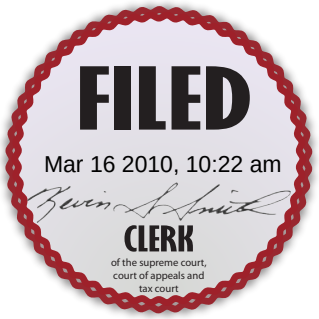

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IN THE
COURT OF APPEALS OF INDIANA

CORY A. McCLARIN,	)	
	)	
Appellant/Defendant,	)	
	)	
vs.	)	No. 20A05-0909-CR-553
	)	
STATE OF INDIANA,	)	
	)	
Appellee/Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0807-FA-27

March 16, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Cory A. McClarin appeals from his convictions of and sentence for Class A felony Dealing in Cocaine[1] and Class B felony Dealing in Cocaine.[2] McClarin contends that the State failed to rebut evidence that he was entrapped, his sentence is inappropriately harsh, the trial court abused its discretion in sentencing him, and the federal rule of "sentencing entrapment" should be adopted and applied to this case. We affirm.

FACTS AND PROCEDURAL HISTORY

On January 16, 2008, Elkhart Police Detective James Anderson, who was undercover, drove with a cooperating source ("CS") to a CVS drug store in Goshen to meet with McClarin. The CS and McClarin were friends and had been involved in a romantic relationship at one time. Once in Detective Anderson's car, McClarin explained that they would have to go elsewhere to retrieve the cocaine that Detective Anderson was attempting to purchase. The group drove to an Elkhart residence, and Detective Anderson gave McClarin $250 in marked and recorded cash. McClarin, however, soon returned from the residence and told Detective Anderson that they would have to go to another residence. McClarin, riding in another person's car, led Detective Anderson and the CS to a Village Pantry parking lot, and McClarin returned to Detective Anderson's car. McClarin directed Detective Anderson to another residence, exited the car, and soon returned with approximately seven grams of crack cocaine, which he gave to Detective Anderson.

[1] Ind. Code § 35-48-4-1(b) (2007).

[2] Ind. Code § 35-48-4-1(a) (2007).

On February 7, 2008, Detective Anderson and the CS arranged to meet McClarin again in order to purchase an "eight ball" of crack cocaine. Detective Anderson and the CS met McClarin inside a Kroger in Elkhart, and Detective Anderson gave him forty dollars in exchange for approximately one half of a gram of crack cocaine.

On July 15, 2008, the State charged McClarin with one count of Class A felony dealing in cocaine and one count of Class B felony dealing in cocaine. On July 14, 2009, a jury found McClarin guilty as charged. On August 20, 2009, the trial court sentenced McClarin to forty-five years of incarceration for Class A felony dealing in cocaine and eighteen years for Class B felony dealing in cocaine, both sentences to be served concurrently. The trial court found, as aggravating circumstances, McClarin's criminal history, his longtime illegal drug use, and the crimes of violence committed against the CS in the past. The trial court found McClarin's "addictions issues" and his "eloquent apology in open court for his criminal conduct" to be mitigating circumstances. Appellant's App. p. 74. The trial court found that the aggravating circumstances "substantially" outweighed the mitigating. Appellant's App. p. 74.

DISCUSSION AND DECISION

I. Whether the State Produced Sufficient Evidence to Rebut McClarin's Claim that He was Entrapped

When this Court reviews a claim of entrapment, we use the "same standard that applies to other challenges to the sufficiency of evidence." *Ferge v. State*, 764 N.E.2d 268, 270 (Ind. Ct. App. 2002) (citing *Dockery v. State*, 644 N.E.2d 573, 578 (Ind. 1994)). That is, we do not reweigh the evidence or judge the credibility of witnesses. *McHenry v.*

State, 820 N.E.2d 124, 126 (Ind. 2005). We must affirm if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. *Id*.

The defense of entrapment is set forth in Indiana Code section 35-41-3-9 (2007), which provides:

> (a) It is a defense that:
> (1) the prohibited conduct of the person was the product of a law enforcement officer, or his agent, using persuasion or other means likely to cause the person to engage in the conduct; and
> (2) the person was not predisposed to commit the offense.
> (b) Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

Once the entrapment defense is raised, the State bears the burden of showing that the defendant was predisposed to commit the crime beyond a reasonable doubt. *Dockery*, 644 N.E.2d at 577. Factors that indicate a predisposition to sell drugs include "a knowledge of drug prices, knowledge of drug sources and suppliers, uses and understanding of terminology of the drug market, solicitation of future drug sales, and multiple sales." *Jordan v.. State*, 692 N.E.2d 481, 484 (Ind. Ct. App. 1998) (citing *Dockery*, 644 N.E.2d at 577).

The evidence most favorable to the jury's verdict clearly indicates a predisposition to sell drugs on McClarin's part. First, McClarin sold drugs multiple times to Detective Anderson, which indicates predisposition. *See Martin v. State*, 537 N.E.2d 491, 495 (Ind. 1989). Second, the evidence most favorable to the jury's verdicts indicates no hesitation whatsoever on McClarin's part to participate in the drug deals. When first contacted by the CS, McClarin indicated that he could obtain cocaine "real easily[,]" Tr. p. 101, and

the only evidence tending to show any reluctance by McClarin is his own testimony, which the jury was not required to believe.

Third, the record contains ample evidence of McClarin's familiarity with the drug trade, including knowledge of drug jargon, market prices, and the local illegal drug trade. McClarin used the term "eight ball" numerous times and charged Detective Anderson $250 for approximately two "eight balls" when the market price for that amount of crack cocaine was approximately $200 to $300. The record also indicates McClarin's knowledge of the local drug trade and his access to multiple suppliers. On January 16, 2008, McClarin had to take Detective Anderson to another source of crack cocaine because "his guy didn't have the drugs" and, on February 7, 2008, told him that he did not have the previously agreed-upon "eight ball" because he was using a supplier who was not "his regular guy." Tr. pp. 82, 129. *See, e.g.*, *Riley v. State*, 711 N.E.2d 489, 494 (Ind. 1999) (familiarity with drug jargon and prices, engaging in multiple transactions, and undertaking to arrange future transactions are among circumstances which support conviction); *Martin*, 537 N.E.2d at 495 (familiarity with drug jargon and two sales to undercover officers are sufficient to demonstrate predisposition to sell drugs).

Finally, there is the evidence that McClarin contacted the CS twice after the second controlled buy asking her if she wanted to buy more drugs. *See Young v. State*, 620 N.E.2d 21, 25 (Ind. Ct. App. 1993) (concluding that solicitation of future drug sales indicates predisposition), *trans. denied*. The State produced ample evidence to establish McClarin's predisposition to sell illegal drugs.

II. Whether McClarin's Sentence is Inappropriate

McClarin contends that his forty-five-year aggregate sentence is inappropriately harsh. We "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). "Although appellate review of sentences must give due consideration to the trial court's sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." *Shouse v. State*, 849 N.E.2d 650, 660 (Ind. Ct. App. 2006) (citations and quotation marks omitted), *trans. denied*.

While McClarin's offenses were not particularly inherently egregious, we conclude that they were somewhat more egregious than typical drug sales to the extent that they indicated his ongoing involvement in the illegal drug trade. During both transactions, McClarin indicated that he had access to more than one drug supplier and more than a passing familiarity with the local drug trade, clear indications that his sales to Detective Anderson were not isolated incidents. The nature of McClarin's offenses justifies an aggravated sentence.

We conclude that McClarin's character also justifies an enhanced sentence. Despite McClarin's many brushes with the criminal justice system, he has not chosen to conform his behavior to societal norms. At the age of thirty-two, McClarin had prior convictions for Class C felony robbery, Class C felony battery, Class A misdemeanor criminal conversion, misdemeanor criminal conversion, misdemeanor battery,

misdemeanor operating a vehicle without ever having received a license, and (in Illinois) criminal trespass of a vehicle. McClarin had failed to appear in court on three occasions and had violated the terms of probation twice. Moreover, McClarin admitted to marijuana use from the age of nine and methamphetamine use since 2002, indicating a long-time propensity for illegal activity. Finally, the record clearly indicates that McClarin was involved in an ongoing drug-dealing concern. Despite McClarin's indications of remorse at sentencing, we conclude that his character, especially as revealed by his record of criminal activity and contempt for the law, justifies an enhanced sentence. In light of the nature of McClarin's offenses and his character, he has failed to establish that his forty-five year executed sentence in inappropriate.

III. Whether the Trial Court Abused its Discretion in Sentencing McClarin

McClarin's offenses were committed after the April 25, 2005, revisions to Indiana's sentencing scheme. Under this new scheme, "the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007). We review the sentence 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." *Id.*

A trial court abuses its discretion if it (1) fails "to enter a sentencing statement at all[,]" (2) enters "a sentencing statement that explains reasons for imposing a sentence–including a finding of aggravating and mitigating factors if any–but the record does not support the reasons," (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration," or (4) considers reasons that

"are improper as a matter of law." *Id*. at 490-91. If the trial court has abused its discretion, we will remand for resentencing "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." *Id*. at 491. However, under the new statutory scheme, the relative weight or value assignable to reasons properly found, or to those which should have been found, is not subject to review for abuse of discretion. *Id*.

McClarin's argument in this regard appears to differ from his appropriateness argument only to the extent that he argues that the trial court should have given the State's alleged coercion more mitigating weight. As mentioned above, however, the weight of mitigating circumstances the appellant contends should have been found is not reviewable under our current sentencing scheme. In any event, the trial court was under no obligation to credit evidence that the State coerced McClarin, and apparently did not. McClarin has not established the trial court abused its discretion in sentencing him.

IV. Whether the Federal Doctrine of Sentence Entrapment Applies to McClarin's Sentence

McClarin urges us to adopt the federal sentencing doctrine of sentence entrapment and apply it to the facts of his case. "Sentencing entrapment or 'sentence factor manipulation' occurs when 'a defendant, although predisposed to commit a minor or lesser offense, is entrapped in committing a greater offense subject to greater punishment.'" *U.S. v. Staufer*, 38 F.3d 1103, 1106 (9th Cir. 1994) (quoting *U.S. v. Stuart*, 923 F.2d 607, 614 (8th Cir. 1991)). In the two federal circuits that have adopted sentence

entrapment, it allows a downward departure from federal sentencing guidelines. *See U.S. v. Searcy*, 233 F.3d 1096, 1099 (8th Cir. 2000); *Staufer*, 38 F.3d at 1108.

Even if we were inclined to see some merit in the adoption of some form of sentence entrapment, this case would be an inappropriate vehicle. Quite simply, even taking into consideration McClarin's testimony, there is no evidence whatsoever that he, although predisposed to commit a lesser drug crime, was coerced into a greater crime by the State or its agent. McClarin's claim, which we have already concluded he failed to establish, has been all along that he was not predisposed to commit *any* drug crime, which would render sentence entrapment inapplicable, even if we were to adopt it.

The judgment of the trial court is affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.