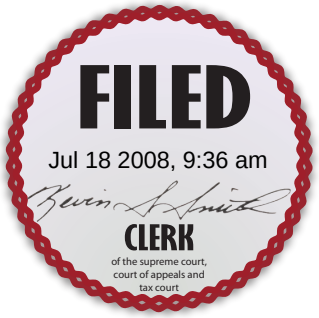

ATTORNEY FOR APPELLANT:

RUTH JOHNSON
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

RICHARD C. WEBSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ERIC ANTHONY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0801-CR-29
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William Young, Judge
Cause No. 49G20-0101-PC-9395

July 18, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Eric Anthony ("Anthony") pleaded guilty in Marion Superior Court to Class A felony dealing in cocaine. He was sentenced to a term of thirty years in the Department of Correction. Anthony appeals, and raises three issues:

I. Whether the factual basis was sufficient to support Anthony's plea of guilty to Class A felony dealing in cocaine;

II. Whether the trial court abused its discretion in denying Anthony's request to withdraw his guilty plea; and

III. Whether Anthony's sentence was appropriate.

We affirm.

Facts and Procedural History

On January 11, 2001, Anthony was pulled over on Interstate 70 near Indianapolis by Indiana State Police Trooper Dean Wildauer ("Trooper Wildauer") while a passenger in a vehicle driven by Richard Williams ("Williams"). Trooper Wildauer approached the vehicle and spoke with Williams. He smelled the strong odor of marijuana coming from the vehicle. Trooper Wildauer called for backup, and when it arrived he removed Anthony and Williams from the vehicle and performed a pat-down search.

It was a cold, dark night, and neither man was wearing a coat. Trooper Wildauer retrieved the first of two coats from the back of the vehicle. Williams indicated that the first coat belonged to him. Trooper Wildauer then retrieved the second coat. Anthony claimed that coat after Trooper Wildauer asked. Trooper Wildauer noted that the second coat seemed to contain a few items and searched it for weapons. In the first pocket, he found a wallet containing Anthony's identification and in the other pocket, he found a paper sack that contained a plastic bag of chunky, white powder that was later identified

as four ounces of cocaine. Trooper Wildauer arrested Anthony and Williams and advised them of their Miranda rights.

Anthony and Williams were transported to a nearby state police post. While there Anthony told Trooper Wildauer that they had purchased the cocaine in Chicago for $2,300 and that they were going to Ohio. Tr. pp. 41-42. Anthony told Trooper Wildauer that the amount of cocaine was four ounces. Tr. p. 42.

On January 11, 2001, the State charged Anthony with Class A felony conspiracy to commit dealing in cocaine, Class A felony dealing in cocaine, Class C felony possession of cocaine, and Class A misdemeanor possession of marijuana. On May 2, 2002, the jury trial began. A jury was chosen and the State began its presentation of evidence. Following the testimony of Trooper Wildauer, the State's first witness, Anthony agreed to plead guilty to Class A felony dealing in cocaine with a sentence cap of thirty years.

On June 4, 2002, prior to sentencing, Anthony orally moved to withdraw his guilty plea. The trial court denied the motion and proceeded to sentence Anthony to the presumptive term of thirty years.

On June 9, 2003, Anthony filed a pro se petition for post-conviction relief. The State filed its answer on June 25, 2003. On December 16, 2004, Anthony filed a motion to dismiss his petition for post-conviction relief and petitioned for appointment of counsel to pursue proceedings under Indiana Post-Conviction Rule 2. On May 26, 2006, Anthony petitioned the trial court to file a belated notice of appeal. The trial court granted that petition. Anthony filed his belated notice of appeal on July 20, 2006.

On November 17, 2006, Anthony filed, with this court, a verified motion for leave to file a Davis petition in the trial court, we granted on December 11, 2006. On April 19, 2007, Anthony filed his Davis petition in the trial court. On May 30, 2007, the trial court held a Davis petition hearing. On December 12, 2007, the trial court entered findings of fact and conclusions of law, and denied Anthony's petition.

Anthony appeals.

I. Anthony's Petition for Post-Conviction Relief

The purpose of post-conviction proceedings is to afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. Reed v. State, 856 N.E.2d 1189, 1194 (Ind. 2006). These proceedings are not "super appeals" where issues can be raised which the convicted persons failed to raise at trial or on direct appeal. Id. Post-conviction proceedings are civil in nature, and petitioners bear the burden of establishing their grounds for post-conviction relief by a preponderance of the evidence. Smith v. State, 822 N.E.2d 193, 198 (Ind. Ct. App. 2005), trans. denied.

An appeal of the denial of post-conviction relief is an appeal from a negative judgment. Allen v. State, 791 N.E.2d 748, 752 (Ind. Ct. App. 2003), trans. denied. "[T]o the extent his appeal turns on factual issues, the petitioner must convince this court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction relief court." Smith, 822 N.E.2d at 198 (citation omitted). "It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law." Godby v. State, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004),

trans. denied. We will accept the post-conviction court's findings of fact unless they are clearly erroneous, yet we do not give deference to the court's conclusions of law. Allen, 791 N.E.2d at 752.

On appeal from his denial of his petition for post-conviction relief, Anthony argues that the trial court failed to establish a sufficient factual basis for his guilty plea. The trial court's determination of an adequate factual basis is presumed to be correct. Butler v. State, 658 N.E.2d 72, 76 (Ind. 1995). Anthony pleaded guilty to Class A felony dealing in cocaine. The charging information alleged that Anthony "did knowingly possess with intent to deliver a controlled substance, that is: cocaine, in an amount greater than three (3) grams." Appellant's App. p. 118.

Importantly, Anthony's guilty plea hearing took place after the testimony of the arresting officer, complete with statements made by Anthony regarding the ownership of the cocaine and the likely use of four ounces of cocaine. The trial court asked Anthony if Trooper Wildauer's testimony was substantially correct and Anthony responded affirmatively.

Anthony's next argument concerns whether he had possession of the cocaine as a matter of law. Anthony did not have actual possession since the cocaine was found in his coat in the back seat of the vehicle. However, Anthony did have constructive possession. To prove constructive possession, the State must show that Anthony had both the intent to maintain dominion and control and the capability to maintain dominion and control over the contraband. Goliday v. State, 708 N.E.2d 4, 6 (Ind. 1999). If the control of the contraband is non-exclusive then "intent to maintain dominion and control may be

inferred from additional circumstances that indicate the person knew of the presence of the contraband." Id.

After Anthony was Mirandized, he told Trooper Wildauer that Anthony and Williams had picked up the cocaine in Chicago, that he was hauling it for "himself," that he paid $2300 for four ounces of cocaine, and that he got a "good deal in Chicago." Tr. pp. 41-43. It is therefore reasonable to infer that Anthony had constructive possession of the cocaine.

For all these reasons, we conclude that a sufficient factual basis existed for Anthony's guilty plea.

Anthony next argues that the trial court abused its discretion when it denied his request to withdraw his guilty plea. Under Indiana Code section 35-35-1-4(b) (2004), a motion to withdraw a guilty plea filed after the guilty plea hearing but before sentencing "shall be in writing and verified." Anthony orally moved to withdraw his plea. Therefore, Anthony failed to comply with the statutory requirements regarding the withdrawal of a guilty plea and waived this issue. Indiana Code § 35-35-1-4 (2004); Flowers v. State, 528 N.E.2d 57, 59 (Ind. 1988). Also, since we have determined that a sufficient factual basis existed to support the guilty plea, the trial court's denial of Anthony's motion to withdraw his guilty plea was not an abuse of discretion and did not constitute manifest injustice. See Butler, 658 N.E.2d at 77 (Ind. 1995).

II. Direct Appeal Arguments

Finally, Anthony argues, on direct appeal, that the sentence imposed was inappropriate in light of the nature of the offense and the character of the offender.

Under Indiana Appellate Rule 7(B), "The Court shall not revise a sentence that is authorized by statute unless the sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender." The trial court did not find any mitigating or aggravating factors when it entered the presumptive sentence. "The presumptive sentence is meant to be the starting point for any court's consideration of the sentence which is appropriate for the crime committed." Hildebrandt v. State, 770 N.E.2d 360, 361 (Ind. Ct. App. 2002), trans. denied.[1] Since the trial court imposed the presumptive sentence, it did not need to identify its reasons for imposing that sentence. See Lander v. State, 762 N.E.2d 1208, 1215 (Ind. 2002).

The sentence is not inappropriate in light of the nature of the offense and character of the offender. Anthony was transporting four ounces of cocaine across state lines with the intent to sell the cocaine in either a powder form or as "crack" cocaine. Also, he has had a number of drug-related convictions. Moreover, Anthony agreed to a guilty plea agreement that capped his potential sentence at thirty years, which was the presumptive sentence at the time.[2] Under these facts and circumstances, we conclude that Johnson's sentence is not inappropriate based on the nature of the offense and the character of the offender.

Affirmed.

MAY, J., and VAIDIK, J., concur.

[1] Anthony was charged on January 11, 2001 well before change in our sentencing statute which became effective on April 25, 2005.

[2] See Childress v. State, 848 N.E.2d 1073, 1081 (Ind. 2006) (Dickson, J., concurring) ("A defendant's conscious choice to enter a plea agreement that limits the trial court's discretion to a sentence less than the statutory maximum should usually be understood as strong and persuasive evidence of sentence reasonableness and appropriateness.")