MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Latrell D. McCall,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 29, 2021

Court of Appeals Case No. 21A-CR-1066

Appeal from the Elkhart Circuit Court

The Honorable Michael A. Christofeno, Judge

Trial Court Cause No. 20C01-1804-F2-19

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Latrell McCall (McCall), appeals his conviction for dealing in a controlled substance with intent to deliver, a Level 2 felony, Ind. Code § 35-48-4-2(a)(2)(C), and dealing in a synthetic drug or look alike substance, a Level 6 felony, I.C. § 35-48-4-10.5 (repealed July 1, 2019).

[2] We affirm.

ISSUES

[3] McCall presents two issues on appeal, which we restate as the following:

(1) Whether the State presented sufficient evidence beyond a reasonable doubt to establish McCall's constructive possession of a controlled substance; and

(2) Whether McCall's sentence is inappropriate in light of the nature of the offenses and his character.

FACTS AND PROCEDURAL HISTORY

[4] On March 14, 2017, Chad Hoien (Corporal Hoien) and investigator Jeremy Overmyer (Overmyer) of the Elkhart County Sheriff's Department were trying to locate McCall for active child support warrants. Corporal Hoien and Overmyer went to McCall's last known address and knocked on the door. Makayla Johnson (Johnson), McCall's ex-girlfriend and the tenant of the apartment, answered the door. Johnson stated that McCall was not there and that he had moved out approximately two weeks prior. Johnson, however,

advised them that McCall had a key to her apartment and some of his belongings were still inside. Johnson stated that she believed McCall had been in her apartment earlier that day while she was at work. Johnson allowed Corporal Hoien and Overmyer to enter her apartment.

[5] After an initial sweep, Corporal Hoien and Overmyer conducted an in-depth search for McCall. During the search, they noticed a pair of men's shoes next to the front door, and Johnson stated that they belonged to McCall. In plain sight, there was a "big stockpile" of ammunition close to the front door. (Transcript Vol. II, p. 194). Underneath Johnson's bed, there was a .45 caliber handgun with an extended magazine. Johnson denied owning the gun or the ammunition. While continuing to look for McCall, Corporal Hoien opened the cabinet under the sink, and he found a large bag containing a green leafy plant material which later tested positive for synthetic marijuana and weighed 271.4 grams. Following the discovery of the synthetic marijuana, Johnson signed a consent form allowing Corporal Hoien to further search her apartment.

[6] Inside the cabinet above the sink, Corporal Hoien found the firearm box for the .45-caliber handgun previously located underneath Johnson's bed. Two more magazines were located in the firearm box. In the partitioning wall between the kitchen and the living room, there was a lock box containing a "tan rock-like substance," twelve individual baggies with a similar tan substance, twelve packages of Suboxone, a digital scale with a white powdery residue on it, and a probation receipt made out to McCall. (Tr. Vol. II, pp. 218, 220). The tan rock-like substance later tested positive for heroin and weighed 23.49 grams.

The twelve individual baggies with a similar tan-like substance tested positive for fentanyl and heroin and had a total weight of 11.5 grams. McCall's fingerprint was found on the digital scale.

[7] About a month after the search, and while at the Elkhart County Jail, McCall agreed to be interviewed by the police. After McCall was given his *Miranda* warnings, he stated that the gun recovered under the bed belonged to him. McCall also stated that the "toonchie," a "slang term for synthetic marijuana," was his and that he had planned on spraying it with "Roach Raid" before smoking it. (Tr. Vol. III, p. 85). McCall maintained that the heroin and the other drugs did not belong to him, and that two weeks prior to the search, he had moved out of Johnson's apartment, and he admitted to still having a key to the apartment. McCall, however, claimed that Johnson had "changed the locks on him." (Tr. Vol. II, p. 88).

[8] On April 4, 2018, the State filed an Information, charging McCall with Level 2 felony dealing in a controlled substance with intent to deliver, and Level 6 felony dealing in a synthetic drug or lookalike substance. Beginning March 16, 2021, a two-day jury trial was held. Several officers testified that the items in the lock box, the amount of heroin, fentanyl, and synthetic marijuana found, and the packaging of the drugs, were consistent with drug dealing. Johnson testified that McCall began living with her about a month prior to the search. Although McCall's name was not on the lease, Johnson stated that McCall helped pay the bills and had a key to her apartment. Johnson stated that McCall kept some of his possessions inside the apartment. She claimed that

two weeks prior to the search, and following an argument, she asked McCall to leave, and she requested that McCall return her apartment key and remove his belongings. McCall never returned the apartment key, and Johnson denied changing the locks. Johnson testified that other than herself, McCall was the only other individual who had a key to her apartment. Johnson believed that McCall went in and out of her apartment when she was not home. Johnson testified that the lock box containing the drugs belonged to McCall, McCall treated the lock box like a "baby," and he never allowed her to touch it. (Tr. Vol. III, p. 72). While McCall admitted that the firearm found under the bed and the bag of synthetic marijuana found underneath the sink belonged to him, he denied owning the lock box or the drugs found inside the lock box. As for the digital scale, McCall stated that he was familiar with the scale because he had used it to bake cakes and cookies, but he claimed that he did not know how it ended up inside the lock box. McCall also stated that he did not know why his probation receipt was inside the lock box.

[9] At the close of the evidence, the jury found McCall guilty as charged. On May 13, 2021, the trial court conducted McCall's sentencing hearing and sentenced McCall to thirty years for the Level 2 felony conviction, with two years suspended to probation, and to two-and-one-half years for the Level 6 felony conviction, all suspended, for an aggregate executed sentence of twenty-eight years.

[10] McCall now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Sufficiency of the Evidence*

[11] McCall challenges his conviction for Level 2 felony dealing in a controlled substance with intent to deliver and argues the evidence is insufficient to demonstrate that he constructively possessed the drugs. When reviewing a claim of insufficient evidence, it is well-established that our court does not reweigh evidence or assess the credibility of witnesses. *Walker v. State*, 998 N.E.2d 724, 726 (Ind. 2013). Instead, we consider all of the evidence, and any reasonable inferences that may be drawn therefrom, in a light most favorable to the verdict. *Id*. We will uphold the conviction "'if there is substantial evidence of probative value supporting each element of the crime from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.'" *Id*. (quoting *Davis v. State*, 813 N.E.2d 1176, 1178 (Ind. 2004)).

[12] The State alleged that McCall violated Indiana Code section 35-48-4-2(a)(2)(C), which provides in relevant part that: "A person who possesses, with intent to deliver . . . a controlled substance, pure or adulterated, classified in schedule I, II, or III . . . commits dealing in a schedule I, II, or III controlled substance[.]" The offense is a Level 2 felony if the controlled substance is at least twenty-eight grams. *See* I.C. § 35-48-4-2(f)(1). Therefore, to convict McCall as charged, the State was required to prove beyond a reasonable doubt that McCall possessed a controlled substance, *i.e.*, heroin, with intent to deliver it.

[13] McCall focuses his appellate challenge solely on the possession element of the charge—not the intent to deliver prong—and maintains that the evidence does not support a conclusion that he constructively owned the heroin found inside the lock box. In support of this argument, McCall claims that "he had not been back to the apartment and had no contact with [] Johnson," and therefore, "[i]t cannot be said that [he] had possession of the premises when the lock box [was] found in [] Johnson's apartment." (Appellant's Br. p. 14).

[14] Where, as here, a defendant does not have actual possession of the contraband, a conviction will be sustained if it rests on constructive possession. *Gray v. State*, 957 N.E.2d 171, 171 (Ind. 2011). Constructive possession occurs when a person has the capability and the intent to maintain dominion and control over the item. *Canfield v. State*, 128 N.E.3d 563, 572 (Ind. Ct. App. 2019), *trans. denied*. The capability element of constructive possession is met if the State shows "that the defendant is able to reduce the controlled substance to the defendant's personal possession." *Goliday v. State*, 708 N.E.2d 4, 6 (Ind. 1999). Proof of a possessory interest in the premises in which the object is found is adequate to meet the capability element. *Id*.

[15] The evidence presented at trial shows that McCall moved into Johnson's apartment about a month prior to the recovery of the contraband. While his name was not on the lease, McCall helped Johnson pay the bills, including rent, had a key to the apartment, and kept his belongings there. Two weeks prior to the search, the two ended their relationship, and although Johnson asked McCall to return her key and remove his belongings, McCall did not comply

and kept the apartment key. At trial, Johnson testified that McCall was the only other individual, besides herself, who had a key to her apartment. Contrary to McCall's claim, the evidence in support of the verdict and the reasonable inferences therefrom reflect that McCall accessed the apartment while Johnson was away. Johnson testified that following her breakup with McCall, she believed McCall secretly visited her apartment while she was at work. She advised the court that, on the morning of March 14, 2017, the day of the search, she left the apartment to go to work and school and did not return to the apartment until later that night. Johnson stated that she noticed that several things in her apartment were different from when she had left that morning, such as new dishes in the sink and new items like the pile of ammunition near the front door. Johnson additionally testified that the lock box belonged to McCall, McCall treated the lock box like his baby, and that he would not allow her to touch it. Based on the fact that McCall admitted that he still had a key to Johnson's apartment, even after the breakup, coupled with Johnson's testimony that the lock box belonged to McCall, we find that McCall had a possessory interest in Johnson's apartment and was therefore capable of maintaining dominion and control over the heroin and the baggies of the heroin/fentanyl mix found in the lock box. *See Goliday*, 708 N.E.2d at 6 (holding that proof of a possessory interest in the premises in which the object is found is adequate to meet the capability element). We find McCall's reliance on his own testimony claiming that Johnson had changed the apartment's locks to be nothing more than self-serving and an invitation for this court to reweigh the credibility of the evidence, which we are not allowed to do. *See Walker*, 998 N.E.2d at 726.

[16] However, when control of the premises where drugs are found is not exclusive, the inference of intent to maintain dominion and control over the drugs "must be supported by additional circumstances pointing to the defendant's knowledge of the nature of the controlled substances and their presence." *Lampkins v. State*, 682 N.E.2d 1268, 1275 (Ind. 1997) *modified on reh'g*, 685 N.E.2d 698 (Ind. 1997). This knowledge may be inferred from either the exclusive dominion and control over the premises containing the contraband or, where, as here, the control is non-exclusive, evidence of additional circumstances pointing to the defendant's knowledge of the presence of the contraband. *Goliday*, 708 N.E.2d at 6. Such additional circumstances include, but are not limited, to the following: (1) incriminating statements made by the defendant; (2) attempted flight or furtive gestures; (3) a manufacturing setting; (4) proximity of the defendant to the contraband; (5) location of the contraband within the plain view of the defendant; and (6) location of the contraband within close proximity of items owned by the defendant. *Bradley v. State*, 765 N.E.2d 204, 212 (Ind. Ct. App. 2002).

[17] With respect to the intent to maintain dominion and control over the heroin, the State presented evidence showing McCall's knowledge of the contraband. The location of the heroin was close to items owned by McCall, *i.e.*, McCall's probation receipt. The digital scale, located inside the lockbox, contained McCall's fingerprint. Despite his claim to the contrary, a reasonable inference can be made that McCall owned the lockbox in which the heroin was located. Johnson testified that she had observed McCall carrying a lock box multiple

times at the apartment, which he treated "like a baby" and which she was not allowed to touch. These additional circumstances established that McCall had knowledge of the presence of the heroin and had the intent to maintain dominion and control over the heroin and the baggies of the heroin/fentanyl mix found in the lock box. *See Jones v. State*, 807 N.E.2d 58, 65-66 (Ind. Ct. App. 2004) (holding that bills and receipts, made out to Jones, in close proximity to contraband constituted evidence of additional circumstances that Jones had the intent to maintain dominion and control over the contraband), *trans. denied*. Here, we conclude that both prongs of constructive possession are therefore satisfied, and we reject McCall's claim that there was insufficient evidence beyond a reasonable doubt to demonstrate that he constructively possessed the heroin found in the lock box.

[18] McCall focuses his appellate challenge solely on the constructive possession element of the change and fails to explicitly challenge the intent to deliver prong of the charge. Nevertheless, the evidence in the record supports an inference that McCall intended to deliver the heroin. At his jury trial, several officers theorized that the items in the lock box, *i.e.,* the digital scale, the amount of the heroin and heroin/fentanyl mix, and the packaging of the drugs, were consistent with drug dealing. *See, e.g., White v. State*, 772 N.E.2d 408, 412-13 (Ind. 2002) (holding that the "peculiar packaging" of a clear plastic bag with twenty-nine individual plastic bags containing crack cocaine was sufficient to uphold a jury's inference that the defendant intended to deliver the cocaine); *McGuire v. State*, 613 N.E.2d 861, 864 (Ind. Ct. App. 1993) (examples of

circumstantial evidence of a defendant's intent to deliver drugs include possession of a large quantity of drugs, large amounts of currency, scales, plastic bags, other paraphernalia, and evidence of other drug transactions), *trans. denied*. We find that based on the amount of heroin, its packaging, and the digital scale, a reasonable factfinder could infer that McCall intended to deliver the heroin found in the lock box.

II. *Inappropriate Sentence*

[19] McCall further contends that his sentence is inappropriate in light of the nature of the offenses and his character. Indiana Appellate Rule 7(B) empowers us to independently review and revise sentences authorized by statute if, after due consideration, we find the trial court's decision inappropriate in light of the nature of the offense and the character of the offender. *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007). The "nature of offense" compares the defendant's actions with the required showing to sustain a conviction under the charged offense, while the "character of the offender" permits a broader consideration of the defendant's character. *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008); *Douglas v. State*, 878 N.E.2d 873, 881 (Ind. Ct. App. 2007). An appellant bears the burden of showing that both prongs of the inquiry favor a revision of his sentence. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). Whether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and a myriad of other considerations that come to light in a given case.

Cardwell, 895 N.E.2d at 1224. Our court focuses on "the length of the aggregate sentence and how it is to be served." *Id*.

[20] The advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed. *Abbott v. State*, 961 N.E.2d 1016, 1019 (Ind. 2012). For his Level 2 felony, McCall faced a sentence of ten to thirty years with an advisory term of seventeen-and-one-half years. I.C. § 35-50-2-4.5. For his Level 6 felony, McCall faced a sentence of six months to two and one-half years, with an advisory sentence of one year. I.C. § 35-50-2-7. Here, the trial court imposed consecutive sentences of thirty years for the Level 2 felony conviction, with two years suspended to probation, and a suspended sentence of two and one-half years for the Level 6 felony conviction.

[21] Turning to the nature of his offenses, McCall argues that there "was nothing notably distinguishable or egregious in this instance based on the nature of the offense[s]." (Appellant's Br. p. 18). McCall possessed, with the intent to deliver, 23.49 grams of heroin, 11.15 grams of heroin and fentanyl mix and 271.4 grams of a synthetic marijuana or lookalike substance. In addition, McCall possessed twelve packages of Suboxone, which is a prescription drug. Moreover, McCall, who is a convicted felon, admitted to owning the .45 caliber handgun and the large amount of ammunition found inside Johnson's apartment. Here, we find that McCall has failed to show us that nature of the offenses warrants a lesser sentence.

[22] When considering the character of the offender, one relevant fact is the defendant's criminal history. *Johnson v. State*, 986 N.E.2d 852, 857 (Ind. Ct. App. 2013). The presentence investigation report (PSI) reveals that McCall's first involvement with the legal system was at the age of fourteen. Prior to turning eighteen, he was adjudicated a delinquent for battery, disorderly conduct, receiving stolen property, and possession of marijuana, hashish, or hash oil. As an adult, McCall accumulated several felony and misdemeanor convictions for disorderly conduct, escape, nonsupport of a dependent child, possession of marijuana, resisting law enforcement, contempt, possession of a synthetic drug or synthetic drug lookalike, and driving while suspended. McCall has violated the terms of his probation and community correction placement multiple times and has also failed to appear in court over fifteen times. When McCall committed the present offenses, he had active child support warrants. At the time of sentencing, McCall had pending cases for domestic battery, criminal mischief, possession of cocaine, and trafficking a controlled substance with an inmate. Furthermore, McCall committed these offenses while he was out on bond for other crimes.

[23] The trial court noted that McCall's prior sanctions included, among others, probation, an anger management program, work release, suspended jail sentences, home detention, and community corrections from which he escaped. As the State succinctly argues, McCall's criminal history establishes that past interactions with law enforcement have done nothing to deter his flagrant disregard of Indiana laws. Despite receiving leniency from the court on

numerous prior occasions, McCall refuses to reform his behavior and to comport with the requirements of the law.

[24] We also find that McCall's substance abuse speaks poorly of his character. In the PSI, McCall stated that he started using marijuana at age fourteen, and he also admitted to smoking synthetic marijuana and to using cocaine. When asked what he and his friends like to do for fun, McCall stated they "smoke weed and play games." (Appellant's App. Conf. Vol. II, p. 152). McCall argues that he should be given a more lenient sentence since he is addicted to drugs, and that he needs rehabilitation. Contrary to his claim, the evidence shows that McCall has not taken appropriate steps to seek treatment, despite acknowledging that he has a substance abuse problem. *See Hape v. State*, 903 N.E.2d 977, 1002 (Ind. Ct. App. 2009) (holding that, where a defendant is aware of a substance abuse problem but has not taken appropriate steps to treat it, a sentence reduction was not warranted), *trans. denied*.

[25] After due consideration, we find that McCall's arguments do not portray the nature of his crimes and his character in "a positive light," which is his burden under Appellate Rule 7(B). *See Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015). He has not shown that his sentence is inappropriate in light of the nature of the offenses and the character of the offender. We, therefore, affirm the sentence imposed by the trial court.

CONCLUSION

[26] For the reasons set forth above, we conclude that the State presented sufficient evidence beyond a reasonable doubt to convict McCall of Level 2 felony dealing in a controlled substance with the intent to deliver. Further, we conclude that McCall's sentence is not inappropriate in light of the nature of the offenses and his character.

[27] Affirmed.

[28] Najam, J. and Brown, J. concur