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IN THE
COURT OF APPEALS OF INDIANA

TYRELL TAYLOR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A04-0605-CR-231
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD CIRCUIT COURT
The Honorable Lynn Murray, Judge
Cause No. 34C01-0412-FB-440

December 4, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Tyrell Taylor (Taylor), appeals his conviction for Counts I & II, dealing in cocaine, Class B felonies, Ind. Code § 35-48-4-1(a)(1) and Counts III & IV, possession of cocaine, Class D felonies, I.C. § 35-48-4-6(a).

We affirm.

ISSUES

Taylor raises two issues on appeal, which we restate as follows:

(1) Whether the State presented sufficient evidence to sustain Taylor's conviction for dealing in cocaine; and

(2) Whether the trial court properly sentenced Taylor.

FACTS AND PROCEDURAL HISTORY

On December 2, 2004, the Howard County Drug Task Force hired Corrie Morrow (Morrow) as an informant to conduct a controlled buy of crack cocaine. Prior to the transaction, Morrow was searched and outfitted with a wire intercept device. After he was outfitted, Morrow contacted Taylor, a.k.a Evil, by telephone and made arrangements to purchase four bags of crack cocaine for $70. That same day, Morrow met Taylor at a CVS drugstore located in Kokomo, Indiana. As Morrow approached the CVS drugstore, Taylor exited the store and met with Morrow. Morrow handed Taylor $70 that had been provided to him by the drug task force and in turn received four bags of crack. After the transaction, Morrow met with officers from the drug task force in a nearby park.

Even though officers had anticipated to arrest Taylor after the controlled buy, Taylor disappeared. Accordingly, the task force decided to conduct a second transaction. Again, Morrow contacted Taylor by telephone and made arrangements to purchase two additional bags of cocaine. The same protocol was followed as during the first controlled buy: Morrow met Taylor at the CVS drugstore and money was exchanged for crack cocaine. At this point, the drug task force arrested Taylor. While searching Taylor, officers found currency matching what was given to Morrow to conduct the first buy. Furthermore, while changing clothes at Howard County Jail, a bag of crack cocaine fell from Taylor's underwear. Despite his attempt to hide the bag from view with his foot, a corrections officer noticed it on the floor.

On December 3, 2004, the State filed an Information charging Taylor with Counts I & II, dealing in cocaine, Class B felonies, I.C. § 35-48-4-1(a)(1) and Counts III & IV, possession of cocaine, Class D felonies, I.C. § 35-48-4-6(a). On March 14, 2006, a jury trial was held, at the end of which the jury found Taylor guilty as charged. On April 12, 2006, at the sentencing hearing, the trial court vacated Counts III & IV on double jeopardy grounds and sentenced Taylor to twelve years, with eight years executed and four years suspended on each Count, with sentences to run concurrently.

Taylor now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Sufficiency of the Evidence*

Taylor appears to contend that the evidence presented at trial was insufficient to support his conviction. However, besides repeating his statement of facts, he does not

specify any weaknesses in the State's case. Rather, after enumerating the facts most favorable to the judgment, Taylor makes the meritless statement that the evidence is insufficient to prove the State's case.

Our standard of review for a sufficiency of the evidence claim is well-settled. In reviewing sufficiency of the evidence claims, we will not reweigh the evidence or assess the credibility of the witnesses. *Cox v. State*, 774 N.E.2d 1025, 1028-29 (Ind. Ct. App. 2002). We will consider only the evidence most favorable to the judgment, together with all reasonable and logical inferences to be drawn therefrom. *Alspach v. State*, 755 N.E.2d 209, 210 (Ind. Ct. App. 2001), *trans. denied*. The conviction will be affirmed if there is substantial evidence of probative value to support the conviction of the trier-of-fact. *Cox*, 774 N.E.2d at 1028-29. A judgment will be sustained based on circumstantial evidence alone if the circumstantial evidence supports a reasonable inference of guilt. *Maul v. State*, 731 N.E.2d 438, 439 (Ind. 2000).

Dealing in cocaine as a Class B felony is defined by I.C. § 35-48-4-1(a) as "[a] person who knowingly or intentionally . . . delivers . . . cocaine or a narcotic drug, pure or adulterated." Thus, in order to convict Taylor, the State was required to prove that he knowingly or intentionally delivered cocaine.

Here, we find that the State met its burden of proof. The record establishes that Morrow conducted two controlled buys with Taylor during which Morrow gave Taylor money in exchange for crack cocaine. At trial, Officer Neil Marcus (Officer Marcus), a member of the Howard County Drug Task Force, testified that he monitored the controlled buy from a laundromat across the street from the CVS drugstore. Officer

Marcus stated that he observed "a hand-to-hand transaction take place." (Transcript p. 52). After the second transaction was conducted, Taylor was arrested by the task force. During a search, the officers located currency matching what was given to Morrow on Taylor's person. Based on the evidence before us, we conclude that the trier-of-fact could reasonably find that Taylor was dealing in cocaine. *See* I.C. § 35-48-4-1. Accordingly, we find that there is substantial evidence of probative value to support the judgment of the trial court. *See Williams*, 714 N.E.2d at 672.

II. *Sentencing*

Next, Taylor contends that he was improperly sentenced. Specifically, Taylor claims that (1) the trial court relied on invalid aggravators to enhance his sentence and (2) his sentence is inappropriate in light of the nature of the offense and his character.

A. *Standard of Review*

It is well established that sentencing decisions lie within the discretion of the trial court and will be reversed only for an abuse of discretion. *Hayden v. State*, 830 N.E.2d 923, 928 (Ind. Ct. App. 2005), *trans. denied*. In *Rodriguez v. State*, 785 N.E.2d 1169, 1179 (Ind. Ct. App. 2003), *trans. denied*, we held that when considering the appropriateness of the sentence of the crime imposed, courts should initially focus upon the presumptive penalties.[1] Trial courts may then consider deviation from this presumptive sentence based upon a balancing of the factors which must be considered

[1] We observe that Taylor committed this offense on February 2, 2004, and was charged on December 3, 2004. However, he was tried, convicted and sentenced in March and April of 2006, after the new sentencing scheme was enacted on April 25, 2005. We will apply the sentencing scheme in effect at the time of the commission of the offense. *See Richards v. State*, 681 N.E.2d 208, 213 (Ind. 1997).

pursuant to I.C. § 35-38-1-7.1(a), together with any discretionary aggravating and mitigating factors found to exist. *Id*. For a trial court to impose a sentence other than the presumptive, it must (1) identify the significant aggravating and mitigating factors; (2) relate the specific facts and reasons that the court found to those aggravators and mitigators; and (3) demonstrate that the court has balanced the aggravators with the mitigators. *Hayden*, 830 N.E.2d at 928. Also, the finding of mitigating factors is not mandatory and rests within the discretion of the trial court. *Dylak v. State*, 850 N.E.2d 401, 410 (Ind. Ct. App. 2006).

B. *Aggravating Factors*

Relying on *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), Taylor argues that the trial court erred in imposing an aggravated sentence of twelve years for each Class B felony dealing in cocaine. Specifically, he argues that the trial court improperly relied upon his criminal history and included an invalid aggravator that Taylor traveled "to Kokomo to sell cocaine." (Transcript p. 137).

In *Blakely*, the United States Supreme Court held, "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id*. at 2536 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)). "The 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id*. at 2537. Thus, the key to *Blakely* is whether the case

involves "a sentence greater than what the state law authorized on the basis of the verdict alone." *Id*. at 2538.

At the time of Taylor's offense, I.C. § 35-50-2-5 (1998) provided: "A person who commits a Class B felony shall be imprisoned for a fixed term of ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances." As noted above, Taylor's sentence was aggravated from the presumptive term of ten years to a term of twelve years. In imposing this enhanced sentence the trial court relied in part on Taylor's criminal history, which consisted of one misdemeanor conviction of possession of a controlled substance.

Even though Taylor acknowledges that the trial court could rely on his prior conviction without any additional findings by a jury in light of *Blakely*, he now argues that his prior misdemeanor conviction is insufficient to support the aggravated sentence. While prior convictions may be considered to have significant weight, this is not necessarily so. *Waldon v. State*, 829 N.E.2d 168, 182 (Ind. Ct. App. 2005), *reh'g denied, trans. denied*. The significance afforded to a defendant's criminal history depends upon the gravity, nature, and number of the prior offenses as they relate to the current offense. *See Ballard v. State*, 808 N.E.2d 729, 736 (Ind. Ct. App. 2004), *trans. granted, summarily aff'd in relevant part by* 812 N.E.2d 789 (Ind. 2004).

Furthermore, since *Blakely* was decided this court has held that prior misdemeanor convictions are insufficient aggravating factors to support a *substantially* enhanced

sentence.[2] With our case law in mind, we recently affirmed the trial court's aggravated sentence in *Williams v. State*, 830 N.E.2d 107, 114 (Ind. App. 2005). In *Williams*, the trial court enhanced Williams' murder sentence from the presumptive term of fifty-five years, to a term of fifty-eight years based on his criminal history of two misdemeanors, *i.e.*, a conviction for violating a protective order and a public intoxication conviction. *Id.* at 113. While we agreed that two prior misdemeanor convictions would not support a maximum enhanced sentence, in *Williams*, we concluded that the enhancement was not substantial and could be supported by Williams' criminal history. *Id*.

Accordingly, here, we find that Taylor's sole misdemeanor conviction can support his two year enhancement above the presumptive sentence, as this increase does not represent a substantial penalty enhancement. Moreover, Taylor's misdemeanor conviction of possession of a controlled substance is closely related to the instant offenses of dealing in cocaine. *See Ballard*, 808 N.E.2d at 736. Thus, we conclude that Taylor's criminal history is a valid aggravator.

With regard to the trial court's aggravator that Taylor had traveled to Kokomo to sell drugs, we agree with Taylor, and the State concedes, that there is no evidence in the record to support this fact, let alone, that this evidence was found by the jury pursuant to *Blakely*. Nevertheless, as a single proper aggravating factor is sufficient to enhance a

[2] *See e.g. Traylor v. State*, 817 N.E.2d 611, 622 (Ind. Ct. App. 2004), *trans. denied* (single misdemeanor battery conviction insufficient to enhance an A felony sentence by ten years and C felony sentence by two years); *Ruiz v. State*, 818 N.E.2d 927, 928-29 (Ind. 2004) (based solely on state law grounds and not *Blakely*, criminal history of alcohol-related misdemeanors not significant aggravators to support maximum sentence for Class B felony child molestation).

sentence, we decline Taylor's invitation to reduce his sentence to the presumptive. *See Carson v. State*, 813 N.E.2d 1187, 1189 (Ind. Ct. App. 2004).

C. *Appellate Rule 7(B)*

Next, Taylor alleges that his sentence is inappropriate in light of the nature of the offense and his character. Pursuant to Ind. Appellate Rule 7(B), we may revise a sentence authorized by statute, if after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *See* Ind.Appellate Rule 7(B).

First, we find Taylor' sentence appropriate in light of his character. The record shows that he incurred the misdemeanor conviction of possession of a controlled substance in 2001. It is clear that barely three years later Taylor has graduated from mere possession to dealing in cocaine, a Class B felony. Furthermore, we agree with the State that the fact that Taylor was able to sell multiple crack rocks of cocaine in a span of several hours, and had more in his possession at the time of his arrest, permits the inference that he was running a high volume drug enterprise. With regard to the nature of the offense, we find Taylor's sentence equally justified. Taylor conducted his business in front of a drugstore, a public area frequented by many people. This conduct shows a blatant disregard for the safety of Kokomo residents.

Accordingly, based on the evidence before us, we conclude that the trial court imposed a sentence which was appropriate in light of the nature of the offense and Taylor's character. Therefore, we will not disturb the trial court' sentence.

CONCLUSION

Based on the foregoing, we find that the State presented sufficient evidence to sustain Taylor's conviction for dealing in cocaine. Additionally, we find that the trial court properly sentenced Taylor.

Affirmed.

BAILEY, J., and MAY, J., concur.