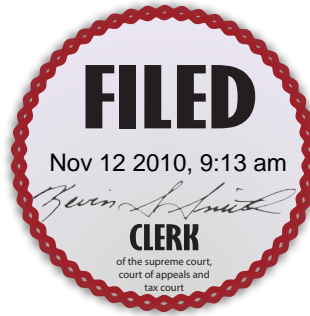


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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SIMON ALLEN, )  
 )  
Appellant-Defendant, )  
 )  
vs. )  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

No. 67A01-1005-CR-245

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APPEAL FROM THE PUTNAM CIRCUIT COURT  
The Honorable Matthew L. Headley, Judge  
Cause No. 67C01-0906-FC-101

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**November 12, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

Simon Allen appeals from his convictions for Conspiracy to Commit Trafficking with an Inmate,<sup>1</sup> a class C felony, and Possession of Cocaine,<sup>2</sup> a class D felony. Allen was also determined to be a Habitual Offender. Allen presents two issues for our review, which we expand and restate as follows:

1. Do Allen's convictions violate double jeopardy principles?
2. Is the charging information defective?
3. Is the evidence sufficient to sustain Allen's convictions?

We affirm and remand.

The facts most favorable to the convictions are that on May 9, 2009, Elizabeth Strong went to visit Allen, who was an inmate in the Putnamville Correctional Facility. Strong went to the facility with Alexis Brown and Alexis Thorpe. Thorpe went to the facility to visit Damieon Latchman.

Pursuant to standard procedure, the three women were each patted down before entering the visitation room. During the search of Brown, a guard discovered a suspicious object under her clothes. Brown refused a more thorough search and also refused to allow a baby with her to be searched. Instead, Brown left the facility of her own accord without visiting an inmate. Strong was wearing a tight fitting skirt that prevented the guard from conducting a proper groin search. Strong was nevertheless permitted to enter the visitation room. Thorpe was also permitted to enter the visitation room after she was searched.

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<sup>1</sup> Ind. Code Ann. § 35-44-3-9 (West, Westlaw through 2010 2nd Regular Sess.) (trafficking); Ind. Code Ann. § 35-41-5-2 (West, Westlaw through 2010 2nd Regular Sess.) (conspiracy).

<sup>2</sup> Ind. Code Ann. § 35-48-4-6 (West, Westlaw through 2010 2nd Regular Sess.).

Prior to the women's arrival, guards at the facility had received information that Allen or Latchman would receive a "drop" that day. *Transcript* at 40. As a result of this information, the guards trained video cameras on the tables that were to be used by Allen and Latchman in order to closely monitor their visits. Correctional Officer Jessica Woolery watched the entire visit between Strong and Allen on a monitor as it was being recorded.

Officer Woolery noticed that Strong "adjusted herself" several times prior to and during her visit with Allen. *Id.* at 25. Woolery observed Allen put his hands up Strong's skirt between her legs. After Allen pulled his hand back, Strong reached behind her back and retrieved an item and put it in her mouth. Woolery then observed Strong "rummage[] around under her chest area", pull things out, and place them in her mouth. Strong and Allen then kissed, which is a violation of prison policy. Near the end of the visit, Strong pulled something out from under her breast area and handed it to Allen. Allen dropped the item on the floor near his foot and then Allen leaned over to pick the item up from the floor. Allen placed the item in his pocket. When the visit ended, Officer Woolery noticed a bulge in Allen's pocket where he had placed the item given to him by Strong. Woolery also noted that during the visit, Allen spoke to Latchman, who was visiting with Thorpe at a nearby table.

The visit between Allen and Strong ended at the same time as the visit between Latchman and Thorpe, which was before the end of their allotted visitation period. Allen and Latchman exited the visitation room together and walked through a corridor to the porter's room. In the porter's room, inmates are processed and strip searched after a visit. Officer Woolery called the porter's room and warned the officers of a possible drop involving Allen.

Once inside the porter's room, Allen and Latchman were positioned near a desk where they were to return their visitation passes before being strip searched. Correctional Officer Peter Baylou noticed that Latchman had something in his hand and asked him to reveal what it was. Officer Baylou stood up from behind the desk and positioned himself between Allen and Latchman. As Officer Baylou approached, Latchman testified that he dropped a package containing powdered cocaine to the floor and put it under his foot. Latchman then dragged the package over to a row of chairs. Latchman opened his hand for Officer Baylou, revealing that he had nothing in his hands.

Latchman was strip searched by Correctional Officer James Taylor, who found no contraband on Latchman. While Latchman was being searched, Allen was "leaning" his arms over the counter of the desk directly over a box of papers to be shredded on a nightly basis. *Transcript* at 89. Allen was then searched and nothing was discovered on his person or in his clothes.

Officers Baylou and Taylor searched the areas where Allen and Latchman had been standing prior to their respective searches and found a package of powdered cocaine near the chairs where Latchman had been standing. The officers also discovered a package wrapped in black electrical tape in the box of items to be shredded. This package contained marijuana and crack cocaine.<sup>3</sup>

On June 22, 2009, the State charged Allen with conspiracy to commit trafficking with an inmate, a class C felony, and possession of cocaine, as a class D felony. The State also

filed a habitual offender allegation. On March 31, 2010, the trial court conducted a joint bench trial for Allen and Strong. At the conclusion of the evidence, the trial court found both guilty as charged. The following day the court conducted the habitual offender phase of Allen's trial. Before evidence was presented, Allen admitted that he had two prior unrelated felony convictions. The trial court entered judgment of convictions and determined Allen to be a habitual offender. At a sentencing hearing on April 28, 2010, the trial court sentenced Allen to six years for the trafficking offense to be enhanced by six years for the habitual offender finding. The trial court also sentenced Allen to a concurrent two-year sentence for the possession offense, for a total aggregate sentence of twelve years.<sup>4</sup>

1.

Allen argues that his convictions for conspiracy to commit trafficking with an inmate and possession of cocaine violate his constitutional right against double jeopardy. The double jeopardy clause in the Indiana Constitution is embodied in article 1, section 14, and provides, "No person shall be put in jeopardy twice for the same offense." Our Supreme Court has concluded this provision was intended to prohibit, among other things, multiple punishments for the same actions. *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999). Our analysis under this provision involves dual inquiries under what have come to be known as the "statutory elements test" and the "actual evidence test." *Davis v. State*, 770 N.E.2d 319,

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<sup>3</sup> Thorpe testified and admitted that she smuggled the powdered cocaine into the facility and transferred it to Latchman. Thorpe further testified that she did not smuggle in the package containing the marijuana and crack cocaine that was found in the shred box.

<sup>4</sup> The court's written sentencing statement, the chronological case summary, and the abstract of judgment each show that the trial court sentenced Allen to four years for the trafficking offense enhanced by six years for the habitual offender determination and to a concurrent two-year term of imprisonment for the possession offense, for a total aggregate sentence of four years.

323 (Ind. 2002).

Under the actual evidence test, multiple convictions are prohibited if there is ““a reasonable possibility that the evidentiary facts used by the fact-finder to establish the elements of one offense may also have been used to establish the essential elements of a second challenged offense.”” *Id.* (quoting *Richardson v. State*, 717 N.E.2d at 53). In determining whether the trier of fact used the same evidence to establish the essential elements of each offense, it is appropriate to consider the charging information and arguments of counsel. *See Lee v. State*, 892 N.E.2d 1231 (Ind. 2008) (citing *Richardson v. State*, 717 N.E.2d at 54 n.48).

In Count I, Allen was charged as follows:

SIMON ALLEN . . . on or about May 9, 2009, at and in the County of Putnam, State of Indiana, did then and there without the prior authorization of the person in charge of the Putnamville Correctional Facility, a penal or juvenile facility, did knowingly conspire with Elizabeth Strong to carry or deliver into said facility a controlled substance, to-wit marijuana and cocaine, with the intent to deliver said article to an inmate, to-wit: Simon Allen.

*Appellant’s Appendix* at 18. In Count II, Allen was charged as follows:

SIMON ALLEN . . . on or about May 9, 2009, at and in the County of Putnam, State of Indiana, did then and there without a valid prescription or order of a practitioner acting in the course of his professional practice, knowingly or intentionally possess a controlled substance, pure or adulterated, classified in Schedule I or II, to-wit: Cocaine.

*Id.* at 19. During its opening statement, the State did not specifically allege the overt act in furtherance of the conspiracy. At the conclusion of the evidence, the State and defense counsel waived the opportunity to make a closing statement for the court. In finding Allen guilty, the trial court did not identify the overt act it found the State established beyond a

reasonable doubt to support the conspiracy conviction. Allen thus argues “given the lack of any specific allegation of the overt act which the State was alleging and attempting to prove and the trial court’s silence as to the overt act which it found to be proved beyond a reasonable doubt, a reasonable probability<sup>[5]</sup> exists that the trial court relied on evidence of Allen’s alleged possession of the cocaine to establish the essential elements of both the Conspiracy and Possession of Cocaine counts.” *Appellant’s Brief* at 14 (footnote added).

We begin by noting that the charging information for the conspiracy charge is based upon Strong’s act of carrying and delivering to Allen the controlled substance whereas the possession charge is based on Allen’s possession of the cocaine. Further, as Allen acknowledges, the State presented testimony from Officer Woolery about the visit between Strong and Allen and how Officer Woolery witnessed an exchange of the cocaine package between the two. The State also admitted into evidence the videotape of that visit, which was consistent with Officer Woolery’s testimony. The evidence was clear that Strong handed a package to Allen during their visit. Allen reached for the package, dropped it, then picked it

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<sup>5</sup> The test is “reasonable *possibility*”. *Richardson v. State*, 717 N.E.2d at 53 (emphasis supplied).

up from the floor and put it in his pocket. A bulge in Allen's pocket was noticeable when he stood up. The trial court found it was obvious from the video that a transfer had occurred. The State presented separate evidence establishing Allen's possession of the cocaine.

An appellate court presumes that the trial court knows and follows the applicable law. *Donaldson v. State*, 904 N.E.2d 294 (Ind. Ct. App. 2009). Even without a specific allegation of the overt act in the charging information or in the State's opening and closing argument, the evidence presented by the State clearly establishes several overt acts aside from possession that support the conspiracy conviction. Indeed, the trial court found the evidence proved beyond a reasonable doubt that a transfer had occurred. This is an overt act that supports the conspiracy conviction. Allen has pointed to nothing in the record that rebuts the presumption that the trial court followed the applicable law pertaining to application of double jeopardy principles and relied upon separate and distinct evidence in finding Allen guilty of the charged offenses. Having reviewed the record, we find that there is no reasonable possibility that the trial court relied upon the same evidence to prove the essential elements of the conspiracy and possession convictions. Hence, we find no violation of double jeopardy principles.

2.

Allen argues that the charging information is defective because it failed to specifically allege the overt act performed in furtherance of the conspiracy. As set forth above, the charging information provided as follows:

SIMON ALLEN . . . on or about May 9, 2009, at and in the County of Putnam, State of Indiana, did then and there without the prior authorization of the person in charge of the Putnamville Correctional Facility, a penal or juvenile



facility, did knowingly conspire with Elizabeth Strong to carry or deliver into said facility a controlled substance, to-wit marijuana and cocaine, with the intent to deliver said article to an inmate, to-wit: Simon Allen.

*Appellant's Appendix* at 18.

Generally, a challenge to the sufficiency of an information must be made by a motion to dismiss prior to arraignment. *Dickenson v. State*, 835 N.E.2d 542 (Ind. Ct. App. 2005), *trans. denied*. Failure to assert error in an indictment or information results in waiver of that error. *Id.*; *Buzzard v. State*, 712 N.E.2d 547 (Ind. Ct. App. 1999), *trans. denied*. Here, Allen did not object to the information prior to trial. To avoid waiver, Allen contends that the defect in the charging information for the conspiracy charge amounted to fundamental error. To be considered fundamental, the error must be so prejudicial to the rights of the defendant that he could not have received a fair trial. *Dickenson v. State*, 835 N.E.2d 542.

“An information that enables an accused, the court, and the jury to determine the crime for which conviction is sought satisfies due process.” *Lampitok v. State*, 817 N.E.2d 630, 636 (Ind. Ct. App. 2004), *trans. denied*. “Errors in the information are fatal only if they mislead the defendant or fail to give him notice of the charge filed against him.” *Gordon v. State*, 645 N.E.2d 25, 27 (Ind. Ct. App. 1995), *trans. denied*. “Although the State may choose to do so, it is not required to include detailed factual allegations in the charging instrument.” *Richardson v. State*, 717 N.E.2d at 51 (citing Ind. Code Ann. § 35-34-1-2).

Here, Allen had notice of the elements of conspiracy, understood that the conspiracy involved an agreement with Strong to carry in and deliver marijuana and cocaine to Allen during their visit at the penal facility. While arguably the information did not refer to a specific overt act, Allen had notice that the State had to prove an overt act in furtherance of

the conspiracy and the information for the conspiracy charge specifically referred to carrying and delivering marijuana and cocaine to Allen. We cannot say that the manner in which Allen was charged precluded him from knowing the nature of the charges he faced. The omissions in his information did not constitute fundamental error.

3.

Allen argues that the evidence is insufficient to support his convictions. When considering a challenge to the sufficiency of evidence to support a conviction, we respect the fact-finder's exclusive province to weigh the evidence and therefore neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the conviction, and “must affirm ‘if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.’” *Id.* at 126 (quoting *Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

Allen first challenges the sufficiency of the evidence in support of his conviction for conspiracy to commit trafficking with an inmate. To sustain Allen's conviction for conspiracy to commit trafficking with an inmate, the State was required to prove that, with intent to commit the felony, Allen agreed with Strong to commit trafficking with an inmate and that either Allen or Strong performed an overt act in furtherance of the agreement. Allen focuses his sufficiency challenge on the evidence establishing that he had an agreement with Strong and that he or Strong committed an overt act in furtherance of such agreement.

“In proving the agreement element of conspiracy, the State is not required to show an express formal agreement.” *Hightower v. State*, 866 N.E.2d 356, 368 (Ind. Ct. App. 2007)

(quoting *Riehle v. State*, 823 N.E.2d 287, 293 (Ind. Ct. App. 2005), *trans. denied*), *trans. denied*. An agreement can be inferred from circumstantial evidence, which may include the overt acts of the parties in furtherance of the criminal act. *Hightower v. State*, 866 N.E.2d 356. It is sufficient if the minds of the parties meet understandingly to bring about an intelligent and deliberate agreement to commit the offense. *Id.* To determine whether the defendant had the requisite intent to commit the crime alleged, the trier of fact must usually resort to circumstantial evidence or reasonable inferences drawn from examination of the circumstances surrounding the crime. *Id.*

In arguing that there is no evidence of an agreement between Allen and Strong, Allen asks this court to credit Latchman's testimony that Allen was not involved in smuggling drugs into the penal facility and that only Latchman and Thorpe had an agreement to do so. Allen also asks that we credit Latchman's testimony that he (Latchman) discarded the package in the shred box. Allen essentially asks us to reweigh the evidence and draw inferences contrary to a finding of guilt and judge the credibility of the witnesses. We cannot accept Allen's request. *See McHenry v. State*, 820 N.E.2d 124.

In any event, the evidence before the court demonstrated that Strong came to the facility with Brown and Thorpe to visit Allen. Thorpe subsequently admitted to smuggling in powdered cocaine in the crotch of her pants and giving it to Latchman. Further, Strong wore clothing that prevented correctional officers from conducting a proper groin sweep. During her visit with Allen, which was closely monitored by Officer Woolery and videotaped, Strong is observed fidgeting with her clothing before and during her visit with Allen. Allen is seen putting his hands up Strong's skirt between her legs. When Allen withdrew his hand,

Strong reached behind her back and retrieved an item and placed it in her mouth. She then kissed Allen in violation of visitation rules. Near the end of the visit, Strong pulled something from her breast area and handed it to Allen. We conclude that a reasonable inference can be drawn from this evidence that Allen and Strong had an agreement that Strong would smuggle in marijuana and cocaine and transfer the contraband to Allen during their visit.

The same evidence referred to above sufficiently establishes the overt act in furtherance of the conspiracy. The evidence is clear that a transfer occurred between Allen and Strong. Indeed, the trial court noted that the transfer of a package was obvious from the video. We find that from the evidence a reasonable inference can be drawn that there was an agreement between Allen and Strong and an overt act was performed in furtherance of the conspiracy. We therefore sustain Allen's conviction for conspiracy to commit trafficking with an inmate.

Allen also argues that the evidence is insufficient to support his possession of cocaine conviction. To sustain the conviction for possession of cocaine, the State's evidence must have established beyond a reasonable doubt that Allen knowingly or intentionally possessed, without a valid prescription, pure or adulterated cocaine. *See* I.C. § 35-48-4-6. Allen asks this court to credit Latchman's testimony that he (Latchman) was in sole possession of the crack cocaine attributed to Allen.

As has been noted previously, Strong rode to the penal facility with two women, one of whom (Brown) left after something suspicious was discovered under her clothing and the other one (Thorpe) who subsequently admitted to smuggling powdered cocaine in the crotch

of her pants and giving it to Latchman. Strong's outfit prevented a proper groin search. Prior to and during Strong's visit with Allen, Strong was observed adjusting herself several times. Allen was seen reaching up Strong's skirt between her legs. Strong was observed reaching behind her back, retrieving an object and placing it in her mouth and then she engaged in a kiss with Allen. Near the end of the visit, Strong reached into her breast area, pulled out an item and transferred it to Allen. Allen dropped the item near his foot. He then leaned over, picked up the item, and placed it in his pocket. When Allen stood up, there was a noticeable bulge in Allen's pocket.

The visit between Allen and Strong ended prematurely, and at approximately the same time as the visit between Latchman and Thorpe. Allen and Latchman arrived in the porter's room together. When Latchman approached the counter to return his visitation pass, an officer observed something in his hand. The officer stepped between Latchman and Allen. As the officer approached, Latchman dropped the item in his hand and put it under his foot. This package contained powdered cocaine. Latchman dragged the package with his foot over to some chairs. A strip search of Latchman's person revealed no contraband. During the search of Latchman, Allen was observed leaning over the counter of the desk directly above the shred box. Allen was strip searched immediately after Latchman and nothing was discovered on his person. After the searches, officers discovered powdered cocaine near the chairs, where Latchman admitted he left it. The officers also discovered a package in the shred box, directly under where Allen had been leaning. This package contained marijuana and crack cocaine.

The evidence presented by the State supports the conclusion that Allen possessed the marijuana and crack cocaine. Allen took a package from Strong and put it in his pocket, which created a noticeable bulge in his pants. During a strip-search, nothing was found on Allen's person. A search of the area where Allen had been standing just prior to his search revealed a package in a shred box directly under the counter where Allen had been leaning. Actual possession occurs when a person has direct physical control over the item. *Henderson v. State*, 715 N.E.2d 833 (Ind. 1999). From the evidence presented, a reasonable inference can be drawn that Allen was in actual possession of the package containing the crack cocaine and marijuana and that he took the package out of his pocket and dropped it in the shred box before his search. The State's evidence sufficiently supports Allen's conviction for possession of cocaine.

Having affirmed Allen's convictions, we sua sponte address a sentencing matter. As noted above, in its oral sentencing statement, the trial court described the sentence as six years executed for the trafficking offense to be enhanced by six years for the habitual offender finding and a concurrent two-year sentence for the possession convictions, for a total aggregate sentence of twelve years. In its written sentencing statement, filed one week after the sentencing hearing, the trial court identified the sentence as four years for the trafficking offense enhanced by six years for the habitual offender determination and to a concurrent two-year term of imprisonment for the possession offense, for a total aggregate sentence of ten years. In their respective statements of the case, both parties acknowledge the discrepancy between the trial court's oral sentencing statement and written sentencing order as to the sentence imposed, but neither party presents an argument as to an appropriate

resolution. Having reviewed the record, we cannot reconcile the two sentencing statements.

We therefore remand to the trial court for clarification of the sentence imposed.

Judgment affirmed and remanded.

BARNES, J., and CRONE, J., concur.