



## **Case Summary**

Appellant-Defendant Robert J. Nickels (“Nickels”) appeals his conviction and sentence for Dealing in a Narcotic Drug, a Class B felony.<sup>1</sup> We affirm.

### **Issues**

Nickels presents three issues for review:

- I. Whether evidence gained as a result of Nickels’ arrest is inadmissible because the arrest warrant is unsupported by probable cause;
- II. Whether the trial court erroneously denied Nickels’ motion for a directed verdict due to the destruction of evidence; and
- III. Whether Nickels’ sentence is inappropriate.

### **Facts and Procedural History**

Nickels was convicted of Auto Theft and placed on probation. During 2004, the State filed two petitions to revoke Nickels’ probation, alleging that he had committed the offenses of Battery Resulting in Serious Bodily Injury and Invasion of Privacy. Nickels was free on bond when, on March 1, 2005, another notice of probation violation was filed. On March 3, 2005, the State filed an Amended Petition to Modify or Revoke Probation, alleging that Nickels violated his probation by committing the additional offenses of Possession of Methamphetamine, Possession of a Controlled Substance and Possession of Paraphernalia. On March 3, 2005, the trial court ordered Nickels’ arrest.

During the evening hours of March 16, 2005, City of Peru Police Officers Jay Richardson, Jason Mooney, Sam Finnegan, and Mike Stuber arrived at Nickels’ residence to execute the arrest warrant. Officers Mooney and Stuber walked up the alley toward the rear

of the residence and immediately detected the odor of anhydrous ammonia. Officers Richardson and Finnegan knocked at the front door several times without a response. Officer Richardson also detected an odor of anhydrous ammonia, and informed the other officers that he intended to procure a search warrant for the premises.

The officers began dispersing so as to secure the property. Officer Richardson heard movement inside a fenced area. As he approached the fence, Officer Richardson saw Nickels crouched over a container of bubbling liquid, a container with a bluish liquid and a container with orange sludge in it. Nickels was arrested.

The officers obtained a search warrant for the premises. The warrant was executed with assistance from the Indiana State Police Clandestine Drug Lab Team, and yielded methamphetamine, rock salt, gas line antifreeze, camping fuel, battery cases stripped of lithium, plastic tubing, fish tank pumps and a device for smoking methamphetamine.

On March 24, 2005, the State charged Nickels with Dealing in a Narcotic Drug, Possession of Methamphetamine, a Class D felony,<sup>2</sup> Possession of Chemical Reagents or Precursors with Intent to Manufacture, a Class D felony,<sup>3</sup> Maintaining a Common Nuisance, a Class D felony,<sup>4</sup> two counts of Possession of a Controlled Substance, a Class D felony,<sup>5</sup> Illegal Possession of Anhydrous Ammonia, a Class D felony,<sup>6</sup> Possession of a Switchblade

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<sup>1</sup> Ind. Code § 35-48-4-1(a)(1).

<sup>2</sup> Ind. Code § 35-48-4-6(a).

<sup>3</sup> Ind. Code § 35-48-4-14.5(e).

<sup>4</sup> Ind. Code § 35-48-4-13(b)(1).

<sup>5</sup> Ind. Code § 35-48-4-7(a).

<sup>6</sup> Ind. Code § 35-48-4-14.5(c).

Knife, a Class B misdemeanor,<sup>7</sup> Possession of Chinese Throwing Stars, a Class C misdemeanor,<sup>8</sup> and Possession of Paraphernalia, a Class A misdemeanor.<sup>9</sup>

On January 17, 2006, Nickels was brought to trial on the charges of Dealing in Methamphetamine and Possession of Methamphetamine.<sup>10</sup> He was found guilty as charged. The trial court entered a judgment of conviction for Dealing in a Narcotic Drug, and sentenced Nickels to twenty years imprisonment. He now appeals.

## **Discussion and Decision**

### **I. Admission of Evidence**

Prior to trial, Nickels filed a Motion to Suppress Evidence, wherein he claimed that the City of Peru Police Officers, armed with an illegal arrest warrant, trespassed on his property and thereby gained evidence against him. In particular, Nickels challenged the arrest warrant as follows:

That the warrant issued for the Defendant's arrest in Miami Superior Court cause number 52D01-0110-DF-189 for a violation of probation was an invalid warrant pursuant to I.C. 35-38-2-3(b) which states that a "Court may issue a warrant for the person's arrest if there is a risk of the person's fleeing the jurisdiction or causing harm to others."

(App. 44.) The trial court denied the motion to suppress, in relevant part concluding that the trial court reasonably issued a warrant after finding a risk of flight or potential harm, and was not obligated to enter a specific finding with regard to those factors. At trial, Nickels interposed a continuing objection to the admission of evidence gained pursuant to his arrest.

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<sup>7</sup> Ind. Code § 35-47-5-2.

<sup>8</sup> Ind. Code § 35-47-5-12(a).

<sup>9</sup> Ind. Code § 35-48-4-8.3(a)(1).

<sup>10</sup> The remaining charges were dismissed.

A trial court has broad discretion in ruling on the admissibility of evidence, and we will disturb its rulings only where it is shown that the court abused that discretion. Griffith v. State, 788 N.E.2d 835, 839 (Ind. 2003). We view the circumstances in their totality to determine if there was substantial evidence of probative value to support the trial court's ruling. Id. at 839-40. However, when presented with a question of law, we review the ruling under a de novo standard. Id. at 839.

Indiana Code Sections 35-33-5-1 and -2 provide that no arrest warrant may issue except upon probable cause. However, Nickels as a probationer was enjoying a conditional liberty. Cox v. State, 706 N.E.2d 547, 549 (Ind. 1999), reh'g denied. When the State has filed a petition to revoke probation and the trial court must decide whether to order the probationer taken back into custody pending the probation revocation hearing, Indiana Code Section 35-38-2-3 is controlling. Subsection (a) provides in pertinent part: "The court may revoke a person's probation if ... the person has violated a condition of probation during the probationary period[.]" Subsection (b) provides:

When a petition is filed charging a violation of a condition of probation, the court may:

- (1) order a summons to be issued to the person to appear; or
- (2) order a warrant for the person's arrest if there is a risk of the person's fleeing the jurisdiction or causing harm to others.

Nickels suggests a construction of the foregoing statute so as to provide that a warrant for the arrest of a probationer is fatally defective for lack of probable cause if the trial court has ordered it absent a specific finding of a risk of flight or causing harm.

A question of statutory interpretation is a matter of law, and we are neither bound by, nor are we required to give deference to, the trial court's interpretation. Denney v. State, 773

N.E.2d 300, 301 (Ind. Ct. App. 2002). When interpreting a statute, we look to the express language of the statute and the rules of statutory construction. Id. However, we may not interpret a statute that is clear and unambiguous on its face. Id. Rather, the words of the statute are to be given their plain, ordinary and usual meaning unless a contrary purpose is clearly shown by the statute itself. Id. at 301-302.

The statutory provision at issue here provides that a trial court may order a warrant if there is a risk of the person's fleeing the jurisdiction or causing harm to others. (Emphasis added). We will not engraft onto the statutory language a requirement that a specific finding must be made and entered into the record. Moreover, we are satisfied that the State made an adequate showing that Nickels' continued freedom presented a risk of harm to others by presenting information from the Miami County Probation Department that Nickels had been charged with multiple crimes while on probation, including Battery Causing Serious Bodily Injury and drug-related offenses.

The arrest warrant at issue was not invalid. Thus, the trial court properly admitted evidence gained as a result of Nickel's arrest.

## II. Motion for a Directed Verdict

At the close of the State's case-in-chief, Nickels moved for a directed verdict on the charge of Dealing in a Narcotic Drug. In support of his motion for a directed verdict, Nickels complained that the State destroyed evidence without sufficient compliance with Indiana Code Section 35-33-5-5(e),<sup>11</sup> which governs the destruction of chemical evidence without a

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<sup>11</sup> It appears that Nickels' actual objective was to challenge the admissibility of testimonial or photographic evidence offered in lieu of certain physical items. However, he failed to lodge a contemporaneous objection on grounds of destruction of evidence during the State's presentation of evidence, and first raised a

court order.<sup>12</sup>

In order for a trial court to appropriately grant a motion for a directed verdict, there must be a total lack of evidence regarding an essential element of the crime, or the evidence must be without conflict and susceptible only to an inference in favor of the innocence of the defendant. Proffit v. State, 817 N.E.2d 675, 680 (Ind. Ct. App. 2004), trans. denied. If the evidence is sufficient to sustain a conviction upon appeal, then a motion for a directed verdict is properly denied; thus, our standard of review is essentially the same as that upon a challenge to the sufficiency of the evidence. Id. We neither reweigh evidence nor judge witness credibility, but consider only the evidence that supports the conviction and the reasonable inferences to be drawn therefrom in order to determine whether there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. Id.

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destruction of evidence argument in the context of his motion for a directed verdict. Nevertheless, Nickels has not claimed that the State destroyed exculpatory evidence.

<sup>12</sup> Indiana Code Section 35-33-5-5(e) provides:

A law enforcement agency may destroy or cause to be destroyed chemicals, controlled substances, or chemically contaminated equipment (including drug paraphernalia as described in IC 35-48-4-8.5) associated with the illegal manufacture of drugs or controlled substances without a court order if all the following conditions are met:

(1) The law enforcement agency collects and preserves a sufficient quantity of the chemicals, controlled substances, or chemically contaminated equipment to demonstrate that the chemicals, controlled substances, or chemically contaminated equipment was associated with the illegal manufacture of drugs or controlled substances.

(2) The law enforcement agency takes photographs of the illegal drug manufacturing site that accurately depict the presence and quantity of chemicals, controlled substances, and chemically contaminated equipment.

(3) The law enforcement agency completes a chemical inventory report that describes the type and quantities of chemicals, controlled substances, and chemically contaminated equipment present at the illegal manufacturing site.

The photographs and description of the property shall be admissible into evidence in place of the actual physical evidence.

To convict Nickels of Dealing in a Narcotic Drug, as charged, the State was required to show that he knowingly manufactured methamphetamine. See Ind. Code § 35-48-4-1(a)(1)(A).

Officer Richardson testified that he found Nickels crouched over containers of bubbling liquid and orange sludge, with a can of camping fuel nearby. The odor of anhydrous ammonia was prevalent. In the nearby garage, Officer Richardson found Morton salt, mineral spirits, camping fuel containers and bottles of gas line antifreeze. Officer Richardson also testified that he took possession of two substances recovered by Sergeant Robert Land (“Sergeant Land”) during the execution of the search warrant, including a white powder found in Nickels’ bedroom. Indiana State Police Forensic Scientist Kimberly Brown testified that she tested the substances recovered from Nickels’ property. One substance was 0.46 gram of methamphetamine. Another was found to contain methamphetamine and ephedrine or pseudo-ephedrine. City of Peru Police Captain David VanBaalen testified that, during the execution of the search warrant, many items commonly associated with methamphetamine production were recovered, including baggies, ball jars, plastic tubing, a receipt for lithium, a digital scale, butane torches, butane refills, razor blades, a glass tray, alcohol, and a receipt for Coleman fuel. Sergeant Land, who had received specialized training involving methamphetamine labs, testified that the components recovered indicated “an active meth lab” utilizing the “Birch Reduction Method.” (Tr. 207, 223.)

Accordingly, the State presented sufficient evidence to permit the factfinder to conclude that Nickels knowingly manufactured methamphetamine. Because there was not a



total lack of evidence on the elements of Dealing in a Narcotic Drug, as charged, the trial court was not compelled to grant Nickels' motion for a directed verdict.

### III. Sentence

Finally, Nickels challenges his twenty-year sentence as inappropriate in light of his character and the nature of his offense. Specifically, he contends that he needs substance abuse treatment rather than long-term punishment.

At the time of Nickels' offense, Indiana Code Section 35-50-2-5 provided that a person who committed a Class B felony should be imprisoned for a fixed term of ten years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances. Citing Nickels' prior criminal history, the trial court sentenced Nickels to the maximum term of twenty years.

Indiana Appellate Rule 7(B) provides that 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."

Concerning the nature of the instant offense, we observe that Nickels was manufacturing methamphetamine while his father was asleep in the house and unaware of the danger. The character of the offender is such that prior rehabilitative efforts have failed. Indeed, Nickels committed the instant offense while on probation for Auto Theft and while he was released on bond facing additional charges.

In light of the failure of prior rehabilitative efforts, and the circumstances of the instant offense, we do not find Nickels' twenty-year sentence inappropriate.

## **Conclusion**

Nickels has demonstrated no reversible error in the admission of evidence. Moreover, his twenty-year sentence is not inappropriate.

Affirmed.

VAIDIK, J., and BARNES, J., concur.