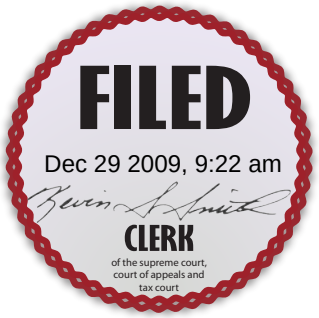

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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL SMITH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0907-CR-664
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William Young, Judge
Cause No. 49G20-0803-FA-64195

December 29, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Michael Smith appeals his convictions and forty-year sentence for class A felony dealing in cocaine and class A misdemeanor driving while suspended. We affirm.

Issues

I. Did the trial court commit fundamental error in questioning witnesses during Smith's bench trial?

II. Is Smith's sentence inappropriate?

Facts and Procedural History

The facts most favorable to the trial court's judgment indicate that around noon on March 21, 2008, Indianapolis Metropolitan Police Department undercover officers Andre Bell, Christopher Cavanaugh, and Christopher Wuensch were traveling northbound in an unmarked car in the 3600 block of Illinois Street. They saw an Oldsmobile Aurora with "dark tinted windows" pick up a woman, later identified as Sharnita Brooks, on the right-hand side of the road. Tr. at 43. The Aurora crossed three lanes of traffic without signaling and turned westbound onto 37th Street. The officers followed the Aurora, which parked facing eastbound near the intersection of 37th and Capitol Avenue. The officers parked approximately fifty yards away, facing the Aurora.

The Aurora's hood "popped open." *Id*. at 45. Smith exited the driver's-side door, lifted up the hood, and "pulled out a ball-like object" from the passenger's side of the engine compartment. *Id*. A man, later identified as Ron Emerson, approached, and Smith gestured toward the Aurora. Smith lowered the Aurora's hood, and both men entered the vehicle. Although the officers were unable to see through the Aurora's tinted windows, they believed

that a drug transaction was occurring and radioed for a marked police vehicle and uniformed officer. A marked vehicle arrived, and both police cars converged on the Aurora. The officers obtained Smith's identification and determined that he had been driving with a suspended license. The officers arrested Smith and found $1126 on his person during the ensuing patdown search.

The officers searched the Aurora but did not find the "ball-like object" that they had seen Smith retrieve from the engine compartment. The officers found no drugs on either Smith or Emerson. When the officers searched Brooks, a crack pipe fell out of her head covering. The officers advised Brooks of her *Miranda* rights, and she admitted that she possessed crack cocaine. Officer Wuensch removed a sock from Brooks's underwear that held several plastic bags containing over forty-eight grams of cocaine. Brooks told the officers that she and Emerson had purchased cocaine from Smith, who retrieved the drug from the sock, and that she panicked and stuffed the sock in her underwear when the officers approached the Aurora.[1]

The State charged Smith with three counts: class A felony dealing in cocaine, class C felony possession of cocaine, and class A misdemeanor driving while suspended. Smith waived trial by jury, and his case was tried to the court. On December 23, 2008, Judge William Young found Smith guilty as charged and entered judgment of conviction on counts

[1] Brooks testified that she swallowed the cocaine that she had purchased from Smith and that she did not know what happened to Emerson's cocaine. Tr. at 95.

one and three. On June 1, 2009, Judge Steven Eichholtz sentenced Smith to concurrent executed terms of forty years on count one and one year on count three. This appeal ensued.

Discussion and Decision

I. Trial Court's Questioning of Witnesses

At trial, Judge Young asked questions of all three witnesses: Officer Bell, Officer Wuensch, and Brooks. Smith did not object to this questioning and challenges its propriety for the first time on appeal. "If a defendant is of the opinion the trial court is intervening improperly in the trial, he must make timely and proper objection. If not, the issue is waived." *Puckett v. State*, 443 N.E.2d 77, 78 (Ind. Ct. App. 1982). In apparent recognition of this fact, Smith claims that the trial court committed fundamental error by "repeatedly filling in the blanks left by the State's case[.]" Appellant's Br. at 16. We note that

> [t]he fundamental error doctrine is extremely narrow. To qualify as fundamental error, an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible. Further, the error must constitute a blatant violation of basic principles, the harm, or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process.

Rowe v. State, 867 N.E.2d 262, 266 (Ind. Ct. App. 2007) (citations omitted).

Smith acknowledges that "in a bench trial, the judge may, in his discretion, ask questions of a witness to aid in the fact finding process as long as it is done in an impartial manner and the defendant is not prejudiced." *Ware v. State*, 560 N.E.2d 536, 539 (Ind. Ct App. 1990), *trans. denied* (1991); *see also* Ind. Evidence Rule 614(b) ("The court may interrogate witnesses, whether called by itself or by a party."). "[I]nterrogation of witnesses alone does not make a judge biased. Moreover, a judge's discretion to question witnesses is

greater in bench trials than in trials before juries. This is because the opportunity to influence the jury is not present in a bench trial." *Rosendaul v. State*, 864 N.E.2d 1110, 1115 (Ind. Ct. App. 2007) (citations omitted), *trans. denied*.

> Although a trial judge may not assume an adversarial role in any proceeding, the judge may intervene in the fact-finding process and question witnesses in order to promote clarity or dispel obscurity. The purpose of allowing the judge to question witnesses is to permit the court to develop the truth or obtain facts which may have been overlooked by the parties.

Griffin v. State, 698 N.E.2d 1261, 1265 (Ind. Ct. App. 1998) (citations omitted), *trans. denied*.

Smith devotes nine pages of his brief to excerpts from the trial transcript. He asserts that the court "elicited testimony from the police witnesses which solidified their description of the item Smith took from the hood area as matching the cocaine filled sock found on [Brooks]" and that, without this testimony, "the State would not have presented sufficient evidence to support a finding that the cocaine found on [Brooks] had been possessed by Smith." Appellant's Br. at 17, 18. We disagree. The trial court's questioning merely clarified the officers' prior testimony regarding the appearance of the "ball-like object" that Smith retrieved from the Aurora's engine compartment and the cocaine-filled sock retrieved from Brooks's underwear,[2] as well as the officers' level of certainty that the objects were one and the same, given that they were approximately fifty yards away from and were unable to

[2] On direct examination, Officer Bell described the sock as gray, and Officer Wuensch described the sock as white. Tr. at 51, 77. On direct examination, Brooks testified, "I think that [the sock] was blue or black. Or something like that." *Id*. at 92. On cross examination, Brooks stated, "[I]t was a sock. It could have been white after I got it out, I don't know. I just know that it was a sock. Cause it was on my persons (sic)[.]" *Id*. at 101. The black-and-white photocopy of the sock in the exhibit volume appears to depict a white athletic sock with a gray heel and top. State's Ex. 1.

see inside the Aurora. In fact, after the trial court questioned Officer Bell, Smith's counsel acknowledged that the officer's responses were "consistent with everything that he's testified so far in this case." Tr. at 72. The same may be said for Officer Wuensch. Moreover, Brooks testified that the sock was the same object that Smith had retrieved from the Aurora's engine compartment. *Id*. at 93. In sum, Smith has failed to establish any bias in or prejudice resulting from the trial court's questioning of the officers, let alone fundamental error.[3] Consequently, we affirm Smith's convictions.

II. Sentencing

Judge Eichholtz sentenced Smith as follows:

> I note that the defendant, because of his criminal history, is non-suspendable. That being the case, this Indiana General Assembly has determined what his ability for second chances are [sic], and they have determined that he must serve at least 20 years because he is non-suspendable for a Class A Felony. We talked about second chances. Mr. Smith, I know there are people out there that love you. That is understandable. But you have had many second chances, it looks like, according to your pre-sentence report. Most troubling to the Court is that you were on probation after having served a sentence for dealing in cocaine when you were arrested, and now convicted, of dealing in cocaine again. You have had plenty of second chances. I don't think that, quite frankly, you deserve any other second chances.
>
> I note in your criminal history the fact that you were on probation at the time that this occurred. The Court finds those to be aggravating factors. The Court notes no mitigating factors in your history. Therefore, based on those factors, the Court will sentence you on a Class A Felony to a sentence of 40 years in the Department of Corrections [sic] all of which will be executed.

[3] Like Smith, Brooks was charged with class A felony dealing in cocaine and class C felony possession of cocaine, and she apparently agreed to testify against Smith in exchange for pleading guilty to a class A misdemeanor. Tr. at 89-90. Brooks testified that she had been released on house arrest but fled the jurisdiction and therefore would be convicted of and sentenced for a class D felony. *Id*. at 100. When Smith cross-examined Brooks regarding the plea, Judge Young noted that her case was still open. *Id*. On appeal, Smith complains that Judge Young "interjected his own knowledge of [Brooks's] case status when she testified." Appellant's Br. at 17. Smith fails to establish that this interjection constituted fundamental error.

Tr. at 145-46.

On appeal, Smith challenges the propriety of his sentence pursuant to Indiana Appellate Rule 7(B), which provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Smith bears the burden of persuading us that his sentence is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218.

"[R]egarding the nature of the offense, the advisory sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Id*. "A person who commits a Class A felony shall be imprisoned for a fixed term of between twenty (20) and fifty (50) years, with the advisory sentence being thirty (30) years." Ind. Code § 35-50-2-4. Dealing in cocaine is a class A felony if the amount of the drug involved weighs three grams or more. Ind. Code § 35-48-4-1(b)(1). Here, Smith possessed forty-eight grams of crack cocaine, which, as the State observes, is "an amount substantially in excess of that required to prove the crime." Appellee's Br. at 13.[4]

As for the character of the offender, the record indicates that Smith, who was twenty-eight in March 2008, has a significant juvenile and criminal history. Smith's presentence investigation report ("PSI") reveals a 1996 true finding for possession of cocaine, two prior

[4] The State further observes that "Smith was apprehended in the area of 36th and Capitol, the same area where he dealt drugs while on probation for his 1997 conviction for dangerous control of a firearm with a prior conviction." Appellee's Br. at 13. Smith's presentence investigation report ("PSI") indicates that in February 2000, the probation department "received a phone call that [Smith] was dealing drugs at 36th/Capitol, and the issue was subsequently addressed with him." PSI at 5. We decline the State's invitation to rely on this unsubstantiated report in our analysis.

firearm-related convictions, a conviction for resisting law enforcement, a prior conviction for driving while suspended, and a 2002 conviction for dealing in cocaine, for which he was on probation when he committed the instant offenses.[5] Smith also violated probation three times after being convicted of class C felony dangerous control of a firearm in 1998. Clearly, Smith has learned nothing from his previous encounters with the criminal justice system, and he has failed to respond to shorter periods of incarceration and probation. In sum, Smith has failed to persuade us that his sentence is inappropriate. Therefore, we affirm.

Affirmed.

RILEY, J., and VAIDIK, J., concur.

[5] The PSI indicates that Smith was charged with class A felony dealing in cocaine and pleaded guilty to a lesser charge, presumably a class B felony, for which he received a fifteen-year sentence, with five years suspended and 365 days of probation. PSI at 6. Pursuant to the plea agreement, four additional drug-related charges were dismissed. *Id*.