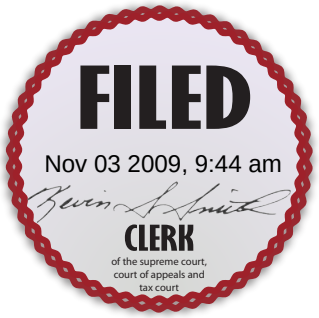

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IN THE
COURT OF APPEALS OF INDIANA

SHILOH MACON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A04-0907-CR-391
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable J. Jerome Frese, Judge
Cause No. 71D03-0701-FB-3

November 3, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Shiloh Macon appeals his convictions and sentences for three counts of Dealing in Cocaine, as Class B felonies, following a jury trial. Macon presents two issues for review, namely:

1. Whether the evidence is sufficient to support his convictions.

2. Whether his sentence is inappropriate in light of the nature of the offenses and his character.

We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

On April 12, 2006, Officer Shay Bailey, then an undercover officer in the South Bend Police Department narcotics unit, followed up on a lead regarding the sale of cocaine by arranging to purchase cocaine from someone calling himself "J.D." Later that day, Officer Bailey met with "J.D." at a local Phillips 66 gas station. The officer telephoned "J.D." to advise that he had arrived, and a short time later a black four-door Chevy Blazer pulled into the gas station. Officer Bailey asked the person in the passenger seat "who they were [sic] and if it was the person, and they [sic] said yes." Transcript at 177.

The Blazer's passenger dropped a small clear plastic bag containing a rock-like substance into Officer Bailey's hand, and Officer Bailey paid him $100 using previously recorded bills. The passenger also gave Officer Bailey a note on which was written the name "Stak" and a telephone number. The passenger said, "if you need me again call that." Id. at 180. Later laboratory testing showed the rock-like substance to be .39 grams of cocaine.

On May 5, 2006, Officer Bailey called "the same phone number that [he] had previously . . . and arranged a drug transaction." Transcript at 184. Specifically, Officer Bailey confirmed that he was talking to "Stak," then stated that he wanted to buy "a quarter," meaning a quarter ounce of cocaine. Id. at 186. "Stak" set the meeting place to be at the same Phillips 66 station where the April 12 sale had occurred. A few minutes after Officer Bailey arrived there, a silver SUV pulled up beside him. In the passenger seat of the SUV was the same person who had sold cocaine to him on April 12.

The SUV pulled up beside Officer Bailey's vehicle. Officer Bailey and the SUV's passenger each held their hands out of their car windows. The passenger dropped a clear plastic bag containing a rock-like substance into Officer Bailey's hand. Officer Bailey complained that the bag was light, but the passenger disagreed. Officer Bailey paid the passenger $250 using previously recorded bills. The officer noted the license plate number of the SUV before it left. Back at the police station, he checked the plate number of the silver SUV and learned that the vehicle was registered to Macon's father, Calvin Macon, of 1959 Piedmont Way in South Bend. Laboratory analysis of the rock-like substance in the plastic bag showed that the bag contained 2.28 grams of cocaine.

Sometime after May 5, Officer Bailey obtained a photograph of Shiloh Macon from the Bureau of Motor Vehicles ("BMV") and positively identified Macon as the person from whom he had bought cocaine on April 12 and May 5. Macon's BMV records showed his address to be 1959 Piedmont Way in South Bend.

On May 11, 2006, Officer Bailey drove to the same Phillips 66 station for another arranged drug purchase. A black four-door Pontiac with three people inside pulled up

beside Officer Bailey's vehicle. Macon, the person from whom the officer had purchased cocaine on April 12 and May 5, was in the back seat of the Pontiac. Macon exited the Pontiac and entered the officer's car, sitting in the front passenger seat. He handed Officer Bailey a clear plastic bag containing a rock-like substance, and Officer Bailey gave him $100 in previously recorded bills. Subsequent laboratory analysis of the rock-like substance in the plastic bag showed that the bag contained .42 grams of cocaine.

On January 4, 2007, the State arrested Macon. On January 6, the State charged him with three counts of dealing in cocaine, as Class B felonies. On August 18, the State filed its motion to amend the information and an amended information, correcting the date alleged in one of the counts. A jury trial was held on November 12-14, 2008. The jury returned verdicts of guilty on the three counts as charged, and the court entered judgment of conviction. Following a hearing on February 11, 2009, the court sentenced Macon in relevant part as follows:

> On Count I, Dealing in Cocaine, Class B felony [the May 5, 2006, offense], the Court sentences the Defendant to fifteen years[']incarceration. Execution of thirteen years [is] suspended [sic]. Court orders the Defendant to serve two years executed in DuComb day reporting with electronic monitoring program. Defendant [is] given one week to enroll. Pre-sentence jail credit is three days. Probation on Count I is for eight years and is to begin after the two[-]year executed sentence is completed. As a condition of probation, the Court orders the Defendant to continue for one year in DuComb day reporting program. Court orders the Defendant's driving privileges suspended for one year.
>
> On Count II, Dealing in Cocaine, Class B felony [the May 11, 2006, offense], the Court sentences the Defendant to ten years[']incarceration. Execution [is] suspended [sic]. This sentence is consecutive to the sentence imposed on Count I. Probationary period is for two years which is consecutive to the probationary period on Count I.

> On Count III, Dealing in Cocaine, Class B felony [the April 12, 2006, offense], the Court sentences the Defendant to ten years[']incarceration. Execution [is] suspended [sic]. This sentence is concurrent with [the sentence imposed on] Count II. Probationary period is for two years which is also concurrent with [the] probationary period on Count II.

Appellant's App. at 5. Macon now appeals.

DISCUSSION AND DECISION

Issue One: Identification Evidence

Macon contends that the evidence is insufficient to support his convictions. When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences that may be drawn from that evidence to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

To prove the offense of dealing in cocaine, as a Class B felony, the State was required to show beyond a reasonable doubt that Macon knowingly delivered cocaine on April 12, May 5, and May 11, 2006. See Ind. Code § 35-48-4-1. Macon argues that "[t]here was insufficient identification evidence from which a reasonable trier of fact could have concluded that [he] committed any of the offenses charged in his three[-]count [i]nformation." Appellant's Brief at 6. We cannot agree.

Macon's argument is based on Officer Bailey's testimony, in which he refers to the person who sold cocaine to him on three occasions by different names. Officer

Bailey testified that he had purchased cocaine from "J.D." on April 12, 2006, and from "Stak" on May 5 and May 11, 2006. He also testified repeatedly that he had purchased the cocaine from the same person on each of those dates. See Transcript at 178 (seller at April 12 transaction was defendant); id. at 95-97 (BMV photograph of Macon was same person from whom officer bought cocaine on April 12, May 5, and May 11, 2006); id. at 201 (same person sold cocaine to officer on April 12, May 5, and May 11, 2006); id. at 211-12 ("[n]o doubt" that booking photograph of Macon shows the person from whom officer bought cocaine on April 12, May 5, and May 11, 2006). And Officer Bailey testified that it was common for people to use street names: "Everybody on the streets goes by a street name. I went by a different name. Everybody else—just Stak or just an initial just so you don't know who they really are, you know, just like I did so nobody really knows who I am." Transcript at 179.

Nevertheless, Macon contends that the identification evidence in this case is insufficient. In support he cites this court's opinion in Scott v. State, 871 N.E.2d 341 (Ind. Ct. App. 2007), trans. denied. There, we held that "identification evidence need not be unequivocal to be sufficient to support a conviction only [sic] when the identification is supported by circumstantial evidence; when such identification is the only evidence, the identification must be unequivocal." Id. at 344. Macon then argues that Officer Bailey's identification testimony was equivocal. For example, Macon notes that Officer Bailey testified

> that the person he [had] purchased cocaine from on April 12, 2006[,] was a person named J.D[.]; that "Stak" and J.D. were two separate people; that on April 7, 2006[,] he thought he was meeting J.D. but was really meeting "Stak[;" and] that he never saw Shiloh Macon before April 12, 2006[.]

Appellant's Brief at 9. But Macon bases his argument on testimony taken out of context. Officer Bailey testified that he had arranged to buy cocaine from "J.D." on April 12. He called the same number to arrange a subsequent purchase on May 5, but the person he called confirmed his identity to be Stak. And Officer Bailey clearly and unequivocally testified that he had purchased cocaine from the same person, whom he later identified as Macon, on April 12, May 5, and May 11, 2006.

Macon also contends that Officer Bailey's testimony is equivocal because the officer testified that J.D. and Stak are two different people. Again, Macon has taken that testimony out of context. On cross-examination, Officer Bailey testified as follows:

> Q: Now, to be clear, this J.D. and this Stak are two different people?
>
> A: Correct.
>
> Q: And we've established that you've identified Stak as being Shiloh Macon?
>
> A: Yes, sir.
>
> Q: And that he sold you cocaine on the 12th, the 5th, and the 11th?
>
> A: Yes, sir.

Transcript at 238-39. Macon's use of multiple aliases causes the transcript to be somewhat confusing. But the testimony in question, when considered together with follow-up questions and answers, as well as Officer Bailey's testimony in its entirety, clearly shows that Officer Bailey identified Macon as the seller of cocaine at each of the three transactions.

Finally, Macon argues that Officer Bailey's identification of him as the person who had sold him cocaine is equivocal because the officer testified both that he had never met Macon before April 12, 2006, and also that he had met Macon on April 7, 2006. Again, Macon takes the officer's testimony out of context. On cross-examination, Officer Bailey testified as follows:

Q: Do you recall meeting with Stak on April 7th of 2006?

A: April 7th? That's prior to the first deal, was it not?

Q: April 7th would be before the April 12th date.

A: Yes.

Q: Okay. So you met with Stak on April 7th of 2006?

A: It would have been our first probably run-in there, yeah. I wasn't sure who he was at the time. Not Stak. It was J.D. that I thought–

Q: Well, at the time, April 7th, you were meeting with this J.D. Correct?

A: Uh-huh.

Q: But it turned out to be Stak?

A: Correct.

Q: And at that point in time he was driving a[] green four[-]door Dodge. Correct?

A: Correct.

Q: With Indiana plate 71U3529?

A: Yes.

Q: And that car came back to an Elizabeth Brown on Donald Street?

A: Yes, sir.

Q: But you testified earlier than you had never seen Shiloh Macon before April 12th, 2006?

A: I was unaware that was Shiloh Macon. I always thought the green Dodge was J.D. That's how they first knew who J.D. was.

Q: Okay. So you go to meet the green Dodge person and you think it's J.D. but it's Stak?

A: Uh-huh.

Q: Is that correct?

A: Yes.

Transcript at 239-41. Considered in context, Officer Bailey's testimony shows that he had initially met Macon on April 7 but knew him as J.D. at that time and that he bought cocaine from the same person, Macon, on April 12, May 5, and May 11. Macon's argument that the officer's testimony was equivocal must fail. We conclude that the totality of Officer Bailey's testimony is sufficient to show that Macon was the person who sold cocaine to Officer Bailey on April 12, May 5, and May 11, 2006. As such, the evidence is sufficient to support Macon's convictions.

Issue Two: Appellate Rule 7(B)

Macon next contends that his sentence is inappropriate in light of the nature of the offenses and his character. Indiana Appellate Rule 7(B) provides that this court "may review a sentence authorized by statute 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." Although Rule 7(B) does not require us to be "very deferential" to a trial court's sentencing decision, we still must give due

consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. "Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id.

Macon contends that the imposition of consecutive sentences is inappropriate in light of his character. But he does not make any argument regarding the nature of the offenses.[1] In Williams v. State, 891 N.E.2d 621 (Ind. Ct. App. 2008), Williams argued only that his sentence was inappropriate in light of the nature of the offenses. By failing to present any argument that his sentence was inappropriate in light of his character, Williams had arguably waived the issue for review. Id. at 633. Nevertheless, we chose to exercise our authority to revise Williams' sentence, guided by our supreme court's opinion in Gregory v. State, 644 N.E.2d 543 (Ind. 1994). Similarly, here, we exercise our authority to revise Macon's sentence to comply with the rule set out in Gregory.

In Gregory, our supreme court stated:

> As the result of a government sting operation, appellant Jeffrey Gregory was convicted of four counts of selling cocaine to the same police informant. The court sentenced him to the presumptive term of thirty years on each count, to be served consecutively. Consecutive sentences are not appropriate when the State sponsors a series of virtually identical offenses.
>
> * * *
>
> In a case with similar facts, we held consecutive sentences manifestly unreasonable where the state sponsors a series of offenses in a

[1] As discussed below, Macon cites Gregory v. State, 644 N.E.2d 543 (Ind. 1994), and Williams v. State, 891 N.E.2d 621 (Ind. Ct. App. 2008), in support of his argument that his sentence is inappropriate under Appellate Rule 7(B). His reliance on those cases could be considered an argument regarding the nature of the offenses. But Macon does not discuss the nature of his particular offenses to show why Gregory and Williams support his contention that his sentence is inappropriate. As a result, Macon does not present a cogent argument under the nature of the offenses prong of Rule 7(B).

> sting operation. Beno v. State (1991), Ind., 581 N.E.2d 922. In Beno, the defendant was convicted of selling cocaine to a police informant on two occasions within a four day period. The buys were virtually identical, involving the same drug and the same informant. The trial count enhanced both sentences to fifty years and ordered them to run consecutively. We revised the sentence to two enhanced terms of fifty years, to run concurrently. Id. at 924.
>
> As in Beno, Gregory sold the same drug to the same informant on several occasions over a short period of time. Presumably, the police could have set up any number of additional transactions, each time adding an additional count against Gregory. While the police may find it necessary to conduct a series of buys, the trial court should be leery of sentencing a defendant to consecutive terms for each count. We hold that on these facts, a sentence of 120 years was inappropriate.

Gregory, 644 N.E.2d at 544, 546.

Williams involved similar facts to those present here. In Williams, an informant purchased cocaine from Williams on two consecutive days while being monitored by police. Based on those purchases, police officers executed a search warrant at Williams' home on the day following the second drug transaction. Based on evidence obtained from the two controlled buys and that seized upon execution of the search warrant, a jury found Williams guilty of two counts of dealing in cocaine, as Class A felonies; one count of possession of cocaine, as a Class A felony; two counts of possession of cocaine, as Class C felonies; and one count of possession of marijuana, as a Class D felony. The trial court sentenced Williams to thirty years for each conviction for dealing in cocaine, as a Class A felony; four years for each conviction for possession of cocaine, as a Class C felony; forty years for possession of cocaine, as a Class A felony; and three years for possession of marijuana, as a Class D felony. The court ordered the two dealing in cocaine convictions and the two Class C felony possession of cocaine convictions to run

concurrent with each other. The court then ordered the thirty-year term, the Class A felony cocaine possession sentence, and the Class D felony marijuana possession sentence to run consecutively, for an aggregate term of seventy-three years.

On appeal, we held that the imposition of consecutive sentences was inappropriate on the facts presented:

> Here, as in Gregory, Beno, and Jones [v. State, 807 N.E.2d 58 (Ind. Ct. App. 2004), trans. denied], Williams' multiple convictions arose from two nearly[]identical, State-sponsored drug transactions within a short period of time, as well as from evidence seized pursuant to a search warrant that was procured solely as a result of those State-sponsored transactions. In each transaction, Williams sold the same drug, cocaine, to the same informant at the same location, and the transactions occurred within twenty-four hours of each other. And within twenty-four hours of the last transaction, the State searched Williams' house, pursuant to the warrant, seizing additional cocaine, along with marijuana.
>
> While Williams' crimes were separate episodes of criminal conduct justifying multiple convictions, nonetheless, Gregory and Jones require that the sentences for each conviction arising from evidence seized after the State began sponsoring the criminal activity to run concurrently. The trial court here ordered the convictions relating directly to the two transactions to be served concurrently, but then ordered those sentences to be served consecutive to the cocaine and marijuana convictions arising from the evidence seized under the search warrant. While Gregory and Jones did not expressly address this issue, the clear import of those decisions—that the State may not "pile on" sentences by postponing prosecution in order to gather more evidence—applies equally to convictions arising from evidence gathered as a direct result of the State-sponsored criminal activity. Accordingly, we hold that ordering consecutive sentences is, on these facts, inappropriate.

Williams, 891 N.E.2d at 634-35. Thus, we revised Williams' sentence, ordering each of his sentences to run concurrent with each other. Id. at 635.

Here, Macon was convicted of three counts of dealing in cocaine, as Class B felonies. Each count was based on Macon's sale of the same drug to the same

undercover officer at the same location, and the sales all occurred within a five-week period. Gregory, Jones, and Williams require that the "sentences for each conviction arising from evidence seized after the State began sponsoring the criminal activity to run concurrently." Williams, 891 N.E.2d at 635. As stated in Gregory and applied in Williams, consecutive sentences are inappropriate where the convictions that arise from virtually identical offenses, committed as the result of a state-sponsored sting operation. Gregory, 644 N.E.2d at 546; Williams, 891 N.E.2d at 635. An illegal sentence is an inappropriate sentence. Therefore, we exercise our authority to revise Macon's sentences and order that his sentences under Count II and Count III run concurrent with each other and with his sentence for Count I. We remand and instruct the trial court, without a hearing, to issue an order and make any other docket entries necessary to sentence Macon accordingly.

Affirmed in part, reversed in part, and remanded.

KIRSCH, J., and BARNES, J., concur.