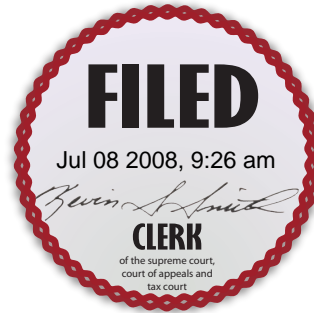


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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KRISTOFER KEITH FUELLING, )  
a/k/a KRISTOPHER KEITH FUELLING, )  
 )  
Appellant-Defendant, )  
 )  
vs. )  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

No. 65A01-0712-CR-607

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APPEAL FROM THE POSEY CIRCUIT COURT  
The Honorable James M. Redwine, Judge  
Cause No. 65C01-0701-FA-12

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**July 8, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## Case Summary

Appellant-Defendant Kristofer Fuelling appeals his conviction for Dealing in Methamphetamine, as a Class A felony.<sup>1</sup> We affirm the conviction of Dealing in Methamphetamine and remand with instructions to vacate the two Class C felony counts for Possession of Methamphetamine.<sup>2</sup>

## Issues

- I. Whether the trial court erred in admitting evidence of prior drug dealing activity;
- II. Whether the evidence was sufficient to establish constructive possession of the methamphetamine with the intent to deliver; and
- III. We raise *sua sponte* whether convictions entered by the trial court for two counts of Possession of Methamphetamine, both as Class C felonies, subjected Fuelling to double jeopardy.

## Facts and Procedural History<sup>3</sup>

For two days starting January 23, 2007, Kim Topper, Fuelling's former fiancée, rented a hotel room in Mt. Vernon, Indiana. Topper planned on staying in the room along with Latisha Ingram, Stephen Eaton, and Fuelling. When they arrived at the hotel, the group helped Ingram bring in her things. Among the items Ingram carried in was a purple Crown Royal bag. Ingram later retrieved the Crown Royal bag that contained methamphetamine and a glass pipe among other things. The group then smoked some of the methamphetamine.

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<sup>1</sup> Ind. Code § 35-48-4-1.1.

<sup>2</sup> Ind. Code § 35-48-4-6.1(b).

<sup>3</sup> We remind counsel for Appellant of the obligation under Indiana Appellate Rule 46(A)(10) to include a copy of the sentencing order in the Appellant's Brief.

Later that day, Fuelling's girlfriend, Kristin Willis joined the group. That evening, Ingram retrieved the Crown Royal bag from the nightstand drawer, and everyone smoked methamphetamine except for Willis. The next day the individuals sporadically occupied the room but returned that evening and spent the night.

Acting on a tip, the Posey County Sheriff's Department began surveillance of the hotel room on January 25, 2007. Fuelling was observed pulling into the hotel parking lot in the afternoon, entering the hotel room, and leaving approximately thirty minutes later. Deputy Sheriff Mark Saltzman called the Mt. Vernon Police Department requesting that they locate and stop Fuelling's car. When Fuelling was stopped by police officers, a K-9 unit was utilized, and the dog indicated at the passenger side of the vehicle. However, no drugs were found in the car. No arrests were made at that time.

The officers then returned to the Mt. Vernon Inn and knocked on the door of the room that was under surveillance, room 219. They spoke with Ingram, and she gave consent for the room to be searched. The items recovered from the search included the Crown Royal bag containing 7.82 grams of methamphetamine, a small knife, a set of digital scales, a pair of scissors, a pack of rolling papers, an alligator clip, a fragment of a Bic pen, a green cigar filler tube, a razor blade, plastic baggies, zip ties, cut-corner baggies containing methamphetamine, an eyeglass case, and three glass pipes. Also recovered were \$207 from Ingram's purse, two butane torches, four baggies with cut corners, men's and women's clothing, and a twenty-two caliber handgun owned by Fuelling's father.

Shortly thereafter, Fuelling was arrested and his person searched. Two hotel magnetic

cards were found on Fuelling as well as \$60. One of the keys was programmed for room 217 and the other for room 219. The police then searched room 217 and no contraband was found.

When police questioned Fuelling, he initially denied having received drugs from Ingram. In a second interview, Fuelling admitted to knowing of Ingram's use and selling of drugs. He also admitted to being a "middle man" for Ingram in the past. However, Fuelling denied selling any drugs during the stay at the motel.

On January 26, 2007, the State charged Fuelling with Dealing in Methamphetamine, as a Class A felony, Possession of Methamphetamine, as a Class C felony,<sup>4</sup> and Possession of Methamphetamine while possessing a firearm, a Class C felony. After a jury trial, Fuelling was found guilty as charged and the trial court entered judgments of conviction on all counts. In imposing sentence, the trial court's order specified that "[a]ny sentence imposed on Counts 2 and 3 merge with Count 1 for the purpose of sentencing." Appellant's Appendix at 155. For Dealing in Methamphetamine, the trial court sentenced Fuelling to twenty years at the Department of Correction.

Fuelling now appeals.

## **Discussion and Decision**

### **I. Admission of Evidence**

First, Fuelling contends that the trial court erred in admitting the testimony of Kimberly Topper relating to previous incidents where she purchased methamphetamine from Fuelling. Specifically, he argues that this evidence constituted character evidence prohibited

under Indiana Evidence Rule 404(b). A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. Gauvin v. State, 878 N.E.2d 515, 520 (Ind. Ct. App. 2007), trans. denied. An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Id. This Court will only reverse for an error in a ruling on admissibility if the error is inconsistent with substantial justice. Ind. Trial Rule 61.

During the direct examination of Kimberly Topper by the prosecutor, the following exchange took place:

Q: How about Kris Fuelling? Prior to this period of time, have you used methamphetamine with Kris Fuelling before?

A: Yes

Q: And had you bought methamphetamine from Kris Fuelling before?

Defense: Your Honor, I would object. I don't know the relevance of that.

Court: [Prosecutor]?

Prosecutor: Judge, I believe that it is relevant due to the crimes charged here today.

Defense: They haven't charged him with that offense. They could do that, I guess, if they wanted, but they haven't done that, Your Honor.

Prosecutor: I charged him with possession with intent to deliver,

Judge: I think that goes to his intent.

.....

Q: How long from prior to the January 25<sup>th</sup> date had you been using

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<sup>4</sup> Ind. Code § 35-48-4-6.1(b)(1).

methamphetamine?

A: A year-and-a-half.

....

Q: You indicated that you had used methamphetamine in the past with Kris Fuelling. Had you always gotten that methamphetamine from Latisha, or had you gotten it from other places?

A: Other places.

Q: How long did you know Latisha?

A: A month-and-a-half to two months.

Q: So for a year and four or five months, you had a different supply for you methamphetamine?

A: Yes.

Q: Was one of those persons Kris Fuelling?

A: Yes.

Trial transcript at 26-27. After permitting the State to lay more foundation, the trial court overruled Fuelling's relevancy and uncharged acts objections. On appeal, Fuelling challenges the admission of the testimony as being inadmissible under Indiana Evidence Rule 404(b) because the drug dealing constituted prior uncharged bad acts. See Gillespie v. State, 832 N.E.2d 1112, 1115 n.4 (Ind. Ct. App. 2005) (Where defendant objected to evidence on grounds of relevance and that testimony was evidence of other offenses not charged, the defendant had preserved appellate review of a claim of error based on Indiana Evidence Rule 404(b)).

Indiana Evidence Rule 404(b) prohibits the admission of evidence of other crimes,

wrongs, or acts to prove the character of the defendant to show conformity with their past behavior. However, such evidence may be admissible for “other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]” Evid. Rule 404(b). The effect of Rule 404 (b) is that evidence is excluded only when it is introduced to prove the “forbidden inference” of demonstrating the defendant’s propensity to commit the charged crime. Sanders v. State, 724 N.E.2d 1127, 1130-1131 (Ind. Ct. App. 2000). “In determining the admissibility of evidence under Rule 404(b), the trial court must: (1) determine whether the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant’s propensity to commit the charged act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Indiana Evidence Rule 403.” Southern v. State, 878 N.E.2d 315, 321 (Ind. Ct. App. 2007), trans. denied. Here, the trial court did not elaborate on its 404(b) analysis, so we apply the above analytical framework to the evidence at issue.

Fuelling concedes that he asserted at trial that his intent in possessing methamphetamine was for use rather than for delivery. Thus, Fuelling claimed a contrary intent than that needed for the crime of dealing methamphetamine. The intent exception of 404(b) is only available when a defendant goes beyond merely denying the charged culpability and affirmatively presents a claim of particular contrary intent. Wickizer v. State, 626 N.E.2d 795, 799 (Ind. 1993). When a defendant alleges in trial a particular contrary intent, the State may respond by offering evidence of prior crimes, wrongs, or acts to the extent genuinely relevant to prove the defendant’s intent at the time of the charged offense.

Id.

Here, the State presented evidence that Fuelling had sold Topper, one of the individuals present at the hotel room, methamphetamine during her year and one-half period of using the drug. These prior acts of dealing are relevant to Fuelling's intent as to his possession of methamphetamine as the prior acts involved the same drug, sold to a friend of Fuelling who was present at the hotel, and that the prior acts were not remote in time to the date of the offense.

Next, we must determine whether the probative value of this relevant evidence is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." Ind. Evidence Rule 403. Fuelling argues that the probative value of the evidence is outweighed by its prejudicial effect. We disagree. In light of the other evidence of the large quantity of methamphetamine present at the hotel and that some of it was packaged for sale, the probative value of this evidence is greater than its prejudicial effect as it supports other circumstantial evidence that Fuelling's intent was to deal methamphetamine rather than just consume it. Therefore, the trial court did not abuse its discretion in admitting Topper's testimony.

## II. Sufficiency of the Evidence

Next, Fuelling contends that the evidence was insufficient to support his conviction for Dealing in Methamphetamine. In addressing a claim of insufficient evidence, we do not reweigh the evidence nor do we reevaluate the credibility of witnesses. Rohr v. State, 866



N.E.2d 242, 248 (Ind. 2007), reh'g denied. We consider only the probative evidence and reasonable inferences supporting the judgment and will affirm the conviction unless “no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.” Brown v. State, 868 N.E.2d 464, 470 (Ind. 2007) (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)).

To convict Fuelling, as charged, the State had to prove that Fuelling (1) knowingly possessed methamphetamine (2) weighing three grams or more (3) with the intent to deliver it. See I.C. § 35-48-4-1.1. Fuelling argues that the evidence presented is insufficient to demonstrate that he possessed the 7.82 grams of methamphetamine or that he had the intent to deliver it.

#### A. Constructive Possession

Possession of contraband can be characterized as either actual or constructive. Henderson v. State, 715 N.E.2d 833, 835 (Ind. 1999). Because Fuelling did not actually possess the methamphetamine when it was recovered in the hotel room, the State was required to prove that Fuelling constructively possessed the contraband. A defendant is in the constructive possession of drugs when evidence demonstrates that the defendant has both (1) the intent to maintain dominion and control over the drugs and (2) the capability to maintain dominion and control over the drugs. Gee v. State, 810 N.E.2d 338, 340 (Ind. 2004). Constructive possession of narcotics need not be exclusive, and the items may be possessed jointly by two or more persons without showing that any one person had actual physical control. Russell v. State, 182 Ind. App. 386, 402, 395 N.E.2d 791, 801 (1979).

To establish that the defendant was capable of maintaining dominion and control, the State must demonstrate that the defendant was able to reduce the contraband to his personal possession. Iddings v. State, 772 N.E.2d 1006, 1015 (Ind. Ct. App. 2002), trans. denied. “Proof of a possessory interest in the premises in which contraband is found is adequate to show the capability to maintain control and dominion over the items in question.” Id. This is the case whether possession of the premises is exclusive or not. Gee, 810 N.E.2d at 341.

Here, Fuelling had the keys to the hotel room to which others had access, providing him unfettered access to the room and its contents. Furthermore, Fuelling stayed at the hotel room for two days. This evidence demonstrates that Fuelling had the capability to maintain control and dominion over the 7.82 grams of methamphetamine found in the hotel room because he had non-exclusive possessory interest in the premises.

When control of the premises where drugs are found is not exclusive, the inference of intent to maintain dominion and control over the drugs “must be supported by additional circumstances pointing to the defendant’s knowledge of the nature of the controlled substances and their presence.” Gee, 810 N.E.2d at 341 (quoting Lampkins v. State, 682 N.E.2d 1268, 1275 (Ind. 1997)). Such additional circumstances include: (1) incriminating statements made by the defendant; (2) attempted or furtive gestures; (3) location of substances like drugs in settings that suggest manufacturing; (4) proximity of the contraband to the defendant; (5) location of the contraband within the defendant’s plain view; and (6) the mingling of the contraband with other items owned by the defendant. Id. To prove the element of intent, the State must demonstrate the defendant’s knowledge of the presence of

the contraband. Donnegan v. State, 809 N.E.2d 966, 976 (Ind. Ct. App. 2004), trans. denied.

Here, the State submitted into evidence Fuelling's interviews with police after his arrest. Before each interview, Fuelling was read his Miranda rights. During the second interview, Fuelling admitted that he knew that Latisha had brought methamphetamine and saw her carry it into the hotel room. He further admitted to later smoking some of the methamphetamine with the others in the hotel room. This along with Fuelling's non-exclusive possession of the room is sufficient evidence to support the conclusion that Fuelling constructively possessed the methamphetamine.

#### B. Intent to Deliver

Because intent is a mental state, a trier of fact must generally resort to the reasonable inferences arising from the surrounding circumstances to analyze whether the defendant had the requisite intent. Wilson v. State, 754 N.E.2d 950, 957 (Ind. Ct. App. 2001). Possession of a large quantity of drugs, money, plastic bags, and other paraphernalia is circumstantial evidence of intent to deliver. Id. Moreover, the larger the quantity of drugs a person possesses, the stronger the inference that he intended to deliver it and not consume it personally. Id.

Here, intent to deliver can be inferred from the amount of contraband found as well as some of it being packaged in seven cut-corner baggies. Officer John Montgomery testified that plastic baggies and zip or twist ties are used to package methamphetamine by cutting the corners off the baggies and using the twist tie to close the end. The majority of the cut-corner baggies contained between .26 and .36 grams of methamphetamine, except for one weighing

.90 grams. These weights are consistent with how quantities of methamphetamine are packaged for sale, according to the testimony of Detective Mark Saltzman, indicating that a user would buy in quantities of a quarter, half, or whole gram. A set of digital scales, plastic baggies and zip ties were also recovered from the Crown Royal bag where the methamphetamine was found. A larger plastic bag was found to contain 7.82 grams of methamphetamine. We conclude that a jury could infer intent to deal from this evidence that Fuelling was in constructive possession of an amount of methamphetamine greater than ordinarily carried by an individual user and that the drug was packaged for sale.

### III. Double Jeopardy

Finally, we raise *sua sponte* whether Fuelling's two Class C felony convictions for Possession of Methamphetamine violate the constitutional prohibition against double jeopardy. Here, the trial court entered judgments of conviction for all three counts. In imposing sentence, the trial court's order specified that "[a]ny sentence imposed on Counts 2 and 3 merge with Count 1 for the purpose of sentencing." Appellant's Appendix at 155. Presumably this was done based on the noted comment by defense counsel that Counts 2 and 3 in addition to Count 1 would constitute double jeopardy. A trial court's act of merging, without also vacating the conviction, is not sufficient to cure a double jeopardy violation.<sup>5</sup> A double jeopardy violation occurs when judgments of conviction are entered and cannot be

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<sup>5</sup> In Green v. State, our Supreme Court held that "a merged offense for which a defendant is found guilty, but on which there is neither a judgment nor a sentence, is 'unproblematic' as far as double jeopardy is concerned." Green v. State, 856 N.E.2d 703, 704 (Ind. 2006). The facts before us are distinguishable from Green because the trial court entered judgment on all three counts in its "Judgment of Conviction" order. App. at 12. The entry of judgment of conviction twice for the same offense is a violation of a defendant's constitutional rights. Id. Therefore, the act of merging the previously entered judgments at the sentencing hearing did not cure the double jeopardy violation.

remedied by the “practical effect” of concurrent sentences or by merger after conviction has been entered. Morrison v. State, 824 N.E.2d 734, 741-42 (Ind. Ct. App. 2005), trans. denied. The trial court’s sentencing order acknowledged that judgments of conviction had been entered on all three counts yet chose to “merge” the sentences rather than vacating the convictions for Counts 2 and 3. We therefore remand this cause to the trial court with an order to vacate Fuelling’s Class C convictions for Possession of Methamphetamine.

### **Conclusion**

In sum, the trial court did not error in admitting evidence regarding Fuelling’s past drug dealing. We also conclude that there was sufficient evidence to support his conviction for Dealing in Methamphetamine, as a Class A felony. However, we remand to the trial court with instruction to vacate Fuelling’s convictions for Possession of Methamphetamine.

Affirmed and remanded with instructions.

FRIEDLANDER, J., and KIRSCH, J., concur.