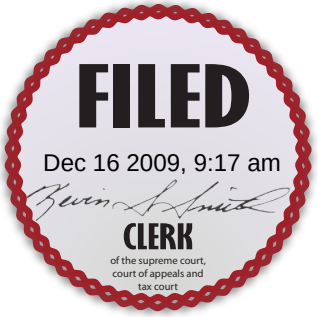

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IN THE
COURT OF APPEALS OF INDIANA

SCOTT D. MOSHER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0905-CR-471
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William E. Young, Judge
The Honorable Michael S. Jensen, Magistrate
Cause No. 49G20-0810-FA-236485

December 16, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Following a bench trial, Scott Mosher was convicted of Possession of Cocaine[1] as a class B felony. As the sole issue on appeal, Mosher challenges the sufficiency of the evidence supporting the enhancement of his conviction from a class D felony to a class B felony for possession of cocaine within one thousand feet of a family housing complex.

We affirm.

The facts most favorable to the conviction reveal that on October 16, 2008, Detective Darrin McGuire of the Beech Grove Police Department was parked in a parking lot at the Motel 6 on Elmwood Avenue in Beech Grove performing routine surveillance. The motel was known by the police for narcotics and prostitution activities. At 3:06 p.m., a Ford Ranger pickup truck stopped and parked in the motel's parking area. Moser exited the truck and walked up a stairway to a room on the second floor. Soon thereafter, Detective McGuire lost sight of Mosher when Mosher entered the room. At 3:10 p.m. Mosher exited the motel room and returned to his truck.

Detective McGuire approached Mosher and identified himself as a police officer. After a brief conversation with Detective McGuire, Mosher admitted that he had cocaine in his shirt pocket, which Detective McGuire then confiscated. Mosher was placed under arrest. At trial, State's Exhibit 2, a packet containing .473 grams of cocaine found on Mosher's person, was admitted into evidence.

The State charged Mosher with one count of dealing in cocaine as a class A felony and one count of possession of cocaine as a class B felony, enhanced as such on the State's

[1] Ind. Code Ann. § 35-48-4-6 (West, PREMISE through 2009 1st Regular Sess.).

allegation that Mosher possessed cocaine within 1000 feet of a family housing complex, namely, the Motel 6. A bench trial was held on February 4, 2009. Mosher did not dispute that he purchased and possessed the cocaine at trial or that the Motel 6 qualified as a family housing complex. Rather, Mosher asserted his defense that he was only briefly within 1000 feet of the family housing complex. *See* I.C. § 35-48-4-16 (West, PREMISE through 2009 1st Regular Sess.). On February 27, 2009, the trial court issued a written order finding Mosher not guilty of dealing in cocaine, but guilty of possession of cocaine as a class B felony. With regard to Mosher's defense, the trial court found as follows:

> While it is true that the time elapsed from [Mosher's] arrival at the motel until confronted by the officer was approximately four (4) minutes; [sic] the defendant was there long enough to park his car, walk to the dealer's room, purchase his drugs and return to his car. The Court believes that being in a protected area long enough to complete a drug transaction necessarily means within the intent of the statute that one was within the protected zone more than briefly.

Appendix at 44-45.

On April 29, 2009, the trial court entertained re-argument on the issue of enhancement from a class D felony to a class B felony. Following the hearing, the court affirmed the enhanced conviction of class B felony possession of cocaine and then sentenced Mosher to six-year executed term to be served on work release with the Marion County Community Correction Program.

On appeal, Mosher argues that the evidence is insufficient to support his enhanced felony conviction because the State failed to rebut his defense that he was only briefly within the protected zone of the family housing complex. "When reviewing a defense, we apply the

same standard of review as that applied to other challenges to the sufficiency of the evidence." *Bell v. State*, 881 N.E.2d 1080, 1085 (Ind. Ct. App. 2008), *trans. denied*. Therefore, we do not reweigh the evidence or judge the credibility of the witnesses and consider only the evidence supporting the bench trial and the reasonable inferences that may be drawn therefrom. *Bell v. State*, 881 N.E.2d 1080.

The crime of possession of cocaine is defined, in relevant part, as follows:

> (a) A person who . . . knowingly or intentionally possesses cocaine (pure or adulterated) . . . commits possession of cocaine . . ., a Class D felony, except as provided in subsection (b).
> (b) The offense is:
> * * *
> (2) a Class B felony if the person in possession of the cocaine or narcotic drug possesses less than three (3) grams of pure or adulterated cocaine or a narcotic drug:
> * * *
> (B) in, on, or within one thousand (1,000) feet of . . . a family housing complex.

I.C. § 35-48-4-6. Mosher was charged with possession of cocaine as a class B felony. The offense was elevated to a class B felony because Mosher's possession took place within 1000 feet of a family housing complex, specifically alleged as the Motel 6.

I.C. § 35-48-1-16 provides in relevant part:

> (a) For an offense under this chapter that requires proof of:
> * * *
> (3) possession of cocaine . . .
> within one thousand (1,000) feet of . . . a family housing complex, . . . the person charged may assert the defense in subsection (b) . . . .
>
> (b) It is a defense for a person charged under this chapter with an offense that contains an element listed in subsection (a) that:
> (1) a person was briefly in, on, or within one thousand (1,000) feet of . . . a family housing complex . . . and

> (2) no person under eighteen (18) years of age at least three (3) years junior to the person was in, on, or within one thousand (1,000) feet of the . . . family housing complex . . . at the time of the offense.

The defenses under this section are defenses of justification that "'admit that the facts of the crime occurred but contend that the acts were justified.'" *Bell v. State*, 881 N.E.2d at 1086 (quoting *Moon v. State*, 823 N.E.2d 710, 716 (Ind. Ct. App. 2005), *trans. denied*). We have stated that even though I.C. § 35-48-4-16 is called a defense, it is actually a mitigator. *Harrison v. State*, 901 N.E.2d 635 (Ind. Ct. App. 2009), *trans. denied*. "Indiana has allocated the burden as to these defenses in two steps." *Moon v. State*, 823 N.E.2d at 716. The defendant must first produce evidence raising the defense. *Harrison v. State*, 901 N.E.2d 635; *Moon v. State*, 823 N.E.2d 710. Once at issue, the State must negate at least one element of the defense beyond a reasonable doubt. *Harrison v. State*, 901 N.E.2d 635; *Moon v. State*, 823 N.E.2d 710.

Mosher specifically challenges the State's evidence to disprove that he was only *briefly* within 1000 feet of a family housing complex, here Motel 6.[2] Mosher's focus is on the fact that he was within the protected zone for approximately four minutes. Indeed, there is no dispute that Mosher arrived at the Motel 6 at 3:06 p.m. and returned to his car to leave at 3:10 p.m. This is an objectively short span of time. Whether this is "brief" within the meaning of the statute, however, is the issue we must decide.[3]

[2] There is no evidence that children were present at the time of the crime. The trial court properly found that the State did not meet its burden of disproving this element of the defense.

[3] We note a recent split of authority in the Court of Appeals as to what constitutes "brief". Our Supreme Court has granted transfer in *Griffin v. State*, 905 N.E.2d 521 (Ind. Ct. App. 2009) (Friedlander, J., dissenting) (pushing moped in front of a school for less than five minutes is more than brief), *trans. granted*, and *Gallagher v. State*, 906 N.E.2d 272 (Ind. Ct. App. 2009) (spending close to twenty-minutes within 1000 feet of

The term "briefly" is not defined in I.C. § 35-48-4-16. Further, there is no ironclad rule as to what constitutes a "brief" presence within a protected zone. Nevertheless, the term "briefly" as used in I.C. § 35-48-4-16 clearly imparts a temporal connotation. The time span itself, however, is not the only consideration. We must also consider the surrounding circumstances. In doing so, we must keep in mind that the purpose of the statute setting forth enhanced penalties if the transaction occurs within one of the protected 1000-foot zones defined in I.C. § 35-48-4-6 is to protect children. The legislature chose to provide a defendant with a defense where the purpose behind the harsher penalty did not exist. One such instance is when the defendant is only "briefly in, on, or within one thousand (1,000) feet of . . . a family housing complex." I.C. § 35-48-4-16.

Here, we note that Mosher specifically drove to the motel with the express purpose of purchasing cocaine from his drug dealer, who used the motel as a base of operation. Mosher parked his truck in the motel parking lot, ascended stairs to the second floor, and entered a motel room. Mosher then returned to his car with the cocaine he purchased, at which time he encountered Detective McGuire. Mosher was within the protected zone long enough to complete a drug transaction. His presence in the protected zone was not transitory or incidental to his involvement in the drug transaction. Under these circumstances, that it took only four minutes to complete the drug transaction is inconsequential. Indeed, the legislature's use of the word "brief" was certainly not intended to create an incentive to conduct speedy drug transactions in those 1000-foot zones identified in the statute. The trial

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a school while waiting for drugs to arrive is brief), *trans. granted*. The Court held a combined oral argument

court properly concluded that Mosher was within the protected zone more than briefly.[4] We therefore conclude that the State presented sufficient evidence to rebut Mosher's claim that he was only briefly within the protected zone of a family housing complex. The evidence is sufficient to sustain Mosher's conviction of the enhanced offense.

Judgment affirmed.

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

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on October 15, 2009.

[4] I do not find the decision of this case to be at odds with my dissenting opinion in *Griffin v. State*, 905 N.E.2d 521. In *Griffin*, I noted the following:

> Although the term "briefly", as used in I.C. § 35-48-4-16(b)(1), clearly imparts a temporal connotation, the time span itself is not the only element in this equation. Whether a particular time interval is "brief" is also a function of surrounding circumstances, including the defendant's intentions to be or remain near the [1000-foot zone] for any period of time, however short.

Id. at 526. The circumstances of this case set it apart from that presented in *Griffin*. In *Griffin*, the defendant was pushing a moped through a school zone when stopped and found to be in possession of crack cocaine. The time-interval for Griffin to push the moped through the school zone was estimated to be five minutes. Based on the circumstances present in *Griffin*, I concluded that the jury's determination that the defendant was within the forbidden zone more than "briefly" was unreasonable. Here, unlike the defendant in *Griffin*, Mosher was more than fortuitously within the 1000-foot zone created for a family housing complex. He specifically drove to the motel with the intention of completing a drug transaction there. Under these circumstances, it is irrelevant that it took only four minutes to do so.