



Appellant-Defendant Ryan T. McMullen appeals his convictions for Possession of Cocaine,<sup>1</sup> a class A felony, and Possession of Marijuana,<sup>2</sup> a class D felony, claiming that the trial court abused its discretion in admitting evidence at trial that police officers seized during a search of a residence. McMullen also claims that the fifty-year sentence that was imposed is inappropriately harsh in light of the nature of his offenses and his character. We affirm.

### **Facts and Procedural History**

Greentree West Apartments (“Greentree”) is a public housing complex in Marion with approximately fifty units. In January 2009, Julie Taylor, Greentree’s manager, distributed fliers to the residents advising them of a future pesticide treatment in the units. The lease agreements informed the residents that pesticide treatments would be conducted two times per year. On January 8, 2009, Steve Gause, a maintenance employee at Greentree, was treating Apartment 410 with pesticides and noticed a loaded assault weapon in one of the kitchen cabinets. Gause then contacted a detective with the Joint Effort Against Narcotics Drug Task Force (“the JEAN Team”) and reported his observation of the firearm.

Marion Police Detective John Kauffman received an e-mail, warning police officers of a potential safety issue if they were called to Apartment 410. Detective Kauffman knew that Janita Glasser lived at the apartment and that she was the mother of

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<sup>1</sup> Ind. Code § 35-48-4-6(b)(3)(B)(iii) (2008).

<sup>2</sup> Ind. Code § 35-48-4-11(1) (2008).

McMullen's children. Detective Kauffman was aware that McMullen had been linked to previous incidents that involved weapons. Detective Kauffman obtained a mug shot of McMullen and showed it to Gause, who confirmed that McMullen had been staying at the apartment. Detective Kauffman discovered that there was an active warrant for McMullen's arrest in an unrelated matter.

Thereafter, JEAN team members went to Greentree to conduct surveillance and serve the arrest warrant on McMullen. McMullen's vehicle was parked near Apartment 410, and Detective Kauffman saw several individuals go into that apartment for short periods of time. Based on his experience as a police officer, Detective Kauffman believed that such conduct was indicative of drug activity. Various members of the JEAN Team were also familiar with McMullen's previous drug and weapons charges. At some point, Detective Kauffman observed a known drug user leave the apartment. Detective Kenneth Allen stopped her vehicle near Greentree and explained that the police were looking for "Pat." Tr. p. 79. The individual said that she had just left Greentree and had spoken with "Ryan" in Apartment 410. Tr. p. 79. Although the woman tried to purchase crack cocaine from "Ryan," who was subsequently identified as McMullen, he refused to sell her any drugs because she had "too much drama." Tr. p. 295.

Several police officers then approached the apartment and one of the detectives looked through the front window blinds that were partially open. Detective Allen looked through the window and saw McMullen sitting on the couch. Thereafter, a detective knocked on the door, held up his police badge, and said, "Ryan, this is the police. We

have a warrant for your arrest. Come to the door. Open the door now.” Tr. p. 64. McMullen got up from the couch, released the blinds, stepped away from the window, and moved toward the kitchen where Gause had seen the weapon. Tr. at 64-65. The police officers then entered the apartment and took McMullen into custody. Detective Kauffman smelled marijuana and saw an infant on the couch. After releasing the infant to her mother, the officers obtained a search warrant for the apartment.

During the course of the search, the officers recovered nearly eighteen grams of cocaine, one kilogram of marijuana, and a nine millimeter handgun. On May 4, 2009, the State charged McMullen as follows:

Count I, Possession of Cocaine, a class A felony  
Count II, Dealing in Cocaine, a class B felony  
Count III, Neglect of a Dependent, a class C felony  
Count IV, Possession of Cocaine, a class C felony  
Count V, Possession of marijuana, a class D felony  
Count VI, Habitual Offender<sup>3</sup>

McMullen’s motion to suppress that he filed on July 28, 2010, alleged that the police officers’ entry into the apartment

4. Was unreasonable and in violation of the rights and privileges of citizens secured under the 4th and 14th Amendments to the United States Constitution and Article 1, Section 11 of the Indiana Constitution, because the drug task force officers lacked the valid authority of a search warrant to search ... Glasser’s apartment for defendant, and defendant had a reasonable expectation of privacy in the premises as a guest and had standing under the Indiana Constitution as a guest of ... Glasser to assert this claim. The arrest warrant did not provide authority to enter ... Glasser’s apartment to search for a non-resident.

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<sup>3</sup> The habitual offender count was later dismissed.

6. Drug task force officers violated the rights and privileges secured by Article 1, Section 11 of the Indiana Constitution when an officer left the porch or walkway to look in the window of [Apartment 410] because defendant had a reasonable expectation of privacy from spying from an area not a public way and therefore, a part of the secure area of the apartment.

7. As a result of these acts that violate defendant's right to privacy secured by [the] 4th and 14th Amendments to the United States Constitution and Article 1, Section 11 of the Indiana Constitution, the fruits of the illegal entry must be suppressed as having been gained by the benefit of the illegal entry, notwithstanding the purported authority of the subsequently acquired search warrant . . . since the authority of the search warrant was based on probable cause gained from the illegal entry.

8. No officer knowledgeable in the scope of the authority granted by an arrest warrant would have a good faith belief in the reasonableness of the entry to [the apartment] to search for defendant, neither would such an officer reasonably rely on the warrant subsequently issued, which should not have issued, because the probable cause for the warrant was based on an illegal entry of the premises as is apparent in the text of the transcript of the probable cause hearing.

Appellant's App. pp. 38-40.

Following a hearing, the trial court denied McMullen's motion to suppress. The trial court determined, *inter alia*, that Gause was employed at Greentree and was acting as a private citizen when he entered the apartment. Gause's entry into the apartment was not conducted at the direction of the police or with the intent to assist law enforcement agents. Thus, Gause's discovery of the weapon was not the result of an unreasonable search in violation of the Fourth Amendment.

The trial court also concluded that the police officers' entry into the apartment was justified because the arrest warrant for McMullen granted them the implied authority to enter the residence and apprehend him. As a result, it was determined that the marijuana

and cocaine seized pursuant to the subsequently issued search warrant were properly admitted into evidence.

At the conclusion of McMullen's jury trial on August 12, 2010, McMullen was convicted of possession of cocaine, a class A felony, possession of cocaine, a class C felony, and possession of marijuana, a class D felony. The trial court vacated the class C felony conviction in light of double jeopardy concerns.

At the sentencing hearing that was conducted on September 10, 2010, the trial court identified McMullen's lengthy criminal history and his failure to report for incarceration after being released from jail as aggravating factors. The trial court recognized the undue hardship that McMullen's incarceration would have on his dependents as the sole mitigating circumstance. After determining that the aggravating factors outweighed the mitigating circumstance, the trial court sentenced McMullen to fifty years on the cocaine possession charge and to a concurrent term of three years for possession of marijuana.

## **DISCUSSION AND DECISION**

### **I. Search and Seizure**

McMullen argues that his convictions must be reversed because the trial court improperly admitted the cocaine and marijuana into evidence that was seized from the apartment. McMullen claims that Gause was acting as a police informant and illegally entered the apartment. Moreover, McMullen maintains that the police officers' subsequent entry into the apartment "on the strength of an arrest warrant was illegal."

Appellant's Br. p. 5-6. Thus, McMullen argues that all of the evidence that the police officers seized in the apartment should have been excluded.

#### **A. Standard of Review—Admissibility of Evidence**

In addressing McMullen's claims, we initially observe that a trial court is afforded broad discretion in ruling on the admissibility of evidence. Absent a requisite showing of abuse, the trial court's decision will not be disturbed. *Goodner v. State*, 685 N.E.2d 1058, 1060 (Ind. 1997). An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. *Bentley v. State*, 846 N.E.2d 300, 304 (Ind. Ct. App. 2006). We will not reweigh the evidence and will consider conflicting evidence in favor of the trial court's ruling. *Collins v. State*, 822 N.E.2d 214, 218 (Ind. Ct. App. 2005).

#### **B. Gause's Entry Into the Residence**

McMullen first claims that the evidence seized from the apartment was improperly admitted at trial because Gause was purportedly acting as an agent of the State when he entered the residence and saw the firearm. Thus, McMullen contends that Gause's entry into the apartment was illegal and all of the evidence seized in the "subsequent search should have been suppressed." Appellant's Br. p. 6-7.

We note that while a search by a private party generally does not implicate Fourth Amendment concerns, such considerations will apply if the individual is acting as an instrument or agent for the government. *Bone v. State*, 771 N.E.2d 710, 714 (Ind. Ct. App. 2002). The two factors to determine whether the private party is acting on behalf of

the government are: (1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the private party's purpose in conducting the search was to assist law enforcement agents or to further its own ends. *Id.*

As noted above, the evidence shows that Gause was not employed by the police department and was not acting at its direction. Gause was an employee of Greentree, and no one from the police department requested him to spray for pests. In fact, no one from the police department even knew that Gause was spraying apartments on January 8, 2009. Although Gause occasionally provided tips to the police if he thought that something was detrimental to the apartment or to its residents, the evidence demonstrated that the police department routinely conducted its own investigation after Gause made the reports. Tr. p. 65. The evidence also demonstrated that Greentree's manager hand delivered the monthly newsletter to the residents informing them of the impending pest control treatments. *Id.* at 100. And the residents agreed in their leases to allow Greentree employees into the units twice a year for pest eradication. *Id.* at 101.

In light of this evidence, the trial court reasonably concluded that Gause was not acting as an agent or instrument for the State when he entered the apartment to spray for pests. As a result, McMullen's claim that Gause's entry into the residence was "illegal," Appellant's Br. p. 5, and that the evidence should not have been admitted at trial on this basis, fails.

### **B. Police Officers' Subsequent Entry**

McMullen also claims that the police officers' subsequent entry into the apartment was illegal. McMullen argues that even though the police officers had a warrant for his arrest, he did not live at the apartment. Therefore, McMullen maintains that the detectives' acts of approaching the apartment window and peering through the blinds to determine whether he was inside, was a violation of his expectation of privacy. Hence, the trial court should have excluded all of the evidence that was subsequently seized from the apartment.

We initially observe that the police may not enter a home by force to make a routine arrest without a warrant. *Duran v. State*, 930 N.E.2d 10, 15 (Ind. 2010). An arrest warrant grants the police limited authority to enter the dwelling where a suspect resides when there is reason to believe the suspect is inside. *Id.*

Although McMullen acknowledges that there was an active warrant for his arrest, he takes issue with the trial court's conclusion that he lived in the apartment and, therefore, maintains that a search warrant was required before the officers entered the residence. Notwithstanding this claim, the record demonstrates that Gause had observed McMullen "hanging out" at the apartment for several weeks. Tr. p. 62. Detective Kauffman knew that McMullen and Glasser had children in common and determined that McMullen had used Glasser's food stamp card and traced her residence to Apartment 410 at Greentree. *Id.* at 59-60. McMullen's vehicle was parked near the apartment, and a known drug user admitted to the police officers that she was at the apartment and tried to

buy drugs from “Ryan.” *Id.* at 61-63. In short, this evidence supported the trial court’s conclusion that McMullen lived at the apartment.

The evidence also established that McMullen was in the apartment when the officers arrived. As noted above, two police officers identified McMullen before entering the apartment. One of the detectives observed McMullen through the partially-open blinds, sitting on a couch. *Id.* at 63. Detective Allen confirmed McMullen’s identity before the officers knocked on the door. *Id.* at 64.

In sum, the trial court properly concluded that McMullen was living at the apartment. The police officers also established that McMullen was inside the apartment when they arrived. After noticing McMullen, the detectives knocked and announced their presence and executed a valid arrest warrant. In light of these circumstances, we find that the trial court did not abuse its discretion in admitting the evidence that was seized pursuant to the subsequently-issued search warrant.<sup>4</sup>

## **II. Sentencing**

McMullen contends that the fifty-year sentence for possession of cocaine is inappropriate in accordance with Indiana Appellate Rule 7(B) when considering the

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<sup>4</sup> We note that although McMullen cites to Article 1, Section 11 of the Indiana Constitution as a basis for his claims that the police officers violated his right to be free from unreasonable search and seizure, he has failed to make a cogent argument as to why the evidence was inadmissible. Moreover, McMullen does not address the trial court’s conclusion that the conduct of the police officers and detectives was reasonable under Article 1, Section 11. Thus, the claim is waived. *See Ackerman v. State*, 774 N.E.2d 970, 978 n.10 (Ind. Ct. App. 2002) (providing that the failure to cite any authority or make a separate argument specific to the state constitutional provision waives the issue on appeal).

Even if McMullen had preserved the issue, his claim fails. Our review of the record reveals that the degree of intrusion was slight and the interest of law enforcement and the public in apprehending McMullen was great. McMullen would not prevail on a claim that the police officers’ conduct was unreasonable in these circumstances.

nature of the offense and his character. Specifically, McMullen maintains that these circumstances do not warrant “imposition of the harshest sentence permitted for a class A felony.” Appellant’s Reply Br. p. 1.

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 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).

The nature of McMullen’s offenses justifies a maximum sentence. While it is true that no evidence of any specific drug sale was introduced at McMullen’s trial, we cannot overlook what the record as a whole makes abundantly clear: McMullen was dealing drugs out of Apartment 410, not just *near* a family housing complex, but *in* a family housing complex. In addition to the vast amounts of illegal drugs found in the apartment (several thousand dollars’ worth each of crack cocaine and marijuana), police also found a digital scale and a loaded nine millimeter handgun, other trappings of the drug dealer. Moreover, police found a letter in the apartment from McMullen to Glasser stating, “I’m gonna get a job and sell weed and ex” and “no more cocaine.” Appellant’s App. p. 61. Finally, police observed a known drug user leave the apartment who told them that she

had tried to purchase crack cocaine from McMullen, an attempt that was apparently unsuccessful only because she had “too much drama.” Tr. p. 295. The nature of McMullen’s offenses is that they were part of an ongoing drug-dealing enterprise located in a family housing complex.

We also believe that McMullen’s maximum sentence is justified by his appalling juvenile and adult criminal record, all amassed by the time he turned twenty-three. Beginning when he was ten, McMullen was adjudged to have committed what would be, if committed by an adult, Class B felony armed robbery, Class D felony auto theft, Class D felony receiving stolen property, Class A misdemeanor conversion, Class A misdemeanor criminal mischief, Class B misdemeanor battery, two counts of Class A misdemeanor resisting law enforcement, Class B misdemeanor disorderly conduct, false informing, illegal possession of alcohol, and Class A misdemeanor marijuana possession. McMullen was also adjudged as a juvenile twice to be incorrigible, to have violated curfew, to have run away, and to have violated the terms of probation three times.

As an adult, McMullen has been convicted of Class D felony criminal recklessness with a deadly weapon, Class D felony marijuana possession, Class A misdemeanor pointing a firearm, Class C misdemeanor illegal possession of alcohol, Class A misdemeanor carrying a handgun without a license, two counts of Class A misdemeanor marijuana possession, Class C misdemeanor operating a vehicle never having received a license, Class C misdemeanor operating a motor vehicle while intoxicated, and Class B misdemeanor criminal mischief. Moreover, McMullen has been incarcerated on several

occasions; has violated the terms of adult probation; has been cited several times for misconduct in the Grant County jail; has been charged with eighteen additional crimes that were later dismissed; and, as of sentencing, had attempted murder, Class D felony criminal recklessness, and Class C felony battery by means of a deadly weapon charges pending. We find McMullen's numerous firearms-related convictions to be particularly disturbing. McMullen's multitudinous juvenile adjudications, criminal convictions, and other contacts with the criminal justice system have not caused him to reform himself. The nature of McMullen's offenses and his character justify his maximum sentence.

We affirm the judgment of the trial court.

BAKER, J., and MAY, J., concur.