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IN THE
COURT OF APPEALS OF INDIANA

Albert Guthery,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 22, 2021

Court of Appeals Case No. 21A-CR-711

Appeal from the Marion Superior Court

The Honorable Alicia Gooden, Judge

Trial Court Cause No. 49D14-1710-F2-38954

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Albert Guthery (Guthery), appeals his convictions and sentences for dealing in cocaine, a Level 2 felony, Ind. Code § 35-48-4-1(a)(2), and for dealing in methamphetamine, a Level 2 felony, I.C. § 35-48-4-1.1(a)(2). Guthery also appeals his sentence enhancement for being an habitual offender, I.C. § 35-50-2-8(a).

[2] We affirm.

ISSUES

[3] Guthery presents this court with three issues, which we restate as follows:

> (1) Whether the trial court abused its discretion in admitting evidence obtained following a traffic stop which he contends was unreasonably extended;
>
> (2) Whether the trial court abused its discretion when it used the same prior conviction to find his conviction for dealing in methamphetamine to be non-suspendable and to adjudicate him as an habitual offender; and
>
> (3) Whether his sentence is inappropriate given the nature of his offenses and his character.

FACTS AND PROCEDURAL HISTORY

[4] On September 27, 2017, Officer Miguel Roa (Officer Roa) of the Indianapolis Metropolitan Police Department's (IMPD) Criminal Interdiction unit was on

patrol on the southwest side of Indianapolis. Officer Roa received a telephone call from the Metropolitan Drug Task Force stating that officers who had been surveilling Guthery that day wanted the truck that he was driving stopped if Officer Roa was able to observe him committing a traffic infraction. Officer Roa quickly located Guthery's white pickup truck, began following him, and paced Guthery driving forty-five miles per hour in a thirty-five-mile-per-hour zone. At 1:31 p.m., after observing Guthery speeding, Officer Roa initiated a traffic stop by instructing Guthery over his loudspeaker to pull over to the right side of Lynhurst Drive at Southern Avenue. After making this announcement, Officer Roa observed Guthery reach for the truck's middle console, a place which he knew through his training and experience to be where illegal substances and firearms are commonly concealed. After Guthery pulled over, Officer Roa parked behind his truck and approached the driver's side to speak with Guthery. Officer Roa explained that he had stopped Roa for speeding and asked for Guthery's driver's license. Officer Roa enquired where Guthery was going and whether Guthery had any illegal substances or firearms in the vehicle. Guthery responded that he was "just driving [] around" and then stated he was going to Kentucky Avenue. (Suppression Transcript p. 13). Guthery voluntarily and repeatedly displayed his cellphone that had a mapping program open, which Officer Roa felt was "not normal" behavior. (Supp. Tr. p. 15). Officer Roa also observed that Guthery was abnormally nervous to the extent that the officer could see Guthery's heartbeat as the blood pulsed through his jugular. Guthery told Officer Roa that he was going to Kroger's and then stated that he was going to visit a friend. Officer Roa took Guthery's driver's

license and instructed Guthery to refrain from using his cellphone and to leave his window unrolled. Officer Roa gave these instructions because sometimes the subject of a traffic stop calls others to come to the site of the stop and distract the investigating officer, or a subject rolls up his window to darken the interior of the vehicle to obscure his actions.

[5] Officer Roa returned to his cruiser and began the process of running Guthery's information through computerized record checks to verify the status of his driver's license and to determine if he had any outstanding warrants. The records checks returned several results which included people with names, dates of birth, and social security numbers that were similar to Guthery's which necessitated that Officer Roa visually scan the results to ensure that they actually pertained to Guthery. During this process, Officer Michael Bragg (Officer Bragg), also of the IMPD Criminal Interdiction unit, arrived at the scene of the traffic stop with canine Officer Koda. Officer Bragg spoke briefly with Officer Roa, who had noticed that Guthery had rolled up the truck's window and was using his cellphone. Officer Roa asked Officer Bragg to instruct Guthery to leave his window down and refrain from using his cellphone, which Officer Bragg did.

[6] Officer Roa finished verifying the results of the computer records checks he had performed and began the process of writing the speeding ticket. Before completing the ticket, Officer Roa exited his cruiser, returned to the truck, and provided Guthery with his *Pirtle* advisements. Officer Roa asked Guthery for his consent to search the truck. Guthery shook his head in two different

directions, indicating both affirmative and negative responses to the officer's question. Officer Roa decided to have Officer Koda sniff the truck, so he removed Guthery from the truck.

[7] At 1:43 p.m., Officer Koda performed an open-air sniff on Guthery's truck and alerted on the passenger side door shortly thereafter. Officer Roa did not continue writing the speeding ticket as the sniff was underway. A subsequent search of the truck's cabin netted what was later determined to be 223.51 grams of cocaine, 28.03 grams of methamphetamine, and 24.91 grams of fentanyl. Officers also found a handgun next to the drugs. After being placed under arrest and provided with his *Miranda* advisements, Guthery admitted that the drugs were his and that he intended to sell them, but he thought he only had cocaine and methamphetamine. Guthery denied that the handgun belonged to him.

[8] On October 10, 2017, the State filed an Information, charging Guthery with Level 2 felony dealing in cocaine, Level 3 felony possession of cocaine, Level 2 felony dealing in methamphetamine, Level 3 felony possession of methamphetamine, Level 2 felony dealing in a narcotic drug (fentanyl), Level 3 felony dealing in a narcotic drug (fentanyl), and Level 4 felony possession of a firearm by a serious violent felon. On May 24, 2018, Guthery filed a motion to suppress. That same day, the State filed an amended Information, alleging that Guthery was an habitual offender due to having prior, unrelated convictions for Class C felony possession of cocaine in 1996 and Class A felony dealing in cocaine in 1997.

[9] On May 13, 2019, the trial court held a hearing on Guthery's motion to suppress. Officers Roa and Bragg provided testimony consistent with the aforementioned facts. In addition, Officer Roa related that while the sniff was being performed, he could have been writing the speeding ticket. He also acknowledged that, at the time he removed Guthery from the truck, he had been investigating possible narcotics offenses that were unrelated to the purpose of the traffic stop. On July 23, 2019, the trial court denied Guthery's motion to suppress, finding that, while the traffic stop had been "extended," other circumstances such as Officer Roa's observation of Guthery moving about the driver's seat near the center console, Guthery's inconsistent statements about his purpose for driving that day, and Guthery's nervousness justified the extended detention. (Appellant's App. Vol. II, p. 51). The trial court found no violation of Guthery's rights under our state or federal Constitutions.

[10] The trial court convened Guthery's bench trial on January 29, 2021, and February 26, 2021. The trial court incorporated the arguments, testimony, and rulings from the suppression proceedings into the trial record. Officer Roa testified at trial that his request for consent to search did not extend the traffic stop because he was still receiving warrant information from the computerized record checks at the time and that he continued to work on verifying that information while Officer Koda performed the sniff. Over Guthery's objections, the trial court admitted evidence pertaining to the cocaine, methamphetamine, fentanyl, and the handgun, as well as Guthery's subsequent inculpating statements. The trial court found Guthery not-guilty of the narcotic

drug charges related to the fentanyl but guilty of the remaining charges. The trial court also found Guthery to be an habitual offender.

[11] On March 22, 2021, the Marion County Probation Department filed its presentence investigation report. Guthery had a misdemeanor conviction for resisting law enforcement in 1994, for which he received a 150-day jail sentence. Guthery received 180 days executed for his 1996 Class C felony cocaine possession conviction. He also received a 1,280-day suspended sentence and 730 days of probation. Also in 1996, the State filed a notice of probation violation, ultimately leading to Guthery's probation being revoked. Guthery served the remainder of his sentence in the Marion County jail. Guthery received thirty years in the Department of Correction (DOC) for his 1997 Class A felony cocaine dealing conviction but successfully petitioned to have his sentence modified after serving twelve years.

[12] Guthery received his GED and a college degree while incarcerated. Prior to his arrest for this case, Guthery had been employed for three years at the same business as a team leader. During the resolution of this case, Guthery worked fulltime as a dock operator at a food bank. Guthery reported that his financial situation was stable and that he did not worry about paying his bills. Guthery did not report having any addiction issues. Guthery had been married to Lynesha Guthery for over ten years, and they had two children together, ages eleven and six. Guthery informed the presentence investigator that he had no knowledge of the drugs or handgun in his truck and that he had been "set up"

by the investigating officers who he maintained had lied when they testified at his trial. (Appellant's App. Vol. II, p. 64).

[13] Many of Guthery's friends and family sent letters to the trial court attesting to Guthery's positive character traits. Lynesha wrote about the fact that she has suffered a series of medical conditions that drained the family financially and necessitated that Guthery support the family by himself. Guthery's friend Demetrius Woodson (Woodson) wrote that Guthery's mother had been addicted to crack cocaine and that Guthery and his siblings had experienced childhood sexual abuse while living in a "dope whore house[.]" (Appellant's App. Vol. II, p. 72). According to Woodson, Guthery had lost his employment after Lynesha fell ill and had begun dealing drugs again to support his family.

[14] On March 24, 2021, the trial court held Guthery's sentencing hearing. Due to double jeopardy concerns, the trial court sentenced Guthery only for his Level 2 felony dealing in cocaine and Level 2 felony dealing in methamphetamine convictions. The trial court found as aggravating circumstances the amount of drugs involved in the offenses, the fact that Guthery was prepared to sell deadly fentanyl to unsuspecting cocaine users, and Guthery's criminal record as a whole, which it noted included a probation violation. The trial court stated that it had considered the remoteness of Guthery's previous criminal convictions in assessing the weight it gave to his criminal record. The trial court found undue hardship to Guthery's family, including to his disabled wife, to be a mitigating circumstance. The trial court observed that Guthery had been employed since his release from prison in 2009 and that he had stayed out of trouble during the

pendency of the instant proceedings, but that this did not neutralize the gravity of the offenses. The trial court imposed twenty-five-year, concurrent sentences for each conviction, with ten years executed in the DOC, ten years to be executed in community corrections, and five years suspended, with three years of probation. The trial court enhanced Guthery's conviction for dealing in methamphetamine by six years for being an habitual offender. The trial court advised Guthery that he could petition for a sentence modification after having served three years of his habitual offender enhancement.

[15] Guthery now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Traffic Stop*

[16] Guthery argues that the trial court erred when it denied his motion to suppress the evidence garnered from the traffic stop. However, because he appeals following a bench trial resulting in his conviction, the issue on appeal is more properly framed as one regarding the admissibility of the challenged evidence. *Clark v. State*, 994 N.E.2d 252, 259 (Ind. 2013). In reviewing a trial court's determination on the admissibility of evidence garnered from an allegedly illegal search, we do not reweigh the evidence, we consider conflicting evidence in a light most favorable to the trial court's ruling, and we defer to the trial court's factual determinations unless they are clearly erroneous. *Bush v. State*, 925 N.E.2d 787, 789 (Ind. Ct. App. 2010). However, we "'consider afresh'"

questions regarding the constitutionality of a search or seizure. *Id*. (quoting *Meredith v. State*, 906 N.E.2d 867, 869 (Ind. 2009)).

[17] Guthery argues that his continued detention after Officer Roa had fulfilled the purposes of the traffic stop violated his Fourth Amendment rights.[1] The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." As a general matter, an officer may stop an automobile without running afoul of the Fourth Amendment if the officer has probable cause to believe that a traffic violation has occurred. *Whren v. U.S.*, 517 U.S. 806, 810, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89 (1996). For the duration of a traffic stop, an officer effectively seizes everyone in the vehicle, the driver as well as any passengers. *Brendlin v. California*, 551 U.S. 249, 255, 127 S.Ct. 2400, 2406, 168 L.E.2d 132 (2007). The United States Supreme Court has described the parameters of a constitutionally permissible traffic stop as follows:

> A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and

[1] Guthery also cites Article I, Section 11 of the Indiana Constitution, but he fails to develop any separate argument based on our state's prohibitions against unreasonable search and seizure. Therefore, he has waived those arguments for our consideration. *See Jackson v. State*, 925 N.E.2d 369, 372 n.1 (Ind. 2010) (finding Jackson's state constitutional claims waived for failure to develop any argument supporting a separate standard under the Indiana Constitution).

> inform the driver and passengers they are free to leave. An officer's inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquires do not measurably extend the duration of the stop.

Arizona v. Johnson, 555 U.S. 323, 333, 129 S.Ct. 781, 788, 172 L.E.2d 694 (2009) (internal citations omitted).

[18] In *Illinois v. Caballes*, 543 U.S. 405, 407-10, 125 S.Ct. 834, 836-38, 160 L.Ed.2d 842 (2005), the Court considered the constitutionality of a dog sniff that was performed during a valid traffic infraction stop and concluded that the officer was not required to have independent reasonable suspicion of criminal activity to justify the dog sniff because "[a]ny intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement." However, the Court noted that a traffic stop based on the need to write a ticket "can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Id*. at 407. Therefore, the Court found that, if the officer had "unreasonably prolonged" the traffic stop to perform the dog sniff, Caballes would have been unlawfully detained, absent any reasonable suspicion of criminal activity other than the traffic violation. *Id*. at 407-08. The Court accepted the state-court findings examining the work of the officer involved and concluding that he had not improperly extended the duration of the stop to enable the dog sniff to occur. *Id*. at 408.

[19] In the wake of *Caballes*, this court has recognized that it is the State's burden to show that the duration of a traffic stop was not increased due to the

performance of a dog sniff. *Wilson v. State*, 847 N.E.2d 1064, 1067 (Ind. Ct. App. 2006). If the State is unable to make that showing, the challenged evidence will be found to have been procured in violation of the Fourth Amendment unless the officer had reasonable suspicion that other criminal activity was afoot to justify prolonging the detention in order for the sniff to occur. *See, e.g., Bush*, 925 N.E.2d at 791-92 (undertaking an analysis of whether the officer had independent reasonable suspicion of criminal activity to justify Bush's continued detention where the State failed to show that the dog sniff at issue occurred while the purpose of the traffic stop was ongoing or that the sniff did not materially increase the duration of the stop). "'Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, but it still requires at least a minimal level of objective justification and more than an inchoate and unparticularized suspicion or 'hunch' of criminal activity.'" *Id*. at 791 (quoting *State v. Schlechty*, 926 N.E.2d 1, 7 (Ind. 2010), in turn citing *Illinois v. Wardlow*, 528 U.S. 119, 123-24, 120 S.Ct. 673, 676, 145 L.E.2d 570 (2000)). Thus, in determining whether additional reasonable suspicion existed to justify a defendant's continued detainment after the purposes of the traffic stop have been completed, we must examine the totality of the circumstances to see if "'the detaining officer has a particularized and objective basis for suspecting legal wrongdoing.'" *Id*. (quoting *Bannister v. State*, 904 N.E.2d 1254, 1255-56 (Ind. 2009)). This is necessarily a fact-sensitive inquiry. *Thayer v. State*, 904 N.E.2d 706, 710 (Ind. Ct. App. 2009).

[20] Here, Guthery argues that his traffic stop was unreasonably prolonged by the dog sniff because the purposes of the stop had been completed by the time it was performed. The State counters that Officer Roa's action were reasonably related to the purposes of the stop and "lasted only long enough for [him] to ensure that Guthery had a valid driver's license and that a warrant was not outstanding for his arrest." (Appellee's Br. p. 18). In addressing these arguments, we begin by noting that Officer Roa offered contradictory testimony regarding what he was doing at the time the dog sniff occurred. At the suppression hearing, Officer Roa testified that he had finished verifying the results of the computer record searches and that, as the dog sniff took place, he could have been finishing writing the traffic ticket, but that he did not. At trial, Officer Roa testified that at the time of the dog sniff, he was still receiving returns from the computer record checks that he was in the process of verifying. The trial court did not enter factual findings regarding Officer Roa's actions during the stop, but the trial court determined that the stop had been "extended[.]" (Appellant's App. Vol. II, p. 51). Whether or not the traffic stop was impermissibly extended is a legal conclusion to which we owe no deference. *See Meredith*, 906 N.E.2d at 869.

[21] However, we need not address these inconsistencies further or resolve the issue of whether Officer Roa had completed the purposes of the traffic stop at the time the dog sniff was performed, because even if he had, we conclude that he had sufficient independent reasonable suspicion to justify Guthery's further detention. After Officer Roa announced his presence through his cruiser's

loudspeaker and instructed Guthery to pull over, he observed Guthery reach for the truck's center console, an area of the truck he knew through his training and experience was a common hiding place for drugs and firearms. Guthery also exhibited unusual nervousness. Although nervousness alone may not support reasonable suspicion, it may be considered alongside other circumstances to support such a finding. *Glasgow v. State*, 99 N.E.3d 251, 257 (Ind. Ct. App. 2018). In addition, Guthery provided inconsistent answers when asked where he was going, at first stating that he had no destination, then that he was going to Kentucky Avenue, then that he was going to a grocery store, and finally settling on the explanation that he was going to visit a friend. These inconsistent explanations were a factor that Officer Roa validly considered as indicative of possible criminal activity. *See State v. Quirk*, 842 N.E.2d 334, 342 (Ind. 2006) ("[A]n inconsistent answer regarding past conduct is less suspicious than an inconsistent answer regarding present destination or purpose . . . the latter casts suspicion and doubt on the nature and legitimacy of the activity being investigated."); *see also U.S. v. McBride*, 635 F.3d 879, 882 (7th Cir. 2011) (finding reasonable suspicion to extend a traffic stop in part because McBride "could not keep even his own story straight."). Guthery also disobeyed Officer Roa's instructions to refrain from rolling up his window and using his cell phone. While it is not illegal or suspicious to roll up a window or use a cell phone, it is suspicious to do these things in the context of a traffic stop after one has been directed by the investigating officer not to, because, as Officer Roa testified, these actions may indicate a desire to impede the investigation, *i.e.*, impede the discovery of contraband.

[22] In his opening brief, Guthery does not argue that Officer Roa lacked reasonable suspicion to detain him after the purpose of the initial traffic stop had been concluded, and he does not challenge the evidence supporting the trial court's factual findings regarding Officer Roa's reasons for extending the stop. In his reply brief, Guthery does not address his suspicious movement in the truck or his failure to obey Officer Roa's instructions regarding his window and cell phone. We are charged with examination of the totality of the circumstances to determine if separate reasonable suspicion existed to justify Guthery's continued detention. *Bush*, 925 N.E.2d at 791. While any one of these cited circumstances standing alone may not have supported a reasonable suspicion of criminal activity, we conclude that their combination within the context of this traffic stop supported Guthery's continued detention. *See Thayer*, 904 N.E.2d at 710 (observing that "nervousness combined with deceptive responses to an officer's questions can generate reasonable suspicion of a crime."); *see also Campos v. State*, 885 N.E.2d 590, 597-98 (Ind. 2008) (observing that Campos's nervousness in addition to the inconsistencies between his and the driver's stories about their destination and who owned the car could have supported a finding of reasonable suspicion to detain Campos after the traffic stop was concluded). Accordingly, Guthery's Fourth Amendment rights were not violated, and the trial court did not abuse its discretion in admitting the challenged evidence.

II. *Felony Suspendability Statute*

[23] Guthery contends that his sentences for Level 2 felony dealing in methamphetamine and for being an habitual offender constituted an impermissible double enhancement. We review a trial court's sentencing decisions for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). Inasmuch as addressing Guthery's argument entails interpreting Indiana's sentencing statutes, those are matters of law which we review *de novo*. *Pierce v. State*, 29 N.E.3d 1258, 1265 (Ind. 2015). If the statutory language is clear and unambiguous, we give effect to its plain and ordinary meaning *Id.* "We strive to interpret a statute consistently with the intent of the enacting legislature, insofar as we can discern it." *Id*.

[24] Dealing in methamphetamine is a Level 2 felony if the drug involved is at least ten grams. I.C. §§ 35-48-4-1.1(a)(2), (e)(1). Indiana Code sections 35-50-2-2.2(a) and (b) provide in relevant part that a trial court "may suspend any part of a sentence for a felony" unless the defendant is convicted of a Level 2 felony and has any prior unrelated felony conviction, in which case a trial court "may suspend only that part of a sentence that is in excess of the minimum sentence" for the Level 2 felony. The minimum sentence for a Level 2 felony is ten years. I.C. § 35-50-2-4.5. In addition, under our general habitual offender statute, a trial court "shall sentence a person found to be a[n] habitual offender to an additional fixed term that is between . . . six (6) years and twenty (20) years" if that person is convicted of a Level 2 felony. I.C. § 35-50-2-8(i)(1).

[25] Here, Guthery was convicted of Level 2 felony dealing in methamphetamine. The trial court determined that Guthery was non-suspendable below the minimum sentence for that offense due to his prior felony conviction for Class A felony cocaine dealing. The trial court also found Guthery to be an habitual offender based on his two prior, unrelated convictions for Class A felony cocaine dealing and Class C felony cocaine possession, and it enhanced Guthery's sentence for dealing in methamphetamine by six years as a result. Guthery argues that the trial court impermissibly used the same prior conviction to doubly enhance his sentence "once as a non-suspendable offense, then as a predicate to the habitual offender enhancement." (Appellant's Br. p. 13). Guthery urges us that his habitual offender enhancement must, therefore, be vacated.

[26] In *State v. Downey*, 770 N.E.2d 794, 795-96 (Ind. 2002), our supreme court discussed the types of sentencing enhancement statutes which dictate when a court may impose a more severe sentence than would otherwise be the case on a defendant who has been proven to be a repeat offender, and it identified three categories of statutes: (1) the general habitual offender statute; (2) specialized habitual offender statutes such as the habitual substance offender, habitual traffic violator, and repeat sexual offender statutes; and (3) progressive penalty statutes. The court defined a progressive penalty statute as one under which "the seriousness of a particular charge (with a correspondingly more severe sentence) can be elevated if the person charged has previously been convicted of a particular offense." *Id.* at 796. The *Downey* court acknowledged the general

rule that "a sentence imposed following conviction under a progressive penalty statute may not be increased further under either the general habitual offender statute or a specialized habitual offender statute absent explicit legislative direction[.]" *Id*. at 794.

[27] In *Conrad v. State*, 747 N.E.2d 575, 592-95 (Ind. Ct. App. 2001), *trans. denied*, this court had previously held that Conrad's sentence for unlawful possession of a firearm by a serious violent felon could not be enhanced under the general habitual offender statute using the same predicate felony. *Id*. at 594-95. In reaching that decision we observed that

> the defendant's serious violent felon status does not serve to "enhance" a sentence in the traditional sense of the word. As a practical matter, though, the defendant's serious violent [felon] status does realistically serve as an "enhancement" in that it increases the potential punishment for "possession of a firearm" from nothing at all to six to twenty years imprisonment and a fine of up to $10,000[.]

Id. at 594. Our supreme court subsequently quoted this language in *Mills v. State*, 868 N.E.2d 446, 449-50 (Ind. 2007), in upholding *Conrad*'s result following amendments to the habitual offender statute. It also reiterated the principal that "absent explicit legislative direction, a sentence imposed following conviction under a 'progressive penalty statute' may not be increased further under either the general habitual offender statute or a specialized habitual offender statute." *Id*. at 451.

[28] Seizing on the quoted language from *Conrad*, Guthery argues that we should view the felony suspendability statute in the same manner as the serious violent felon statute, because he argues that "it increases the mandatory period of incarceration from nothing at all to a definitive amount of mandatory incarceration." (Appellant's Br. p. 19). Therefore, as Guthery's argument goes, following the principals outlined in *Downey* and *Mills*, absent explicit legislative direction, any sentence imposed under the felony suspendability statute may not be further enhanced under the general habitual offender statute.

[29] We do not find Guthery's argument to be persuasive. The felony suspendability statute is not a progressive penalty statute, as it does not elevate the seriousness of an offense and its corresponding penalty due to a previous conviction. *See Downey*, 770 N.E.2d at 796. Put another way, the suspendability statute does not expand the sentencing range for an offense. Rather, it merely limits the discretion of the trial court to order a sentence to be suspended, all within the existing sentencing range for the offense. Therefore, the felony suspendability statute is not a sentencing enhancement statute to which double-enhancement analysis applies. In addition, the quoted language of *Conrad* cannot be applied wholesale to the suspendability statute, as in *Conrad*, we relied upon the fact that the serious violent felon statute criminalized conduct that would otherwise be legal, something which cannot be said of the suspendability statute. Therefore, we find no abuse of the trial court's discretion in finding Guthery's sentence for dealing in methamphetamine to be non-suspendable under the minimum for a Level 2

felony and for enhancing that sentence for being an habitual offender based in part on the same predicate felony.

III. *Appropriateness of Sentence*

[30] Guthery argues that his sentence is inappropriately severe and requests that we revise it. "Even when a trial court imposes a sentence within its discretion, the Indiana Constitution authorizes independent appellate review and revision of this sentencing decision." *Hoak v. State*, 113 N.E.3d 1209, 1209 (Ind. 2019). Thus, we may revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offenses and the character of the offender. *Id*. The principal role of such review is to attempt to leaven the outliers. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). The defendant bears the burden to persuade the reviewing court that the sentence imposed is inappropriate. *Robinson v. State*, 91 N.E.3d 574, 577 (Ind. 2018).

A. *Nature of the Offenses*

[31] Guthery argues that his sentence is inappropriate given the nature of the offenses. When reviewing the nature of offenses, we look to the "the details and circumstances of the offenses and the defendant's participation therein." *Madden v. State*, 162 N.E.3d 549, 564 (Ind Ct. App. 2021). In conducting our review, we determine whether there is "anything more or less egregious about the offense as committed by the defendant that distinguishes it from the typical offense accounted for by our legislature when it set the advisory sentence." *Id*. The advisory sentence is the starting point that the legislature selected as an

appropriate sentence for the particular crime committed. *Childress v. State*, 848 N.E.2d 1073, 1081 (Ind. 2006); *Madden*, 162 N.E.3d at 564. Guthery was convicted of dealing in cocaine and dealing in methamphetamine, both as Level 2 felonies. A Level 2 felony carries a sentencing range of between ten and thirty years, with an advisory sentence of seventeen and one-half years. I.C. § 35-50-2-4.5. The trial court sentenced Guthery to twenty-five-year, concurrent sentences for each conviction, with ten years executed in the DOC, ten years to be executed in community corrections, and five years suspended, with three years of probation. The trial court also enhanced Guthery's conviction for dealing in methamphetamine by six years for being an habitual offender.

[32] Guthery characterizes his offenses as simply "being in a truck with drugs and a gun[,]" although he does acknowledge that the amount of drugs involved in the offenses was significant. (Appellant's Br. p. 20). Guthery also argues that his sentence is inappropriately harsh because he had not yet delivered the drugs to anyone and he did not cause any physical injury or property damage. We find these arguments to be unpersuasive, as they ignore Guthery's admitted intention to sell the drugs he possessed that day. Guthery was caught with 223.51 grams of cocaine and 28.03 grams of methamphetamine. His dealing convictions required proof of only 10 grams of cocaine and methamphetamine, and thus the amount of drugs involved in the offenses was greatly in excess of that required for the offenses, rendering those offenses egregious. *See* I.C. §§ 35-48-4-1(a)(2); 35-48-4-1.1(a)(2). In addition, Guthery denied knowing that he possessed fentanyl and claimed that he thought that he possessed cocaine and

methamphetamine only. Had Guthery sold fentanyl to unsuspecting cocaine users, the consequences could have been fatal, a factor which renders these offenses more serious than the typical offenses. The trial court enhanced Guthery's sentence for dealing in methamphetamine by six years for being an habitual offender, which was the minimum it could have imposed. *See* I.C. § 35-50-2-8(i)(1). Given the quantity of drugs involved, Guthery's intention to deal fentanyl as cocaine, and the minimum habitual offender enhancement imposed, we decline to revise Guthery's aggregate sentence in light of the nature of his offenses.

B. *Character of the Offender*

[33] Guthery also argues that his aggregate sentence is inappropriate given his character, relying chiefly on the positive character letters his friends and family sent to the trial court prior to sentencing and on the presentence investigator's conclusion that he was at low risk to reoffend. Upon reviewing a sentence for inappropriateness in light of the character of the offender, we look to a defendant's life and conduct. *Morris v. State*, 114 N.E.3d 531, 539 (Ind. Ct. App. 2018), *trans. denied*.

[34] Guthery has a criminal record consisting of one misdemeanor conviction for resisting law enforcement and two prior felony drug-related offenses, one of which was also for dealing in cocaine. Although his last offenses were remote in time, Guthery has had the benefit of probation, which was revoked, short jail terms, and a lengthier period of incarceration at the DOC. We acknowledge the evidence in the record of Guthery's difficult childhood, his important role in

supporting his family, especially following his wife's illness, and his strong community support. However, having previously served a prison sentence for dealing cocaine, Guthery was uniquely positioned to be aware of the potential consequences to himself, his family, and his community when he dealt drugs, yet he did so anyway. Guthery's statements to law enforcement made it clear that this was not the first time that Guthery had dealt drugs after serving his sentences for his prior drug offenses. Rather, Guthery had been actively dealing on an ongoing basis, which does not reflect well upon his character. We also observe that Guthery maintained to the presentence investigator that he had been framed and that the investigating officers had lied in their testimony to the trial court. These statements go beyond a mere maintenance of innocence and also do not reflect well upon Guthery's character.

[35] We conclude that Guthery's sentence, which includes sixteen years to be executed with the DOC, followed by ten years on community corrections, and three years of probation, represents an appropriate balance between Guthery's history of recidivism and the positive evidence of his character. In addition, Guthery may petition for a sentencing modification after having served three years, which further indicates to us that the sentence imposed was not inappropriate in light of Guthery's character. Accordingly, we will not disturb the trial court's sentencing order.

CONCLUSION

[36] Based on the foregoing, we conclude that the trial court did not abuse its discretion when it admitted evidence garnered from the traffic stop. We also

conclude that Guthery's sentences for dealing in methamphetamine and for being an habitual offender did not constitute an impermissible double enhancement, nor is his sentence inappropriate in light of his offenses and his character.

[37] Affirmed.

[38] Robb, J. and Molter, J. concur