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# IN THE
# COURT OF APPEALS OF INDIANA

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|---|---|---|
| LARRY BEST, JR., | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 38A02-0604-CR-335 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE JAY CIRCUIT COURT
The Honorable Brian Hutchinson, Judge
Cause No. 38C01-0403-FA-4

**November 14, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## Case Summary

Larry Best appeals his convictions for two counts of dealing in methamphetamine, Class A felonies, and one count of conspiracy to deal in methamphetamine, a Class A felony. We affirm.

## Issues

Best raises three issues, which we restate as:

I. whether the trial court's decision to deny Best's second motion for change of judge was clearly erroneous;

II. whether the trial court properly admitted drugs acquired in controlled buys into evidence; and

III. whether the evidence is sufficient to sustain his conviction for conspiracy to sell methamphetamine.[1]

## Facts

The evidence most favorable to the convictions reveals that Travis Clem and April Grigsby, acting as confidential informants for the Portland Police Department Task Force, performed three controlled drug buys in Jay County. On October 22, 2002, Clem and Grigsby called Mindy McCowan, seeking to purchase methamphetamine. Before arriving at McCowan's apartment, Clem and Grigsby met with Detective Todd Wickey at an abandoned building. Detective Wickey provided Clem with money to purchase the methamphetamine, a transmitter, disguised as a pager, to record conversations, and a radio repeater for his vehicle. Clem and Grigsby were searched. Detective Wickey

[1] We note that Best raised five issues in his brief; however, he only develops arguments for three. Thus, we address only these three.

stated that Clem and Grigsby were not strip-searched. Instead, their outer clothing was searched, specifically their pockets, shoes, socks, as well as their vehicles. See Tr. p. 289. Grigsby's breast area, however, was not searched because a female officer was not present.

Detective Wickey then followed Clem and Grigsby to McCowan's apartment, and parked on a side street to avoid being seen. When they arrived, however, McCowan instructed Clem and Grigsby to return an hour later because the methamphetamine needed to be weighed. Clem, Grigsby, and Detective Wickey returned to the abandoned building to wait. While they waited, Clem and Grigsby were searched a second time, and Clem returned the money to Detective Wickey. After an hour passed, Clem and Grigsby were searched again and provided with money to purchase the methamphetamine. Returning to McCowan's apartment, Clem entered the apartment, while Grigsby waited in the car and Detective Wickey waited on a side street listening and recording the conversation from Clem's transmitting device. Once inside, Clem purchased methamphetamine from McCowan and Best.[2] Clem and Grigsby then returned to the abandoned building, followed by Detective Wickey. Detective Wickey then searched Clem and Grigsby and recovered the methamphetamine, the transmitter, and any change remaining from the initial buy.

[2] Based on the transcript and testimony of Clem, it is not entirely clear whether Best weighed the drugs Clem purchased or whether Clem gave Best one hundred dollars to which Best provided fifty dollars in change. Either way, there clearly is evidence that Best was involved in the October 22, 2002 drug transaction. See Tr. pp. 188-89, 191-92.

On October 23, 2002, Clem and Grigsby contacted Detective Wickey regarding another methamphetamine purchase from McCowan's apartment. Detective Wickey met Clem and Grigsby at the same abandoned building, performed the same vehicle and outer body searches, and provided Clem with money and a transmitter as he had for the buy on the previous day. Detective Wickey then followed Clem and Grigsby to McCowan's apartment and waited on the side street, listening and recording the conversation pertaining the drug transaction. In the back bedroom of McCowan's apartment, Clem gave Best fifty dollars in exchange for half a gram of methamphetamine. Clem and Grigsby exited the apartment and returned to the abandoned building where they were searched, and Clem turned over the drugs and any change remaining from the buy to Detective Wickey.

On October 25, 2002, Clem arranged to buy an "eight ball" of methamphetamine from Best at Annette Lennartz's Jay County residence. Detective Wickey met with Clem and Grigsby at the same location, performed the same searches, and followed the same procedures as in the October 22, and 23, 2002 drug buys.[3] Once inside Lennartz's home, Clem purchased only a gram of methamphetamine because McCowan informed Clem that, "there were other people who wanted some too." See Tr. p. 205. While Best laid on the couch, Clem gave McCowan one hundred dollars and left. Returning to the abandoned building, Clem turned over the money, drugs, and transmitter to Detective Wickey.

[3] As previously stated, Clem and Grigsby were not strip-searched but their outer clothing was searched, specifically their pockets, shoes, socks, and their vehicles. Clem, however, was provided with two hundred and fifty dollars because it was a bigger drug buy, and Grigsby remained in the car. See Tr. pp. 203, 301-02, 436.

The State charged Best with two counts of dealing in methamphetamine, Class A felonies, and conspiracy to commit dealing in methamphetamine, a Class A felony. On April 29, 2004, Best filed a motion for change of judge. Best asserted that the motion was based on conflict of issue concerns and the appearance of impropriety rather than the judge's actual bias or prejudice. See Tr. p. 6. The judge acknowledged, "I have known Mr. Best since he was about fifteen or sixteen years of age[,] and I've made his acquaintance professionally as a probation officer. I have continued to know of him and seen him and talked to him in the community after that time." Tr. pp. 7-8. He also stated that he was familiar with Best's prior conviction and juvenile adjudications, but had no bias or prejudice against him. Although Best had previously filed a judicial complaint against the presiding judge, and the judge had granted Best's request for change of judge on two prior cases, Best's motion for change of judge was denied on May 11, 2004. On May 20, 2005, Best again filed a motion for change of judge based on the October 22, 2004 sentencing hearing of McCowan, his co-defendant. At McCowan's sentencing the judge stated:

> I also believe that at the time of this offense you were subject to a manipulative, stronger personality than your own. I believe that you were not capable--no, I . . . don't want to say it that way. You were weak at the time. You chose poorly on who to associate with and another stronger personality with no concern for your well-being was leading you around for a . . . a significant part of your life. I don't know if that's going to continue or not. It might. I don't know. But, I think that's . . . that is a little bit of mitigation as well.

Tr. p. 48. On September 27, 2005, the motion was denied, and on November 23, 2005, a jury convicted Best. He now appeals.

## Analysis

### *I. Recusal*

Best first contends that, because he demonstrated reasonable questions about the trial judge's impartiality, the judge erred by failing to recuse himself. Although, a trial judge has the discretion to disqualify himself or herself whenever any semblance of judicial bias or prejudice arises, disqualification is not required unless actual prejudice or bias exists. Cook v. State, 612 N.E.2d 1085, 1087 (Ind. Ct. App. 1993). Upon review of the trial judge's decision not to disqualify himself, we presume that the trial judge is unbiased and unprejudiced, and to rebut the presumption, Best must establish from the judge's conduct actual bias or prejudice, which places him in jeopardy. See id. at 1088. Such bias or prejudice exists only where there is an undisputed claim or where the judge has expressed an opinion on the merits of the pending controversy. Id.

Under Indiana Criminal Rule 12(B), a defendant requesting a change of judge for bias or prejudice must timely file an affidavit that the judge has a personal bias or prejudice against the defendant. Winn v. State, 748 N.E.2d 352, 357 (Ind. 2001). Indiana Criminal Rule 12(B) further requires the affidavit to state the facts and the reasons for the belief that such bias or prejudice exists, and be accompanied by a certificate from the attorney of record that the attorney in good faith believes that the historical facts recited in the affidavit are true. Id. The judge must grant the request if the historical facts recited in the affidavit support a rational inference of bias or prejudice.

Id. The ruling on a motion for change of judge is reviewed under the clearly erroneous standard. Sturgeon v. State, 719 N.E.2d 1173, 1182 (Ind. 1999). Reversal of the judge's decision will require a showing that leaves us with a definite and firm conviction that a mistake has been made. Id.

In addition to Indiana Criminal Rule 12(B), Indiana Judicial Conduct Canon 3(E) provides:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter; or the judge has been a material witness concerning it.

Here, although the trial judge had known Best since Best was approximately fifteen years old, he assured Best that, "This Court does not have any bias or prejudice against Mr. Best because of the situation that he is in now." Tr. p. 8. Best, however, contends that the trial judge's comments during McCowan's sentencing hearing, referencing his character as a "manipulative, stronger personality . . . with no concern for [McCowan's] well-being," indicated the trial judge's bias and prejudice. Tr. p. 48. Best does not point to a specific instance in his case when the judge's rulings exhibited bias or prejudice stemming from the trial judge's involvement in McCowan's case or sentencing

hearing. There is also no evidence indicating that the trial judge had personal knowledge of any disputed evidentiary facts. The personal knowledge that requires recusal is knowledge acquired from extrajudicial sources. Lee v. State, 735 N.E.2d 1169, 1172 (Ind. 2000). Any knowledge gained through his service as a sitting judge is not "personal" within the established meaning of the canon. Id. A judge need not disqualify himself merely because he has made an adverse ruling against a defendant in a related action, or because he has presided over the trial of a co-defendant. See id.

The trial judge here has no personal knowledge that would require his recusal. In addition, the trial judge has not served as a lawyer or witness in Best's current case, and this is not an instance where "a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter." Ind. Judicial Conduct Canon 3(E). Applying Indiana Judicial Conduct Canon 3(E), the trial judge's actions did not necessitate recusal.

The commentary to Indiana Judicial Canon 3(E) states, "A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification." Jud. Canon 3(E). Here, the trial judge properly made a record of his previous involvement with Best. The trial judge acknowledged that Best had previously filed a judicial complaint against him, but the trial judge presumed the matter resolved because the Judicial Qualifications Committee had not taken any disciplinary action against him. "Indiana practice has always leaned toward recusal where reasonable questions about impartiality exist; however, a judge's prior

representation of a defendant in an unrelated criminal matter does not mandate reversal of a conviction absent a showing of actual prejudice." Tyson v. State, 622 N.E.2d 457, 460 (Ind. 1993); see also Hammond v. State, 594 N.E.2d 509, 514 (Ind. Ct. App. 1992) trans. denied. Thus, although the trial judge previously served as Best's probation officer and defense counsel, the trial judge was correct in stating, "[M]y prior knowledge of his prior conviction and juvenile adjudications does not disqualify me." Tr. p. 8.

Based on the trial judge's recusal in Best's two prior cases, Best asserts the present case also warrants a recusal. Judges, however, are credited with the ability to remain objective notwithstanding their having been exposed to information that might tend to prejudice lay persons. Stanger v. State, 545 N.E.2d 1105, 1118 (Ind. Ct. App. 1989). Hence, the mere fact that a defendant has appeared before a certain judge in a prior action or the judge has gained knowledge of the defendant by participating in other actions does not establish the existence of bias or prejudice, particularly when a change of judge is sought in a jury trial. Id. Prejudice must be shown by the judge's trial conduct; it cannot be inferred from Best's subjective views. See id. Here, Best does not point to a specific instance when the trial judge's rulings were based upon matters learned or evidence produced at Best's prior hearings. Thus, we conclude the trial judge's conduct in Best's hearing did not constitute bias or prejudice warranting recusal, and we find no clear error in the trial judge's decision to deny Best's motion for change of judge.

**We acknowledge that it is preferable to consider recusal where articulable and reasonable questions concerning the impartiality of a judge might exist. See Saylor v. State, 765 N.E.2d 535, 566 (Ind. 2002). Here, the trial judge had known**

**the defendant since the defendant was an adolescent. Best had filed a previous judicial complaint against the judge. Best's involvement with these particular crimes was noted by the judge when, in sentencing Best's co-defendant, McCowan, he commented that McCowan had been influenced by Best's "manipulative, stronger" personality. Tr. p. 48. Had we been situated in the trial judge's shoes, we would have considered recusing. We cannot say, however, that the denial of the motion to recuse requires reversal of Best's convictions.**

### *II. Admissibility of Evidence*

Best argues that the methamphetamine purchased in the controlled buys should not have been admitted into evidence because the State failed to obtain a female officer to thoroughly search Grigsby's bra and breast area before the buys occurred. He also contends Detective Wickey failed to maintain constant surveillance of Clem and Grigsby. The trial court has broad discretion in ruling on the admissibility of evidence. Love v. State, 741 N.E.2d 789, 791 (Ind. Ct. App. 2001). We will reverse a ruling on the admissibility of evidence only when it has been shown that the trial court abused its discretion. Id. An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts. Weis v. State, 825 N.E.2d 896, 900 (Ind. Ct. App. 2005).

Best contends Grigsby was inadequately searched and, as a result, the State failed to maintain proper control over her as a confidential informant performing a controlled buy. Best offers no authority in support of his argument that such an extended search is required, and we decline to so hold. See Wright v. State, 836 N.E.2d 283, 289 (Ind. Ct. App. 2005) trans. denied. We considered this argument in Hudson v. State, 462 N.E.2d

1077, 1083 (Ind. Ct. App. 1984), where Hudson attacked the sufficiency of pat-down searches before a controlled buy, insisting a strip search and a complete body cavity check were necessary. Id. We determined pat-down searches of informants are sufficient in a controlled buy. Id.

A controlled buy consists of searching the person who is to act as the buyer, removing all personal effects, giving him or her money with which to make the purchase, and then sending him or her into the residence in question. Watson v. State, 839 N.E.2d 1291, 1293 (Ind. Ct. App. 2005). Upon his or her return he or she is again searched for contraband. Id. The pre-buy search establishes the person making the purchase for the police does not have contraband prior to the transaction with the target. Watson, 839 N.E.2d at 1294. Surveillance during the transaction establishes the target as the source of the contraband and excludes other sources of contraband. Id. Thus, any contraband discovered during a search after the transaction is attributable to the target of the controlled buy. Id. Except for what actually transpires within the residence, the entire transaction takes place under the direct observation of the police. Id. They ascertain that the buyer goes directly to the residence and returns directly, and they closely watch all entrances to the residence throughout the transaction. Id.

In this case, pat-down searches were appropriately administered for all three controlled buys. On October 22, 2002, Clem and Grigsby were searched before the controlled buy. When McCowan instructed Clem to return an hour later to purchase the methamphetamine, Clem and Grigsby were again searched while they waited. After the hour passed, Detective Wickey searched Clem and Grigsby again before making the

buy.[4] On October 23, and 25, 2002, Clem and Grigsby were also searched before and after each respective controlled buy. Although a female officer was not present to search Grigsby's bra and breast area, we conclude evidence of the controlled buy was properly admitted into evidence at trial.

Best also argues that the buy was inadequately controlled when Detective Wickey sat on a side street because he failed to maintain continuous surveillance of Clem and Grigsby as they entered the McCowan's apartment. The adequacy of controls in a police buy, however, goes to the weight and credibility of the evidence presented rather than to its admissibility, as Best seems to argue. See Hudson, 462 N.E.2d at 1083. Regardless, the testimony of Clem, the informant-buyer, is sufficient to support Best's convictions, despite any arguable inadequacies in the controls of the buy. Id. We conclude the trial court properly admitted the methamphetamine acquired during the controlled buys into evidence.

### *III. Sufficiency of Evidence*

Best contends that McCowan and Clem made the agreement to buy methamphetamine on October 25, 2002, and thus, the evidence is insufficient to support his conspiracy conviction. When reviewing a claim of insufficient evidence, we neither reweigh the evidence nor judge the credibility of the witnesses, and we affirm the conviction if there is substantial evidence of probative value supporting each element of the crime from which a reasonable trier of fact could have found the defendant guilty

[4] We note that Clem was the actual buyer in all three drug buys, and on October 2, 2004, Grigsby waited in the car while Clem entered McCowan's apartment to the purchase the methamphetamine.

beyond a reasonable doubt. Samaniego-Hernandez v. State, 839 N.E.2d 798, 804 (Ind. Ct App. 2005). It is the job of the fact-finder to determine whether the evidence in a particular case sufficiently proves each element of an offense, and we consider conflicting evidence most favorably to the trial court's ruling. Id.

Here, Best fails to develop a cogent argument and provide supporting authority regarding his conspiracy conviction. An "argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on . . . ." Ind. Appellate Rule 46(A)(8)(a). We will not become a party's advocate, nor will we address arguments that are inappropriate, improperly expressed, or too poorly developed to be understood. Barrett v. State, 837 N.E.2d 1022, 1030 (Ind. Ct. App. 2005) trans. denied. We conclude that this failure to cite the appropriate authority constitutes waiver of this argument. See Wright v. State, 772 N.E.2d 449, 460 (Ind. Ct. App. 2002).

Waiver notwithstanding, Clem testified that on October 25, 2002, he called Best requesting to purchase an "eight ball" of methamphetamine. When Clem arrived, he purchased only a gram of methamphetamine from McCowan because McCowan informed him that, "there were other people who wanted some too." See Tr. p. 205. The State is not required to establish the existence of a formal express agreement to prove a conspiracy. Wieda v. State, 778 N.E.2d 843, 847 (Ind. Ct. App. 2002). It is sufficient if the minds of the parties meet understandingly to bring about an intelligent and deliberate agreement to commit the offense. Id. An agreement can be inferred from circumstantial

evidence, which may include the overt acts of the parties in furtherance of the criminal act. Id. Here, Although Best laid on the couch while the transaction took place between Clem and McCowan, it can be inferred from Clem's phone call to Best that an agreement was made between Best and McCowan to sell methamphetamine to Clem. In this case, the trial court believed Clem's testimony. We defer to the trial court's credibility determination.

**Conclusion**

We conclude the trial judge's conduct in Best's hearing did not constitute bias or prejudice warranting recusal, the trial court properly admitted evidence from the controlled buys into evidence, and the State presented sufficient evidence to support Best's conspiracy conviction. We affirm.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.