MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Tom E. Mills,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 20, 2021

Court of Appeals Case No. 21A-CR-1683

Appeal from the Wabash Circuit Court

The Honorable Robert R. McCallen III, Judge

Trial Court Cause No. 85C01-2002-F5-163

Najam, Judge.

Statement of the Case

[1] Tom E. Mills appeals his convictions for possession of a controlled substance, as a Level 6 felony, and possession of a controlled substance, as a Class A misdemeanor, and his adjudication as a habitual offender following a jury trial. Mills presents three issues for our review:

1. Whether the trial court erred when it admitted evidence obtained pursuant to a search warrant.

2. Whether his convictions violate double jeopardy principles.

3. Whether his sentence is inappropriate in light of the nature of the offenses and his character.

[2] We affirm in part, reverse in part, and remand with instructions.

Facts and Procedural History

[3] During the early morning hours of February 1, 2020, Wabash County Sheriff's Department Deputy Devin Bechtold was patrolling near North Manchester when he saw a blue car that he knew to be associated with Mills. Deputy Bechtold knew that Mills "was actively dealing illegal narcotics and that he was staying with a Kendra Dotson" on Singer Road, located "just outside of North Manchester." Tr. at 20. Deputy Bechtold saw two women and a man get in the blue car at a gas station, and he followed them to Dotson's house. The man got out there, and approximately two minutes later, the two women drove back to the gas station. Approximately ten minutes later, Deputy Bechtold followed

the blue car as it left the gas station, and he pulled the driver over after he saw a traffic infraction.

[4] Deputy Bechtold asked the driver of the blue car, Confidential Informant 363 ("CI"), where she had been and where she was going, and he also called a canine unit to the scene. The CI consented to a search of the car. And at about the same time, the canine alerted to drugs in the car. Another deputy who had arrived to assist with the search, Deputy Gibson, found suspected methamphetamine in the CI's purse, and she told Deputy Bechtold that she had just bought it from Mills at the house on Singer Road. The CI later "pulled out some methamphetamine from her bra area" and gave it to Deputy Bechtold. Tr. at 26.

[5] Deputy Bechtold then obtained a search warrant for Dotson's house, where Mills also lived. When Deputy Bechtold and officers from other law enforcement agencies executed the search warrant, Mills answered the door and let the officers inside the house. In the course of performing a sweep of the house, officers found Dotson's fifteen-year-old son in a bedroom. No one else was found in the house. Deputy Bechtold then read Mills his *Miranda* rights and asked him whether there was any contraband in the house. Mills responded that "there might be a little bit of marijuana[.]" *Id.* at 132. When officers found marijuana and "some pills" in a dresser drawer in a bedroom, Mills told Deputy Bechtold that those were his and that "anything else [they] found inside" the house "would be his." *Id.* at 133. The pills were later

identified as buprenorphine naloxone, which is a schedule III controlled substance.

[6] The State charged Mills with two counts of possession of methamphetamine, one as a Level 5 felony and one as a Level 6 felony; two counts of possession of a controlled substance, one as a Level 6 felony and one as a Class A misdemeanor; and possession of marijuana, as a Class B misdemeanor. The State also alleged that Mills was a habitual offender. Prior to trial, Mills moved to suppress the evidence obtained pursuant to the search warrant because, he alleged, there was no probable cause to support the search warrant. The trial court denied that motion. Prior to trial, the State dismissed the marijuana possession charge.

[7] A jury found Mills guilty of the two possession of a controlled substance charges, one as a Level 6 felony and one as a Class A misdemeanor, but acquitted him on the possession of methamphetamine charges. The jury also found that he was a habitual offender. The trial court entered judgment of conviction accordingly and sentenced Mills to two and one-half years executed for the Level 6 felony conviction, enhanced by three years for being a habitual offender. And the court imposed a concurrent one-year sentence for the Class A misdemeanor conviction, for an aggregate term of five and one-half years. This appeal ensued.

Discussion and Decision

Issue One: Admission of Evidence

[8] Mills first contends that the trial court erred when it admitted the evidence obtained pursuant to the search warrant. Mills initially challenged the admission of this evidence through a motion to suppress but now appeals following a completed trial. Mills contends that the trial court erred under both the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution when it admitted evidence that officers obtained pursuant to the search warrant of his home. As we have explained:

> [The defendant's] arguments that police violated his Fourth Amendment and Article 1, Section 11 rights raise questions of law we review de novo. As the United States Supreme Court has explained with respect to the Fourth Amendment, as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal, while findings of historical fact underlying those legal determinations are reviewed only for clear error. The Indiana Supreme Court applies the same standard under Article 1, Section 11. In other words, we review whether reasonable suspicion or probable cause exists under a standard similar to other sufficiency issues—whether, without reweighing the evidence, there is substantial evidence of probative value that supports the trial court's decision.

Redfield v. State, 78 N.E.3d 1104, 1106 (Ind. Ct. App. 2017) (internal quotation marks and citations omitted), *trans. denied*. "In deciding whether to issue a search warrant, '[t]he task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a

crime will be found in a particular place.'" *Jaggers v. State*, 687 N.E.2d 180, 181 (Ind. 1997) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

[9] Under the Fourth Amendment to the United States Constitution, "[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." U.S. Const. amend. IV. To preserve that right, a judicial officer may issue a warrant only "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id.* "Article 1, Section 11 of the Indiana Constitution contains language nearly identical to its federal counterpart. *McGrath v. State*, 95 N.E.3d 522, 527 (Ind. 2018). "And our statutory law codifies these constitutional principles, setting forth the requisite information for an affidavit to establish probable cause." *Id.* (citing Ind. Code § 35-33-5-2).

[10] In his probable cause affidavit, Deputy Bechtold stated that: he had seen Mills "a few weeks prior" in the same blue car the CI was driving; he had recently "received information from the drug task force that Mr. Mills was actively dealing illegal narcotics" and was living with Dotson at the Singer Road address; he saw two women and one man at the gas station on February 1, and he saw the car drive to Dotson's house; two minutes later, the driver of the car drove back to the gas station, and ten minutes later, Deputy Bechtold stopped the car for a traffic violation; at that time, there were only two women in the car, with the CI driving; the CI initially denied having dropped off a man at Dotson's house; a search of the vehicle revealed a "crystal like substance in a

baggie" which the CI stated was methamphetamine she had "just purchased" from a man whose first name started with "T"; Deputy Bechtold asked the CI whether the man was Tom Mills, and she said yes; the CI stated that she had picked up Mills from the Singer Road house and he had sold her the methamphetamine; the CI then admitted that she had driven Mills to the gas station and back to the house; Deputy Bechtold had seen the blue car at the gas station and followed it back to Dotson's house, where the man got out of the car; and the CI gave Deputy Bechtold additional methamphetamine she had kept in her bra. Appellant's App. Vol. 2 at 79-80. In sum, while the CI initially lied to Deputy Bechtold when she denied that she had just dropped off a man at Dotson's house, after officers found the methamphetamine in her purse, she admitted that she had driven Mills to the gas station and back to Dotson's house just before the traffic stop.

[11] Mills asserts that the search of his home violated his constitutional rights because the probable cause affidavit supporting the search warrant was "almost entirely based upon unreliable and uncorroborated statements made to Deputy Bechtold by CI 363, which due to their unreliability fail to establish probable cause that a crime had been committed and that evidence of the crime would be found in the home that was searched." Appellant's Br. at 17. Mills points out that, under Indiana Code Section 35-33-5-2(b), when based on hearsay, a probable cause affidavit must either: (1) contain reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information

furnished; or (2) contain information that establishes that the totality of the circumstances corroborates the hearsay.

[12] And Mills cites *Jaggers*, where our Supreme Court stated that

> uncorroborated hearsay from a source whose credibility is itself unknown, standing alone, cannot support a finding of probable cause to issue a search warrant. [*Gates*, 462 U.S.] at 227. The hearsay must exhibit some hallmarks of reliability. *Gates* indicated that the trustworthiness of hearsay for purposes of proving probable cause can be established in a number of ways, including where (1) the informant has given correct information in the past; (2) independent police investigation corroborates the informant's statements; (3) some basis for the informant's knowledge is shown; or (4) the informant predicts conduct or activities by the suspect that are not ordinarily easily predicted. Depending on the facts, other considerations may come into play in establishing the reliability of the informant or the hearsay.

687 N.E.2d at 182.

[13] Here, Mills contends that the CI's credibility is unknown because she had never before served as a confidential informant, and Deputy Bechtold did not otherwise know the CI before the traffic stop on February 1, 2020. In addition, Mills points out that the CI lied to Deputy Bechtold "numerous times during his interaction with her." Appellant's Br. at 25. Finally, Mills correctly states that, while a confidential informant's declarations against penal interest "can furnish [a] sufficient basis for establishing the credibility of an informant," *Houser v. State*, 678 N.E.2d 95, 100 (Ind. 1997), where, as here, an informant "was caught 'red-handed' with drugs in h[er] possession before naming h[er]

purported supplier," our Supreme Court has held that the "tip was less a statement against h[er] penal interest than an obvious attempt to curry favor with the police," *State v. Spillers*, 847 N.E.2d 949, 956 (Ind. 2006). Thus, Mills maintains that the CI's hearsay statements were not sufficiently credible to support the probable cause affidavit.

[14] However, the State cites *McGrath*, where our Supreme Court held that "the totality of the circumstances" supporting a probable cause affidavit based largely on an anonymous tip provided sufficient corroborating evidence to satisfy both the Fourth Amendment and Article 1, Section 11 of the Indiana Constitution. 95 N.E.3d at 527-28. In *McGrath*, an anonymous tipster notified the Indianapolis Metropolitan Police Department ("IMPD") "of a possible marijuana grow operation at a private residence" in Indianapolis. *Id.* at 525. "In addition to describing the color of the house and noting its street address, the informant identified the occupants by their first names. . . . The informant further reported a bright light visible from a window at night and that the odor of marijuana often emanated from the premises." *Id.* An IMPD detective "partially corroborated the informant's tips" by confirming the first names of the residents at that address, and he saw "several windows with dark coverings and two air-conditioning units on the upper floor independent of the home's central air system," as well as "a 'high intensity glow' emitting from an upstairs covered window." *Id.* But the detective did not detect an odor of marijuana from outside the house.

[15] Our Supreme Court stated that, because the anonymous tipster "reported having observed the criminal activity firsthand," the tip was entitled to "'greater weight than might otherwise be the case.'" *Id.* at 528 (quoting *Gates*, 462 U.S. at 234). The Court then noted that the detective had "conducted an independent investigation to confirm the street address, the color of the house, the names of the occupants, and the bright light." *Id.* While some of those facts were "plainly evident," not all of them were obvious—"the address was obscured and there was no evidence of [the names of the occupants] in the public domain." *Id.* at 528-29. Finally, the detective explained that, based on his training and experience, "covered windows are used to conceal evidence of criminal activity" and the "'high intensity glow'" was "'consistent with light that emits from High Pressure Sodium light and Metal Halide lights' used for indoor grow operations." *Id.* at 529. And the detective concluded that "the separate A/C units . . . functioned to offset the high temperatures produced by the artificial lighting." *Id.*

[16] The Court concluded that, "[w]hen viewed collectively, and in the context of Detective Buckner's training and experience, these facts are sufficiently indicative of a marijuana grow operation." *Id.* And the Court held that there was sufficient probable cause to grant the search warrant. *Id.* Thus, the Court rejected McGrath's argument that the search violated his rights under both the Fourth Amendment and Article 1, Section 11 of the Indiana Constitution.

[17] Here, the CI was not anonymous, and Deputy Bechtold was able to judge her credibility firsthand. *See Robinson v. State*, 888 N.E.2d 1267, 1271 (Ind. Ct.

App. 2008), *trans. denied*. Further, because the CI made a face-to-face report to Deputy Bechtold, the CI was subject to prosecution if she were later found to have made a false report. *See id.* Moreover, because she stated that she had bought methamphetamine from Mills, she had observed the alleged criminal activity firsthand. Thus, the tip was entitled to "'greater weight than might otherwise be the case.'" *McGrath*, 95 N.E.3d at 528 (quoting *Gates*, 462 U.S. at 234)).

[18] And Deputy Bechtold personally corroborated some of the information given by the CI. Only minutes before having stopped the CI, Deputy Bechtold had observed facts consistent with the CI's statements, namely, that she had driven a man from the gas station to Dotson's house on Singer Road. In addition, Deputy Bechtold had seen Mills in the same blue car only a few weeks prior, and he had been advised by the drug task force that Mills was "actively dealing illegal narcotics" and staying at Dotson's house. Appellant's App. Vol. 2 at 79. We hold that, under the totality of the circumstances, Deputy Bechtold's probable cause affidavit contained sufficient evidence to corroborate the CI's hearsay statements. Accordingly, the trial court did not err when it admitted the evidence officers obtained after they executed the search warrant at his residence.

Issue Two: Double Jeopardy

[19] Mills next contends, and the State agrees, that his convictions violate double jeopardy. Our Supreme Court recently adopted

> an analytical framework that applies the statutory rules of double jeopardy. . . . This framework, which applies when a defendant's single act or transaction implicates multiple criminal statutes (rather than a single statute), consists of a two-part inquiry: First, a court must determine, under our included-offense statutes, whether one charged offense encompasses another charged offense. Second, a court must look at the underlying facts—as alleged in the information and as adduced at trial—to determine whether the charged offenses are the "same." If the facts show two separate and distinct crimes, there's no violation of substantive double jeopardy, even if one offense is, by definition, "included" in the other. *But if the facts show only a single continuous crime, and one statutory offense is included in the other, then the presumption is that the legislation intends for alternative (rather than cumulative) sanctions*. . . .

Wadle v. State, 151 N.E.3d 227, 235 (Ind. 2020) (emphasis added).

[20] Here, Mills was convicted of two counts of possession of a controlled substance, one as a Level 6 felony and one as a Class A misdemeanor, and both convictions were based on Mills' possession of the same pills. The only difference is that Mills' possession of the pills was enhanced to a Level 6 felony because Dotson's minor child was present in the house. The parties agree that the Class A misdemeanor is a lesser included offense of the Level 6 felony. Thus, we consider whether the offenses were "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction." *Id.* at 249. If the facts show only a single crime, judgment may not be entered on the included offense. *Id.* at 256.

[21] The parties agree that Mills' possession of the pills to support both convictions was a single crime. Both the felony and misdemeanor charges are based on the pills officers found in a dresser drawer in Mills' bedroom. Given the charging information and the evidence introduced at trial, we conclude that Mills' possession for both counts constituted a single transaction. *See id.* Accordingly, we affirm Mills' conviction for Level 6 possession of a controlled substance, but we reverse his conviction for Class A misdemeanor possession of a controlled substance. We remand with instructions to vacate that conviction.

Issue Three: Sentence

[22] Finally, Mills contends that his sentence is inappropriate in light of the nature of the offense 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 the 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. *See Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008); *Douglas v. State*, 878 N.E.2d 873, 881 (Ind. Ct. App. 2007). The question is not whether another sentence is more appropriate, but rather whether the sentence imposed is inappropriate. *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008). Deference to the trial court "prevail[s] unless overcome by compelling evidence portraying in a positive light the nature of the offense (such

as accompanied by restraint, regard, and lack of brutality) and the defendant's character (such as substantial virtuous traits or persistent examples of good character)." *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[23] A person who commits a Level 6 felony shall be imprisoned for a fixed term of between six months and two and one-half years, with the advisory sentence being one year. I.C. § 35-50-2-7. Here, the trial court imposed the maximum sentence of two and one-half years, enhanced by three years for the habitual offender adjudication.

[24] Mills asserts that his sentence is inappropriate in light of the nature of the offense because there is nothing "egregious" about the offense, which involved possession of only five pills, and because "this type of crime" is "usually referred to" as a "victimless crime." Appellant's Br. at 35. Whether or not the nature of the offense is considered egregious, that determination would not exhaust our review under Appellate Rule 7(B). As discussed below, we must also take into account the character of the offender.

[25] Mills asserts that his sentence is inappropriate in light of his character because he has only a "moderate criminal history" consisting of several juvenile adjudications, eight misdemeanor convictions, and three felony convictions, and he notes that his probation has been revoked four times. *Id.* at 36. And Mills points out that he has a history of substance abuse. We disagree with Mills' characterization of his criminal history as "moderate." Indeed, two of Mills' prior felony convictions were for possession of methamphetamine. And

Mills does not direct us to any evidence that he has sought treatment for his alleged chronic substance abuse. Mills has not presented compelling evidence of "substantial virtuous traits or persistent examples of good character" to overcome the deference we give to the trial court in sentencing matters. *See Stephenson*, 29 N.E.3d at 122. We hold that his sentence is not inappropriate in light of the nature of the offense or his character.

[26] Mills also contends that the trial court abused its discretion when it failed to identify certain proffered mitigators. The finding of mitigating circumstances is well within the discretion of the trial court. *Abel v. State*, 773 N.E.2d 276, 280 (Ind. 2002). A sentencing court need not agree with the defendant as to the weight or value to be given to a proffered mitigating factor. *Bostick v. State*, 804 N.E.2d 218, 225 (Ind. Ct. App. 2004). "Only when a trial court fails to find a mitigator that the record clearly supports does a reasonable belief arise that the mitigator was improperly overlooked." *Abel*, 773 N.E.2d at 280.

[27] Mills asserts that he proffered two mitigators to the trial court, namely, his history of substance abuse and the fact that he "is still paying on" his child support arrearage. Appellant's Br. at 38. However,

> [w]hile we have recognized that a history of substance abuse may be a mitigating circumstance, *Field v. State*, 843 N.E.2d 1008, 1012 (Ind. Ct. App. 2006), *trans. denied*, we have held that when a defendant is aware of a substance abuse problem but has not taken appropriate steps to treat it, the trial court does not abuse its discretion by rejecting the addiction as a mitigating circumstance. *Bryant v. State*, 802 N.E.2d 486, 501 (Ind. Ct. App. 2004), *trans. denied*.

Hape v. State, 903 N.E.2d 977, 1002 (Ind. Ct. App. 2009), *trans. denied*. And Mills does not explain why his payments on his child support arrearage should be considered as a mitigator. Indeed, our research reveals no Indiana case supporting his bare assertion on this issue. Mills has not shown that the trial court abused its discretion when it declined to identify any mitigating circumstances. We affirm Mills' five and one-half year aggregate sentence.

[28] Affirmed in part, reversed in part, and remanded with instructions.

Vaidik, J., and Weissmann, J., concur.