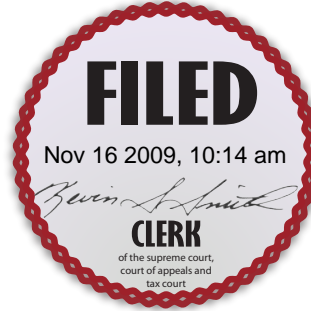


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JOHNIE B. MOODY, JR.,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 48A02-0905-CR-453

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 48C01-0808-FA-462

November 16, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Johnie B. Moody, Jr., appeals the sentence imposed following his plea of guilty to possession with intent to deliver cocaine, a Class B felony.¹ He asserts the trial court abused its discretion by improperly considering as an aggravating factor the amount of cocaine in his possession when he was arrested. We affirm.

FACTS AND PROCEDURAL HISTORY

On August 4, 2008, Moody was pulled over in Madison County because his license plate had expired. Further investigation revealed his driver's license had been suspended. During a search of Moody's vehicle, officers discovered forty-one grams of cocaine. Moody was carrying \$800 in cash. He was arrested and charged with dealing in cocaine, a Class A felony,² and maintaining a common nuisance, a Class D felony.³

Moody agreed to plead guilty to possession with intent to deliver as a Class B felony. The range of penalties for a Class B felony is six to twenty years, with ten years being the advisory.⁴ At the sentencing hearing, the trial court considered as aggravators Moody's substantial criminal history, his probationary status at the time of the offense, his involvement in the drug scene, and the amount of cocaine in his possession when he was arrested. The court noted as a mitigating factor that Moody pled guilty, but did not give the plea significant weight because it came moments before trial. The trial court sentenced Moody to twenty years in the Indiana Department of Correction.

¹ Ind. Code § 35-48-4-1(a).

² Ind. Code § 35-48-4-1(b).

³ Ind. Code § 35-48-4-13.

⁴ Ind. Code § 35-50-2-5.

DISCUSSION AND DECISION

The trial court abused its discretion when it considered as an aggravating factor the amount of cocaine Moody had at the time of his arrest. However, the error was harmless.

“Sentencing is principally a discretionary function in which the trial court’s judgment should receive considerable deference.” *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). “[T]he trial court may impose any sentence within the allowable range for a given crime without a requirement to identify specific aggravating or mitigating circumstances.” *Id.* When evaluating a sentence, we review for abuse of discretion the reasons, or omissions of reasons, given for imposing a particular sentence. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218 (Ind. 2007).

A trial court may not consider an aggravator that is “an element of a higher offense which is dismissed or not filed in exchange for a guilty plea to a lesser charge.”⁵ *Swain v. State*, 870 N.E.2d 1058, 1059-60 (Ind. Ct. App. 2007). Possession of more than three grams of cocaine is a material element of dealing in cocaine, a Class A felony, and the court noted Moody had forty-one grams. The charge of dealing in cocaine as a Class A felony was dismissed pursuant to Moody’s guilty plea. Therefore, it was improper for the trial court to consider Moody’s possession of forty-one grams of cocaine.

⁵ We decline the State’s invitation to “re-evaluate” *Swain* in light of *Pedraza v. State*, 887 N.E.2d 77 (Ind. 2008). *Pedraza* addressed whether use of a prior conviction as an aggravator in sentencing, when the same prior conviction is used to satisfy an element of the crime, is double enhancement prohibited by our double jeopardy jurisprudence. *Pedraza* does not address the issue before us, and we find *Swain* controlling.

Even if a trial court improperly considers an aggravator, we will affirm if we “can say with confidence that the trial court would have imposed the same sentence had it considered only the proper aggravators.” *Taylor v. State*, 891 N.E.2d 155, 162 (Ind. Ct. App. 2008), *trans. denied* 898 N.E.2d 1227 (Ind. 2008), *cert. denied sub nom. Taylor v. Indiana*, ___ U.S. ___, 129 S.Ct. 1008 (2009), *reh’g denied* ___ U.S. ___, 129 S.Ct. 1665 (2009). Although the trial court’s consideration of the amount of cocaine was improper, the court properly considered as aggravators Moody’s involvement in the drug scene, his probationary status at the time of the offense, and his criminal history, which included convictions involving the possession of narcotics.⁶ These valid aggravators permit the sentence imposed by the trial court. We are confident the trial court would have imposed the same sentence had it not considered the amount of cocaine in Moody’s possession.

CONCLUSION

Although the trial court’s consideration of the amount of cocaine as an aggravator was an abuse of discretion, we affirm Moody’s sentence of twenty years based on other valid aggravators.

Affirmed.

CRONE, J., and BROWN, J., concur.

⁶ A court may properly consider a defendant’s history of criminal behavior as an aggravating circumstance in sentencing. Ind. Code § 35-38-1-7-1; *Mitchell v. State*, 844 N.E.2d 88, 91 (Ind. 2006). Moody asserts the trial court should not have considered his criminal record as an aggravating factor because his criminal history has no relation to his current offense of possession of cocaine with intent to deliver. We decline to hold Moody’s prior convictions involving “simple possession” of narcotics, (Br. of Appellant at 6), had “no relation” (*id.* at 7) to the possession with intent to deliver charge.