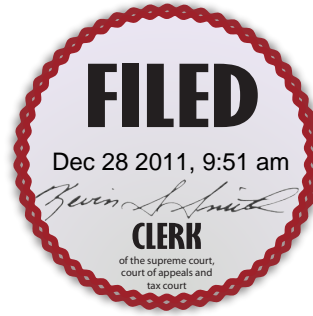


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

TERRENCE TERREN WALKER,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 79A04-1104-CR-266

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Randy J. Williams, Judge
Cause No. 79D01-0910-FA-22

December 28, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Terrence Terren Walker was standing outside an apartment building with his cousin when an officer approached them to inquire about a reported fight involving several men and a possible weapon. Walker's slurred speech, watery eyes, and odor indicated that he had been drinking alcohol. When the officer conducted a preliminary patdown search, he found that Walker was carrying a wallet containing more than \$3000 in cash. The officer arrested him for public intoxication and conducted a search of his person incident to arrest. This search produced twenty-six baggies of cocaine.

The State charged Walker with cocaine dealing, cocaine possession near a family housing complex, and public intoxication. Three months after the omnibus date (and one month before the first phase of his bifurcated bench trial), the State filed a habitual offender count. The day before phase I of his trial, Walker objected to the habitual offender count on the grounds of untimeliness. The trial court rejected his argument and determined that since he had nearly a month until the habitual offender phase of the trial, he would have adequate time to prepare a defense against the habitual offender charge.

The trial court found Walker guilty as charged and found him to be a habitual offender. Walker now appeals, challenging the sufficiency of evidence supporting his drug-related convictions as well as the timeliness of the habitual offender filing. We affirm his dealing conviction and habitual offender finding and remand with instructions to merge his cocaine possession conviction into his cocaine dealing conviction.

Facts and Procedural History

At 9:00 p.m. on October 21, 2009, Lafayette Police Officer Brian Landis was dispatched to an apartment complex to investigate a fight involving eight to nine men and possibly a weapon. When he arrived, he saw no signs of a fight, but he did see a group of men standing inside an apartment building. When he exited his squad car to investigate, the group scattered.

Moments later, when Officer Landis returned to his vehicle, he noticed a man, later identified as Walker, outside the entry to the building. Walker was joined by another man, Brian Smith, who emerged from the building. Officer Landis approached the two men to inquire about the reported fight. He noticed that Walker had bloodshot, watery eyes, slurred speech, and an alcohol odor. Because he was the only officer on the scene and because the dispatch reported the possible involvement of a weapon, he conducted a cursory patdown of both Walker and Smith. When he patted down Walker, he discovered a bulky object that turned out to be an overstuffed wallet containing \$3020, in denominations of \$20 and \$50 bills.

Officer Landis arrested Walker for public intoxication and conducted a search incident to arrest. In Walker's pants pocket, he found twenty-six baggies containing an aggregate amount of more than three grams of cocaine. Walker told Officer Landis that he had come to Lafayette to make some "easy money." Tr. at 49-50. He said he knew that he had the cocaine in his pocket and that he personally used marijuana, ecstasy, and alcohol. He told Officer Landis that the money in the wallet belonged to Smith.

On October 28, 2009, the State charged Walker with one count each of class A felony dealing cocaine, class A felony cocaine possession, and class B misdemeanor public intoxication. That same day, the State also filed a notice of intent to file an information containing a habitual substance offender count. The trial court set an omnibus date of December 11, 2009.

On March 25, 2010, the State filed a habitual substance offender count, citing Walker's prior convictions for heroin and cocaine possession. That same day, the State filed a habitual offender count, citing Walker's prior felony convictions for attempted armed robbery, aggravated battery, aggravated unlawful use of a weapon, and possession of both heroin and cocaine.¹

On April 19, 2010, the State filed an amended habitual offender information deleting the heroin possession conviction and adding commission dates for the prior offenses listed in its original habitual offender information. The State cited as its reason for delay in filing the habitual offender count the slow response from Cook County, Illinois in sending Walker's certified conviction records. Walker waived his right to a jury trial, and on April 20, 2010, his bench trial began. Defense counsel objected to the amended habitual offender information, but stated that although he would like a continuance, the bifurcation of the trial would provide him time to examine the certified records. However, during the initial phase

¹ The prior heroin and cocaine possession convictions were the same as those that formed the basis for the habitual substance offender count.

of the trial, Walker renewed the objection, arguing that the State had failed to show good cause for the delay in filing the amendment. The trial court overruled Walker's objection.

The bench trial continued on May 12, 2010, and the trial court convicted Walker as charged. The court then heard evidence on the habitual offender count. The defense renewed its objection, yet acknowledged that the delay in the second phase of the trial had enabled defense counsel to investigate Walker's prior record. The State presented certified records from Cook County, Illinois, listing four prior unrelated felony convictions and including fingerprint evidence linking Walker to those convictions. The State also presented testimony from its investigator, Frank Love, stating that Cook County court officials had been slow in responding to his repeated requests for Walker's certified records. On May 26, 2010, the trial court issued a written order finding Walker guilty of cocaine dealing, cocaine possession, and public intoxication. The trial court took Walker's habitual offender status under advisement.

On July 30, 2010, the State requested that the trial court not enter conviction on the habitual substance offender count. That same day, the trial court issued an order finding Walker to be a habitual offender. At sentencing on August 30, 2010, the trial court apparently merged the cocaine possession count into the cocaine dealing count and sentenced Walker to thirty years for dealing. The court also imposed a 180-day concurrent term for public intoxication, plus thirty years for the habitual offender finding. On April 4, 2011, Walker filed a motion for leave to file a belated notice of appeal, which was granted. Additional facts will be provided as necessary.

Discussion and Decision

I. Habitual Offender Filing

Walker contends that the trial court erred in allowing the State to amend the information more than ten days after the omnibus date to add a habitual offender count.² Indiana Code Section 35-34-1-5(e) states that an information to include a habitual offender charge “must be made not later than ten (10) days after the omnibus date. However, upon a showing of good cause, the court may permit the filing of a habitual offender charge at any time before the commencement of the trial.” We have determined that in using the phrase “may permit,” the Indiana General Assembly has given trial courts the discretion to allow or disallow a belated habitual offender charge upon a showing of good cause. *Falls v. State*, 797 N.E.2d 316, 317 (Ind. Ct. App. 2003), *trans. denied*. As such, we use an abuse of discretion standard when reviewing a trial court’s determination that the State has shown good cause for its belated habitual offender filing. *Id.* An abuse of discretion occurs only where the decision is clearly against the logic and effect of the facts and circumstances. *Land v. State*, 802 N.E.2d 45, 53 (Ind. Ct. App. 2004), *trans. denied*. A trial court’s decision to permit the State to file a habitual offender count outside the prescribed period may serve as an implied finding of good cause for delay. *Id.*

Here, the State presented evidence from its investigator, Frank Love, indicating that he had repeatedly sought to obtain Walker’s certified criminal record from Cook County,

² This appeal involves only the habitual offender count, not the habitual substance offender count, upon which the trial court did not enter judgment.

Illinois. Love testified that in his experience, although Cook County officials were generally cooperative, they were also slow in responding to such requests. Although the trial court did not specifically state that such evidence constituted “good cause,” the trial court subsequently found, and defense counsel admitted, that the bifurcation of Walker’s trial, with the habitual offender phase about one month away, would allow him adequate time to prepare a defense to the habitual offender count and thus was not prejudicial to him.

Walker now argues that where, as here, the amendment concerns a habitual offender count under Indiana Code Section 35-34-1-5(e), it is not subject to the requirement elsewhere in the statute that the defendant demonstrate prejudice. *See* Ind. Code § 35-34-1-5(b) (stating that a substantive amendment may be made at any time before the commencement of trial if it does not prejudice the defendant). However, in *Jackson v. State*, another panel of this Court recently stated that a “defendant who challenges the State’s filing of an *habitual offender* allegation on the ground that it is filed outside of the time limit must demonstrate that he was prejudiced.” 938 N.E.2d 29, 39 (Ind. Ct. App. 2010) (quoting *Land*, 802 N.E.2d at 53) (emphasis added), *trans. denied* (2011). There, as here, the State encountered difficulty in obtaining the records necessary to substantiate the habitual offender count, and the Court affirmed on the basis that Jackson had not presented any explanation of how he was prejudiced by the timing of the additional charge. *Id.*

In this case, although the State was aware of Walker’s prior offenses, it sought verification via certified records from Illinois. The State first filed the habitual offender count in March, 2010, seven weeks before the habitual offender phase of Walker’s trial.

Although the State amended the habitual offender count one day before the initial phase of his trial on April 20, 2010, the amendment merely struck one of the predicate offenses previously listed and added commission dates to the remaining offenses. Thus, as defense counsel acknowledged, Walker had access to the information he needed to prepare his defense. We note that Walker does not dispute the existence or validity of the prior convictions or otherwise demonstrate to us that, given more time, he could have presented a valid defense against the information contained in those records. Based on the foregoing, we find no abuse of discretion in the trial court's denial of his objection to the habitual offender count.

II. Sufficiency of Evidence

Walker challenges the sufficiency of evidence supporting his conviction for dealing cocaine. When reviewing sufficiency of evidence claims, we neither reweigh evidence nor judge witness credibility; rather, we consider only the evidence and reasonable inferences most favorable to the judgment. *Stokes v. State*, 801 N.E.2d 1263, 1271 (Ind. Ct. App. 2004), *trans. denied*. We will affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. *Davis v. State*, 863 N.E.2d 1218, 1220 (Ind. Ct. App. 2007), *trans. denied*.

The State charged Walker with possession with intent to deliver cocaine, and the trial court convicted him of class A felony dealing cocaine. “A person who ... possesses, with intent to ... deliver ... cocaine, commits dealing in cocaine, ... a Class A felony if ... the amount of the drug involved weighs three (3) grams or more.” Ind. Code § 35-48-4-

1(a)(2)(C), -1(b)(1). Intent to deliver cocaine may be supported by either direct or circumstantial evidence. *Davis*, 863 N.E.2d at 1220. “Intent involves a person’s state of mind, and the fact finder can infer its existence from surrounding circumstances when determining whether the requisite intent exists.” *Id.* (citation and internal quotation marks omitted).

Here, Walker had in his pants pocket twenty-six individual baggies, each containing a substance later determined to be cocaine. The aggregate weight of the substance was well over the three-gram minimum to support a conviction for class A felony dealing. Walker admitted to Officer Landis that he knew he had the cocaine in his pocket. Moreover, he was carrying a wallet containing over \$3000 in twenty- and fifty-dollar bills, and he told Officer Landis that he had come to Lafayette to make some “easy money.” Tr. at 49-50.

On the night of his arrest, Walker admitted to Officer Landis that he is a user of marijuana, ecstasy, and alcohol. To the extent he now argues that he is a cocaine *user* and not a cocaine *dealer*, he merely invites us to reweigh evidence and judge witness credibility, which we may not do. *Dandridge v. State*, 810 N.E.2d 746, 750 (Ind. Ct. App. 2004), *trans. denied*. Based on the foregoing, we affirm his conviction for dealing cocaine.

III. Merger of Counts

Walker also challenges the sufficiency of evidence to support his conviction for cocaine possession. We note that at sentencing, the trial court merged this count into the cocaine dealing count, presumably on double jeopardy grounds. However, because the trial court did not specifically merge the convictions, we remand with instructions to merge the

cocaine possession conviction into the cocaine dealing conviction. In all other respects, we affirm.

Affirmed and remanded.

BAILEY, J., and MATHIAS, J., concur.