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IN THE
COURT OF APPEALS OF INDIANA

JOSEFINA HERNANDEZ-ROMULADO,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0703-CR-221
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William E. Young and The Honorable Michael Jensen, Magistrate
Cause No. 49G20-0509-FA-152055

December 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Josefina Hernandez-Romulado appeals her convictions for Dealing Cocaine,[1] as a class A felony, and Dealing Marijuana,[2] as a class D felony. She also appeals her aggregate sentence of twenty-five years in prison. Hernandez-Romulado presents the following restated issues for review:

1. Are Hernandez-Romulado's convictions void for lack of jurisdiction?

2. Did the trial court err in admitting evidence obtained pursuant to Hernandez-Romulado's written consent to search her vehicle?

3. Did the trial court properly sentence Hernandez-Romulado?

We affirm in part and remand for resentencing.

On the morning of September 5, 2005, Officer James Martin of the Indianapolis Police Department received an anonymous telephone call regarding Hernandez-Romulado's involvement in drug dealing. The caller reported that Hernandez-Romulado had a large amount of drugs in the trunk of her car under the spare tire. He also reported that she had bragged at a bar the previous night that she had been stopped by the police and the drugs were not found during a search of her car. The caller provided Officer Martin with the location of the bar where he had heard this information, Hernandez-Romulado's name and address, and her vehicle's make and license plate number. Officer Martin verified certain information and then went to the address and observed Hernandez-Romulado's vehicle parked in front of her apartment.

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[1] Ind. Code Ann. § 35-48-4-1 (West, PREMISE through 2007 1st Regular Sess.).

[2] I.C. § 35-48-4-10 (West 2004).

After surveilling the area for over an hour and observing no illegal activity, Officer Martin and other officers knocked on the front door in order to speak with Hernandez-Romulado. Hernandez-Romulado was cooperative, and the officers primarily conversed with her in English. Officer Martin informed her of the drug complaint, which she denied. Hernandez-Romulado confirmed that her car had been searched during a traffic stop within the last month and that no drugs were found. Hernandez-Romulado consented both verbally and in writing to the search of her vehicle and apartment. She then provided officers with the keys to her locked car. Upon searching the trunk, officers discovered sixty-four individual baggies of powder cocaine, weighing a total of about 40 grams. Additionally, 880 grams of marijuana were found in the same area. The drugs had a combined street value of around $10,000. The officers discovered nothing noteworthy in her apartment.

Officer Martin spoke at length with Hernandez-Romulado after the discovery of the drugs in her car. While she denied knowledge of the drugs, Hernandez-Romulado acknowledged exclusive ownership of the car and indicated that no one else drove it or had access to the car's keys. She further stated that she kept the car locked and knew of no one who would want to set her up. Hernandez-Romulado had no explanation for the large quantity of drugs found in her car.

The State charged Hernandez-Romulado with class A felony cocaine dealing, class C felony possession of cocaine, class D felony marijuana dealing, and class D felony possession of marijuana. After receiving and rejecting several plea offers from the State, Hernandez-Romulado was tried by jury on January 18, 2007. The jury found her

guilty as charged, and the trial court entered judgment on the dealing charges. Thereafter, the trial court sentenced Hernandez-Romulado to concurrent terms of twenty-five years in prison for the class A felony cocaine dealing conviction and one year for the class D felony marijuana dealing conviction. She now appeals. Additional facts will be provided below as necessary.

1.

Hernandez-Romulado initially argues that the trial court lacked jurisdiction in this matter because the charging information was never file-marked as required by Ind. Code Ann. § 35-34-1-1(c)(1) (West 2004).[3] Relying exclusively on *Emmons v. State*, 847 N.E.2d 1035 (Ind. Ct. App. 2006), she asserts that her convictions were, therefore, void for lack of jurisdiction.

In *Emmons*, we noted that the failure to properly file-stamp the charging information constituted clerical error that could have been corrected by a nunc pro tunc entry. *Id*. (citing *Owens v. State*, 263 Ind. 487, 333 N.E.2d 745 (1975)). In that case, however, the trial court had granted the defendant's motion to dismiss the charges at the bench trial prior to the presentation of evidence. Upon retrial, Emmons moved to dismiss the charges on double jeopardy grounds. We affirmed the trial court's denial of the motion, explaining in an alternative analysis:

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[3] I.C. § 35-34-1-1(c) provides: "Whenever an indictment or information is filed, the clerk of the court shall: (1) mark the date of filing on the instrument; (2) record it in a record book; and (3) upon request, make a copy of it available to the defendant or his attorney." In the instant case, though the charging information was apparently not file-stamped, the chronological case summary indicates that the information and probable cause affidavit were filed on September 7, 2005.

> A defendant may also be retried if the prior proceeding was terminated because a legal defect in the proceedings would make any resulting judgment reversible as a matter of law…. We have explained:
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> > [A] criminal action can be commenced only in the manner provided by law, and that it is the filing of the accusation in lawful form that invokes the jurisdiction of the court in the particular case. It is a universal principle as old as the law that the proceedings of a court without jurisdiction are a nullity and its judgment void. There can be no conviction or punishment for crime, except on accusation made in the manner prescribed by law….
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> *Pease v. State*, 74 Ind. App. 572,576, 129 N.E. 337, 339 (1921) (internal citations omitted)….
>
> The original information against Emmons had not been file-stamped and therefore was not properly filed under Ind. Code § 35-34-1-1. As a result, the trial court did not have jurisdiction over Emmons and any judgment rendered would have been void for lack of jurisdiction….

Emmons v. State, 847 N.E.2d at 1038-39.

Unlike the defendant in *Emmons*, Hernandez-Romulado did not raise the alleged jurisdictional defect before the trial court. If she had, the clerical error could have easily been corrected by a nunc pro tunc entry. *See id*. at 1037 n.6 ("[t]he better course of action…would be a nunc pro tunc entry to show the filing of the information"). Moreover, even assuming that the clerical error constituted a jurisdictional defect, it was at most a defect in personal jurisdiction, not subject matter jurisdiction. *See K.S. v. State*, 849 N.E.2d 538 (Ind. 2006) (discussing the difference between subject matter and personal jurisdiction and cautioning against the casual use of the notion of jurisdiction to characterize various claims of procedural error). "[U]nlike subject matter jurisdiction, a defendant can waive personal jurisdiction by failing to make a timely objection." *Truax v. State*, 856 N.E.2d 116, 122 (Ind. Ct. App. 2006). Here, Hernandez-Romulado appeared before the trial court on numerous occasions, including her jury trial and

sentencing hearing, without filing an objection based on lack of personal jurisdiction. Therefore, she clearly waived this argument by failing to make a timely objection. *See Truax v. State*, 856 N.E.2d 116.

2.

Hernandez-Romulado next argues that the trial court erred in failing to suppress the drug evidence seized during the search of her car.[4] Specifically, she claims her consent to the search was not knowingly, voluntarily, and intelligently made because she did not understand English well enough to waive her Fourth Amendment rights.

Although Hernandez-Romulado claims the trial court erred in denying her motion to suppress, the issue is more properly framed as whether the trial court abused its discretion when it admitted the challenged evidence at trial. *See Packer v. State*, 800 N.E.2d 574 (Ind. Ct. App. 2003), *trans. denied*. When reviewing a trial court's admission of evidence for an abuse of discretion, we will reverse only where the decision is clearly against the logic and effect of the facts and circumstances. *Id*. In the suppression context, we examine the evidence most favorable to the trial court's ruling along with any uncontradicted evidence in favor of the defendant, neither reweighing the evidence nor judging witness credibility. *Matson v. State*, 844 N.E.2d 566 (Ind. Ct. App. 2006), *trans. denied, cert. denied*. Further, we consider the foundational evidence from the trial as

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[4] Hernandez-Romulado unsuccessfully moved to suppress the evidence prior to trial but did not challenge the admission of the evidence at trial. While she asserts the error was fundamental, as she must under the circumstances, she does not actually ever apply the narrow fundamental error standard of review. In any case, however, Hernandez-Romulado has not established any error on appeal, let alone fundamental error, resulting from the trial court's admission of the drug evidence. Therefore, for ease of analysis, we will proceed as if she challenged the evidence at trial.

well as evidence from the motion to suppress hearing that is not in direct conflict with the trial testimony. *Kelley v. State*, 825 N.E.2d 420 (Ind. Ct. App. 2005).

The gravamen of Hernandez-Romulado's claim is that she did not validly consent to the search of her car because the consent form she signed was in English, which she could not understand. We have set forth the standard for determining the voluntariness of a consent to search as follows:

> When the State seeks to rely upon consent to justify a warrantless search, it has the burden of proving that the consent was, in fact, freely and voluntarily given. The voluntariness of this consent to search is a question of fact to be determined from the totality of the circumstances. A consent to search is valid except where it is procured by fraud, duress, fear, intimidation, or where it is merely a submission to the supremacy of the law. To constitute a valid waiver of Fourth Amendment rights, a consent must be the intelligent relinquishment of a known right or privilege…. Knowledge of the right to refuse a search is one factor which indicates voluntariness.

Lyons v. State, 735 N.E.2d 1179, 1185 (Ind. Ct. App. 2000) (citations omitted), *trans. denied*.

In the instant case, the evidence reveals that Hernandez-Romulado gave the officers both verbal and written consent to search her car. The consent form signed by Hernandez-Romulado was written in English and advised, among other things, that she could refuse any search and had a right to counsel. Several officers involved in the investigation testified that Hernandez-Romulado conversed with them at length in English and that she appeared to understand English well. Moreover, to assure that Hernandez-Romulado understood what she was signing, Officer Kimberly Cook read a Spanish version of the consent form to her, as well as the English version that she signed.

Hernandez-Romulado was also separately advised of her Miranda rights in Spanish. Officer Cook opined at trial that Hernandez-Romulado "[a]bsolutely" understood what she was signing. *Transcript* at 237. In light of this evidence, we conclude that the State met its burden of establishing the voluntariness of Hernandez-Romulado's consent to search and that the trial court did not abuse its discretion in admitting the evidence obtained during the search.

3.

Finally, Hernandez-Romulado challenges the aggregate sentence of twenty-five years in prison imposed by the trial court. She presents several arguments of which we find the following dispositive: Did the trial court abuse its discretion in finding her untruthfulness with the tribunal to be an aggravating circumstance?

Our Supreme Court recently determined that when a trial court imposes a sentence for a felony conviction "[t]he trial court must enter a statement including reasonably detailed reasons or circumstances for imposing [that] particular sentence." *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. We review those reasons and the omission of any reasons arguably supported by the record for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482. An abuse of discretion will be found only if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id*. One specific way a trial court may abuse its discretion is by finding an aggravating circumstance that is not supported by the record. *Id*. When an abuse of discretion is found, "remand for resentencing may be the appropriate remedy if

we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." *Id*. at 491.

In the instant case, the trial court found two mitigating factors – no criminal history and hardship on her minor children – and one aggravating factor – her untruthfulness with the court. The trial court found that the mitigators outweighed the lone aggravator and sentenced her to an executed term of twenty-five years for the class A felony conviction. While this sentence was less than the advisory of thirty years, we note the minimum sentence available was twenty years. *See* Ind. Code Ann. § 35-50-2-4 (West, PREMISE through 2007 1st Regular Sess.). Further, Hernandez-Romulado was statutorily eligible for suspension of all or part of her sentence. *See* I.C. § 35-50-2-2 (West, PREMISE through 2007 1st Regular Sess.).

Hernandez-Romulado claims the aggravator found by the trial court has no basis in the record. We agree. In finding that Hernandez-Romulado had been untruthful with the court, the trial court compared her statements during allocution at the sentencing hearing with the court's (incorrect) recollection of her testimony at trial.

During allocution, Hernandez-Romulado continued to proclaim her innocence and, for the first time, indicated that she knew who had put the drugs in her car. She accused Medaldo Lopez[5] and Aldelpho Gonzoles but stated she had no way to prove it. This prompted the following colloquy:

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[5] A "Mendardo Lopez" is identified in the presentence report as the father of two of her children.

[COURT]: If I remember correctly, Ma'am, you testified at your trial you had no idea who would do this. Is that not correct?
[DEFENDANT]: What trial?
[COURT]: The trial we had last week.
[DEFENDANT]: What?
[COURT]: Last week you testified in your own defense --- now a week and a half ago, you testified in your own defense maybe two weeks ago. And I believe you testified that you had no idea who would try to set you up. Isn't that correct?
[DEFENDANT]: I don't remember. I swear to God I don't remember.
[COURT]: [Prosecutor], did you hear that testimony.
[PROSECUTOR]: I recall that Judge.
[COURT]: Madam reporter, did you hear that testimony?
[REPORTER]: Yes, sir.
[COURT]: Yes? That's what I thought.
[DEFENDANT]: It was so much that I really don't know. But I do know and I swear to God --- I swear on my children that I love most in the world that these are the people. It's not possible that you are going to punish me for something that I didn't do. I swear to God and my children and my life that I am innocent. And thank you for listening to all that I wanted to say.

Transcript at 303-04.[6]

The reason Hernandez-Romulado seemed confused and did not remember testifying as indicated by the trial court is because she did not so testify. In her brief trial testimony, Hernandez-Romulado simply claimed that she did not know about the drugs in

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[6] In this regard, the court further stated:

> Unfortunately, for her, the jury didn't believe her. And they also didn't believe some of the other things that she testified about in Court. Because I talked to them afterwards. And now I don't believe her now because you know, two weeks ago --- a little less than two weeks ago or more than two --- whatever, she testified that she had no idea who would do this to her[.] And today she says [s]he has two names. I don't understand the inconsistencies within her testimony where you --- and then she professes not to remember what she said two weeks ago. So it's just hard to believe that she has any view towards rehabilitation when she is still trying to somehow manipulate the Court with untruthfulness….

Id. at 310-11.

her car and indicated that the trunk to her car could be opened without a key from inside the passenger compartment. Contrary to the trial court's belief, her statement in allocution was not "directly contrary to what she testified under oath." *Id*. at 313-14.

In light of the trial court's inaccurate recollection of Hernandez-Romulado's trial testimony, we conclude that the trial court abused its discretion in finding as an aggravator Hernandez-Romulado's "untruthfulness with the tribunal." *Id*. at 315. The record does not support this sole aggravator. Moreover, we observe that the fact Hernandez-Romulado maintained her innocence during her statement in allocution,[7] despite the jury's verdict, cannot be properly considered as an aggravator. *See Mathews v. State*, 849 N.E.2d 578 (Ind. 2006).

Our review of the trial court's statements at the sentencing hearing reveals the court was frustrated by what it believed to be Hernandez-Romulado's untruthfulness with the tribunal. The court referred to this aggravating circumstance a number of times. Under the circumstances, we are not confident that the trial court would have imposed the same sentence had it not improperly considered this lone aggravator against the substantial mitigating circumstances, particularly Hernandez-Romulado's lack of criminal history. Therefore, we remand for resentencing. *See Anglemyer v. State*, 868 N.E.2d 482. Because we remand for resentencing, we need not address the

[7] We feel compelled to remind the State that a statement in allocution is not testimony, made under oath or subject to cross-examination, and is not evidence. *Biddinger v. State*, 868 N.E.2d 407 (Ind. 2007).

appropriateness of Hernandez-Romulado's sentence under Ind. Appellate Rule 7(B).[8] *See Comer v. State*, 839 N.E.2d 721 (Ind. Ct. App. 2005), *trans. denied*.

Judgment affirmed in part and remanded for resentencing.

RILEY, J., and SHARPNACK, J., concur.

[8] With respect to her sentence, Hernandez-Romulado asserts in passing that the trial court prejudged her prior to hearing any evidence at the sentencing hearing. While she appears to assert a violation of due process, she offers no authority in support of her argument. Therefore, we find the issue waived. *See* Ind. Appellate Rule 46(A)(8)(a).