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# IN THE
# COURT OF APPEALS OF INDIANA

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| JOHNNY TILSON MOORE, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 45A03-0705-CR-243 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE LAKE SUPERIOR COURT
CRIMINAL DIVISION, ROOM 3
The Honorable Thomas W. Webber, Sr., Judge Pro Tempore
Cause Nos. 45G03-0402-FA-7 & 45G03-0402-FA-8

**December 31, 2007**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellant-Defendant, Johnny Tilson Moore (Moore), appeals his conviction for two Counts of dealing in cocaine, Class B felonies, Ind. Cod § 35-48-4-1.

We reverse and remand.

## ISSUE

Moore raises one issue on appeal, which we restate as: Whether Moore was inappropriately sentenced in light of the nature of the offense and his character.

## FACTS AND PROCEDURAL HISTORY

On November 30, 2003, at approximately 2:00 p.m., Officer Irving Givens (Officer Givens) of the Gary Police Department together with an undercover informant planned and executed an undercover purchase in a Gary neighborhood. The undercover informant bought .35 grams of cocaine for forty dollars from Moore. On February 4, 2004, the State of Indiana filed an Information under cause number 45G03-0402-FA-7 charging Moore with knowingly and intentionally delivering cocaine, within a thousand feet of an Indiana State Licensed Day Care, a Class A felony, I.C. § 35-48-4-1(a)(1)(b)(3)(B)(iv).

On December 5, 2003, Officer K. Banker (Officer Banker) of the Gary Police Department observed another planned and executed undercover purchase by a confidential informant. Officer Banks followed the informant to a neighborhood and within a few minutes, the undercover informant returned with thirteen clear, knotted, small plastic bags. The informant told Officer Banker that he had purchased the cocaine from Moore for one hundred and ten dollars. At this time, Moore was out on bond awaiting sentence for a

previous conviction.[1] A week later, on December 13, 2003, Officer Banker and an undercover informant planned and executed a purchase of crack cocaine from Moore for sixty dollars. As a result of these two undercover operations, the State of Indiana filed an Information on February 10, 2004, under cause number 45G03-0402-FA-8, charging Moore with two Counts of knowingly or intentionally delivering cocaine, within a thousand feet of an Indiana State Licensed Day Care, Class A felonies, I.C. § 35-48-4-1(a)(1)(b)(3)(B)(iv).

On July 21, 2004, Moore entered into a plea agreement with the State and pled guilty to an amended charge of dealing in cocaine as a Class B Felony, I.C. § 35-48-4-1, under cause number 45G03-0405-FA-7, and an amended charge of one count of dealing in cocaine as a Class B Felony, I.C. § 35-48-4-1, under cause number 45G03-0402-FA-8. In return, the State agreed to leave sentencing to the discretion of the trial court.

On August 24, 2004, a sentencing hearing was held, at which the trial court accepted Moore's guilty plea and Moore was given an aggravated sentence of twenty years for each Count, to be served concurrently for a total of twenty years imprisonment.

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

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[1] Moore pled guilty to possession of cocaine, a Class D felony. He was sentenced on December 16, 2003, to one year suspended to probation.

## DISCUSSION AND DECISION

Moore argues that his sentence is inappropriate when considering the nature of the offense and his character.[2] We disagree.

A sentence, which is authorized by statute, will not be revised unless it is inappropriate in light of the nature of the offense and character of the offender. Ind. App. R. 7(b). We note the range for a Class B felony is six to twenty years, with a presumptive sentence of ten years. *See* I.C. § 35-50-2-5 (2004).

The trial court accepted Moore's plea agreement, found the aggravating circumstances outweighed the mitigating circumstances, and enhanced his sentence of ten years for dealing in cocaine, a Class B felony, to a sentence period of twenty years. Furthermore, the trial court ordered this sentence to run concurrently with the sentence for his second amended charge of dealing in cocaine, a Class B felony.

Our evaluation of the nature of the offense renders it difficult to ignore the serious nature of Moore's offense –specifically, continuing to deal in cocaine while out on bond awaiting his sentence. A mere several days before he was sentenced, Moore was selling cocaine to the confidential informants in the instant causes. It has been held that the commission of additional crimes while on bond is a valid aggravator. *See Field v. State*, 843

[2] Moore committed the instant offenses before the advisory sentence language took effect. *See Public Law* 71-2005 (abolishing "presumptive sentences" in favor of "advisory sentences"). Thus, we will refer to Moore's sentence as the aggravated penalty for Class B felonies under the presumptive sentencing scheme.

N.E.2d 1008, 1011 (Ind. Ct. App. 2006). However, Indiana courts have consistently held that the maximum possible sentences are generally most appropriate for the worst offenses and worst offenders. *See Buchanan v. State*, 767 N.E.2d 967 (Ind. 2002). Our supreme court has previously decided that the maximum sentence allowed by law for a nineteen year old dealing in cocaine as a Class A felony, with a criminal record, in unreasonable. *See Evans v. State*, 725 N.#.d 850 (Ind. 2000). In *Evans*, the defendant was nineteen years old and sold 6.55 grams of cocaine to a police informant while on probation for previous offenses. *Id*. Additionally, Evans had accumulated a record of unlawful activity including juvenile adjudications for theft, criminal trespass, auto theft and one adult misdemeanor conviction for receiving stolen property. *Id*. at 851. The supreme court held that the maximum sentence of fifty years was clearly, plainly, and obviously unreasonable. *Id.*

Similar to Evans, Moore was nineteen when he committed the crime of dealing cocaine. Moore also had a record of unlawful activity and committed another crime while on bond, just as Evans committed another crime while on probation for a previous offense. *See id*. The *Evans* court held that in light of the nature of the offense and the character of the offender the maximum sentence was inappropriate and recommended the trial court impose the presumptive sentence. *Id*. at 852.

In light of *Evans*, we find it difficult to sustain Moore's maximum sentence. Under the presumptive sentencing scheme the trial court does not have to take mitigating factors into account. Regardless, if the Indiana supreme court held that the maximum sentence was inappropriate for a Class A felony, with similar underlying circumstances, then likewise we

conclude the maximum sentence for a Class B felony is also inappropriate. Thus, Moore's sentence of twenty years should be vacated and remanded back to the trial court with instructions to impose the presumptive sentence of ten years.

Moore also argues that his sentence is inappropriate based on his character. Specifically, Moore argues that the trial court did not consider Moore's family background or his guilty plea when determining his sentence. It is well established that sentencing decisions lie within the discretion of the trial court and will be reversed only for abuse of discretion. *Hayden v. State*, 830 N.E.2d 923, 928 (Ind. Ct. App. 2005), *trans. denied*. When considering the appropriateness of the sentence for the crime committed, trial courts should initially focus upon the presumptive penalties. *Rodriguez v. State*, 785 N.E.2d 1169, 1179 (Ind. Ct. App. 2003), *trans. denied*. Trial courts may consider deviation from this presumptive sentence based upon a balancing of factors considered pursuant to I.C. § 25-28-1-7.1(a), together with any discretionary aggravating and mitigating factors found to exist. *Id*.

Recognizing mitigating factors is within the discretion of the trial court. *Williams v. State*, 840 N.E.2d 433, 438 (Ind. Ct. App. 2006). A trial court is not obligated to assign the same weight to mitigating factors as suggested by the defendant. *Id*. Thus, the trial court did not have to consider Moore's age and family circumstances as mitigating factors. Additionally, Moore received a substantial benefit by pleading guilty. Namely, his charges were reduced from Class A felonies to Class B felonies. Thus, if the benefit is in exchange for pleading guilty, a benefit must not also necessarily be extended at sentencing. *See Sensback v. State*, 720 N.E.2d 1160, 1165 n.4 (Ind. 1999)(defendant's benefit was received

when the State amended the charge from a Class A felony carrying twenty to fifty years to a Class B felony carrying six to twenty years).

However, the nature of the offense alone is enough for Moore's sentence to be reduced to the presumptive sentence of ten years.

## CONCLUSION

Based on the foregoing, we conclude that Moore was inappropriately sentenced based upon the nature of the offense and his character for dealing in cocaine.

Reversed and remanded with instructions.

FRIEDLANDER, J., concurs.

SHARPNACK, J., dissents with opinion.

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**SHARPNACK, JUDGE dissenting**

I respectfully dissent as to the majority's reduction of Moore's sentence to ten years. I believe that this case is distinguishable from Evans v. State, 725 N.E.2d 850 (Ind. 2000). There, Evans was sentenced to the maximum sentence for dealing in cocaine as a class A felony, but the Indiana Supreme Court reduced his sentence from fifty years to the presumptive sentence of thirty years. 725 N.E.2d at 851-852. Evans had a criminal history, but none of the prior convictions involved drugs, and Evans was only nineteen years old. Id. at 851. Here, Moore was also nineteen years old, but his criminal history is more indicative

of an experienced drug dealer. In the late fall of 2003, Moore pleaded guilty to possession of cocaine as a class D felony. **(Appellee's Appendix at 4)** Moore was ultimately sentenced to one year suspended to probation for the possession of cocaine conviction. **(Appellee's Appendix at 4)** However, he was released on bond and awaiting sentencing on that conviction at the time of these two dealing in cocaine offenses. **(Appellee's Appendix at 4)** Moreover, he was later arrested again for dealing in cocaine, and these charges were dismissed as part of the plea agreement in this case. **(Appellee's Appendix at 4)** Based upon this history, I conclude that Moore's twenty-year sentence is not inappropriate in light of the nature of the offense and the character of the offender.