ATTORNEY FOR APPELLANT:

MARK EVERETT WATSON
Terre Haute, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

KENNY HAWKINS, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 84A01-1005-CR-268
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable David R. Bolk, Judge
Cause No. 84D03-0904-FB-984

December 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Kenny Hawkins, Jr. appeals his conviction of Dealing In Cocaine,[1] a class B felony, as well as the twelve-year sentence imposed thereon. Hawkins presents the following restated issues for review:

1. Did Hawkins receive ineffective assistance of trial counsel?

2. Was the evidence sufficient to support his conviction?

3. Did the trial court impose an inappropriate sentence?

We affirm.

The facts favorable to the conviction are that on February 17, 2009, confidential informant #824 (the C.I.) contacted Detective Martin L. Dooley Jr. of the Terre Haute Police Department and informed him that she could purchase cocaine from persons from Mississippi. The C.I. met Detective Dooley and Detective Karen Cross at a predetermined location, where Detective Cross searched the C.I. and the C.I.'s vehicle for contraband. The C.I. was then equipped with a recording device known as a hawk device. In the detectives' presence, the C.I. placed a telephone call and asked for "Dred". *Appellant's Appendix* at 13. The individual that answered was not "Dred" and the C.I. informed the individual she had a "bill". *Id*. The individual on the phone informed the C.I. to meet him near the Jiffy Mini Mart around 25th and 8th Avenue. The C.I. was provided with photocopied buy money.

The C.I. drove to the designated location, where she met Hawkins and exchanged the one hundred dollars in buy money for five plastic bags. The transaction was recorded, although the quality of the recording was such that the court reporter later was unable to transcribe the audio portion. The C.I. returned to the staging area, where Detective Dooley

[1] Ind. Code Ann. § 35-48-4-1(a)(1) (West, Westlaw through 2010 2nd Regular Sess.).

took possession of the hawk device and the baggies the C.I. had purchased from Hawkins. The C.I. was searched by Detective Cross. Detective Cross also conducted a search of the C.I.'s vehicle. No money or other contraband was found on the C.I.'s person or in the C.I.'s vehicle. The substance in the baggies was later field tested by Detective Dooley and tested positive for cocaine weighing 2.0 grams in the aggregate. The cocaine was tagged as evidence and later placed in the Terre Haute Police Department's evidence room.

On March 31, 2009, Detective Dooley filed an affidavit for probable cause to issue an arrest warrant for Hawkins. The probable cause affidavit indicated that all the facts were within Detective Dooley's personal knowledge. A charging information was prepared charging Hawkins with dealing in cocaine as a class B felony.

A jury trial was conducted on April 13-14, 2010, after which Hawkins was found guilty as charged. At sentencing, the trial court found Hawkins's criminal history as an aggravator and determined that it outweighed the lone mitigator, i.e., Hawkins's history of substance abuse. He was sentenced to twelve years in prison, which is two years above the advisory sentence for a class B felony. *See* I.C. § 35-50-2-5 (West, Westlaw through 2010 2nd Regular Sess.).

1.

Hawkins contends he received ineffective assistance of trial counsel in that counsel failed to file a timely motion to suppress the arrest warrant and to suppress the cocaine purchased in the drug buy because it lacked a sufficient chain of custody. He also claims counsel was ineffective for failing to challenge the reliability of the C.I.

In order to prevail on his claim of ineffective assistance of counsel, a petitioner must

demonstrate both that his counsel's performance was deficient and that he was prejudiced thereby. *French v. State*, 778 N.E.2d 816 (Ind. 2002) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). This is the so-called *Strickland* test. Counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. *Id*. To establish the requisite prejudice, a petitioner must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002). The two elements of *Strickland* are separate and independent inquiries. The failure to satisfy either component will cause an ineffective assistance of counsel claim to fail. *Taylor v. State*, 840 N.E.2d 324 (Ind. 2006). Thus, if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Landis v. State*, 749 N.E.2d 1130 (Ind. 2001).

Hawkins's first claim in this regard is that counsel rendered ineffective assistance in failing to file a motion to suppress the arrest warrant because "the arrest warrant affidavit was not supported by probable cause because it was based on uncorroborated hearsay from a source whose reliability was an issue." *Appellant's Brief* at 11. Although cases involving motions seeking the suppression of *evidence* are legion, Hawkins does not direct this court's attention to authority for the proposition that a party may attain suppression of an arrest warrant. It is simply not clear what remedy Hawkins's trial counsel could have obtained by filing a motion to suppress the arrest warrant. It is possible that Hawkins is comingling two separate and distinct types of challenges that might have been made, one involving the

validity of the arrest and the other involving the admissibility of the evidence. If so, both would have failed for the same reason, as will be explained below.

There was no flaw in the arrest warrant in this case.

> A valid arrest warrant must be supported by probable cause. Probable cause turns on a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit ... there is a fair probability" that the subject has committed a crime or evidence of a crime will be found. *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). To establish probable cause, an affidavit in support of the warrant must do more than state the conclusion of the affiant. A neutral and detached magistrate must draw his or her own conclusion whether probable cause existed and cannot act as a "rubber stamp for the police." *Aguilar v. Texas*, 378 U.S. 108, 111, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). In assessing the validity of an issued warrant, the reviewing court is "to determine whether the magistrate had a 'substantial basis' for concluding that probable cause existed." *Figert v. State*, 686 N.E.2d 827, 830 (Ind. 1997) (quoting *Gates*, 462 U.S. at 238-39, 103 S.Ct. 2317). "[S]ubstantial basis requires the reviewing court, with significant deference to the magistrate's determination, to focus on whether reasonable inferences drawn from the totality of the evidence support the determination" of probable cause. *Houser v. State*, 678 N.E.2d 95, 99 (Ind. 1997) (discussing *Gates*, 462 U.S. at 236, 103 S.Ct. 2317).

Shotts v. State, 925 N.E.2d 719, 723 (Ind. 2010) (some internal citations omitted). In this case, contrary to Hawkins's assertions, Detective Dooley did not rely upon the uncorroborated hearsay of the C.I. in completing the probable cause affidavit.

At the staging area, Detective Dooley placed the hawk device on the C.I. after giving her $100 and searching her car and person, thereby confirming at that point that she had no contraband on her. Detective Dooley followed close behind her as she drove to the transaction, remaining in visual contact with her the whole time until they came within a few blocks of the target site. At that point, Detective Dooley pulled into a filling station and parked. Detective Matthew Cardin, driving in a different vehicle, fell in behind the C.I.'s

vehicle and followed her. There was no time when the C.I.'s vehicle was out of sight of both Detectives Dooley and Cardin; at least one of them was in visual contact at all times. Detective Cardin stopped about a block and a-half from the spot where the transaction was to take place. He observed as Hawkins approached the C.I.'s car and remained there for less than a minute, then walked away. At that point, the C.I. turned around and retraced the route she had followed to get there. Detective Cardin followed her until she was once again within sight of Detective Dooley, who at that point resumed following the C.I. back to the original staging point. Once there, the C.I. gave Detective Dooley five plastic baggies containing what was later determined to be two grams of cocaine. A subsequent search of the C.I.'s person and vehicle revealed the presence of no contraband or money. The C.I. described in detail the transaction to Detective Dooley, who then retrieved the hawk device from the C.I., drove to the police station, downloaded and then viewed the video recording, which was "accurate and consistent" with the C.I.'s account of the transaction. *Transcript* at 67.

Yet, Hawkins maintains that there were inadequate controls with respect to the buy to establish that Hawkins was the source of the cocaine delivered to Detective Dooley by the C.I. This claim is simply unavailing and to support this conclusion we cite our previous descriptions of the thorough measures undertaken in this regard by the law enforcement officers involved. Hawkins also claims the digital recording used to verify the C.I.'s account of the transaction was not of sufficient quality to corroborate her account, noting that the audio could not be transcribed. We have viewed the recording in question and conclude otherwise. The transaction itself lasted just a few seconds. Hawkins can clearly be seen approaching the car. He mumbled a response to the C.I.'s initial comment about the cold

weather and then can be heard saying "Got a hundred?" or "Have a hundred?" The word "hundred" is clear. The first word of the C.I.'s terse response denotes affirmation and includes the word "hundred." At the same time this occurred, Hawkins can be seen placing something in the C.I.'s right hand. As the C.I. transferred the delivered items into her left hand and Hawkins walked away, she said "They look good." After that, the C.I. turned the vehicle around and drove back to the staging area. Although not every utterance that passed between Hawkins and the C.I. was intelligible, the quality of the audio was sufficient to permit the listener to understand enough to corroborate the C.I.'s account of her very brief encounter with Hawkins.

Hawkins contends trial counsel rendered ineffective assistance in failing to submit a pre-trial motion to disclose the identity of the C.I. and that if counsel had done such, the trial court would have been bound to grant it.

> "The general policy is to prevent disclosure of an informant's identity unless the defendant can demonstrate that disclosure is relevant and helpful to his defense or is necessary for a fair trial." *Schlomer v. State*, 580 N.E.2d 950, 954 (Ind. 1991). It is the defendant's burden to demonstrate the need for disclosure. *Id*. "[B]are speculation that the information may possibly prove useful" is not enough to justify the disclosure of a confidential informant's identity, and an informant's identity shall not be disclosed "to permit 'a mere fishing expedition.'" *State v. Cook*, 582 N.E.2d 444, 446 (Ind. Ct. App. 1991) (quoting *Dole v. Local 1942, et al.*, 870 F.2d 368, 373 (7th Cr. 1989)).

Mays v. State, 907 N.E.2d 128, 131 (Ind. Ct. App. 2009), *trans. denied*.

As discussed above, Hawkins bears the burden of establishing that disclosure of the C.I.'s identity would have been helpful to his defense. Upon appeal, he contends that, armed with the identity of the C.I., he could have successfully challenged the arrest warrant "because it was based on uncorroborated hearsay from a source whose reliability was an

issue." *Appellant's Appendix* at 11. We have already determined that the arrest warrant was not based upon the C.I.'s uncorroborated testimony, therefore this argument is unavailing. Simply put, the C.I.'s credibility did not play a role in the issuance of the arrest warrant, or in any other relevant way that we can discern such as would have obligated the trial court to grant a motion to disclose. Therefore, Hawkins has failed to demonstrate that he was prejudiced by trial counsel's failure to move for a disclosure of the C.I.'s identity. *See Landis v. State*, 749 N.E.2d 1130.

Hawkins contends trial counsel rendered ineffective assistance in failing to object to the introduction into evidence of the cocaine the C.I. purchased from him because "[t]he State failed to establish a proper of chain of custody from the date the C.I. made the purchase to the date evidence was submitted at trial." *Appellant's Appendix* at 12.

"'The chain-of-custody doctrine requires an adequate foundation to be laid showing the continuous whereabouts of physical evidence before it may be admitted into evidence.'" *Robinson v. State*, 724 N.E.2d 628, 640 (Ind. Ct. App. 2000) (quoting *Shipley v. State*, 620 N.E.2d 710, 715 (Ind. Ct. App. 1993)) (citations omitted), *trans. denied*. In order to establish a proper chain of custody, the State must give reasonable assurances that the evidence remained in an undisturbed condition. *Troxell v. State*, 778 N.E.2d 811 (Ind. 2002). The State, however, does not need to establish a perfect chain of custody; once the State "strongly suggests" the exact whereabouts of the evidence, any gaps go to the weight of the evidence and not to admissibility. *Id*. at 814 (citations omitted). There is a presumption of regularity in the handling of evidence by officers, and there is a presumption that officers exercise due care in handling their duties. *Troxell v. State*, 778 N.E.2d 811. To successfully

challenge the chain of custody, a defendant must present evidence that does more than raise a mere possibility that the evidence may have been tampered with. *Id*. Moreover, In *Jackson v. State*, our Supreme Court held that when a defendant bases an ineffective assistance of counsel claim on counsel's failure to object at trial, the defendant must show that a proper objection, if made, would have been sustained. 683 N.E.2d 560 (Ind. 1997).

After the transaction was completed and the C.I. returned to the staging area, Detective Dooley took possession of the cocaine, later designated at trial as Exhibit 13, and transported it to the Drug Task Force Office at the police station. There, he field-tested the substance and ascertained that it contained cocaine. He then placed the cocaine in a clear plastic bag and took it to the Terre Haute Police Department's evidence room, where it was logged in and placed on a shelf. It remained there until Detective Dooley filled out a lab request form directing that Exhibit 13 be sent to the Indiana State Police Laboratory for testing. The evidence was transported to the lab by Lieutenant Bill Bergherm. Once there, it was logged in by lab personnel and subjected to analysis. After testing was complete, Lieutenant Bergherm logged it out and transported it back to the Terre Haute Police Department, where it was once again logged into the evidence room and replaced in its original location. Detective Dooley then retrieved Exhibit 13 for use at trial. Hawkins contends a chain-of-custody objection would have been sustained because Lieutenant Bergherm did not testify at trial concerning his handling of Exhibit 13, "causing a break in the chain regarding the exhibit's location." *Appellant's Brief* at 12. According to Hawkins, trial counsel "failed to exploit that gap[.]" *Id*. at 13.

Although it is true that Lieutenant Bergherm did not testify about his role in delivering

Exhibit 13 to the State Police Lab and then returning it to the Terre Haute Police Department's evidence room, Hawkins directs our attention to no other circumstances that suggest Exhibit 13 was tampered with. Rather, he points only to the "gap" in chain-of-custody evidence resulting from the failure of Lieutenant Bergherm to testify. *Id*. This gap does little more than suggest a possibility of tampering, and such is not enough to carry Hawkins's burden on appeal. *See Troxell v. State*, 778 N.E.2d 811. In view of Detective Dooley's testimony and the legal presumption that Lieutenant Bergherm exercised due care in handling his duties with respect to Exhibit 13, the State's chain-of-custody evidence sufficed to "strongly suggest" the whereabouts of Exhibit 13. *Troxell v. State*, 778 N.E.2d at 814. Therefore, "any gaps go to the weight of the evidence and not to admissibility." *Id.* (citing *Jenkins v. State*, 627 N.E.2d 789 (Ind. 1993) (in which the Court noted that the failure of an FBI technician to testify did not constitute error), *cert. denied*, 513 U.S. 812 (1994). Hawkins has failed to demonstrate that he was prejudiced by trial counsel's failure to challenge the admissibility of Exhibit 13 on chain-of-custody grounds. *See Landis v. State*, 749 N.E.2d 1130.

Finally, Hawkins's claims of ineffective assistance of trial counsel concerning the chain-of-custody evidence may be understood to include a claim that Lieutenant Bergherm's failure to testify violated Hawkins's Sixth Amendment right of confrontation. In a similar case, our Supreme Court rejected such a claim in language applicable here:

> The failure of the State to call a competent witness does not deny a defendant his constitutional right. The State cannot be compelled to call witnesses at the instance of the accused. Appellant had the burden of seeing that witnesses who may have aided in his defense were called. We find no merit to his contention.

Beverly v. State, 543 N.E.2d 1111, 1115 (Ind. 1989). For the same reasons, we find no merit in Hawkins's contention.

2.

Hawkins contends the evidence was insufficient to support his conviction.

> When reviewing the sufficiency of the evidence needed to support a criminal conviction, we neither reweigh evidence nor judge witness credibility. *Henley v. State*, 881 N.E.2d 639, 652 (Ind. 2008). "We consider only the evidence supporting the judgment and any reasonable inferences that can be drawn from such evidence." *Id*. We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt. *Id*.

Bailey v. State, 907 N.E.2d 1003, 1005 (Ind. 2009).

In order to convict Hawkins of class B felony dealing in cocaine, the State was required to prove beyond a reasonable doubt that Hawkins knowingly or intentional delivered cocaine. I.C. § 35-48-4-1(a)(1). The evidence set out in detail and discussed above showed that the C.I. arranged to purchase $100 worth of cocaine from Hawkins. She met him at the appointed time and place and he walked up to her car and asked for "a hundred", after which she gave him money and he placed something in her hands. Detective Cardin, observing from a nearby vantage point, corroborated the fact that the C.I. stopped her vehicle at a curb and that Hawkins walked up to the car briefly, after which he walked away and the C.I. drove back in the direction from which she had come. A search of the C.I.'s person and vehicle before and after the transaction reveals that she had $100 and no cocaine before the incident, and cocaine and no money after the incident. The video from the hawk device depicted actions from which a reasonable inference may be drawn that a drug transaction occurred

between the C.I. and Hawkins, and it also recorded the C.I.'s entire journey from the time the C.I. left the staging area to the time she arrived back again after meeting with Hawkins. We can see nothing on the video that would support a conclusion that the C.I. obtained the cocaine from a source other than Hawkins during her absence from the staging area. Moreover, the C.I. was under constant surveillance during the trip, and her only contact with persons other than Detective Dooley and another police officer was with Hawkins.

Hawkins offers several challenges to the evidence, including the fact that the C.I. was not subjected to a body-cavity search, the quality of the hawk device's recording, and the fact that no buy money was recovered from Hawkins. With respect to the first argument, we have determined that strip searches and complete body cavity checks are not necessary before a controlled buy and that pat-down searches are sufficient. *See Hudson v. State*, 462 N.E.2d 1077 (Ind. Ct. App. 1984).[2] We have also determined that the recordings from the hawk device in this case were of sufficient quality to be useful to the jury. Finally, the fact that no buy money was recovered from Hawkins is no doubt attributable to the fact that he was not arrested until April 1, almost six weeks after this transaction occurred. The evidence was sufficient to support Hawkins's conviction.

3.

Hawkins contends the trial court imposed an excessive sentence. The proper recourse for challenging a sentence as excessive is to offer argument on grounds of appropriateness.

[2] We also note that Detective Dooley testified that when drugs are stored in baggies that have been hidden in body cavities, the baggies are "usually damp, or they have something else smeared on them" like a lubricant or body waste. *Transcript* at 162. As for the bags recovered from the C.I. following the transaction with Hawkins, Detective Dooley testified that there was "[n]othing out of the ordinary on the outside of the bags." *Id*.

Article 7, section 4 of the Indiana Constitution grants our Supreme Court the power to review and revise criminal sentences. Pursuant to Ind. Appellate Rule 7, the Supreme Court authorized this court to perform the same task. *Cardwell v. State*, 895 N.E.2d 1219 (Ind. 2008). Per App. R. 7(B), we may revise a sentence "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." *Wilkes v. State*, 917 N.E.2d 675, 693 (Ind. 2009), *cert. denied*, 131 S.Ct. 414 (2010). "[S]entencing is principally a discretionary function in which the trial court's judgment should receive considerable deference." *Cardwell v. State*, 895 N.E.2d at 1223. Hawkins bears the burden on appeal of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006).

As a function of his argument that his sentence is inappropriately long, Hawkins contends the trial court erred in failing to find the following three mitigators: "alternative forms of punishment, incarceration would cause undue hardship to Hawkins' [sic] dependent(s), and the crime having neither caused nor threatened serious harm to persons or property because he dealt cocaine to a confidential informant[.]" *Appellant's Brief* at 19.

Sentencing determinations, including the finding of mitigating factors, are generally committed to the trial court's discretion. *Scott v. State*, 840 N.E.2d 376 (Ind. Ct. App. 2006), *trans. denied*. A sentencing court must consider all evidence of mitigating factors presented by a defendant, but is not obligated to weigh or credit them in the manner a defendant suggests. *Id*. Also, a sentencing court "need not consider, and we will not remand for reconsideration of, alleged mitigating circumstances that are highly disputable in nature, weight, or significance." *Creekmore v. State*, 853 N.E.2d 523, 530 (Ind. Ct. App. 2006), *clarified on reh'g*, 858 N.E.2d 238. Finally, subject to an exception not applicable here, our Supreme Court has held, "the trial court does not abuse its discretion in failing to consider a mitigating factor that was not raised at sentencing." *Anglemyer v. State*, 868 N.E.2d 482, 492 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218.

We note that Hawkins did not argue the mitigators quoted above at sentencing. Therefore, we presume they are not significant. *See id*. The trial court did not abuse its discretion in failing to find the alleged factors as mitigating.

The only mitigator argued at sentencing by Hawkins was his history of drug and alcohol abuse. Referring to this history, the trial court stated, "[t]o the extent that they could be considered a mitigating circumstance I'm finding they're outweighed by aggravating

circumstance [sic]." *Sentencing Transcript* at 11. Thus, it appears the trial court did consider Hawkins's substance-abuse history as a mitigator, albeit not a significant one. The trial court did not abuse its discretion in finding mitigating circumstances.

We proceed now to a consideration of the appropriateness of Hawkins's sentence, beginning with the nature of the offense. As the State acknowledges, the nature of Hawkins's offense was not unusual. As found by the trial court, Hawkins's character, and specifically his criminal history, constitutes the most significant consideration in formulating an appropriate sentence. The trial court reviewed that history with Hawkins before pronouncing sentence:

> [Y]ou've have two (2) prior unrelated felony convictions, a grand larceny conviction in Ninety-Eight ('98) that you served three (3) years in the Pinola County, Mississippi Jail; and July Thirty (30), Ninety-Nine ('99), conspiracy to commit burglary, burglary of a dwelling in Mississippi as well where you were given a sentence of twenty (20) years on.

Sentencing Transcript at 10. In addition to these two felonies, Hawkins also had convictions in Mississippi of an unspecified classification for the following: Disturbing the peace and public drunkenness (March 14, 1998), and disorderly conduct (April 11, 1998). Finally, as of the time Hawkins's presentence investigation report was prepared, he had outstanding arrest warrants in Mississippi for resisting arrest, possession of liquor, and disorderly conduct (warrant issued on March 26, 2007) and a second charge of resisting arrest (warrant issued on April 16, 2007). Although this is not the most extensive criminal history that can be imagined, it is extensive enough to constitute a valid aggravating circumstance. In light of Hawkins's troubling pattern of criminal activity, the twelve-year sentence imposed, which is two years in excess of the advisory sentence for this offense, is not inappropriate.

Judgment affirmed.

MAY, J., and MATHIAS, J., concur.