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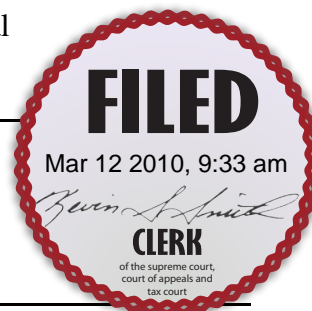
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**IN THE
COURT OF APPEALS OF INDIANA**



EDGAR BURELISON,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 12A02-0908-CR-734

APPEAL FROM THE CLINTON SUPERIOR COURT
The Honorable Justin H. Hunter, Judge
Cause No. 12D01-0706-FB-81

March 12, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Edgar Burelison (“Burelison”) appeals from his convictions and sentences for three counts of dealing in a controlled substance,¹ each as a Class B felony, and his habitual substance offender determination. Burelison presents the following restated issues for our review:

- I. Whether the trial court abused its discretion by denying Burelison’s motion for discharge;
- II. Whether there is sufficient evidence to support Burelison’s convictions for three counts of Class B felony dealing in a controlled substance;
- III. Whether the trial court erred when sentencing Burelison; and
- IV. Whether the trial court erred when it entered the sentence for Burelison’s habitual substance offender finding.

We affirm and remand.

FACTS AND PROCEDURAL HISTORY

Dereck Sutherland, who had charges pending against him, and was already acquainted with Burelison, agreed to act as a confidential informant in Clinton County in an effort to procure lenient treatment in sentencing for himself. Sutherland telephoned Burelison and arranged to buy some of Burelison’s methadone prescription pills on January 24, 2007. Sutherland contacted Clinton County Sheriff’s Detective Curt Catron about the buy. Later that evening, Sutherland met with Detective Catron and other law enforcement officers at a designated location. Sutherland’s vehicle was searched for illegal substances by the officers, as was Sutherland, and none were found.

¹ See Ind. Code § 35-48-4-2.

After receiving the buy money from the officers, Sutherland was outfitted with a recording device. The police followed Sutherland to Burelison's residence and maintained surveillance while Sutherland entered Burelison's house and completed the methadone purchase. Police officers followed Sutherland's vehicle as Sutherland and Burelison left Burelison's house. Sutherland gave Burelison a ride to his place of business before Sutherland returned to the designated location to meet the officers. Sutherland handed the pills that he had purchased from Burelison to Detective Catron. Sutherland's vehicle and his person were again searched and no other illegal substances were found. Thereafter, Sutherland was debriefed about the buy. The officers had made an audio tape of the buy, which was subsequently placed on a CD.

Sutherland contacted Burelison two more times about purchasing methadone pills from him and notified Detective Catron of those transactions, which were to occur at Burelison's place of business. The buys took place on February 23, 2007, and on February 24, 2007. The procedure described above, involving the pre-buy search of Sutherland's person and car, use of buy money, surveillance of Sutherland and Burelison, return to the designated location where Sutherland gave the pills to Detective Catron, post-buy search of Sutherland's person and vehicle, debriefing, and transfer of the audio tape of the buy onto CD, were employed for both of those buys.

Burelison was charged with three counts of dealing in a Schedule II controlled substance, each as a Class B felony, and the State filed a habitual substance offender allegation. At the conclusion of Burelison's jury trial, the jury found Burelison guilty as

charged, and the trial court found that Burelison was a habitual substance offender. The trial court sentenced Burelison to concurrent fifteen-year sentences on each of his convictions and ordered a consecutive six-year sentence for the habitual substance offender finding. Burelison now appeals.

DISCUSSION AND DECISION

I. Motion For Discharge

Burelison claims that the trial court abused its discretion by denying his motion for discharge under Indiana Criminal Rule 4(C) because he was not brought to trial within the one-year limit of the rule. Criminal Rule 4(C) provides, in relevant part:

No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar[.]

Under this rule, a defendant may seek and be granted a discharge if he is not brought to trial within the proper time period. *State v. Delph*, 875 N.E.2d 416, 419 (Ind. Ct. App. 2007), *trans. denied*. “The purpose of Criminal Rule 4(C), however, is to create early trials and not to discharge defendants.” *Id.* “If a defendant seeks or acquiesces in any delay that results in a later trial date, the time limitations set by Criminal Rule 4 are extended by the length of such delays.” *Id.*

The duty to bring a defendant to trial within one year is an affirmative one which rests with the State, and the defendant is under no obligation to remind the court of the State’s

duty. *State v. Suggs*, 755 N.E.2d 1099, 1102 (Ind. Ct. App. 2001). The one-year time limitation of the rule commences with the latter of two events, the date of defendant's arrest or the filing of the information. *Id.* By the rule's own terms, the one-year period is extended by any delay due to: 1) a defendant's motion for a continuance; 2) delay caused by the defendant's act; or 3) congestion of the court calendar. *Id.* "When a record is silent concerning the reason for a delay, it is not attributable to the defendant." *Id.* at 1103. The trial court must make the factual determination of whether delays in the scheduling of the trial have occurred and to whom the delays are charged. *State v. Smith*, 495 N.E.2d 539, 541 (Ind. Ct. App. 1986). Delays that are caused by action taken by the defendant are chargeable to the defendant whether or not a trial date has been set. *Cook v. State*, 810 N.E.2d 1064, 1067 (Ind. 2004).

Here, while the information was filed in Burelison's case on June 26, 2007, he was not arrested until August 10, 2007. Therefore, the time period of the rule began to run on August 10, 2007, and, absent delay, the State had until August 9, 2008 to bring Burelison to trial. Review of the record reveals that at Burelison's initial hearing held on August 13, 2007, the trial court set Burelison's jury trial for December 4, 2007. Those 116 days are charged to the State. At a pre-trial conference held on November 8, 2007, Burelison requested a continuance of the next pre-trial conference due to plea negotiations, and the trial court rescheduled the next pre-trial conference to December 13, 2007. This delay from the original trial date of December 4, 2007 until December 13, 2007, or eight days, is charged to Burelison.

The pre-trial conference held on December 13, 2007 resulted in the trial court setting the matter for a guilty plea hearing on February 20, 2008. Arguably, this 69 day delay should be charged to the State, bringing the total time charged to the State to 185 days. The guilty plea hearing was not held on February 20, 2008, however, because Burelison failed to provide a transport order to secure his appearance at the guilty plea hearing. The trial court set Burelison's jury trial date to July 29, 2008. This delay, having occurred due to Burelison's failure to provide a transport order, is chargeable to Burelison.

On May 22, 2008, Burelison's trial was reset to October 1, 2008. This delay of 64 days is chargeable to the State, bringing the time chargeable to the State to a total of 249 days. On September 29, 2008, the trial court rescheduled Burelison's trial to February 3, 2009 due to congestion of the court's calendar. Court calendar congestion also resulted in the trial court rescheduling Burelison's jury trial from February 3, 2009 to July 21, 2009. On May 21, 2009, the trial court advanced Burelison's jury trial to June 2, 2009, the date on which Burelison's jury trial was held.

Burelison filed a motion for discharge on May 22, 2009 which the trial court denied. Burelison renewed his motion for discharge at his jury trial. While Burelison tenders a different calculation of the time, the record reveals that only 249 days are chargeable to the State. Burelison does not argue that the trial court's finding of court calendar congestion was legally or factually incorrect, and did not object to the trial court's findings in that regard. Consequently, the trial court did not abuse its discretion by continuing the jury trial dates.

Furthermore, as only 249 days are chargeable to the State, some time was chargeable to Burelison, and the time period was tolled due to court congestion, the trial court did not err by denying Burelison's motion for discharge.

II. Sufficiency of the Evidence

Our standard of review for a challenge to the sufficiency of the evidence is well-settled. When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the conviction. *Boyd v. State*, 889 N.E.2d 321, 325 (Ind. Ct. App. 2008). 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.* It is not necessary that the evidence overcome every reasonable hypothesis of innocence. *Id.* The evidence is sufficient if an inference may reasonably be drawn from it to support the conviction. *Id.*

Burelison argues that there is insufficient evidence to sustain his convictions for Class B felony dealing in a Schedule II controlled substance. More specifically, Burelison argues that Sutherland's testimony should be reviewed pursuant to the incredible dubiousity rule. "Within the narrow limits of the 'incredible dubiousity' rule, a court may impinge upon a jury's function to judge the credibility of a witness." *Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002). For testimony of a sole witness to be disregarded based on a finding of "incredible dubiousity," it must be inherently contradictory, wholly equivocal, or the result of coercion. *Id.* at 806. Moreover, there must also be a complete lack of circumstantial

evidence of the defendant's guilt. *Id.* This rule is rarely applicable. *Id.*

The incredible dubiousity rule does not apply here since there is other evidence supporting Burelison's convictions, and Sutherland's testimony is not inherently incredible or the result of coercion. First, the jury was aware of Sutherland's motive for becoming a confidential informant and the benefit he hoped to receive from acting as such. Additionally, any discrepancies between his testimony and that of the officers who testified do not trigger application of the rule. Rather, they are relevant to the weight to be given to such testimony.

More importantly, however, is the existence of the circumstantial evidence of Burelison's guilt. Sutherland was the only person who witnessed the actual transactions. Nonetheless, the testimony of the officers establishes that Sutherland and his vehicle were searched prior to each transaction, they observed Sutherland going into and out of the locations where the transactions took place, Sutherland returned with the pills, and he and his vehicle were searched after the transactions. Sutherland wore a recording device during the transactions, and the audio tape recordings of the transactions were placed on CDs and admitted in evidence.

To the extent Burelison asks this court to reassess Sutherland's credibility, our standard of review forbids us to do so. Such is the province of the jury, and there is no basis here to impinge upon the function of the jury. *See Boyd*, 889 N.E.2d at 325. We find that there is sufficient evidence to support the convictions.

III. Sentencing Errors

Burelison argues that the trial court abused its discretion through the weight attributed

to the aggravating and mitigating circumstances when sentencing him. Burelison also claims that his sentence is inappropriate in light of the nature of the offense and the character of the offender.

Trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (2007). The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Id.* If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id.* Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Id.* An abuse of discretion occurs if the decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Id.*

Because the trial court no longer has any obligation to "weigh" aggravating and mitigating factors against each other when imposing a sentence, a trial court cannot now be said to have abused its discretion in failing to "properly weigh" such factors. *Id.* at 491. Once the trial court has entered a sentencing statement, which may or may not include the existence of aggravating and mitigating factors, it may then "impose any sentence that is . . . authorized by statute; and . . . permissible under the Constitution of the State of Indiana." Ind. Code § 35-38-1-7.1(d).

Burelison was charged with and convicted of three offenses, each of which is a Class B felony. The sentencing range for a Class B felony is a fixed term of imprisonment of between six and twenty years. Ind. Code § 35-50-2-5. Burelison received a fifteen-year sentence for each of his convictions, a sentence which is authorized by statute.

Burelison contends that the trial court failed to find as mitigating factors his health or his age. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Anglemyer*, 868 N.E.2d at 493. If the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist. *Id.* (quoting *Fugate v. State*, 608 N.E.2d 1370, 1374 (Ind. 1993)). Moreover, the trial court is not obligated to weigh or credit facts proffered as mitigating by the defendant in the way that the defendant suggests they should be weighed or credited. *Abel v. State*, 773 N.E.2d 276, 280 (Ind. 2002). Furthermore, “[t]he approach employed by Indiana appellate courts in reviewing sentences in non-capital cases is to examine both the written and oral sentencing statements to discern the findings of the trial court.” *McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007) (citing *Corbett v. State*, 764 N.E.2d 622, 631 (Ind. 2002)).

When sentencing Burelison, the trial court found as aggravating circumstances Burelison’s history of criminal behavior and that Burelison was out on bond when he committed the instant offenses. The trial court found as mitigating circumstances that Burelison had taken advantage of corrective rehabilitative programs while incarcerated prior

to trial, thus making attempts to address his substance abuse problem, and that he did not contest the habitual substance offender allegation at trial. The record reveals that the trial court explicitly rejected Burelison's age and poor health as mitigating circumstances.

To the extent Burelison claims the trial court abused its discretion by improperly weighing the aggravating and mitigating circumstances, his argument fails because that argument is no longer available on appeal. Furthermore, the record reveals that Burelison argued the existence of his age and health as mitigating factors and the trial court explicitly declined to find those factors as mitigating. There is no abuse of discretion here as the trial court is not required to credit proffered mitigating factors in the way Burelison argued.

Burelison additionally challenges his sentence as inappropriate in light of the nature of the offense and the character of the offender. Indiana Appellate Rule 7(B) provides that the court may revise a sentence 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).

Here, assuming without deciding that the nature of Burelison's crimes was not remarkable, Burelison's character, as shown by his criminal history, renders his enhanced sentence appropriate. Even a limited criminal history can be considered an aggravating factor. *See Pagan v. State*, 809 N.E.2d 915, 928 (Ind. Ct. App. 2004) (single juvenile adjudication and single adult conviction warranted some aggravation). We note that Burelison has failed to supply this court with a copy of his pre-sentence investigation report,

a factor which is an impediment to appellate review. That notwithstanding, it is apparent from the record that Burelison had a criminal history dating back to the late 1960s, including convictions for theft, escape, and burglary. The State noted at the sentencing hearing that “[t]hey haven’t all been uh substance violations.” *Tr.* at 310. Burelison was also released on bond in another criminal case when he committed the three instant offenses. Both a criminal history and commission of the offenses while on bond are valid aggravating circumstances. Ind. Code § 35-38-1-7.1. We find that Burelison’s fifteen-year concurrent sentences are not inappropriate in light of the nature of the offenses and the character of the offender.

IV. Habitual Substance Offender Sentencing

The State notes that this cause must be remanded to the trial court to correct the sentencing error which is apparent on the face of the record. When sentencing Burelison, the trial court imposed a sentence for the Habitual Substance Offender finding to be served consecutively to the underlying concurrent convictions for the three Class B felony offenses.

A finding that a defendant is a habitual substance offender is a sentence enhancement to the underlying substance abuse conviction, not a separate consecutively-imposed sentence. Ind. Code § 35-50-2-10(f); *Bauer v. State*, 875 N.E.2d 744, 747 (Ind. Ct. App. 2007). Thus, we remand with instructions to amend the sentencing order to show that Burelison’s habitual offender finding is attached to an underlying conviction and to enhance the sentence for that conviction accordingly.

Affirmed and remanded.

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