



## STATEMENT OF THE CASE

Rickey D. McKinney appeals his conviction and sentence after a bench trial for dealing in cocaine as a class B felony.<sup>1</sup>

We affirm.

### ISSUES

1. Whether the trial court abused its discretion in admitting evidence.
2. Whether there is sufficient evidence to support the conviction.
3. Whether the sentence is inappropriate.

### FACTS

On December 6, 2007, Goshen Police Captain Wade Branson filed an affidavit for probable cause to obtain a search warrant for McKinney's residence, located at 722 West Wolf Avenue in Elkhart. The affidavit contained the following facts.

In 2004 and 2005, the Elkhart County Prosecutor's Organized Crime Unit received nine apparently anonymous reports that McKinney was dealing in crack cocaine. On or about April 17, 2006, a citizen known to Captain Branson approached Elkhart Police Officer Michael Bogart, an officer assigned to the Elkhart County Interdiction and Covert Enforcement Unit (the "ICE Unit"), and advised him "that drug activity was occurring at 722 West Wolf Avenue in Elkhart." (App. 34). "The concerned citizen advised further that he had relatives that lived near 722 West Wolf Avenue and that the drug activity was so 'open air' and obvious that they were afraid to leave their residence." *Id.*

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<sup>1</sup> Ind. Code § 35-48-4-1.

On or about May 24, 2006, an undercover officer interviewed a “cooperating source,” who had “assisted the ICE Unit in the past” and provided “accurate and reliable” information, including information that led to the arrest of two individuals and the seizure of “a large amount of crack cocaine . . . .” *Id.* “The cooperating source gave the undercover drug officer drug dealing information on seven (7) individuals.” *Id.* The ICE Unit subsequently arrested three of those individuals for dealing crack cocaine. The cooperating source stated that “‘Ricky,’” one of the seven individuals, “lived on Wolf Avenue in Elkhart between seventh and eighth streets” and described the residence. *Id.* “The cooperating source advised further that he/she would purchase no less than one-quarter ounce of crack cocaine from ‘Ricky’ each time and that ‘Ricky’ charged \$160.00 for the one-quarter ounce.” *Id.* The cooperating source also advised that “‘Ricky’” lived with his girlfriend. *Id.*

On or about July 17, 2006, another undercover officer from the ICE Unit interviewed an inmate at the Elkhart County Sheriff’s Department Security Center. The inmate, who was known to Captain Branson, informed the undercover officer that he had purchased crack cocaine from “a black male named ‘Ricky’ who lived on Wolf Avenue in Elkhart between seventh and eighth streets . . . .” (*Id.* at 35). The inmate “indicated that ‘Ricky’ usually had several ounces to one-half kilo of crack cocaine at any given time to sell” and that he “had purchased as much as one ounce of crack cocaine from ‘Ricky’ in the past for \$700.00.” *Id.* Captain Branson confirmed that the residence described by the cooperating source and the inmate was 722 Wolf Avenue, Elkhart and that McKinney previously had given this address as his residence to law enforcement.

On December 3, 2007, a third undercover officer and another cooperating source drove to a residence on West Cleveland Avenue in an undercover vehicle to purchase cocaine. Prior to leaving for the residence, the undercover officer had searched the cooperating source and found no contraband.

Upon arriving at the residence, an individual identified as Lisa Lewis informed them that the person they wanted was not at home; however, she “offered to get them crack cocaine from her ‘guy.’” *Id.* Lewis got in the undercover vehicle and “directed the undercover officer to drive to 722 West Wolf Avenue.” *Id.* Lewis informed the undercover officer that “she was getting the crack cocaine from her daughter’s father, ‘Ricky,’” and that “she could go to ‘Ricky’s’ house at any time to buy crack cocaine.” *Id.*

Upon arriving at 722 West Wolf Avenue, the undercover officer gave Lewis previously photocopied fifty dollars. A black male, later identified from a booking photograph by both the undercover officer and the cooperating source as McKinney, allowed Lewis into the residence. Lewis returned to the undercover vehicle three minutes later and “handed the undercover officer a clear plastic bag containing an off-white rock like substance,” which a field test later determined was 1.0 gram of cocaine. (*Id.* at 36).

During the evening of December 5, 2007, the undercover officer again went to the residence on West Cleveland Avenue to purchase crack cocaine from Lewis. The undercover officer “was equipped with a transmitting/recording device and had with him a quantity of ICE Unit fund money that had been previously photocopied.” *Id.*

The undercover officer met with Lewis inside her residence and she advised that she needed to get her coat on and that she would take the undercover officer to get crack cocaine. The undercover officer entered into the undercover vehicle and Lisa Lewis exited the residence shortly after this and entered into the undercover vehicle. Lisa Lewis advised that ‘her guy lived right around the corner.’ Again, Lisa Lewis directed the undercover officer to drive her to 722 West Wolf Avenue. The undercover officer handed Lisa Lewis \$140.00 of photocopied ICE Unit fund money and [Lewis] exited the vehicle and she was observed by [the undercover officer] enter into the front door of 722 West Wolf Avenue. Approximately three (3) minutes later the undercover officer observed Lisa Lewis exit the front door of the residence and re-enter the undercover vehicle. Lewis handed the undercover officer a clear plastic bag containing an off-white rock like substance. Lewis told [the undercover officer] that there were a bunch of people inside the residence and that they were drinking, smoking weed and playing cards. . . . Lewis indicated to the undercover officer that ‘Ricky’ had more crack and he was still selling crack cocaine.

*Id.*

At approximately 9:00 p.m. on December 6, 2007, the ICE Unit executed the search warrant at McKinney’s residence. In addition to McKinney, eight other individuals, including McKinney’s girlfriend and child, were in the house.

Upon conducting a pat down of McKinney’s outer clothing, Elkhart Police Officer Jeffrey Eaton “felt an object in his left front pant pocket that [he] immediately recognized as being . . . crack cocaine.” (Tr. 44-45). A later analysis determined that the item was 2.85 grams of cocaine base. Officer Eaton also removed \$100.00 in five, ten, and twenty dollar bills from McKinney’s pocket.

A subsequent search of the residence revealed “three clear plastic baggies missing . . . corners” in the living room; “a digital scale that had white powdery residue on it”; and two boxes of clear plastic baggies in the kitchen. (Tr. 52; 52-53). Officer Eaton also discovered correspondence addressed to McKinney at 722 West Wolf Avenue, Elkhart in

the living room and an upstairs bedroom. Officers, however, did not find paraphernalia associated with the ingestion of cocaine.

On December 12, 2007, the State charged McKinney with dealing in cocaine as a class A felony. McKinney filed a motion to suppress the evidence, which the trial court denied on January 5, 2009. The trial court held a bench trial on January 7, 2009.

During the trial, Captain Branson testified that people who deal in crack cocaine commonly package it in clear plastic baggies, “where the corner ha[s] been either pulled off and tied in a knot or cut off and then tied in a knot.” (Tr. 80). He also testified that digital scales are used to “to weight out certain amounts [of drugs] for a sale” but that people who just purchase drugs usually do not use scales. (Tr. 81). He further testified that “the two most common amounts sold on the street of crack cocaine is what they would call . . . 20 rock which is \$20 worth. It’s usually .25 to .3 grams, or a 50 rock which is for \$50 which is usually around a half of gram.” (Tr. 81). According to Captain Branson, “[a]n eight ball” of cocaine typically weighs 3.5 grams but sometimes weighs as little as 2.0 grams. (Tr. 91). Someone who is dealing smaller amounts of cocaine usually possesses cash in “smaller denominations: 5s, 10s, 20s, even 50 once in a while.” (Tr. 84).

On January 9, 2009, the trial court found McKinney guilty of the lesser-included offense of dealing in cocaine as a class B felony. The trial court ordered a pre-sentence

investigation report (“PSI”) and held a sentencing hearing on February 5, 2009.<sup>2</sup> According to the PSI, McKinney had been arrested in Arkansas for two counts of felony burglary, twenty-one counts of felony theft, and one count of breaking and entering in 1990. He was sentenced in 1992 to six years with five years suspended. He also had been convicted for being a felon in possession of a firearm and for dealing in cocaine, a felony, in 1992 and 1995, respectively. In 2003, Arkansas revoked his parole and imposed a sentence of fifty-four months. He also had an arrest for battery in 1994, the disposition of which was unknown.

McKinney had the following convictions in Indiana: class A misdemeanor resisting law enforcement in 1996; public intoxication in 1997; two counts of driving with a suspended license in 2001; one count of driving with a suspended license in 2002; misdemeanor possession of marijuana in 2003; misdemeanor visiting a common nuisance in 2004; driving with a suspended license in 2005; and operating a vehicle while intoxicated in 2005, for which McKinney was placed on probation. His probation was revoked in 2006. He also had two arrests for battery.

The trial court found two mitigating circumstances: McKinney’s addiction to drugs and saving the State money by agreeing to a bench trial. The trial court, however, found McKinney’s criminal history and “the fact that [a] child was present” to be aggravating circumstances. (Tr. 121). It further found McKinney’s prior criminal history

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<sup>2</sup> We remind McKinney’s counsel that pre-sentence investigation reports shall be “tendered on light green paper or have a light green coversheet attached to the document, marked “Not for Public Access” or “Confidential.” Ind. Trial Rule 5(G)(1).

to be a “substantial aggravator[.]” (Tr. 119). The trial court sentenced McKinney to eighteen years with two years suspended.

## DECISION

### 1. Admission of Evidence

McKinney asserts that the trial court improperly admitted evidence seized from his residence.<sup>3</sup>

We note that the admission or exclusion of evidence is within the sound discretion of the trial court, and we will reverse the trial court’s determination only for an abuse of that discretion. An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the trial court. In reviewing the admissibility of evidence, we consider only the evidence in favor of the trial court’s ruling and any unrefuted evidence in the appellant’s favor. As a rule, errors in the admission or exclusion of evidence are to be disregarded as harmless unless they affect the substantial rights of a party. In determining whether an evidentiary ruling affected a party’s substantial rights, we assess the probable impact of the evidence on the trier of fact.

*Redding v. State*, 844 N.E.2d 1067, 1069 (Ind. Ct. App. 2006) (citations omitted), *reh’g denied*.

McKinney contends that the affidavit was not supported by probable cause because it contained stale information and uncorroborated hearsay.

The Fourth Amendment to the United States Constitution and article 1, section 11 of the Indiana Constitution both require probable cause for the issuance of a search warrant. Probable cause is “a fluid concept incapable of precise definition . . . [and] is to be decided based on the facts of each

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<sup>3</sup> McKinney poses the issue as whether the trial court improperly denied his motion to suppress. He, however, did not seek an interlocutory appeal after the trial court denied his motion to suppress. Rather, he proceeded with his trial. “Once the matter proceeds to trial, the question of whether the trial court erred in denying a motion to suppress is no longer viable.” *Kelley v. State*, 825 N.E.2d 420, 424 (Ind. Ct. App. 2005). The issue therefore becomes whether the trial court improperly admitted evidence at trial. *Id.* at 425.

case.” In deciding whether to issue a search warrant, the issuing magistrate’s task is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit, there is a fair probability that evidence of a crime will be found in a particular place. The reviewing court’s duty is to determine whether the issuing magistrate had a “substantial basis” for concluding that probable cause existed. A substantial basis requires the reviewing court, with significant deference to the magistrate’s determination, to focus on whether reasonable inferences drawn from the totality of the evidence support the finding of probable cause.

*Mehring*, 884 N.E.2d at 376-77 (internal citations omitted). “In determining whether an affidavit provided probable cause for the issuance of a search warrant, doubtful cases are to be resolved in favor of upholding the warrant.” *Id.* at 377.

a. *Staleness*

McKinney argues that the information that was provided in the affidavit was stale as it was “obtained in 2004, 2005 and 2006,” and therefore cannot be used to establish probable cause. McKinney’s Br. at 3.

“Time can be a critical requirement in determining probable cause.” “It is a fundamental principle of search and seizure law that the information given to the magistrate or judge in the application for a search warrant must be timely.” The general rule is that stale information cannot support a finding of probable cause. Rather, it only gives rise to a mere suspicion, especially where the items to be obtained in the search are easily concealed and moved. The exact moment when information becomes stale cannot be precisely determined. Although the age of the information supporting an application for a warrant can be a critical factor when determining the existence of probable cause, our courts have not established a bright-line rule regarding the amount of time that may elapse between obtaining the facts upon which the search warrant is based and the issuance of the warrant. “[P]robable cause is not determined by merely counting the number of days between the occurrence of the facts relied upon and the warrant’s issuance.” Instead, whether the information is tainted by staleness must be determined by the facts and circumstances of each particular case.

*Mehring v. State*, 884 N.E.2d 371, 377 (Ind. Ct. App. 2008) (internal citations omitted). “While stale information alone may not support a finding of probable cause, it may be considered as ‘part of the totality of the circumstances creating probable cause.’” *Snover v. State*, 837 N.E.2d 1042, 1050 (Ind. Ct. App. 2005) (quoting *Cheever-Ortiz v. State*, 825 N.E.2d 867, 872 (Ind. Ct. App. 2005)).

We agree that the information regarding the buying and selling of crack cocaine in 2004, 2005, and 2006 may be stale as crack cocaine is something easily concealed and moved. *See State v. Haines*, 774 N.E.2d 984, 990 (Ind. Ct. App. 2002) (finding information regarding drug transactions conducted two to six weeks prior to the probable cause hearing to be stale), *trans. denied*. However, it is clear that the information regarding the events prior to 2007 was not the sole basis for issuing the search warrant in this case; rather, the information gave rise to the suspicion that McKinney might still be dealing in cocaine. The trial court therefore could consider the stale information as part of the totality of circumstances creating probable cause.

As for the information obtained from the drug buys on December 3 and 5, 2007, McKinney does not explain how a delay of one to three days renders the information stale. Given the insubstantial lapse of time, we do not find the information stale. *See Raymer v. State*, 482 N.E.2d 253, 256 (Ind. 1985) (finding a lapse of three days between the time the informant observed narcotics in the defendant’s residence and the execution of the search warrant did not render the information stale); *cf. Haines*, 774 N.E.2d at 990 (finding that “a crack cocaine purchase that took place two (2) to six (6) weeks prior to

the probable cause hearing” to be too substantial a period of time to support a finding of probable cause that crack cocaine could be found at that residence).

b. *Hearsay*

McKinney further argues that the “more timely” information regarding the sales of crack cocaine failed to establish probable cause as it consisted mainly of uncorroborated hearsay. McKinney’s Br. at 4. McKinney, however, does not cite to specific instances of uncorroborated hearsay although it does appear that he is referring only to the drug buys that occurred in 2007.

“Probable cause to issue a search warrant cannot be supported by uncorroborated hearsay from an informant whose credibility is unknown.” *Scott v. State*, 883 N.E.2d 147, 154 (Ind. Ct. App. 2008) (quoting *Cheever-Ortiz v. State*, 825 N.E.2d at 872).

Indiana Code section 35-33-5-2(b) provides:

[w]hen based on hearsay, the affidavit must either:

- (1) contain reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information furnished; or
- (2) contain information that establishes that the totality of the circumstances corroborates the hearsay.

An affidavit based upon the actual knowledge and statements of officers engaged in the investigation is not deficient, despite its hearsay character. *Redden v. State*, 850 N.E.2d 451, 461 (Ind. Ct. App. 2006), *trans. denied*. “Such testimony can satisfy the statutory standard for establishing probable cause to support a search warrant.” *Id.* at 462

(quoting *Mitchell v. State*, 541 N.E.2d 265, 270 (Ind. 1989), *abrogated on other grounds*).

Regarding the 2007 transactions, Captain Branson based the affidavit on the actual knowledge, observations, and statements of an undercover police officer. We therefore find that there was a substantial basis from which the trial court could have found probable cause to issue a search warrant. Accordingly, we find no abuse of discretion in admitting the evidence.

## 2. Sufficiency of the Evidence

McKinney asserts that the evidence is insufficient to support his conviction for dealing in cocaine. We disagree.

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

*Drane v. State*, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted).

To convict McKinney of dealing in cocaine as a class B felony, the State had to prove that he possessed cocaine with intent to deliver cocaine. *See* I.C. § 35-48-4-1(a)(2). McKinney, however, argues that the State failed to prove that he had the intent to deliver cocaine where he possessed only 2.85 grams of cocaine; there was no “link

established between the baggies found and McKinney himself”; and the powdery substance on the scale was not tested. McKinney’s Br. at 6.

The trier of fact may infer intent from the defendant’s conduct and the surrounding circumstances. *Davis v. State*, 791 N.E.2d 266, 270 (Ind. Ct. App. 2003), *trans. denied*.

“Circumstantial evidence showing possession with intent to deliver may support a conviction. Possessing a large amount of a narcotic substance is circumstantial evidence of intent to deliver. The more narcotics a person possesses, the stronger the inference that he intended to deliver it and not consume it personally.”

*Id.* (quoting *Love v. State*, 741 N.E.2d 789, 792 (Ind. Ct. App. 2001)).

The evidence in this case shows that officers recovered almost three grams of rock cocaine and \$100.00 in small bills from McKinney’s pocket.<sup>4</sup> Captain Branson testified that when someone is “selling smaller amounts” of crack cocaine, officers will often find smaller denominations of cash: “5s, 10s, 20s, even 50 once in a while.” (Tr. 84). He also testified that crack cocaine is often sold in .25 or .5 gram increments; thus, McKinney possessed an amount larger than customary for personal consumption at any one time. Captain Branson testified that “[d]rug addicts usually don’t have the item very long that they purchase[d],” while drug dealers “will hold whatever certain amount so they can sell it.” (Tr. 84-85).

Officers also discovered a digital scale and plastic baggies, some with missing corners, in the residence. According to Captain Branson’s testimony, dealers often use the corners of plastic baggies to package crack cocaine and use digital scales to weigh the cocaine. He also testified that he found no paraphernalia for ingesting crack cocaine in

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<sup>4</sup> The \$100.00 consisted of three twenty-dollar bills, three ten-dollar bills, and two five-dollar bills.

the residence. Finally, Officer Eaton testified that he discovered correspondence addressed to McKinney at 722 West Wolf Avenue in Elkhart in the same room as the plastic baggies with missing corners, thus linking McKinney to the residence and items associated with dealing in cocaine.

Under these facts and circumstances, we find the evidence sufficient to support McKinney's class B felony dealing in cocaine conviction. McKinney's argument that he merely possessed cocaine for his personal use is an invitation to reweigh the evidence and the credibility of the witnesses, which we will not do.

### 3. Inappropriate Sentence

McKinney asserts that his sentence is inappropriate. We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). It is the defendant's burden to "persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007) (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007).

In determining whether a sentence is inappropriate, the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Childress*, 848 N.E.2d at 1081. Indiana Code section 35-50-2-5 provides that "[a] person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years."

McKinney received a sentence of eighteen years. He contends that his sentence "is excessive based upon the nature of the offense," where "the cocaine was a weight that

fell within the parameters of a class D felony possession.” McKinney’s Br. at 7. He further contends that “[t]here was nothing exceptional about the facts surrounding the commission offense noted by the court as an aggravator other than a child being present in the home.” *Id.*

As to the nature of the offense, it is significant that McKinney endangered a child by exposing him to illegal drugs and drug-related activity. As to McKinney’s character, he has a lengthy history of arrests and convictions, including drug-related convictions. He has violated probation and had his parole revoked. McKinney’s record reveals a blatant disregard for the law. We therefore are not persuaded that his sentence is inappropriate.

Affirmed.

ROBB, J., and MATHIAS, J., concur.