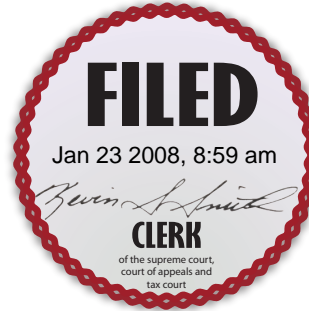


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

**DONALD C. SWANSON, JR.**  
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**  
Attorney General of Indiana

**JOBY D. JERRELLS**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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CHARLTON L. SMITH,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 02A04-0707-CR-420

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APPEAL FROM THE ALLEN SUPERIOR COURT  
The Honorable Kenneth R. Scheibenberger, Judge  
Cause No. 02D04-0502-FA-6

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**January 23, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## Case Summary

Appellant-Defendant Charlton L. Smith (“Smith”) challenges the twenty-year sentence imposed upon him following his plea of guilty to Dealing in Cocaine, a Class A felony.<sup>1</sup> We remand.

### Issue<sup>2</sup>

Smith presents a single issue for review: whether the trial court considered Smith’s withdrawn plea of guilty to possession of a firearm, a charge later dismissed, to establish that the sentence imposed for the instant offense was non-suspendible.

### Facts and Procedural History

On February 9, 2005, the State charged Smith with Dealing in Cocaine, Dealing in a Schedule I, II, or III Controlled Substance,<sup>3</sup> Carrying a Handgun Without a License,<sup>4</sup> and Possession of Marijuana.<sup>5</sup> He pled guilty to Dealing in a Schedule I, II, or III Controlled Substance and Carrying a Handgun Without a License. The State moved to withdraw the plea agreement, which the trial court granted over Smith’s objection.

On April 30, 2007, Smith pled guilty to Dealing in Cocaine and the State moved to dismiss the remaining counts. On June 1, 2007, the trial court sentenced Smith to twenty years imprisonment. He now appeals.

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<sup>1</sup> Ind. Code § 35-48-4-1.

<sup>2</sup> Smith also makes a cursory allegation that his sentence is inappropriate and should be revised pursuant to Indiana Appellate Rule 7(B), which provides that we “may revise a sentence authorized by statute 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.” However, the trial court imposed the minimum sentence authorized by statute. See Ind. Code § 35-50-2-4. Indiana Appellate Rule 7(B) does not authorize this Court to order a lesser sentence than that which Smith has already received.

<sup>3</sup> Ind. Code § 35-48-4-2.

<sup>4</sup> Ind. Code § 35-47-2-23.

## Discussion and Decision

At the time Smith committed his offense, Indiana Code Section 35-50-2-4 provided that a person who committed a Class A felony should be imprisoned for a fixed term of thirty years, with not more than twenty years added for aggravating circumstances and not more than ten years subtracted for mitigating circumstances. Smith received the minimum sentence of twenty years. The trial court declined to suspend any portion of the sentence. Smith now argues that the trial court improperly considered his withdrawn plea of guilty to Carrying a Handgun Without a License in reaching its decision on suspension.

Indiana Code Section 35-50-2-2 provides that the trial court may suspend any part of a sentence for a felony, except as provided by statute. One statutory exception to sentence suspension beyond the minimum term of years (twenty years in this case) is dealing in cocaine “if the court finds the person possessed a firearm at the time of the offense[.]” Ind. Code § 35-50-2-2(b)(4)(O).

The trial court refused to consider suspension of part of Smith’s sentence, explaining:

Court: A gun was involved in this situation. It was in the car that you were in. ... And that makes this non-suspendable in my opinion. ... I’m taking the position that I have no discretion, that there was a gun involved.

(Tr. 13-14.) Subsequently, the following exchange took place:

Court: And you also plead [sic] guilty to Carrying a Handgun, too.

Smith: No, I didn’t.

Court: Yeah, you did.

Smith: No, I didn’t.

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<sup>5</sup> Ind. Code § 35-48-4-11.

Court: In that old plea agreement, you plead [sic] guilty to Counts II and III, sport. Yeah, you did.

(Tr. 15.) Indiana Code Section 35-35-1-4(d) provides: “A plea of guilty, or guilty but mentally ill at the time of the crime, which is not accepted by the court or is withdrawn shall not be admissible as evidence in any criminal, civil, or administrative proceeding.”

Accordingly, the trial court could not consider Smith’s withdrawn guilty plea as evidence establishing his possession of a firearm during his commission of Dealing in Cocaine so as to render the sentence for the Dealing offense to be non-suspendable. Remand for consideration of suspension is appropriate in these circumstances. See Henning v. State, 477 N.E.2d 547, 553 (Ind. 1985) (remanding for the sole purpose of considering suspension where “it is apparent that the trial court was under an erroneous conception that precluded his consideration of suspending any part of [the] sentence.”)

Remanded.

NAJAM, J., and CRONE, J., concur.