



Appellant/Defendant Armand Robinson appeals from his conviction for Class A felony Dealing in Cocaine<sup>1</sup> and his fifty-year aggregate sentence. We affirm.

### **FACTS AND PROCEDURAL HISTORY**

At approximately 10:00 p.m. on January 28, 2008, two undercover Indianapolis Metropolitan police officers drove to an alley behind a Marathon Station at the intersection of 29<sup>th</sup> Street and Dr. Martin Luther King, Jr., Street, a location which was approximately 564.8 feet from Holy Angels School. Detective Christopher Jones stopped the truck he was driving, Robinson approached and asked what he wanted, and Detective Jones replied that he “was trying to get a 40 rock for my guy here.” Tr. p. 55. Robinson retrieved 0.2835 grams of a substance containing crack cocaine from a confederate nearby and delivered it to Detective Jones in exchange for money.

At that point, Detective Jones exchanged telephone numbers with Robinson and his confederate, which was his signal for the “take-down” officers to approach. Tr. p. 58. As uniformed Indianapolis Metropolitan Police Officer Zachary Taylor approached, Robinson ran and did not stop when Officer Taylor said, “Stop. Police.” Tr. p. 77. Robinson eventually turned around, faced Officer Taylor, and assumed a “fighting stance.” Tr. p. 78. Officer Taylor ordered Robinson to the ground, but he did not comply. Eventually, Officer Taylor performed a front kick to Robinson’s torso, and, once on the ground, Robinson forcibly resisted efforts to handcuff him.

On January 30, 2008, the State charged Robinson with Class A felony conspiracy to

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<sup>1</sup> Ind. Code § 35-48-4-1 (2007).

commit dealing in cocaine, Class A felony dealing in cocaine, Class B felony cocaine possession, two counts of Class A misdemeanor resisting law enforcement, and Class A misdemeanor marijuana possession. At trial, Robinson did not argue that he was only briefly within 1000 feet of Holy Angels or that there were no children present at the school at the time, nor was the jury instructed on Indiana Code section 35-48-4-16 (2007), which outlines circumstances that mitigate some drug-related crimes, including the ones Robinson was facing. On December 19, 2008, a jury found Robinson guilty of Class A felony dealing in cocaine, Class B felony cocaine possession, and two counts of Class A misdemeanor resisting law enforcement.<sup>2</sup> On January 6, 2009, the trial court sentenced Robinson to fifty years of incarceration for dealing in cocaine and one year for each resisting law enforcement conviction, all sentences to be served concurrently.

## **DISCUSSION AND DECISION**

### **I. Whether the State Produced Sufficient Evidence to Rebut the Mitigating Factors Outlined in Indiana Code Section 35-48-4-16**

Indiana Code section 35-48-4-16 provides, in part, as follows:

- (a) For an offense under this chapter that requires proof of:
- (1) delivery of cocaine, a narcotic drug, methamphetamine, or a controlled substance;
  - (2) financing the delivery of cocaine, a narcotic drug, methamphetamine, or a controlled substance; or
  - (3) possession of cocaine, narcotic drug, methamphetamine, or controlled substance;
- within one thousand (1,000) feet of school property, a public park, a family housing complex, or a youth program center, the person charged may assert the defense in subsection (b) or (c).

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<sup>2</sup> Robinson was not sentenced for cocaine possession and does not challenge his convictions of or sentences for resisting law enforcement.

(b) It is a defense for a person charged under this chapter with an offense that contains an element listed in subsection (a) that:

(1) a person was briefly in, on, or within one thousand (1,000) feet of school property, a public park, a family housing complex, or a youth program center; and

(2) no person under eighteen (18) years of age at least three (3) years junior to the person was in, on, or within one thousand (1,000) feet of the school property, public park, family housing complex, or youth program center at the time of the offense.

Robinson's charges for dealing in cocaine and cocaine possession both contained allegations that he was within 1000 feet of Holy Angels School, so the mitigating circumstances outlined above could potentially have applied to them. Robinson contends that, even though he presented no evidence relating to the mitigating circumstances listed in subsection (b), the State's evidence did, in fact, establish them without rebutting them. Consequently, Robinson argues, we must reduce his Class A felony dealing in cocaine conviction to a Class B felony.

Robinson, however, raises this issue for the first time on appeal and has therefore waived the issue for appellate review. *See, e.g., Goodner v. State*, 685 N.E.2d 1058, 1060 (Ind. 1997) ("Goodner did not contest the finding of probable cause in the trial court through objections, motions to suppress, or otherwise. He may not litigate the issue for the first time on appeal."). Regardless of what the State's evidence did or did not establish or rebut, Robinson did not mention the mitigating circumstances outlined in Indiana Code section 35-48-4-16 at trial and may not avail himself of them at this stage. Because Robinson did not mention section 35-48-4-16 or request an instruction based on it, the jury was not, in fact, instructed on it and was therefore not even able to apply it. Moreover, although the State

may very well have been able to rebut the mitigating circumstances, had they been raised, it is now too late for it to do so. We will not punish the State for failing to rebut arguments that were not made. Robinson may not raise arguments based on Indiana Code section 35-48-4-16 for the first time on appeal.

The case on which Robinson relies,<sup>3</sup> *Harrison v. State*, 901 N.E.2d 635 (Ind. Ct. App. 2009), *trans. denied*, is distinguishable. In *Harrison*, the defendant raised and argued Indiana Code section 35-48-4-16, and the jury was instructed on it. *See id.* at 642 (noting that both parties made arguments to the jury based on Indiana Code section 35-48-4-16 and that the trial court addressed it in its final instructions). As such, the State was on notice that it must rebut the mitigating circumstances—if it desired to and could—in order to preserve the enhanced charges, which, as previously mentioned, did not happen here.

## **II. Whether Robinson’s Sentence is Inappropriate**

Robinson contends that his fifty-year aggregate sentence is inappropriate in light of the nature of his offenses and his character. We “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.” Ind. Appellate Rule 7(B). “Although appellate review of sentences must give due consideration to the trial court’s sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when

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<sup>3</sup> Robinson also relies on *Griffin v. State*, 905 N.E.2d 521 (Ind. Ct. App. 2009), which was vacated by order of the Indiana Supreme Court on July 23, 2009.

certain broad conditions are satisfied.” *Shouse v. State*, 849 N.E.2d 650, 660 (Ind. Ct. App. 2006), *trans. denied* (citations and quotation marks omitted).

Here, the nature of Robinson’s offenses was not particularly egregious when compared to other cocaine dealing cases. Robinson dealt less than three tenths of a gram of crack cocaine to an undercover police officer. Furthermore, although the offense took place within 600 feet of a school, the sale took place at night, and there is no evidence in the record before us that any children were at the school or the scene of the crime. While it is true that Robinson fled and then forcibly resisted being handcuffed, it seems that he got the worst of the encounter, suffering injuries that required at least brief hospitalization. We conclude, however, that Robinson’s character, as reflected by his criminal record, fully justifies his sentence.

Robinson’s criminal record is appalling. Robinson has a total of twenty-five prior convictions, eight of which were for felonies (one of which involved a killing), and one juvenile true finding, dating back to 1977. As a juvenile, Robinson had a true finding for “Ungovernable” in 1977. Green App. p. 3. As an adult, Robinson has previous convictions for disorderly conduct in 1983; resisting with injury in 1984; disorderly conduct in 1986, 1989, and 1990; Class D felony carrying a handgun without a license, two counts of battery, two counts of resisting law enforcement, and disorderly conduct in 1991; Class C felony burglary and Class D felony auto theft in 1995; Class D felony auto theft in 1997; possession of paraphernalia in 1999; Class D felony resisting law enforcement, public intoxication, and possession of paraphernalia in 2000; resisting law enforcement in 2001; Class C felony auto

theft, Class D felony resisting law enforcement, and battery in 2002; Class C felony reckless homicide and public intoxication in 2005; and driving while suspended in 2008. Additionally, Robinson violated the terms of probation twice in 1992, twice in 1997, in 2001, in 2003, and in 2006.

In addition to establishing an ongoing and decades-long disregard for the law, several of Robinson's convictions reveal him to be a dangerously violent individual who has fought with police on several occasions, committed acts of domestic violence, and killed a man in a fight. Despite Robinson's multitudinous arrests, convictions, incarcerations, and probation violations, he has shown no signs of reforming himself. In light of Robinson's criminal history, particularly to the extent that it reveals his proclivity for violence, we cannot say that his fifty-year executed sentence is inappropriate.<sup>4</sup>

The judgment of the trial court is affirmed.

BAILEY, J., and VAIDIK, J., concur.

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<sup>4</sup> Robinson cites to Article I, sections 16 and 18 of the Indiana Constitution but has waived any claims based thereon for failure to develop cognizable arguments. *See* Ind. Appellate Rule 46(A)(8)(a).