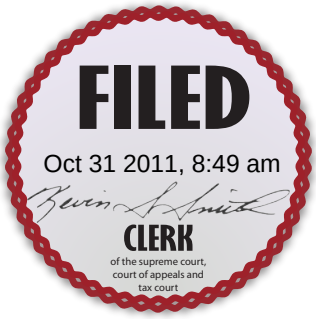

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IN THE
COURT OF APPEALS OF INDIANA

PATRICK BLACK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A04-1103-CR-175
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert J. Pigman, Judge
Cause No. 82D02-0607-FB-533

October 31, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Patrick Black appeals following his convictions for Class D felony Possession of a Controlled Substance (Count 1); two counts of Class A misdemeanor Resisting Law Enforcement (Counts 2 and 3); Class B misdemeanor False Informing (Count 4); Class A misdemeanor Battery (Count 5); and Class C felony Possession of Cocaine in an amount over three grams (Count 7), for which he received an aggregate six-year sentence. Upon appeal, Black claims that the trial court abused its discretion in permitting the State to file certain charges and in denying his motion for change of judge. In addition, Black claims that there was insufficient evidence to convict him of Count 7, and that his sentence is inappropriate. We affirm.

FACTS AND PROCEDURAL HISTORY

On July 25, 2006, Evansville Police Officer Jason Thomas received a report of a male carrying narcotics who had allegedly confined a woman in the vicinity of Vann and Bellemeade Streets. Officer Thomas broadcast a description of the male over his radio. A short time later and approximately three blocks away, Officer Brent Lloyd identified a person, subsequently determined to be Black, who he believed matched the description. Black agreed to a pat down search, during which Officer Thomas discovered a bulge in Black's left front pocket. The bulge raised Officer Thomas's suspicions, so he asked Black for identification. Black provided identification cards containing the name of another person. Officer Shawn Chapman subsequently arrived and also performed a pat down search. Initially Black consented, but as Officer Chapman neared the bulging pocket, Black spun around and, shortly thereafter, ran away. Officers Lloyd and Chapman chased Black, who physically fought their attempts

to subdue him. Ultimately, with the help of two other officers and a canine, the officers succeeded in apprehending him. During Black's flight, eyewitness Anthony Dillman, who was standing approximately forty to forty-five yards away, saw him throw a purple bag between two garages. Officers later retrieved a purple Crown Royal bag from the area. The bag contained 5.03 grams of cocaine and thirty pills of hydrocodone.

On approximately July 10, 2006, the State charged Black, apparently with Counts 1 through 5.[1] On November 16, 2006, the State filed additional Counts 6-8. Black objected to the State's additional charges, which the trial court overruled. On March 5, 2007, Black filed a renewed motion to dismiss Counts 6-8, which the trial court denied. By this point, Black was apparently incarcerated in Kentucky on multiple felonies, where he remained until August 9, 2010.

On August 9, 2010, Black appeared in court on the instant charges and indicated his wish to represent himself, and on September 8, 2010, waived his right to standby counsel. On September 17, 2010, Black moved to suppress certain evidence, which the trial court subsequently denied. On September 20, 2010, the State moved to dismiss Count 1, which the trial court granted.[2] On October 4, 2010, Black again moved to suppress certain evidence, which the trial court again denied. On October 20, 2010, Black indicated his wish to have standby counsel, which the trial court appointed. On

[1] The CCS indicates that an information was filed on July 10, 2006. Neither the original charging information nor the amended charging information was included in the Appellent's Appendix.

[2] Without the charging information, and given that the trial court later renumbered previous Counts 2-8 current Counts 1-7, we do not know the contents of Count 1. It appears from the verdicts listed in the CCS that Count 5 (former Count 6) alleged Class A misdemeanor battery and Count 7 (former Count 8) alleged Class C felony possession of over three grams of cocaine.

November 22, 2010, Black requested a change of judge, which the trial court denied on December 1. On December 28, 2010, Black moved to exclude testimony of witness Dillman. The trial court denied this motion on January 5, 2011.

On February 8, 2011, the case was tried to a jury. Prior thereto, the trial court renumbered remaining Counts 2-8 as Counts 1-7. The jury found Black guilty of Counts 1-5 and Count 7. At a March 2, 2011 sentencing hearing, the trial court imposed concurrent sentences of two years in the Department of Correction on Count 1; one year on Counts 2, 3, and 5; six months on Count 4; and six years on Count 7, for an aggregate sentence of six years. This appeal follows.

DISCUSSION AND DECISION

I. Filing of Charges

Black's first challenge on appeal is to the State's subsequent filing of Counts 6-8 some months after it had filed Counts 1-5. Black alleges that the State's filing Counts 6-8 was vindictive and attributable to the prosecutor's effort to bolster support for election purposes. In support of his allegations, Black merely lists *Blackledge v. Perry*, 417 U.S. 21 (1974), and *Cherry v. State*, 275 Ind. 14, 414 N.E.2d 301 (1981), as authority but includes no argument based on those cases.

In *Cherry*, the Indiana Supreme Court, citing *Blackledge*, observed that in cases where the prosecution files more numerous or more severe charges for the same basic criminal conduct *after the accused has successfully exercised his statutory or constitutional rights to an appeal*, the prosecution bears a heavy burden of proving that any increase in the number or severity of the charges was not motivated by a vindictive

purpose. *Cherry*, 275 Ind. at 20, 414 N.E.2d at 305 (emphasis supplied). Here, unlike in *Cherry*, Black's challenge is to the filing of additional charges, not the refiling of charges, which serves as a material distinction. *See Cox v. State*, 475 N.E.2d 664, 671 (Ind. 1985) (finding, in case involving filing of additional charges, that *Cherry* and *Blackledge* are not on point because they deal with refiling of charges). Black provides no argument suggesting otherwise. Furthermore, the deputy prosecutor claimed that the late-filed charges were attributable to the discovery of additional evidence and that the prosecutor was not consulted about the filing of additional charges, supporting the conclusion that the charges were not the product of improper motivations relating to the prosecutor's election. The trial court was within its discretion to credit these explanations over Black's speculative accusations of vindictiveness. We find no abuse of discretion on these grounds.

II. Change of Judge

Black also argues that the trial court abused its discretion by denying his request for change of judge. Indiana Code section 35-36-5-1 (2006) permits a defendant or the State, in any criminal action, a "[per]emptory change of venue from the judge without specifically stating the reason."[3] Despite the language of section 35-36-5-1, Indiana Criminal Rule 12, which, as a procedural rule, takes precedence, does not permit a change of judge for no reason. *See Wilcoxen v. State*, 619 N.E.2d 574, 576 (Ind. 1993) (observing that Rule 12 takes precedence over section 35-36-5-1). Specifically, Rule 12 provides that a motion for change of judge shall be accompanied by an affidavit stating

[3] The statute uses the language "preemptory" which should probably read "peremptory."

the facts and reasons supporting a belief that the judge has a bias or prejudice, and it shall be accompanied by a certificate from the attorney of record indicating his good faith belief that these facts are true. Black, who makes only unsubstantiated allegations, fails to point to any affidavit or certificate in support of his motion, and he makes no showing that such documents were attached to his motion below. We find no abuse of discretion. *See id.* at 576-77 (finding no error in refusal to grant motion for change of judge which did not allege bias or prejudice).

III. Sufficiency of the Evidence

Black argues that the purple bag evidence should have been suppressed. His justification for this argument is that the bag, discovered on the ground after Black had been apprehended, cannot be linked to him and that there was a discrepancy in the evidence establishing the amount of cocaine it contained. According to Black, there was evidence that the field test measured 4.4 grams and that the laboratory test measured 5.03 grams. Black does not argue that the bag was the product of an illegal search or seizure, or that its admissibility was improper on some other ground. Black's argument is essentially a challenge to the sufficiency of the evidence.

In evaluating the sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. *Kien v. State*, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), *trans. denied*. We consider only the evidence which supports the conviction and any reasonable inferences which the trier of fact may have drawn from the evidence. *Id.* We will affirm the conviction if 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*. It is the function of the trier of fact to resolve conflicts of testimony and to determine the weight of the evidence and the credibility of the witnesses. *Jones v. State*, 701 N.E.2d 863, 867 (Ind. Ct. App. 1998).

Black's challenge revolves around Count 7, Class C felony possession of cocaine, which requires an amount in excess of three grams. *See* Ind. Code § 35-48-4-6 (2006). Black first argues that the bag was discovered on the ground after he was apprehended, and that the person claiming to have seen him drop it was forty to fifty yards away. By making this argument, Black challenges this witness's credibility and invites us to reweigh the evidence, which we decline. The jury was fully within its discretion to credit the witness testimony that Black had had the purple bag in his hand before discarding it. To the extent there was a discrepancy between the field test and the laboratory test regarding the weight of the cocaine contained in the bag, this too is an invitation to reweigh the evidence. In any event, both the field and lab tests established that the weight exceeded the three grams necessary to establish the Class C felony in Count 7. Black's challenge to the sufficiency of the evidence warrants no relief.

IV. Sentence

Black's final challenge is to the appropriateness of his aggregate six-year sentence and placement in the Department of Correction. Article VII, Sections 4 and 6 of the Indiana Constitution "'authorize[] independent appellate review and revision of a sentence imposed by the trial court.'" *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007) (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006) (emphasis and internal quotations omitted)). Such appellate authority is implemented through Indiana

Appellate Rule 7(B), which provides that the "Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." We exercise deference to a trial court's sentencing decision, both because Rule 7(B) requires that we give "due consideration" to that decision and because we recognize the unique perspective a trial court has when making sentencing decisions. *Stewart v. State*, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). It is the defendant's burden to demonstrate that his sentence is inappropriate. *Childress*, 848 N.E.2d at 1080.

The place that a sentence is to be served is an appropriate focus for application of our review and revise authority. *Biddinger v. State*, 868 N.E.2d 407, 414 (Ind. 2007). Nonetheless, it is quite difficult for a defendant to prevail on such a placement challenge because the question under Rule 7(B) is not whether another sentence is more appropriate but rather, whether the existing sentence is inappropriate. *King v. State*, 894 N.E.2d 265, 267-68 (Ind. Ct. App. 2008).

As the State observes, Black did not include his pre-sentence investigation report in the record to facilitate this court's assessment of his sentence. Regardless, Black does not dispute that he has a criminal history of drug-related offenses. This, together with his incarceration for multiple felonies in Kentucky and his sustained efforts at escape in the instant case, do not establish that he is of particularly high character. As for the nature of these offenses, Black's repeated involvement in drugs and the violence of his escape efforts were adequately egregious to support an aggregate six-year sentence. To the extent Black suggests his placement in the Department of Correction is inappropriate, he

points to no part of the record establishing his eligibility for alternative placement, and his criminal history, disregard for authority, and drug involvement suggest that his current placement is fully suitable.

The judgment of the trial court is affirmed.

ROBB, C.J., and BARNES, J., concur.