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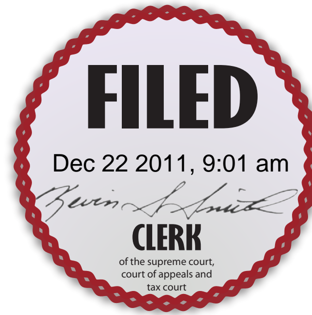

ATTORNEY FOR APPELLANT:

LEANNA WEISSMANN
Lawrenceburg, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ANDREW R. FALK
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JAMES LOWERY,)
)
Appellant-Defendant,)
)
vs.) No. 15A05-1106-CR-296
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE DEARBORN CIRCUIT COURT
The Honorable James Humphrey, Judge
Cause No. 15C01-1007-FC-022

December 22, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, James Lowery (Lowery), appeals his sentence for manufacture of more than ten pounds of marijuana, a Class C felony, Ind. Code § 35-48-4-10(b)(2) following a guilty plea.

We affirm.

ISSUE

Lowery raises two issues on appeal, which we consolidate and restate as the following single issue: Whether the trial court properly sentenced Lowery.

FACTS AND PROCEDURAL HISTORY

In June of 2010, Detective Nicholas Beetz (Detective Beetz) with the Dearborn County special crimes unit, received an anonymous tip that Lowery was growing marijuana in two of his rental properties in Greendale, Indiana and using his satellite installation service truck to transport the drugs. Detective Beetz and other officers conducted surveillance on the houses and saw Lowery and James Felland (Felland) visit the homes during the day for brief periods, but at night no vehicles were at the residences and no lights were visible. Detective Beetz also determined that although it was a hot summer, no air conditioner was running. Additionally, the utility records indicated high water and electricity usage despite the fact that the residences appeared little used.

Detective Beetz obtained search warrants for the two homes. In the first house, he discovered 9.55 pounds of marijuana, divided in twenty-seven one gallon bags and six vacuum-sealed bags, as well as 11.56 pounds of marijuana that was being dried.

Detective Beetz located a total of 179 marijuana plants at the residence. He also found a hydroponic system that was not being used, in addition to extra growing equipment in the attic and throughout the house which signified that "this was an operation that had either been going on for a long period of time, or they was [sic] looking to expand." (Transcript p. 255). Detective Beetz estimated that the residence contained tens of thousands of dollars worth of marijuana-growing equipment.

Detective Beetz also searched the second house. During his first search, he located growing equipment, trash bags filled with waste related to the growth of marijuana, and filters. When he returned to the residence the following day, Detective Beetz found an area hidden behind a concealed door. Behind the door were three rooms. The first room was a utility room, containing equipment, two video monitors wired to surveillance cameras on the outside of the house, and a ventilation system. The second room was a growing room where Detective Beetz found eighteen marijuana plants in pots and sixty-five plants that had been recently harvested; the plants were high quality marijuana with relatively large buds. The room also contained seven grow lights. From the total number of plants and the method of harvesting, it was determined that Lowery could produce at least twenty-one pounds of marijuana every sixty days. Pinned to the wall, Detective Beetz found hand-written notes containing dates in sixty day intervals between 2005 and 2008 which Detective Beetz concluded to be consistent with a "two-stage grow," *i.e.*, a sixty-day cycle to yield marijuana. (Tr. pp. 285, 287).

Detective Beetz also obtained a search warrant for Lowery's residence. In the home, Detective Beetz located $3,900 in one-hundred dollar bills. Lowery was in the

process of having a three-story, detached garage built with a radiant heating system. Each room in the garage had some electricity and some rooms had been plumbed with water. Detective Beetz also reviewed Lowery's bank records and noticed that Lowery had deposited $223,794 between June 2009 and June 2010.

On July 1, 2010, the State filed an Information charging Lowery with Count I, possession of marijuana with intent to deliver more than ten pounds, a Class C felony, I.C. § 35-48-4-10(b)(2) and Count II, manufacture of more than ten pounds of marijuana, a Class C felony, I.C. § 35-48-4-10(b)(2). On December 29, 2010, Lowery agreed to plead guilty to Count II in exchange for the State's agreement to dismiss Count I and with sentencing left to the discretion of the trial court. On April 7 and 28 and May 6, 2011, the trial court conducted a sentencing hearing. On May 26, 2011, the trial court sentenced Lowery to eight years executed. In an elaborate six page sentencing statement, the trial court found the following aggravating factors:

> 1. The [c]ourt finds that the criminal history outlined in the PreSentence Investigation does not rise to the level of an aggravating circumstance. The [c]ourt, however, considers this lack of significant criminal history in the context of evidence admitted through the testimony of [Lowery] and exhibits 3, 4, 5 and 6 [the handwritten notes indicating a two-stage growth cycle] which indicate a significant growing operation had been conducted by [Lowery] over a considerable period of time. In fact, evidence shows that [Lowery] was conducting growing operations from approximately 2005 until the time of his arrest in June of 2010. The [c]ourt therefore, finds that although [Lowery's] criminal history does not itself constitute a specific aggravating circumstance, it must be considered in this context.
>
> 2. The [c]ourt considers the nature and circumstances of the crime to be an aggravating circumstance. Specifically, the [c]ourt finds that the size and scope of [Lowery's] growing operation constitutes a significant aggravating factor. Evidence presented through the testimony of Detective Beetz shows that [Lowery] was, at the time the search warrant was executed, in

> possession of 9.55 pounds of marijuana packages for sale. [Lowery] also had 11.56 pounds of marijuana drying on racks constituting a total of 21.11 pounds of harvested marijuana. Based on the nature of the growing operation, the [c]ourt finds that [Lowery] was growing approximately 20 pounds of marijuana for sale every sixty (60) days and that each pound of marijuana would sell for at least [t]wo [t]housand [f]ive [h]undred [d]ollars ($2,500.00). Given a minimum sale price of [t]wo [t]housand [f]ive [h]undred [d]ollars ($2,500.00) per pound, the marijuana which [Lowery] had in his possession, ready for sale, was valued at approximately [f]ifty-[t]wo [t]housand [s]even [h]undred [s]eventy-[f]ive [d]ollars ($52, 755.00). In addition to the marijuana which was packaged or drying, the [c]ourt finds that there were approximately one hundred and seventy-nine (179) growing plants in the [first] residence [] and approximately eighty-three (83) in the [second residence].
>
> 3. The [c]ourt finds that [Lowery] conducted an elaborate growing process which called for harvesting large amounts of marijuana every sixty (60) days. That this process appeared to have been an on-going operation since approximately 2005 at some level. The [c]ourt further finds that [Lowery] used growing techniques and processes to enhance the strength and THC content of the marijuana. [Lowery] had a special ventilation system in both residences, a hidden growth room in one house and used CO_2, grow lights and other processes to enhance the strength and production of the marijuana. The [c]ourt also finds that [Lowery's] intent was to further expand his operation. The [c]ourt makes this finding based upon the manner in which the garage was constructed at his [own residence]. The [c]ourt also considers Exhibits 92 and 93 in which an individual seeks advice and expertise from [Lowery] on how to better conduct his own growing operation. This growing operation was far and above what would be expected for personal use.
>
> In sum, the [c]ourt finds that all of these factors cited and the evidence presented indicate that [Lowery] was a major marijuana producer and seller and constitutes a danger to the Southeastern Indiana community.

(Appellant's App. pp. 25-27).

As mitigating circumstances, the trial court cited (1) Lowery's plea agreement; and (2) the impact Lowery's incarceration will have on his family. The trial court also stated that Lowery is not likely to respond to probation or short-time imprisonment due to

his long-time involvement with the marijuana production. The court noted that it had considered Lowery's argument regarding the proportionality of sentence between Lowery and Felland but rejected it and clarified that Lowery was the owner of the two rental residences converted to growing operations and was in the process of building a garage for the specific purpose of adding an additional future growing operation.

Lowery now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Lowery contends that the trial court abused its discretion when it imposed an eight year sentence for his manufacture of more than ten pounds of marijuana, a Class C felony. A person who commits a Class C felony shall be imprisoned for a fixed term of between two and eight years, with the advisory sentence being four years. I.C. § 35-50-2-6. Here, the trial court imposed the maximum sentence under the statute.

As long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *aff'd 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 trial court may abuse its discretion is by failing to enter a sentencing statement at all. *Id*. Another example includes entering a sentencing statement that explains reasons for imposing a sentence, including aggravating and mitigating factors, which are not supported by the record. *Id*. at 490-91.

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 by failing to properly weigh such factors. *Id.* at 491. This is so because 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 permitted under the Indiana Constitution. *Id.*

This does not mean that criminal defendants have no recourse in challenging sentences they believe are excessive. *Id.* Although a trial court may have acted within its lawful discretion in determining a sentence, Appellate Rule 7(B) provides that the appellate court may revise a sentence authorized by statute if the appellate court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Id.* It is on this basis alone that a criminal defendant may now challenge his sentence where the trial court has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing the particular sentence that is supported by the record, and the reasons are not improper as a matter of law. *Id.*

A. *Aggravator*

Lowery first contends that the trial court's consideration of aggravators was improper. Specifically, Lowery asserts that (1) the trial court's statement that Lowery was a major producer and seller of marijuana and had been for several years is not supported by the record; (2) the allegation that Lowery was expanding his business by

building a three-story garage is unsupported by the evidence; and (3) there is no evidence for the claim that Lowery enhanced his crop.

With respect to the length and size of his operations, Lowery points to testimony from his ex-wife indicating that the handwritten notes found in the second rental property referenced Lowery's hobby of breeding Discus fish. However, Detective Beetz testified, and was found credible by the trial court, that the sixty-day intervals corresponded with a two-stage growth cycle of the plants. Based on this two-stage growth cycle, detective Beetz calculated that Lowery grossed $52,000 every sixty days or $300,000 per year. Detective Beetz noted that this amount corresponded closely with the deposits Lowery had made in his bank account between June 2009 and June 2010. Essentially, Lowery's argument amounts to an invitation to reweigh the evidence, which we cannot do.

Next, Lowery disputes the trial court's conclusion that the construction of a three-story garage pointed to an expansion of his operation. However, the record indicates that a large amount of unused equipment needed for the manufacture of marijuana was located in the rental properties. Furthermore, the garage was a large three-story, three-car garage of which two floors were built, plumbed, and wired in a similar manner to the residences used by Lowery in the production of marijuana. Based on this evidence, the trial court reasonably inferred that Lowery was trying to expand his operation.

Finally, Lowery contests the trial court's conclusion that he was enhancing his crop by trying to increase the plants' THC level. Detective Beetz testified that the marijuana plants were of high quality and had large buds that had high levels of THC. In addition, the record reflects that Lowery had a special ventilation system in both

residences, a hidden growth room in one house, and used CO_2, grow lights and other processes to enhance the strength and production of the marijuana. Therefore, the trial court's aggravator was reasonably supported by the evidence presented.

In sum, we conclude that the trial did not abuse its discretion in its determination of the aggravators.

B. *Nature and Character*

With respect to Lowery's argument pursuant to Ind. Appellate Rule 7(B), we find Lowery's sentence of eight years appropriate in light of the nature of the crime and his character.

Turning to the nature of Lowery's crime, we note the sheer size, length, and commercial nature of Lowery's operation. Not only did the plants yield a crop every sixty days, this process had been going on for several years, and a considerable amount of specialized equipment was involved. Detective Beetz found nearly ten pounds of marijuana individually packaged and ready for sale, with another eleven pounds drying. As noted by the State, Lowery was a sophisticated grower, cultivating enriched and highly potent marijuana buds. In his operation, Lowery used two rental properties that he owed and apparently was ready to branch out into a three-story garage which he was building on a third property.

With respect to his character, we note that even though his criminal history is almost non-existent—a charge for possession and consumption of alcohol—he had been engaged in a significant growing operation which had put marijuana on the street in regular intervals and for a prolonged period of time. There was no indication that

Lowery wanted to stop his life of crime; rather, to the opposite, evidence reflects that he sought to ramp up the size of his operation. Although Lowery points to his past as a good father for his children and his remorse, we cannot conclude that these character traits override the impact the availability of Lowery's marijuana had on the community.

Additionally we note that even though Lowery's co-defendant, Fellan, received a lesser sentence, we have previously held that sentence review is independent to each defendant and we "need not compare" sentences between co-defendants. *See Dennis v. State*, 908 N.E.2d 209, 214 (Ind. 2009).

We affirm the trial court's imposition of an eight year sentence.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion in sentencing Lowery.

Affirmed.

FRIEDLANDER, J. and MATHIAS, J. concur