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IN THE
COURT OF APPEALS OF INDIANA

JAVIER WILSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0604-CR-213
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick Murphy, Commissioner
Cause No. 49G20-0501-FC-012529

DECEMBER 28, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

GARRARD, Senior Judge

A jury convicted Wilson of possession of cocaine and possession of marijuana. He was sentenced to six years with two years suspended on the cocaine charge and a concurrent one year on the marijuana count.

On appeal Wilson challenges the sufficiency of the evidence to support the cocaine conviction and the sentence imposed.

About 6:30 p.m. on January 26, 2005, Indianapolis Police Officer Nygren was on patrol in the 800 block of Eugene Street, a high crime area, when he saw a number of people, including Wilson, standing in front of an abandoned house. He drove by again and observed about five men still standing there with a bottle of Hennessy in view. Officer Nygren decided to stop and speak to the men about loitering and drinking. He also contacted Officer Blackwell, who was on patrol nearby, and who arrived to assist.

Nygren approached the group and told everyone to keep their hands out of their pockets. All, except Wilson, complied. Wilson turned his back to Nygren and began walking away with his hands in his pockets. Nygren told Wilson to turn around and keep his hands out, but Wilson kept going. While Wilson was walking away from him, Nygren saw an object drop from the area of Wilson's crotch or waist to the ground between Wilson's legs. Because Wilson refused to obey Officer Nygren's commands, and fearing Wilson might have a gun, Nygren tackled him and handcuffed him. Nygren then retrieved the object he had seen dropped. It was a baggie containing what was later determined to be 3.66 grams of rock cocaine. When Wilson was searched a bag of marijuana was recovered from his pants.

It is long settled law that on appeal we will not reweigh the evidence or redetermine the credibility of witnesses. We consider only the evidence favorable to the verdict and the reasonable inferences that may be drawn therefrom. *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005).

Wilson seeks to avoid the consequences of that rule by asserting that the evidence supporting the conviction was of "incredible dubiosity". That exception, however, has no application here. Officer Nygren's testimony was consistent and believable. Wilson points only to potential conflicts occurring from the testimony of Officer Blackwell and a photograph showing trash in the yard by the sidewalk (although the small portion of the sidewalk visible in the photo appears clear).

These matters presented the jury with ordinary credibility issues. The incredible dubiosity exception has no application here. *Berry v. State*, 703 N.E.2d 154, 160 (Ind. 1998). A reasonable jury could have believed Officer Nygren and determined that Wilson was guilty.

Turning to the sentencing arguments, Wilson first asserts the court failed to balance the sentencing factors and failed to find all mitigating circumstances.

Wilson's offense was committed on January 27, 2005 and his trial occurred February 13, 2006. In the interim our legislature amended our sentencing statutes in apparent response to *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Following the amendments some uncertainty existed as to whether the amendments applied to offenses committed before the effective date of the amendments. *Compare, eg. Weaver v. State*, 845 N.E.2d 1066 (Ind. Ct. App. 2006) with *Samaniego-*

Hernandez v. State, 839 N.E.2d 798 (Ind. Ct. App. 2005).[1] This explains why at sentencing the trial judge commented that he did not know whether he still had to do the same balancing that he used to. He, nevertheless, clearly found that a mitigating circumstance was the hardship to Wilson's ten year old dependent daughter, and that aggravating circumstances were Wilson's prior felony convictions for possession of cocaine and theft.[2] He necessarily found that the aggravators outweighed the mitigator and imposed a two year suspended sentence in addition to the presumptive sentence of four years.

Wilson further argues that the court failed to consider all the mitigating circumstances.

While the trial court must consider all evidence of mitigating circumstances submitted by a defendant, the court is not bound to agree with defendant as to the weight or value to be given to those circumstances. The finding of a mitigating circumstance is a matter within the discretion of the court. *Gillem v. State*, 829 N.E.2d 598, 604-605 (Ind. Ct. App. 2005) *trans. denied.*

The judge's statement at sentencing, "All right, the … what I am finding is that there is of the ones you mentioned, I think there is a mitigating circumstance it's a dependent hardship factor." Thus, the court pretty clearly considered the other factors offered by Wilson and concluded the hardship factor was the only one he accepted as

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[1] Here the state concedes that the prior statute applies.

[2] No potential *Blakely* harm exists because the prior convictions are outside the *Blakely* requirements.

truly mitigating. The court is not bound to explain why some proffered factors are not accepted. *Johnson v. State,* 580 N.E.2d 959, 961 (Ind. 1991).

The court did not err by failing to balance mitigating and aggravating factors, nor did it fail to consider factors in mitigation offered by Wilson.

Finally, Wilson contends that his sentence was not appropriate in view of the nature of the offense and character of the offender. He urges the sentence imposed can only be seen as vindictive justice. We disagree.

The presumptive sentence for Wilson's offense was four years. To this the court added two years (out of a possible four years additional). I.C. §35-50-2-6. Wilson had two prior felony convictions with one of them also being for possession of cocaine. In addition, the presentence report revealed he violated his probation in the prior cocaine case by testing positive for cocaine.

Thus, it appears that Wilson has a cocaine problem that he has been unable or unwilling to address. Given his prior record, requiring him to serve at least two years followed by two years of probation, during which he may be subject to drug screens, may hopefully provide the necessary impetus for Wilson to stay clean and drug free.

We cannot say that the sentence was inappropriate considering the nature of the offense and the nature of the offender.

Affirmed.

DARDEN, J., and MAY, J., concur.