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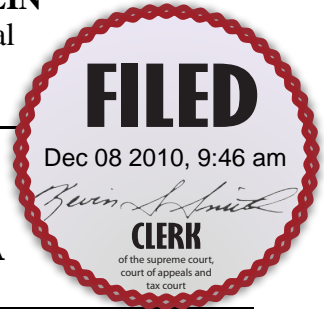
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**IN THE  
COURT OF APPEALS OF INDIANA**

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DAVID TERRY, )  
 )  
Appellant-Defendant, )  
 )  
vs. )  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

No. 33A05-1004-CR-305

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APPEAL FROM THE HENRY CIRCUIT COURT  
The Honorable Mary G. Willis, Judge  
Cause Nos. 33C01-0905-FA-0007 & 33C01-0905-FC-0013

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**December 8, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## **Case Summary**

David Terry appeals his convictions and aggregate thirty-year term for three counts of Class A felony dealing in a schedule II controlled substance, one count of Class D felony maintaining a common nuisance, and two counts of Class C felony possession of a schedule II controlled substance. We find sufficient evidence to support Terry's convictions and no abuse of discretion by the trial court at sentencing. However, we conclude Terry's aggregate term is inappropriate in light of the nature of his offenses and his character. We revise three of his sentences for a resulting term of twenty years with fourteen years suspended, for an executed sentence of six years followed by two years of probation. We remand for resentencing.

## **Facts and Procedural History**

Terry lived at 1521 Michigan Street in New Castle, approximately 490 feet from Wilbur Wright Elementary School.

In May 2009, the Henry County Drug Task Force was conducting surveillance of Terry's residence. One day officers observed a man named Kenneth Riddle leaving Terry's home. The officers followed Riddle, discovered drug paraphernalia in his car, and enlisted him to serve as a confidential informant in a controlled buy from Terry. On May 21, Riddle was outfitted with a recording device and given \$90 in buy-money. Riddle entered Terry's house and purchased an 80-mg Oxycodone pill while officers monitored from outside. Police also observed a woman named Kelli Reynolds coming and going from Terry's home during the surveillance period. They enlisted her to act as an informant in two controlled buys as well. Reynolds purchased an 80-mg Oxycodone

pill from Terry on May 21 and another 80-mg pill on May 23. Law enforcement entered Terry's home on May 27 pursuant to a search warrant. They found two pill bottles containing Oxycodone on Terry's person. Terry did not have a prescription.

The State charged Terry with, among other things, three counts of Class A felony dealing in a schedule II controlled substance within 1000 feet of school property, Ind. Code § 35-48-4-2(b)(2)(B)(i), one count of Class D felony maintaining a common nuisance, Ind. Code § 35-48-4-13(b), and two counts of Class C felony possession of a schedule II controlled substance within 1000 feet of school property, Ind. Code § 35-48-4-7(a)(2)(A).

At trial, three investigating officers testified that Terry's home was close to "Wilbur Wright School" or "Wilbur Wright Elementary School." Tr. p. 75, 96, 125. A county surveyor testified that Terry's home was 490 feet from "the Wilbur Wright School Property." *Id.* at 196, 198.

A jury found Terry guilty on the three counts of dealing as well as the single count of maintaining a common nuisance. Terry pled guilty to the two possession charges.

According to his presentence investigation report, Terry was fifty-four years old at the time of the instant offenses and had no prior criminal convictions. He committed only one seatbelt infraction in 2003. Terry also served in the United States Marine Corp from 1974 until 1977. He began battling pharmaceutical addiction later in his life following several back surgeries. At the time Terry dealt controlled substances from his residence, his younger brother Danny was under electronic monitoring at the house in connection with his own drug offense.

At sentencing, the trial court found in pertinent part:

The Court cannot find any aggravat[o]rs . . . . I recognize mitigator in the State [sic] is the fact that there is no prior criminal record . . . . The Court has considered the fact though that Mr. Terry, despite his protest to the Supplementary Report did not take responsibility for his action until after he had been sentenced by a jury at which time he did take responsibility in the C Felony case . . . .

*Id.* at 42-43. The court sentenced Terry to thirty years with ten years suspended, five to probation, for each count of dealing; two years for maintaining a common nuisance; and four years for each count of possession. The sentences were imposed concurrently for an aggregate term of thirty years with ten years suspended, five to probation.

Terry now appeals.

### **Discussion and Decision**

Terry challenges (I) the sufficiency of the evidence supporting his dealing convictions and (II) the propriety of his sentences.

#### **I. Sufficiency of the Evidence**

Terry argues there is insufficient evidence to sustain his convictions for Class A felony dealing in a schedule II controlled substance. He claims specifically that there is no evidence he dealt within 1000 feet of school property. Terry maintains that the investigating officers' and county surveyor's references to "Wilbur Wright Elementary School" were insufficient to prove that that location is actually school property. Terry suggests the State needed documentation or testimony from a school official establishing that the property at issue was owned by a school.

Our standard of review with regard to sufficiency claims is well settled. In reviewing a sufficiency of the evidence claim, this Court does not reweigh the evidence

or judge the credibility of the witnesses. *Bond v. State*, 925 N.E.2d 773, 781 (Ind. Ct. App. 2010), *reh'g denied, trans. denied*. We will consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the verdict. *Id.* A conviction may be based upon circumstantial evidence alone. *Id.* Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id.*

A person who knowingly or intentionally delivers a controlled substance classified in schedule II commits a Class B felony. Ind. Code § 35-48-4-2(a)(1)(C). Oxycodone is a schedule II substance. *Id.* § 35-48-2-6(a)(b)(1)(O). The offense is a Class A felony if the person delivers or finances the delivery of the substance in, on, or within one thousand feet of school property. *Id.* § 35-48-4-2(b)(2)(B)(i). “School property” means a building or other structure owned or rented by a school corporation, *id.* § 35-41-1-24.7(1), as well as the grounds adjacent to and owned or rented in common with such building or other structure, *id.* § 35-41-1-24.7(2).

We conclude the evidence is sufficient to sustain a finding that Terry conducted the subject transactions within 1000 feet of school property. Three investigating officers indicated that the drug deals occurred near “Wilbur Wright Elementary School” or “Wilbur Wright School,” and the county surveyor testified that Terry’s residence was 490 feet from “the Wilbur Wright School Property.” A rational trier of fact could conclude that the “Wilbur Wright Elementary School” is in fact a building or other structure owned or rented by a school corporation. *See Whitt v. State*, 659 N.E.2d 512, 513 (Ind. 1995)

(finding evidence sufficient where officer referred to school property as “Irwin Elementary School”). We therefore find sufficient evidence to sustain Terry’s dealing convictions as Class A felony offenses.

## **II. Sentencing**

### *A. Abuse of Discretion*

Terry next argues that the trial court abused its discretion at sentencing. Terry claims specifically that the trial court “failed to give appropriate weight to the mitigation concerning [his] lack of prior criminal history.” Appellant’s Br. p. 9.

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218 (Ind. 2007). 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.* One way in which a court may abuse its discretion is by entering a sentencing statement that omits mitigating circumstances that are clearly supported by the record and advanced for consideration. *Id.* at 490-91. Another way a court may abuse its discretion is if the sentencing statement explains reasons for imposing a sentence but the record does not support the reasons. *Id.* However, a trial court has no obligation to weigh aggravating or mitigating factors when imposing sentence; thus, the relative weight or value assigned to these factors is not subject to appellate review for an abuse of discretion. *Id.* at 493.

We find no basis to conclude the trial court abused its discretion at sentencing. The court recognized Terry's lack of criminal history as a mitigating circumstance before pronouncing its sentence. According to Terry, the trial court failed to accord it proper mitigating weight. Terry's contention is merely a request to reweigh the aggravating and mitigating factors, which we may not do. We therefore find no abuse of discretion.

### *B. Inappropriateness*

Terry argues in the alternative that his sentence is inappropriate and should be revised pursuant to Indiana Appellate Rule 7(B).

Although a trial court may have acted within its lawful discretion in imposing a sentence, Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Appellate Rule 7(B), which provides that a court "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." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer*, 868 N.E.2d at 491). The defendant has the burden of persuading us that his or her sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)). In assessing whether a sentence is inappropriate, appellate courts may take into account whether a portion of the sentence is ordered suspended or is otherwise crafted using any of the variety of sentencing tools available to the trial judge. *Davidson v. State*, 926 N.E.2d 1023, 1025 (Ind. 2010).

The advisory sentence for a Class A felony is thirty years. Ind. Code § 35-50-2-4. The maximum term is fifty years and the minimum is twenty. *Id.* In general, a court may

suspend any part of a sentence for a felony offense. *Id.* § 35-50-2-2(a). Under certain statutorily-enumerated circumstances, the court may suspend only that part of a sentence in excess of the mandatory minimum. *Id.* § 35-50-2-2(b). Such limitation applies when the offense committed is dealing in a schedule I, II, or III controlled substance, but only if “the court finds the person possessed a firearm . . . at the time of the offense, or the person delivered or intended to deliver to a person under eighteen (18) years of age at least three (3) years junior to the person and was on a school bus or within one thousand (1,000) feet of: (i) school property; (ii) a public park; (iii) a family housing complex; or (iv) a youth program center.” *Id.* § 35-50-2-2(b)(4)(Q). Section 35-50-2-2(b)(4)(Q) requires an initial finding either that the defendant possessed a firearm or that he delivered or intended to deliver to someone under the age of eighteen and at least three years his junior. *Cf. Owens v. State*, 911 N.E.2d 18, 24 n.3 (Ind. Ct. App. 2009), *vacated on other grounds*, 929 N.E.2d 754 (Ind. 2010). Neither of those conditions presents itself here, so the provision is inapplicable and any portion of Terry’s dealing sentences is eligible for suspension.

As for the nature of the offenses, we acknowledge that Terry dealt a controlled substance from his home while his brother was on electronic monitoring for another drug crime. However, Terry’s offenses were not otherwise exceptionally heinous or dangerous. Terry dealt a total of three Oxycodone pills in a short series of uneventful transactions, and he was found with only two bottles of Oxycodone during the subsequent search.



With regard to his character, we observe that Terry is now fifty-five years old and has no prior criminal convictions. We recognize his military service. We also note his willingness to plead guilty to the possession counts, and contrary to the suggestions of the trial court, we do not believe Terry's desire for a jury trial on the other charges should take away from his acceptance of responsibility with regard to possession.

In light of the foregoing, we conclude that Terry's aggregate thirty-year term is inappropriate and warrants reduction. We exercise our review-and-revise authority and amend each of Terry's sentences for Class A felony dealing to the mandatory minimum of twenty years. We further order fourteen years of each sentence suspended, for an executed term of six years on each Class A felony count followed by two years of probation. Terry's remaining sentences shall stay in place, and all sentences are ordered to run concurrently. We remand so that Terry may be resentenced accordingly.

Reversed and remanded.

MAY, J., and ROBB, J., concur.