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IN THE
COURT OF APPEALS OF INDIANA

HUEY R. SEALE, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 26A01-0604-CR-132
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GIBSON CIRCUIT COURT
The Honorable Walter H. Palmer, Judge
Cause No. 26C01-0503-FA-4

November 27, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Huey Seale, Jr., appeals his convictions and sentence for Class A felony dealing in methamphetamine, Class A felony manufacturing methamphetamine, Class D felony possession of anhydrous ammonia with intent to manufacture methamphetamine, and Class D felony dumping of controlled substance waste. We affirm in part, reverse in part, and remand.

Issues

The issues before us are:

I. whether the trial court properly denied Seale's motion to suppress;

II. whether the prosecutor conducted improper voir dire;

III. whether there is sufficient evidence to support Seale's convictions; and

IV. whether his sentence is proper.

Facts

The evidence most favorable to the convictions reveals that in early 2005, Seale lived in a trailer in Francisco where he manufactured methamphetamine, described as being of "awesome" quality, on an almost daily basis. Tr. p. 562. He had a group of several people in their late teens or early twenties who essentially lived at the trailer, smoked methamphetamine that Seale made, and assisted Seale in obtaining precursors such as pseudoephedrine and lithium batteries and/or in dealing the finished product. He called this group his "family" or "children" and gave them methamphetamine for free. Id. at 502, 542. Seale performed the initial "cooking" of the methamphetamine in a

dilapidated trailer near the trailer he lived in, and would finish "smoking off" the drug in the kitchen of the lived-in trailer. Id. at 547, 550. He disposed of some of the leftover waste from the manufacturing process, such as the battery remnants, in a burn pile outside the trailers. This location was less than 1000 feet away from Francisco Elementary School.

In mid-February 2005, Seale advised his "family" that they needed to move to a house in Oakland City because it was too "dangerous" to continue staying at the trailer. Id. at 572. Seale claimed to be renting this particular house. However, the circumstances of how, why, or even if Seale actually came to rent this house are unclear. Jay Wiggs had been living at the house for over a decade, but was incarcerated in the Gibson County Jail beginning in January 2005, and he would remain there for one year serving a sentence. Wiggs' girlfriend, Misty Bolden, had Wiggs' permission to continue living at the house, but he had not given her permission to rent the house out to anyone.

Seale delivered meth to his "family" at the Oakland City house on essentially a daily basis. Wiggs began hearing rumors while in jail that a number of unidentified people regularly were going in and out of his house and possibly were stealing items from it. He contacted a police officer and asked that the house be searched and that anyone, aside from Bolden and her children, be removed from it. Wiggs filled out a statement giving his consent for a search of the house. On March 17, 2005, police searched the house and found a number of people there besides Bolden and her children. One of these persons, Skye Thomas, was arrested for possession of methamphetamine; Seale had delivered it to her at the house earlier that day. The Oakland City house was

less than 1000 feet away from property owned and utilized by the East Gibson School Corporation.

Based on information provided by Thomas, police obtained a search warrant for Seale's property in Francisco. In the lived-in trailer, police found a firearm and many indicia of methamphetamine manufacturing, including pills containing pseudoephedrine, muriatic acid, salt, a scale, gloves, batteries, camp fuel, and HEET, which contains methyl alcohol. Outside of the trailer was a burn pile where police found battery remnants, pill packs, and cans that had contained ether. In the dilapidated trailer was, among other things, a plastic jug containing acid. Leading from this trailer was a well-worn path going to a wooded area where there were some coolers that smelled of ammonia; one of these coolers contained an anhydrous ammonia solution. Parked near the dilapidated trailer was a pickup that was registered to Seale. Police found several coolers in the vehicle, one of which tested positive for the presence of methamphetamine and pseudoephedrine or ephedrine.

The State charged Seale with Class A felony dealing methamphetamine within 1000 feet of school property, Class A felony manufacturing methamphetamine within 1000 feet of school property, Class C felony possession of a firearm and anhydrous ammonia with intent to manufacture methamphetamine, Class D felony dumping of controlled substance waste, Class D felony possession of anhydrous ammonia with intent to manufacture methamphetamine, Class D felony possession of precursors with intent to manufacture methamphetamine, and Class A misdemeanor illegal storage of ammonia. Seale filed a motion to suppress the evidence recovered during the search of his property,

which the trial court denied. During Seale's jury trial held on January 9-11, 2006, the State dismissed the firearm, possession of precursors, and illegal storage of ammonia charges. The jury found Seale guilty of the remaining charges. The trial court sentenced Seale to an aggregate term of thirty-two years. He now appeals.

Analysis

I. Motion to Suppress

Seale first challenges the denial of his motion to suppress. Specifically, he contends that the initial search of Wiggs's house in Oakland City was illegal, and that the eventual search of his property in Francisco, based on information gleaned as a result of the Oakland City search, necessarily also is illegal. At trial, however, Seale never objected to the introduction of any evidence recovered during either the search in Oakland City or the search in Francisco. A defendant must renew his or her objection to the admission of evidence at trial if the trial court previously denied a motion to suppress evidence or took the motion under advisement. McClure v. State, 803 N.E.2d 210, 212 (Ind. Ct. App. 2004), trans. denied. If the moving party does not object to the evidence at trial, any claim of error is waived. Id.

Waiver notwithstanding, Seale's claim of error fails. When reviewing the denial of a motion to suppress, we do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling. Id. at 212-13. "However, unlike the typical sufficiency of the evidence case where only the evidence favorable to the judgment is considered, we must also consider uncontested evidence favorable to the defendant." Id.

Seale claims Wiggs did not actually own the house in Oakland City that he asked police to search and, therefore, he lacked authority to consent to the search. A valid consent to search may be given by either the person whose property is to be searched or by a third party who has common authority over or a sufficient relationship to the premises to be searched. Norris v. State, 732 N.E.2d 186, 188 (Ind. Ct. App. 2000). Establishing actual authority to consent to a search requires a showing that there is a sufficient relationship to or mutual use of the property by persons generally having joint access or control for most purposes. Krise v. State, 746 N.E.2d 957, 967 (Ind. 2001). "If actual authority cannot be shown, then facts demonstrating that the consenting party had apparent authority to consent could prove a lawful search." Id. The State bears the burden of proving authority to consent. Id.

Seale notes that the State presented no evidence that the Oakland City house was titled in Wiggs's name. Rather, it appears the house was titled in the name of Wiggs's father, who died sometime before 2005. Wiggs claimed to have inherited the house after his father's death, but there was no evidence presented of a will or other estate settlement through which Wiggs inherited the house; his father had a spouse, Wiggs's stepmother, who survived him.

Even if there is a lack of conclusive evidence that Wiggs owned the house, however, this is not dispositive on the question of authority to consent to a search. Our supreme court has explained:

> Common authority is not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent rests on the

> mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that each of the co-inhabitants has the right to permit the inspection in his or her own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Brown v. State, 691 N.E.2d 438, 443 (Ind. 1998) (citations omitted). This court has also held that a party either has actual authority to consent to a search, through common control of a premises, or he or she does not. Primus v. State, 813 N.E.2d 370, 376 (Ind. Ct. App. 2004). "The physical location of the person giving consent is irrelevant."[1] Id.

The evidence most favorable to the denial of the motion to suppress reveals that Wiggs had lived at the Oakland City house continuously since at least the early 1990s. The Oakland City police officer who spoke to Wiggs about searching the house personally knew that Wiggs lived there. He paid the utilities for the house and his stepmother continued paying the utilities for Wiggs, using his money, while he was in jail. All of this evidence put together indicates that Wiggs had actual, common authority over the house such that he could consent to a search of it, despite the unusual circumstance of his not physically living in the property at the time. Wiggs's situation can be analogized to a person who is hospitalized or who is out-of-town on a long-term vacation, but who nonetheless has a permanent residence elsewhere and possesses actual authority to consent to a search of that property. The trial court did not err in denying Seale's motion to suppress.

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[1] As we observed in Primus, physical location may be relevant if it is necessary to determine whether a person had apparent, as opposed to actual, authority to consent to a search. Primus, 813 N.E.2d at 376.

II. Voir Dire

Next, we address Seale's claim that the prosecutor conducted improper voir dire of the jury pool. A trial court has broad discretion to regulate the form and substance of voir dire. Perryman v. State, 830 N.E.2d 1005, 1007-08 (Ind. Ct. App. 2005). The function of voir dire examination is not to educate jurors, but rather is to ascertain whether jurors can render a fair and impartial verdict in accordance with the law and the evidence. Id. at 1008. Jurors may be examined to eliminate bias but not to condition them to be receptive to the questioner's position. Id. "At the same time, the court must afford each party a reasonable opportunity to exercise its peremptory challenges intelligently through inquiry." Id. Proper examination, therefore, may include questions designed to disclose the jurors' attitudes about the type of offense charged. Id.

Seale, however, lodged no objection to any questions the prosecutor asked during voir dire. This results in waiver of the issue on appeal. Stevens v. State, 691 N.E.2d 412, 420 (Ind. 1997), cert. denied, 525 U.S. 1021, 119 S. Ct. 550 (1998). Seale attempts to avoid waiver by claiming fundamental error. The fundamental error exception to the waiver rule is extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process. Purifoy v. State, 821 N.E.2d 409, 412 (Ind. Ct. App. 2005), trans. denied. "The mere fact that error occurred and that it was prejudicial will not satisfy the fundamental error rule." Id.

On several occasions, the prosecutor asked prospective jurors, "What do you think the biggest problem in this county is?" Tr. p. 71. A number of prospective jurors

answered that they believed illegal drugs were Gibson County's biggest problem. Seale argues that this type of questioning violates our holding in Perryman. There, we held it constituted reversible error for the prosecutor to ask prospective jurors whether they agreed that illegal drugs were a major problem in the county.[2] Perryman, 830 N.E.2d at 1010.

Here, unlike in Perryman, the prosecutor did not "lead" prospective jurors into answering, yes or no, whether they thought illegal drugs were a societal problem. Also, the questions the prosecutor in Perryman asked were framed in such a way as to presume that drugs were a serious problem, because he asked whether the prospective jurors "agreed" that they were a problem. Instead, the prosecutor here asked an open-ended question that permitted potential jurors to provide their own answers as to what they believed Gibson County's biggest problem to be. It is not apparent to us that such questioning was an illegitimate way for the State to determine potential jurors' attitudes about the type of offenses charged here. Certainly, we cannot say that such questioning amounted to fundamental error. We decline to reverse Seale's convictions on this basis.[3]

III. Sufficiency of the Evidence

Next, Seale argues, for various reasons, that there is insufficient evidence to support his convictions. When reviewing a claim of insufficient evidence, we neither

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[2] The defendant in Perryman objected to the prosecutor's voir dire questions.

[3] Seale asserts in his statement of the issues and in a one-sentence argument that the prosecutor also committed misconduct during closing argument for making a reference to the societal problem of drug use. Seale's failure to develop this contention with any citation to authority related to closing arguments waives the issue for our review. See Ind. Appellate Rule 46(A)(8)(a); Lyles v. State, 834 N.E.2d 1035, 1050 (Ind. Ct. App. 2005), trans. denied.

reweigh the evidence nor judge the credibility of witnesses. Trimble v. State, 848 N.E.2d 278, 279 (Ind. 2006). "If there is sufficient evidence of probative value to support the conclusion of the trier of fact then the verdict will not be disturbed." Id.

We first address Seale's contention that the testimony of several of the State's witnesses, specifically those who testified that they observed Seale's methamphetamine activity first-hand, was incredibly dubious. "We will not impinge upon the jury's resolution with regard to the credibility of witnesses unless confronted with testimony of inherent improbability, or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity." Kien v. State, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), trans. denied. A conviction will be overturned only if a witness' testimony is so incredibly dubious or inherently improbable that it runs counter to human experience, and no reasonable person could believe it. Id. This exception is applied only where a single witness testifies against the defendant. Id.

As indicated, not one, but several, witnesses related their observation of Seale's methamphetamine-related activities. Much of Seale's argument is that their testimony was inconsistent with each other's, regarding details such as who helped Seale deal the drug and when or if people injected versus smoked the drug in Seale's trailer. However, "the standard for dubious testimony is inherent contradiction, not contradiction between witnesses' testimony." Altes v. State, 822 N.E.2d 1116, 1123 (Ind. Ct. App. 2005), trans. denied. In any event, the testimony of these witnesses largely was consistent with respect to describing Seale's manufacturing of methamphetamine in Francisco, his frequent deliveries of the drug to Oakland City, and his method of giving free methamphetamine

to persons whom he would recruit to help him either by buying precursors or by selling the finished product. Additionally, the fact that these witnesses were given use immunity for their testimony does not render their testimony incredibly dubious, but was a factor for the jury to consider in determining their credibility. See Murray v. State, 761 N.E.2d 406, 409 (Ind. 2002) (discussing testimony given in exchange for plea agreement with State). Likewise, any inconsistencies between any of the witnesses' trial testimony and pretrial statements they might have given were for the jury to weigh, and does not necessarily render any trial testimony incredibly dubious. See id. Finally, the witnesses' testimony as a whole clearly, unequivocally, and sufficiently describes Seale's manufacturing of methamphetamine at the trailers in Francisco, which is corroborated by the substantial evidence of methamphetamine manufacturing that police found in and around the trailers.

Seale also specifically challenges the sufficiency of the evidence that he dealt methamphetamine at the Oakland City house on March 17, 2005 and, therefore, within 1000 feet of school property. Skye Thomas was arrested for possession of methamphetamine at the house on that date when police searched the house pursuant to Wiggs's consent. Thomas testified, twice, that Seale had brought the methamphetamine to her at the house earlier that day. Seale posits that because Thomas also testified that she had gone out to breakfast with him that day and because she intimated that her heavy drug usage at that time could have affected her memory, it is possible that she received the methamphetamine at the restaurant instead of the house. Thomas's testimony, however, clearly was that she received it at the house, which certainly would make more

sense than her receiving it in a public place. There is sufficient evidence that Seale dealt methamphetamine at Wiggs's Oakland City house on March 17, 2005.

Seale additionally argues that there is insufficient evidence that either his dealing in Oakland City or his manufacturing in Francisco occurred within 1000 feet of school property as required to elevate his convictions to Class A felonies. See Ind. Code § 35-48-4-2(b)(2)(B)(i) (2005).[4] With respect to the Oakland City house, Seale contends the State failed to prove where exactly on Wiggs's property the delivery to Thomas took place. It is true that in order to prove that illegal drug activity took place within 1000 feet of protected property, the State must measure from where the activity actually took place, not from the edge of a residence where it took place. See Doty v. State, 730 N.E.2d 175, 180-81 (Ind. Ct. App. 2000). Here, however, the State introduced a diagram produced by the Gibson County Surveyor that measured from the northeast corner of Wiggs' property, or the farthest point from the property of the East Gibson School Corporation, and that point was less than 1000 feet from the school property. Thus, any delivery of methamphetamine anywhere on the Wiggs property also would have been within 1000 feet of school property. There is sufficient evidence to support Seale's conviction for dealing methamphetamine within 1000 feet of school property.

With respect to the manufacturing activities at Francisco, Seale's primary challenge is to the method of measurement the State used. Officer John Daniel testified

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[4] In 2006, after Seale committed these crimes, the legislature added a new statute, Indiana Code Section 35-48-4-1.1, that specifically governs methamphetamine dealing and manufacturing. In 2005, these crimes were governed by Section 35-48-4-2.

that he used a measuring wheel borrowed from Oakland City High School to measure from a telephone pole located very near the trailers in Francisco to the edge of Francisco Elementary School property and came up with a measurement of 377 feet. Seale did not object to Daniel's testimony on this point. This court has held that if an objection is made to a distance measured in a case such as this one, the State must show that the measuring device was accurate and was operated correctly in order to allow the admission of the distance as evidence, although expert testimony is not required. See Charley v. State, 651 N.E.2d 300, 303 (Ind. Ct. App. 1995).[5]

We also have held more generally that where a measurement is at issue in a criminal proceeding, the accuracy of the measuring device is a foundational element of the offense, not a substantive element. See Guadian v. State, 743 N.E.2d 1251, 1254-55 (Ind. Ct. App. 2001), trans. denied (discussing scales for measuring the weight of drugs). Therefore, a defendant must lodge an objection to the measurement based on an alleged lack of foundation before the State must establish the measuring device's accuracy. See id. Although Seale did question Officer Daniel on cross-examination regarding the measuring wheel's accuracy, he did not object to his testimony regarding the 377-foot distance to Francisco Elementary School from a spot near the trailers. Thus, the trial court did not err in admitting that testimony, which clearly was relevant to this case and

[5] We made a point of observing, in footnote three of our opinion, that the defendant had objected to the testimony regarding distance.

is sufficient to prove that Seale manufactured methamphetamine within 1000 feet of school property.[6] See id.

We next address Seale's claim that there is insufficient evidence that he dumped controlled substance waste. Indiana Code Section 35-48-4-4.1(a) criminalizes the dumping, discharging, and/or discarding of waste that the person knows was produced from the illegal manufacture of a controlled substance or an immediate precursor. In a burn pile just outside Seale's trailers, police found pseudoephedrine pill packs, battery remnants, and empty cans. Two witnesses testified that Seale used the pit to dispose of waste generated by the methamphetamine manufacturing process, including battery remnants, foil, and filters. There also clearly is evidence that these witnesses observed this activity after the dumping law was passed in 2001, i.e. in early 2005. Additionally, it is irrelevant whether this burn pile was located on Seale's property or was on the property of a neighbor; the dumping law prohibits disposal of illegal drug manufacturing waste anywhere, not just on one's own property. There is sufficient evidence to support Seale's conviction for dumping of controlled substance waste.

IV. Sentencing

Finally, we address Seale's challenges to his sentence. His first argument is not a sentencing argument per se, but is a challenge to the propriety of his conviction for possession of anhydrous ammonia with intent to manufacture methamphetamine.

[6] Although Officer Daniel did not measure from either trailer to Francisco Elementary School, photographs reveal that the telephone pole from which he measured was very near both trailers and also near other areas where indicia of meth manufacturing was discovered, such as the burn pit and the wooded area behind the trailers. From this evidence the jury reasonably could have inferred that Seale manufactured methamphetamine within 1000 feet of school property.

Specifically, he contends that offense is a lesser-included offense of manufacturing methamphetamine under the particular facts of this case and, therefore, must be vacated.

In two companion cases, this court addressed the circumstances under which a defendant can or cannot be convicted of both manufacturing methamphetamine and possession of methamphetamine precursors with intent to manufacture. See Iddings v. State, 772 N.E.2d 1006 (Ind. Ct. App. 2002), trans. denied; Bush v. State, 772 N.E.2d 1020 (Ind. Ct. App. 2002), trans. denied. In Iddings, we acknowledged that it is impossible to commit the crime of manufacturing methamphetamine without first possessing the drug's precursors with intent to manufacture. Iddings, 772 N.E.2d at 1016. Thus, in some cases Indiana Code Section 35-38-1-6, the lesser-included offense statute, will preclude a defendant from being convicted of both manufacturing methamphetamine and possession of precursors with intent to manufacture. See id. However, we held that if there is evidence that the defendant (1) had already manufactured methamphetamine and (2) possessed precursors with the intent to manufacture more of the drug, then the defendant may be convicted of both manufacturing and possession of precursors. See id. There was such evidence in Iddings. See id. In Bush, however, the defendant's "conviction for manufacturing methamphetamine was based exclusively on his possession of the precursors of that drug in circumstances suggesting that he was in the process of manufacturing it." Bush, 772 N.E.2d at 1024. Under those facts, we held the defendant could only be convicted of manufacturing, not both manufacturing and possession of precursors. See id. at 1024-25.

Seale's case is closer to Iddings than to Bush. It is true that no completed methamphetamine was found in either trailer police searched. Chemical tests, however, revealed the presence of completed methamphetamine in a container found in a truck on the property that was registered to Seale. Additionally, multiple witnesses described how Seale used both trailers to manufacture methamphetamine on practically a daily basis. The evidence found by police at the Francisco site also was indicative of an ongoing methamphetamine manufacturing operation. This evidence demonstrates that Seale had successfully completed manufacturing methamphetamine at the Francisco property and possessed anhydrous ammonia with intent to manufacture more of the drug. Under the Iddings holding, Indiana Code Section 35-38-1-6 does not preclude Seale from being convicted of both manufacturing methamphetamine and possession of anhydrous ammonia with intent to manufacture.

Regarding the merits of Seale's sentence, his sole argument is that the trial court sentenced him in violation of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), and Smylie v. State, 823 N.E.2d 679 (Ind. 2005). He contends the trial court enhanced his sentence for the two Class A felony convictions from the prior presumptive term of thirty years to thirty-two years based upon an aggravator neither admitted by him nor proven to the jury beyond a reasonable doubt. At the sentencing hearing, the trial court stated that it found as an aggravator "his methodology of operation; that is involving the young people of our community in a fairly wide geographic area . . . ." Tr. p. 720.

Seale committed these offenses before our legislature replaced the presumptive sentencing scheme with the current advisory sentencing scheme that took effect on April 25, 2005, but he was sentenced after that date. The trial court stated that it did not believe it was constrained by Blakely in imposing sentence. This court, however, generally has concluded that the presumptive sentencing scheme applies, and thus Blakely also applies, if a defendant committed a crime before April 25, 2005 but is sentenced after that date. See, e.g., Weaver v. State, 845 N.E.2d 1066, 1072 (Ind. Ct. App. 2006), trans. denied; but see Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005). The State here concedes that the presumptive sentencing scheme and Blakely apply in this case and that the trial court erred in stating otherwise.

However, we need not engage in analysis of whether the trial court's stated aggravator violated Blakely. Our supreme court has determined that Blakely does not affect determinations regarding consecutive sentences. Smylie, 823 N.E.2d at 686. It also has concluded that if a defendant's sentence raises Blakely concerns, but it is possible to arrive at a nearly identical sentence by imposing presumptive terms and altering the trial court's decision regarding concurrent versus consecutive sentences, that course of action should be followed. See Young v. State, 834 N.E.2d 1015, 1017-18 (Ind. 2005). If such a solution is possible, discussion of Blakely is avoided. See id. In Young, the court did not analyze the Blakely issue in that case where the trial court had arrived at an aggregate thirty-six year sentence by relying in part on sentences exceeding the presumptive. Instead, the court exercised its appellate sentence revision power under the Indiana Constitution to order all sentences reduced to the presumptive, but partially

altered the trial court's decision regarding concurrent versus consecutive sentences to arrive at an aggregate term of thirty-four years. Id.

We follow Young's lead and order partial revision of Seale's sentence. The trial court here imposed sentences of thirty-two years for both Class A felony convictions and the presumptive of eighteen months for both Class D felony convictions and ordered that all sentences be served concurrently. We direct that the sentence for the Class A felonies be reduced to the presumptive of thirty years. We also direct that the sentence for one of the Class D felonies be served consecutive to one of the Class A felony sentences, with the remainder of the sentences to be served concurrently. This results in an aggregate term for Seale of thirty-one and one-half years, or virtually identical to his previous sentence, and there is no Blakely issue in this arrangement. See id. The trial court on remand shall decide, without a hearing, precisely how to rearrange Seale's sentence. See id.

Conclusion

Waiver notwithstanding, the trial court did not err in denying Seale's motion to suppress. The prosecutor's voir dire did not amount to fundamental error. There is sufficient evidence to support Seale's convictions, and he may be convicted of both manufacturing methamphetamine and possession of anhydrous ammonia with intent to manufacture methamphetamine. We partially reverse Seale's sentence and remand with directions to impose sentence consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

NAJAM, J., and DARDEN, J., concur.