Court cases directly on point, we believe that our position is fully consistent with its

jurisprudence. In Hole v. State, 851 N.E.2d 302, 304 n.4 ([Ind.] 2006), the Court indicated that a discretionary placement in either community corrections or the Department of Correction would be subject to appropriateness review. Hole, then, clearly stands for the proposition that the particulars of a sentence can be just as relevant as its length when it comes to Rule 7(B) review. If the difference between prison and community corrections is relevant under 7(B), then it follows that so is the difference between executed time and probation.

Moreover, we believe that Mask v. State, 829 N.E.2d 932, 936 (Ind. 2005), in which the Indiana Supreme Court wrote that "[a] suspended sentence differs from an executed sentence only in that the period of incarceration is delayed unless, and until, a court orders the time served in prison[,]" is distinguishable. First, the holding is limited to the context of the case, which was the question of whether suspended time must be included in calculating the longest allowable aggregate sentence under Indiana Code section 35-50-1-2(c). Id. ("Incarceration *in the context of subsection (c)* does not mean the period of executed time alone. . . . We hold that any period of a suspended sentence must be included *when calculating the maximum aggregate sentence under Indiana Code § 35-50-1-2(c)*." (emphases added)). Moreover, Mask was decided in a completely different context, one governed by statute and in which the length of the sentence was the only relevant consideration. As Hole makes clear, however, length is not the only relevant consideration in appropriateness analysis.

Finally, we agree with Judge Sullivan that Buchanan v. State, 767 N.E.2d 967, 973 (Ind. 2002), does not stand for the proposition that "sentence" and "punishment" are synonymous, thereby compelling us to treat a sentence of maximum length, fully executed or not, as representing maximum punishment. See Cox v. State, 792 N.E.2d 898, 906 (Ind. Ct. App. 2003) (Sullivan, J., dissenting)[, trans. denied]. In Buchanan, that question was not before or decided by the Court, and, because the sentence imposed was both the longest allowed and ordered fully executed, the two terms were interchangeable, at least in that case. We find, however, no indication anywhere in Buchanan that the Court intended to equate "sentence" with "punishment" in all contexts and cases. To summarize, our view is that, for purposes of Rule 7(B) review, a maximum sentence is not just a sentence of maximum length, but a fully executed sentence of maximum length. Anything less harsh, be it placement in community

> corrections, probation, or any other available alternative to prison, is simply not a maximum sentence.

Id. at 1084-1086. Based upon this analysis, we reject McCoy's invitation to review his suspended sentence the same as if it were a fully executed sentence. See id.

Our review of the nature of the offense reveals that McCoy was in an apartment with a "heavy odor of the marijuana" and was "extremely agitated." Transcript at 21. McCoy told the officers that he had "just smoked" marijuana "just prior" to their arrival. Id. at 25. Our review of the character of the offender reveals that McCoy admitted that he had been arrested for driving while suspended and was arrested when he was sixteen or seventeen years old.

After due consideration of the trial court's decision and in light of the facts that the trial court sentenced McCoy to 365 days which was suspended but for time served and ordered 180 days of probation, we cannot say that the sentence imposed by the trial court is inappropriate in light of the nature of the offense and the character of the offender.

For the foregoing reasons, we affirm McCoy's conviction and sentence for possession of marijuana as a class A misdemeanor.

Affirmed.

MATHIAS, J., concurs.

BARNES, J., concurs in result.

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COURT OF APPEALS OF INDIANA

KEITH MCCOY,	)	
	)	
Appellant-Defendant,	)	
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vs.	)	No. 49A02-0907-CR-700
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

BARNES, Judge, concurring in result

I fully concur with the majority's resolution of the first two issues McCoy raises. I concur in result only as to the third issue, the appropriateness of McCoy's sentence. I agree that his sentence is appropriate, but I am on record as disagreeing with the notion that a suspended sentence should be treated differently from an executed sentence for purposes of Indiana Appellate Rule 7(B). See Davidson v. State, 916 N.E.2d 954, 960-62 (Ind. Ct. App. 2009) (Barnes, J., concurring in result), trans. granted. I need not restate my reasons for that view here, except to say that I still adhere to them. Now that our supreme court has granted transfer in Davidson, I anticipate receiving further guidance on

this issue. Until the court issues a decision in that case, however, I will continue to "believe that when reviewing a sentence on appeal, we should treat a fully or partially suspended sentence no differently than a fully executed sentence." Id. at 962.