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IN THE COURT OF APPEALS OF INDIANA

WILLIAM M. ZOLLINGER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0603-CR-91
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Donald W. Jones, Judge Pro Tempore
Cause No. 20D03-0412-FA-189

November 30, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

William Zollinger appeals his conviction for possession of three or more grams of methamphetamine with intent to deliver,[1] a class A felony, and possession of thirty or more grams of marijuana,[2] a class D felony, as well as the sentence he received. We affirm.

Issues

Zollinger presents three issues for our review:

I. Whether the evidence was sufficient to prove that he was in constructive possession of methamphetamine;

II. Whether the trial court abused its discretion in limiting the defense's cross-examination of a State's witness; and

III. Whether his sentence was appropriate in light of the nature of the offenses and his character.

Facts and Procedural History

Around 11:30 p.m. on October 25, 2004, a magistrate in Elkhart County issued a search warrant for the "residence of [Zollinger] and Tonya Hernandez, 1006 Zollinger Road, Goshen[.]"[3] Ex. 1. At approximately 12:45 a.m. on October 26, 2004, police officers executed the warrant by breaking down the door of the residence, entering the home, and loudly announcing themselves. Vol. II, Tr. 48, 62, 132. Inside, the police found Zollinger and Hernandez asleep in a bed in one bedroom and two small children asleep in a separate

[1] *See* Ind. Code § 35-48-4-1(b).

[2] *See* Ind. Code § 35-48-4-11(1).

[3] Interestingly, Zollinger is not only the defendant's last name and the name of the road on which the relevant residence was located, but also the last name of a detective for the Goshen Police Department. *See* Tr. at 194-97 (testimony of David Zollinger, explaining that he is the department's evidence technician whose job it was to transport evidence in the present case to and from a lab).

bedroom. *Id*. at 50, 56, 69. The search of the premises revealed 294 grams of marijuana, approximately 159 grams of methamphetamine, a handgun on a nightstand beside the bed in which Zollinger and Hernandez had been sleeping, a box of baggies in a drawer, and a scale. *Id*. at 152, 157, 163, 169, 170, 207, 208; *see also* Exs. 16, 28, 31, 31.

The State originally charged Zollinger with possession of a handgun without a license,[4] possession of three or more grams of methamphetamine with intent to deliver, and possession of thirty or more grams of marijuana. Appellant's App. at 11. However, prior to trial, the State dismissed the handgun count. *Id*. at 44. In late September 2005, a jury found Zollinger guilty on the two remaining counts. On October 20, 2005, the court entered judgment of conviction and sentenced Zollinger to a forty-year term on the dealing count and a three-year term on the possession count, to be served concurrently.

Discussion and Decision

I. Sufficient Evidence of Constructive Possession

In his first argument, Zollinger asserts that because the methamphetamine was not found on him, the State had to prove constructive possession. He contends that the State did not present sufficient evidence that he had both the capability and the intent to maintain dominion and control over the drugs. Arguing that he did not live at the home on Zollinger Road, Zollinger maintains that he did not have a possessory interest in the residence. In the alternative, he insists that even if he had control over the premises, it was non-exclusive, and that the State did not demonstrate that he knew of the presence of the contraband. While he

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[4] *See* Ind. Code § 35-47-2-1.

admits that he told officers that they would find marijuana in their search, Zollinger asserts that the only evidence suggesting his knowledge of the methamphetamine's presence was Hernandez's questionable testimony that they went together to buy the methamphetamine and that he placed it in her hat.

When reviewing the sufficiency of evidence to establish the elements of a crime, we consider only the evidence and reasonable inferences drawn therefrom that support the conviction. *Cherrone v. State*, 726 N.E.2d 251, 255 (Ind. 2000). "We do not reweigh evidence or judge the credibility of witnesses and will affirm the conviction if there is probative evidence from which a reasonable [fact-finder] could have found the defendant guilty beyond a reasonable doubt." *Id.*

A person who knowingly or intentionally possesses three or more grams of methamphetamine with intent to deliver violates Indiana Code Section 35-48-4-1(b). In the absence of actual possession of drugs, our supreme court has consistently held that "constructive" possession may support a conviction for a drug offense. *Goliday v. State*, 708 N.E.2d 4, 6 (Ind. 1999). "In order to prove constructive possession, the State must show that the defendant has both (1) the intent to maintain dominion and control and (2) the capability to maintain dominion and control over the contraband." *Id.* To prove the intent element, the State must demonstrate the defendant's knowledge of the presence of the contraband. *Id.* Knowledge may be inferred from the exclusive dominion and control over the premises containing the contraband. *Id.*

When possession of the premises is non-exclusive, as in the present case, the defendant's intent to maintain dominion and control over the contraband may be inferred if

there are additional circumstances tending to buttress such an inference. *See Lampkins v. State*, 685 N.E.2d 698, 699 (Ind. 1997). "These additional circumstances have been found to include (1) incriminating statements by the defendant; (2) attempted flight or furtive gestures; (3) a drug manufacturing setting; (4) proximity of the defendant to the drugs; (5) drugs in plain view; and (6) location of the drugs in close proximity to items owned by the defendant." *Ladd v. State*, 710 N.E.2d 188, 190 (Ind. Ct. App. 1999). "In each of the instances enumerated above there exists the probability that the presence and character of the contraband was noticed by the defendant." *Id*.

During intense cross-examination, Hernandez was emphatic that Zollinger lived with her at 1006 Hollinger Road during the relevant time period. Vol. III, Tr. at 38. Indeed, evidence was introduced indicating that Zollinger had clothing and at least four or five pairs of shoes at the home and had received mail there. *Id.* at 23-25; Vol. II, Tr. at 101; Ex. 25. Given this information, the jury could find that Zollinger had a possessory, albeit non-exclusive, interest in the residence.

On the night in question, Zollinger was found in a bed within arm's reach of a handgun. As the police entered the bedroom, Zollinger moved for the gun. Unbeknownst to the police at that time, Zollinger's clothing on the floor was not far from the dresser upon which hung the hat containing the methamphetamine. Once he was handcuffed and as the search continued, Zollinger, whose legs were shaking visibly, volunteered that the only thing the officers would find was marijuana and a handgun. Vol. II, Tr. at 76, 78. Zollinger also started asking about the scope of the search warrant, that is, whether it would include the garage, children's bedroom, and/or other areas. *Id*. at 84-85. Zollinger opined that he did not

think it was "right" as several people used the garage, thus "there could be anything out there and he would not have knowledge of it." *Id*. at 83. An investigating officer testified that he strongly believed that Zollinger's comments were meant to redirect the search outside the bedroom. *Id*. at 85. Moreover, Hernandez testified that she had driven Zollinger to get the methamphetamine and that he had brought it into the home and placed it in the hat. Vol. III, Tr. at 18-21.

From these facts, the jury could infer Zollinger's knowledge of the presence of the methamphetamine and his intent to maintain dominion and control over the drugs. *See Germaine v. State*, 718 N.E.2d 1125, 1132 (Ind. Ct. App. 1999) ("It is well-established that the trier of fact can infer the defendant's knowledge from circumstantial evidence."), *trans. denied*. Accordingly, the State provided evidence sufficient to prove that Zollinger constructively possessed the methamphetamine.

II. Limiting Defense's Cross-Examination of State's Witness

Zollinger next argues that the trial court erroneously denied him an impeachment opportunity. He explains that Hernandez testified that the State had not made any promises to her about getting her sentence modified if she testified against Zollinger. During cross-examination, Zollinger attempted to introduce a letter that he hoped would cast doubt upon Hernandez's no-promises claim. The letter, dated September 3, 2005, and written to Zollinger by Hernandez while she was incarcerated, states:

> . . . Ronnie seems to think that he's only getting 20 do 10. I'll tell you this if he gets less than me he f------ snitched. This is his 3rd time around. It's my first and I got 28 (All I do got is there [sic] word for a modification) Sounds crazy, but I'm tired of sitting here. I probably am stuck here until your trial.

Ex. C. Zollinger asserts: (1) that the letter implies that the State actually had promised Hernandez a sentence modification, and (2) that the jury should have heard this information. The trial court refused to admit the letter into evidence.

"The right to cross-examine witnesses is guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 13 of the Indiana Constitution. It is one of the fundamental rights of our criminal justice system." *Nelson v. State*, 792 N.E.2d 588, 594 (Ind. Ct. App. 2003) (citations omitted), *trans. denied*. However, the Confrontation Clause of the Sixth Amendment does not prevent a trial judge from imposing limits on defense counsel's inquiry into the potential bias of a prosecution witness. *See Collins v. State*, 835 N.E.2d 1010, 1015 (Ind. Ct. App. 2005) (citing *Meagher v. State*, 726 N.E.2d 260, 265 (Ind. 2000)), *trans. denied*. Rather, trial judges retain "wide latitude" regarding the Confrontation Clause, and only a clear abuse of discretion warrants reversal. *Id*.

Our supreme court has "previously determined that any beneficial agreement between an accomplice and the State must be revealed to the jury." *McCorker v. State*, 797 N.E.2d 257, 266 (Ind. 2003). This duty to fully disclose express plea agreements or understandings between the State and witnesses exists even where such agreements or understandings are not reduced to writing. *See Wright v. State*, 690 N.E.2d 1098, 1113 (Ind. 1997). "This rule serves to help the jury better assess the reliability and honesty of the felon-witness." *Morrison v. State*, 686 N.E.2d 817, 819 (Ind. 1997). "The full extent of the benefit offered to a witness is relevant to the jury's determination of the weight and credibility of the witness's testimony." *McCorker*, 797 N.E.2d at 266 (citing *Standifer v. State*, 718 N.E.2d 1107, 1110 (Ind. 1999)).

That said, our supreme court has "held that this duty [to disclose] arises when there is a confirmed promise of leniency in exchange for testimony, and that preliminary discussions are not matters which are subject to mandatory disclosure." *Wright*, 690 N.E.2d at 1114. Moreover, an "express agreement requiring disclosure does not exist if a witness testifies favorably in the *hope* of leniency, and the State neither confirms nor denies that hope to the witness." *Seketa v. State*, 817 N.E.2d 690, 694 (Ind. Ct. App. 2004) (emphasis added). Similarly, hopes and expectations of a state witness coupled with evidence that a prosecutor-accomplice/witness deal may have been consummated after the in-court testimony is insufficient to bring a case within the duty to disclose rule. *See McCord v. State*, 622 N.E.2d 504, 509 (Ind. 1993).

During the defense's cross-examination of Hernandez, the jury heard the following:

> Q. Ok. Now you – we already know, as we already know – uh– have been convicted of possession with intent to deliver those drugs, excuse me, the meth, and possession of the marijuana, is that not correct?
> A. Ya. Ya, I got twenty-eight years. And for somebody that's trying to get out of it, it's horse sh--.
> Q. Well, the standard sentence, or the recommended sentence for a Class A Felony is thirty years, isn't it?
> . . . .
> Q. You could have gotten . . . fifty years, couldn't you?
> A. Ya.
> Q. And you're hoping to get a modification, aren't you?
> A. *No. I mean, I would hope I get one, but, it's not guaranteed that I get one.*
> Q. *And you hope to get a modification because you're sitting here today testifying against [Zollinger]?*
> A. *No.*
> Q. *No?*
> A. *They were gonna call me whether I was willingly or not.*
> Q. I understand. . . .
> . . . .
> Q. At any time prior to you being charged with this offense were you asked to cooperate with the State in [Zollinger's] prosecution?

A. Not in [Zollinger's], no.
Q. In another prosecution?
A. No prosecutions, they just wanted me to help them.
Q. And they had indicated that if you didn't help them, they would file the charges.
A. They didn't so much say that, but – I mean it was a guarantee if I didn't then I would be charged. And obviously, three weeks later, lo and behold –

Vol. III, Tr. at 46, 49-51 (emphases added).

On redirect, the State clarified as follows:

Q. . . . . You plead straight up to the Court, is that correct?
A. Yes mam.
Q. And, would it be fair or accurate to say that the State argued for a particular sentence and then your attorney argued for a lesser sentence?
A. I got in between both.
Q. In between what was asked for?
A. For both – from both of you guys. I got in between.
Q. The Judge – Judge Shewmaker imposed the sentence, is that right?
A. Ya.
Q. With respect to the statements regarding modification that came up. You indicated that you certainly hope to be modified, is that right?
A. Ya, I hope so.
Q. I – I would assume that anyone who received a lengthy sentence would hope for something, is that right?
A. Well, ya.
Q. Ok. *Has the State done anything to encourage you in the hope?*
A. *No.*
Q. All right. *As you indicated, you were going to be called here as a witness in any event, is that right?*
A. *Ya, I was gonna – regardless, I would have been called whether it was willingly or not.*
Q. *And that was made clear to you.*
A. Uh-huh.
Q. Yes?
A. Yes.

Id. at 58-60 (emphases added).

Recognizing Hernandez's potential bias, and faced with the defense's request that her letter be introduced into evidence, the trial court properly arranged for examination of

Hernandez outside the jury's presence. *Id*. at 69-70. During said examination, Hernandez confirmed that the State had not offered to modify her sentence if she testified against Zollinger. *Id*. Indeed, according to Hernandez, the State had been "quite clear" that she would receive "nothing" – let alone a promise of modification – in exchange for her testimony. *Id*. at 78, 79. She went on to state, "I got twenty eight years, sir. I am hoping for a modification. That is all I'm hoping for." *Id*. at 73. In addition, Hernandez noted that her attorney had stated that testifying "might" help, but that "it's not a guarantee." *Id*. at 73, 75. When the jury was brought back, Hernandez reiterated that no promises were made by the State.

To summarize, Hernandez's examination outside of the jury's presence as well as her trial testimony revealed that the State had made no promises to her, that she was going to testify regardless, and that it was merely a "hope" that she would receive a sentence modification at some point. The letter was neither inconsistent with Hernandez's testimony nor did it add to it; instead, it had the real possibility of confusing the jury or injecting improper bias. Given these circumstances, we cannot say that the trial court abused its discretion when it decided not to admit the letter. As such, reversal is not warranted on this ground. *See Seketa*, 817 N.E.2d at 694 (concluding no abuse of discretion in limiting defense's cross-examination on question of plea discussions or rejected plea agreement; trial court was aware of witness's potential prejudice/bias against defendant, but learned witness was testifying against defendant not to obtain better plea but to tell truth; further, even if witness had hoped for leniency, no disclosure of that information was required because State had made no promise of leniency); *see also Collins*, 835 N.E.2d at 1015 (concluding no

abuse of discretion by limiting cross-examination of witness where no leniency deal was offered).

III. Appropriateness of Sentence

Lastly, Zollinger contends that his sentence is inappropriate given the nature of the offenses and his character. Appellant's Br. at 10-11. In challenging his sentence, he notes that the evidence in his case does not demonstrate an ongoing operation with large amounts of methamphetamine. *Cf. Donnegan v. State*, 809 N.E.2d 966 (Ind. Ct. App. 2004) (defendant, who ran an extensive drug network that included several other people and brought large amounts of cocaine from Chicago to Indiana, sentenced to forty years for class A dealing), *trans. denied*. He also points out that Hernandez "only received a twenty-eight (28) year sentence – less than the presumptive even though she also had a significant criminal history." Appellant's Br. at 12. Zollinger focuses upon his steady employment history, stresses that he has no prior convictions for drug-related offenses or class A felonies, and characterizes himself as a nice guy who "continually made some stupid decisions." *Id*. at 12 (quoting his sister's assessment of him).

Article VII, Section 6 of the Indiana Constitution outlines our jurisdiction as follows:

> The Court shall have no original jurisdiction, except that it may be authorized by rules of the Supreme Court to review directly decisions of administrative agencies. In all other cases, it shall exercise appellate jurisdiction under such terms and conditions as the Supreme Court shall specify by rules which shall, however, provide in all cases an absolute right to one appeal and to the extent provided by rule, review and revision of sentences for defendants in all criminal cases.

Pursuant to that authority, our supreme court provided that "[t]he Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the

Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B).

"Regarding the nature of the offense, the presumptive sentence [now advisory] is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Weiss v. State*, 848 N.E.2d 1070, 1072-73 (Ind. 2006). The advisory sentence for a class A felony is thirty years. *See* Ind. Code § 35-50-2-4. The advisory sentence for a class D felony is eighteen months. *See* Ind. Code § 35-50-2-7. An examination of a defendant's character often involves a review of his/her criminal history. *See Weiss*, 848 N.E.2d at 1072-73.

While it has often been said that a single aggravator is sufficient to support an enhanced sentence, "this does not mean that sentencing judges or appellate judges need do no thinking about what weight to give a history of prior convictions. The significance of a criminal history varies based on the gravity, nature and number of prior offenses as they relate to the current offense." *Morgan v. State*, 829 N.E.2d 12, 15 (Ind. 2005) (quotation marks omitted).

> [T]he question of whether the sentence should be enhanced and to what extent turns on the weight of an individual's criminal history. This weight is measured by the number of prior convictions and their seriousness, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability.

Id.

Here the trial court enhanced both terms, adding ten years to the class A felony and eighteen months to the class D felony, and ordered them served concurrently. At Zollinger's

sentencing hearing, the court provided the following detailed explanation of its thoughtful rationale:

> The sentence of the Court – and I don't know how we came by the same – by the mathematics. But the sentence that the Court came up with was a sentence of forty years on the Class A – three on the Class B – concurrent, or the D – concurrent. In assessing that sentence, first of all I'm gonna talk about what I did not give a whole lot of weight to. Although there was an acknowledgement as an aggravating factor, that there were children that were asleep, they were in another room. They were asleep at the time of the transaction. It's not like a transaction that took place at a school or a park that they were oblivious to, and there was in fact, no actual transfer of property from one to the other. It was simply a case of possession. They happened to also be the girlfriend's children. So, the fact that there were children present, while it may be technically an aggravator, was not something that I gave any additional weight to in this case.
>
> Next, the issue of the gun. I didn't give any additional weight to the gun. Uh, the gun was there. It was not used. Uh, he may have tried to hide the gun when the police came in to execute the search warrant, but anybody might have done that. Uh, not knowing who was coming in, so I gave, uh, no weight to the fact that there was a gun there.
>
> I did give consideration to the fact that *this offense was committed while on probation*. Now, what I did look at, and in this case, since both of these people were charged with – and both have been convicted – albeit in different forms, of possessing with intent to deliver the same thing, it seemed to me that it was relevant to look at their respective backgrounds in an effort to try to make sure that the sentence for one defendant is at least reasonably in the same ballpark as the one – for the other defendant. So I looked and the probation – I looked at the Presentence Report of the co-defendant, and, first of all, I would have to say that, although I don't – although the co-defendant got a sentence of twenty-eight years, had that been – had that been my sentencing, I would have gone no lower than the presumptive sentence. And I would have gone no lower than the presumptive sentence because to say anything less than the presumptive sentence would have said that there were mitigating factors that outweighed – or that outweighed the aggravating, and in this case I didn't see those. The defendant in that case had a record not quite as lengthy as the defendant in this case, but birds of a feather sometimes due [sic] tend to fly together. Uh, the more important part in this case is the fact that *this defendant has*, if I counted correctly, *counting these two convictions, now has five felony convictions. In addition to that, there were some six to eight juvenile involvements which I gave some consideration to, but there were also seven misdemeanor convictions and at least on six times he was granted an*

> *unsatisfactory discharge. I think there is also a – either a probation or a parole violation*. So, on par, I would have given the co-defendant no less than thirty years, and based on the difference in the records, but not necessarily in the difference in their culpability, uh, those two records indicated to me the difference between the thirty that I would have given the one defendant, and the forty that I am imposing in this instance. So, those are the reasons why I have given, uh, the two sentences, uh, the defendant will also be given credit for – for the three hundred and fifty nine days and will be entitled to equal good time credit. I will recommend that he receive drug, uh, and alcohol, uh, treatment.
>
> I likewise have given no consideration to the quote lack of remorse. And I have done that specifically because in the Presentence Report the defendant says I still think I'm innocent. And if one thinks he is innocent, showing remorse for something he claimed he didn't do is – if it's not an oxymoron, it's close to. So, if you – if you think you didn't do something wrong, I don't think that you should be – your lack of remorse for not – under those circumstances is not a factor which the Court should consider against it. So I treat that as, as not being a factor at all.

Sent. Tr. at 19-23 (emphases added).

Zollinger's lengthy and varied criminal and delinquent[5] history, the fact that he was on parole/probation[6] at the time of the offenses, the complete lack of mitigating circumstances, and the vast quantities of drugs found during the search, convince us that the enhanced, but not maximum, forty-year total sentence was appropriate.

Affirmed.

BAKER, J., and VAIDIK, J., concur.

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[5] In *Ryle v. State*, 842 N.E.2d 320, 322-23 (Ind. 2005), *cert. denied*, our supreme court held that because juvenile adjudications afford individuals sufficient procedural safeguards, they may be considered as a "prior conviction" for the purposes of sentencing under *Blakely v. Washington*, 542 U.S. 296 (2004).

[6] Our supreme court has also determined that utilizing probation violations as aggravating circumstances does not offend *Blakely*. *Mitchell v. State*, 844 N.E.2d 88, 92 (Ind. 2006).