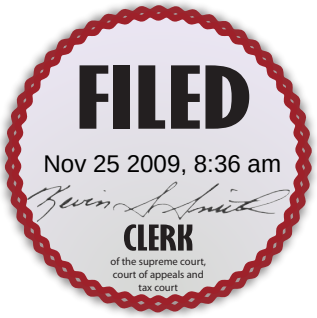

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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL D. WALL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0905-CR-240
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0607-FA-58

November 25, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Michael D. Wall appeals his conviction of Dealing Methamphetamine Weighing Three Grams or More,[1] a class A felony, and the sentence imposed thereon. Wall presents the following restated issues for review:

1. Was the evidence sufficient to support the conviction?

2. Was the sentence inappropriate in light of Wall's character and the nature of his offense?

3. Did the trial court err in calculating the credit time to which Wall is entitled?

We affirm.

The facts favorable to the conviction are that on November 30, 2005, officers from the Elkhart County Interdiction and Covert Enforcement Unit (the ICE) met with a person (hereinafter, "the source") cooperating with the ICE who was to purchase methamphetamine from Wall. The group proceeded to the Christiana Creek Country Club in Elkhart, where undercover Goshen Police Department Officer Brooks Germann was to accompany the source in the drug transaction with Wall. Germann knew Wall because, nine days before, he and the source had purchased from Wall what they believed was methamphetamine. It turned out, however, that the substance did not test positive for methamphetamine in the previous buy. In the instant case, after the officers searched the source and his truck, Germann and the source drove to Christiana Creek Country Club. They arrived at the country club at approximately 6:30 p.m. and Wall arrived shortly thereafter. Wall approached Germann, who was seated in the passenger side of the truck, and produced two small plastic bags

[1] Ind. Code Ann. § 34-48-4-1(a)(1)(C) & (b)(1) (West, PREMISE through 2009 1st Regular Sess.).

containing what he claimed was "ice", meaning a pure form of methamphetamine. *Transcript* at 89. Wall and Germann discussed whether the drugs in this buy were of better quality than those purchased nine days before. Wall claimed he had switched suppliers and assured Germann this buy contained better quality drugs. Wall also told Germann that he could procure more drugs for Germann within fifteen minutes after receiving a phone call making the request. Germann paid Wall $400 for the methamphetamine.

After the transaction was completed, Germann and the source drove away and met with the other officers, after which Germann returned to the ICE office. A field test on the substance purchased proved inconclusive. Thereafter, Germann placed the two small plastic bags containing the substance purchased from Wall in a plastic evidence bag, sealed the evidence bag with blue tape, wrote his badge number across the tape, and then placed it in a secure locker. The following day, Germann transported this evidence bag to a lab at Andrews University in Berrien County, Michigan.

The lab weighed the contents of the two plastic bags. The contents of one bag weighed 3.390 grams, while the contents of the other weighed 3.398 grams for an aggregate weight of 6.788 grams. The lab also performed tests on samples taken from the contents of each of the plastic bags Wall sold to Germann. Both samples tested positive for methamphetamine. The State charged Wall with dealing methamphetamine weighing three (3) grams or more, as a class A felony. He was found guilty as charged following a jury trial. Upon its finding that the aggravating factors outweighed the mitigating factors, the court sentenced Wall to forty years in prison, all executed.

1.

Wall contends the evidence was not sufficient to support the conviction. Specifically, he contends the evidence was not sufficient to prove that the substance he sold to Officer Germann was methamphetamine. Our standard of review for challenges to the sufficiency of evidence is well settled.

> When considering a challenge to the sufficiency of evidence to support a conviction, we respect the fact-finder's exclusive province to weigh conflicting 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 verdict, 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)).

Gleaves v. State, 859 N.E.2d 766, 769 (Ind. Ct. App. 2007).

The gist of Wall's argument against the sufficiency of evidence is that Officer Germann fabricated the evidence against him. His argument is premised upon the claim that Officer Germann had motive to arrest him. According to Wall, Germann "basically lost money" when the substance purchased in the first buy turned out not to be methamphetamine. *Appellant's Brief* at 3. Wall contends that when the field test of the substance purchased in the second buy was inconclusive, German stood to lose $400 more, and therefore tampered with the substance before delivering it to the lab for testing. In support of this contention, Wall notes that Germann was in sole custody of the substance while transporting it to the lab and contends this creates a reasonable doubt that the substance Wall sold contained methamphetamine. This argument was squarely presented to the jury during closing

argument and the jury evidently rejected it. In the final analysis, this amounts to nothing more than a challenge to Officer Germann's credibility. We may not second guess the jury's determination in this regard. *Gleaves v. State*, 859 N.E.2d 766. The evidence was not insufficient.

2.

Wall contends his sentence is inappropriate. We have the constitutional authority to revise a sentence if, after considering the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B); *Corbin v. State*, 840 N.E.2d 424 (Ind. Ct. App. 2006). "We recognize, however, the special expertise of the trial courts in making sentencing decisions; thus, we exercise with great restraint our responsibility to review and revise sentences." *Scott v. State*, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006), *trans. denied*. Wall bears the burden on appeal of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006).

With respect to the nature of the offense, we note that Wall sold methamphetamine weighing twice the amount required for a class A felony. It is also noteworthy that the instant transaction took place near two schools, a fact which the trial court cited as an aggravating circumstance. Wall's claim that this was an isolated incident is greatly diminished by the fact that he had sold a substance represented to be methamphetamine to Officer Germann just nine days before, and he assured Officer Germann that he could procure additional methamphetamine for him within fifteen minutes of receiving the request.

Wall's claim that there was no individual victim in this case is merely a product of serendipity, i.e., that the buyer turned out to be an undercover police officer who was not going to use the drug. This does not render Wall's action any less serious. Neither does the fact that Wall did not resort to violence in committing this offense. We note in this regard that the statutory definition of this offense does not include violent action or intent. One would expect that if Wall *had* employed violence, such would have constituted a separate crime, thereby subjecting him to additional charges and penalties. Regardless, his failure to commit additional (i.e., violent) crimes cannot be said to lessen the seriousness of this offense.

Concerning his character, Wall correctly points out that his criminal history included only one misdemeanor conviction prior to this offense. Of much greater significance, however, is the fact that, after committing and while out on bond for this offense, Wall was arrested three or four more times and convicted once – in Michigan for first-degree home invasion. He received a sentence in that case of between two and twenty years. We note also that, by his own admission, Wall committed this offense while under the influence of drugs.

In summary, Wall committed this serious offense in close proximity to two schools. His arrest on these charges did not deter him from subsequently engaging in even more criminal behavior. Viewed against his relative lack of a criminal history, the recent escalation of dangerous, antisocial behavior is troubling indeed. The forty-year sentence imposed by the trial court was not inappropriate.

3.

Wall contends the trial court erred in calculating the credit time he earned in pretrial confinement. Apparently, the problem lies in the failure to receive credit time for time Wall spent in a Michigan jail awaiting his transfer to Indiana to face the instant charge. The State concedes that Wall is entitled to credit for that confinement, which amounted to thirty-six days. Indeed, the trial court appears to have agreed at the sentencing hearing that Wall should receive credit for the days Wall spent in the Michigan jail, as reflected in the following discussion with Wall's counsel:

> THE COURT: We have a presentence report. Mr. Zook, is it accurate?
>
> MR ZOOK: In many respects, but there are some things to correct, your Honor. The jail credit it says is 293 days. I counted 291 actually doing it the way that they did it, but that's – my count would be starting the first day after –
>
> THE COURT: You don't count the first day and then you starting.
>
> MR. ZOOK: If you don't pick – count the first day, I count 291 plus, though, June 30 to August 5 when he was in Michigan simply to be returned to Elkhart County, and that adds an additional 30 days – 36 days leading me to come up with 327 instead of the 293.
>
> THE COURT: Was he getting credit for a Michigan case when he was up there?
>
> MR ZOOK: No. That's after –
>
> THE COURT: So you want me to give him 293, but you want me to have it recalculated to see if he's entitled to more for time spent in Michigan?
>
> MR. ZOOK: Yes, Sir.
>
> THE COURT: You want to say it again for Ms. Kitson's benefit.
>
> MR ZOOK: I'm - I'm calculating 291, plus an additional 36 days being June

30 through August 5 when he was in Michigan awaiting coming down here. *Appellant's Appendix* at 147-48. When pronouncing sentence shortly thereafter, the court stated, "Defendant will receive 293 days credit and earned credit time in a like amount; however, the Court will direct the probation department to recalculate the credit time. We'll issue an amended abstract if it's determined we need to adjust the credit time." *Id*. at 158.

We are hard-pressed at this point to discern any error committed by the trial court in this matter. The court indicated it would correct the sentencing order if and when the probation department reviewed the matter and determined that the thirty-six days spent in the Michigan jail qualified for earned credit time. It appears that as of the time Wall filed the instant appeal, the probation department had not yet done this. If that is indeed still the case, Wall's remedy does not lie with this court. Rather, he should ask the trial court to prompt the probation department to complete the task, after which the trial court will take whatever corrective measures it deems appropriate.

Judgment affirmed.

NAJAM, J., and BRADFORD, J., concur.