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.

FILED
Jul 29 2011, 9:59 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

KENNETH R. MARTIN
Goshen, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

KATHERINE M. COOPER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

OSWALDO QUIZAMAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A05-1010-CR-712
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0902-FA-8

July 29, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Oswaldo Quizaman appeals his eighty-year aggregate sentence for two counts of dealing in cocaine as class A felonies[1] and one count of dealing in methamphetamine as a class A felony.[2] Quizaman raises one issue, which we revise and restate as whether his sentence is inappropriate in light of the nature of the offense and the character of the offender. We affirm the court's sentence of forty years on each conviction but reverse the court's order that the concurrent sentences for Counts II and III be served consecutive to Count I, and remand.

The relevant facts follow. On January 2, 2009, the Interdiction and Covert Enforcement Unit ("ICE Unit"), a multi-agency drug task force in Elkhart County, arranged to purchase cocaine from Miguel Esqueda. During a telephone conversation, Esqueda told confidential source 08-011 ("CS 08-011") that he was out of town, but he still wanted to provide the narcotics. CS 08-011 and Esqueda agreed that Esqueda would be sending someone to meet CS 08-011 at Rickey's Taqueria to deliver the cocaine. Esqueda later changed the meeting location to the parking lot of a Big Lots store. Esqueda told CS 08-011 that his "trusted person" would be driving a yellow Jeep Wrangler and told CS 08-011 not to talk to this person. Transcript at 265.

CS 08-011, confidential source 08-014 ("CS 08-014"), and undercover officer 151 ("UC 151") arrived in one vehicle at the Big Lots parking lot and parked near a yellow Jeep. CS 08-011 exited the vehicle from the passenger side, walked around the car that

[1] Ind. Code § 35-48-4-1 (Supp. 2006).

[2] Ind. Code § 35-48-4-1.1 (Supp. 2006).

was between the confidential source vehicle and the Jeep, and approached the driver's side of the Jeep. Quizaman, who was standing outside of the Jeep when CS 08-011 arrived, pointed to the side door compartment and told CS 08-011 to "grab the bag that was there." Id. at 294. CS 08-011 took the bag and its contents from the door and placed $1,500 on the driver's seat, which consisted of $1,000 for a previous debt and $500 for cocaine. CS 08-011 noticed two young girls who were Quizaman's daughters inside the Jeep and heard one of the girls ask Quizaman, "Did he pay already?" Id. at 305. Quizaman then went inside Big Lots with the girls, and CS 08-011 returned to the confidential source vehicle and gave the bag, which was later determined to contain 55.02 grams of cocaine, to UC 151.

The ICE Unit continued to investigate Quizaman until January 29, 2009, when the Indiana State Police Emergency Response Team ("ERT") executed a search warrant on Quizaman's residence. Upon entering through the front door, the ERT saw Quizaman's girlfriend, Lorena Rojas, and an infant on the couch. The ERT secured Rojas and the infant, continued an initial search of the residence, and did not notice any other people in the house.

At some point during the execution of the search warrant, Indiana State Trooper Andrew Barker, who was conducting perimeter security of the house, noticed a dark SUV driving back and forth past Quizaman's residence. When the SUV veered into the opposite lane and almost hit Trooper Barker's vehicle, Trooper Barker conducted a traffic stop and discovered Quizaman driving the vehicle. Trooper Barker contacted another

state trooper to see if Quizaman was a person of interest, and Trooper Barker was instructed to bring Quizaman to the house.

UC 151 informed Quizaman of his Miranda rights, and Quizaman told UC 151 that he lived at the residence with Rojas and their four children, that he had fourteen pounds of methamphetamine and six ounces of cocaine in his garage along with $10,000 hidden in his bathroom, and that the drugs were worth approximately $1.5 million. Quizaman also told UC 151 that he had agreed approximately one or two months earlier to hold the narcotics in his home in exchange for $2,000 per month and that he would be paid an additional $150 for every delivery of narcotics that he made.

The ICE Unit seized over 6,300 grams of methamphetamine and over 330 grams of cocaine from the residence. In Quizaman's bathroom, officers found $1,362 in a cabinet above the toilet, $9,880 in the pipe chase, ledgers, notebooks, and a digital scale. Officers also found approximately $2,900 in a pocket of a coat in the entryway closet. In the kitchen, officers found a 40-caliber Glock handgun with an extended magazine on top of a kitchen cabinet and six eight-ounce bottles of Inositol powder, a cutting agent, in a black garbage bag under the kitchen sink. In Quizaman's garage, officers found a five-pound capacity digital scale, plastic sandwich bags, yellow rubber gloves, a roll of plastic bags, a box of ammunition, an opened bottle of Inositol powder, an electric sealer, a coffee grinder, and marijuana.

On February 3, 2009, the State charged Quizaman with: Count I, dealing in cocaine as a class A felony; Count II, dealing in cocaine as a class A felony; and Count

III, dealing in methamphetamine as a class A felony. After a jury trial, Quizaman was found guilty as charged. At the sentencing hearing, the court found that Quizaman had no previous criminal convictions as a significant consideration but noted that the significance was substantially diminished by the fact that he had charges pending in Los Angeles County, California, for inflicting corporal injury on a spouse or cohabitant and assault with a deadly weapon. The court also noted that Quizaman failed to appear for proceedings in that case and a bench warrant was outstanding for his arrest. The court stated that it was "not considering the Los Angeles charges as convictions, but [was] finding that [Quizaman's] failure to appear with respect to the proceedings in that case demonstrates a lack of respect for the judicial process and an unwillingness to abide by the orders of court on the part of [Quizaman]." Appellant's Appendix at 87. The court also considered the fact that there were two children present in his residence where he stored a loaded firearm and substantial quantities of both cocaine and methamphetamine. The court also noted that Quizaman admitted that he was in possession of a quantity of marijuana. Lastly, the court considered the fact that Quizaman was in this country illegally by his own admission and that "evidences a disdain for the country's laws." Id.

The court sentenced Quizaman to forty years for each conviction. The court ordered the sentences for Counts II and III to be served concurrently with one another and consecutive to Count I. Thus, the court sentenced Quizaman to an aggregate term of eighty years in the Department of Correction.

The issue is whether Quizaman's sentence is inappropriate in light of the nature of the offense and the character of the offender.[3] Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Quizaman argues that he played a minor role in the drug distribution network. Quizaman points out that he made a detailed and accurate statement to the police upon his arrest and that he has no prior convictions, and requests that his sentence be reduced to forty years. The State argues that the evidence "shows that [Quizaman] operated a large drug-dealing business enterprise for the sole purpose of distributing illegal narcotics into the community." Appellee's Brief at 8.[4] The State also argues that "[t]he fact that [Quizaman] conducted his drug-dealing business from his family's home and willingly

[3] Quizaman argues that his sentence "far exceeds the amount of correction needed to ensure Quizaman's rehabilitation." Appellant's Brief at 10. To the extent that Quizaman suggests that his sentence violates Article 1, Section 18 of the Indiana Constitution, which provides that "[t]he penal code shall be founded on the principles of reformation, and not of vindictive justice," we note that the Indiana Supreme Court has held that "particularized, individual applications are not reviewable under Article 1, Section 18 because Section 18 applies to the penal code *as a whole* and does not protect fact-specific challenges." Ratliff v. Cohn, 693 N.E.2d 530, 542 (Ind. 1998), reh'g denied.

[4] The State also argues that Quizaman waived the issue of whether his sentence is inappropriate by failing to make a cogent argument. We decline to hold that Quizaman waived this issue as he raises the issue of whether his sentence is inappropriate and his arguments pertain to the nature of the offense and the character of the offender.

exposed his young children to drug-dealing and guns shows extremely poor character." Id.

Our review of the nature of the offense reveals that Quizaman met CS 08-011 with two of his daughters present and delivered cocaine to CS 08-011. Quizaman lived with his girlfriend and four children, and the residence contained over 6,300 grams of methamphetamine, over 330 grams of cocaine, over $14,000 in cash, ledgers, a digital scale, a loaded handgun with hollow point bullets, and marijuana. In sum, Quizaman was part of a large-scale drug-dealing operation.

Our review of the character of the offender reveals that Quizaman, who was born on August 13, 1979, does not have any previous felony or misdemeanor convictions. However, Quizaman was charged with infliction of corporal injury on a spouse or cohabitant and assault with a deadly weapon not a firearm in California in 2006, and a bench warrant was issued after he failed to appear.

The presentence investigation report indicates that Quizaman stated: "I'm conscious about what I did and I'm willing to accept responsibility for what I did, but I'm hoping not to get the max." Appellant's Appendix at 106. At the sentencing hearing, Quizaman admitted that he possessed the drugs in his residence and denied dealing or delivering any drugs. The presentence investigation report indicates that Quizaman stated that he used cocaine sporadically for the past four years and denied having a

problem with cocaine. Quizaman has four children who currently reside with his mother in Mexico.[5]

Goshen Police Captain Shawn Turner and UC 151 both indicated at the sentencing hearing that Quizaman was cooperative during the investigation. Quizaman told UC 151 that he lived at the residence with Rojas and their four children, that he had fourteen pounds of methamphetamine and six ounces of cocaine in his garage along with $10,000 hidden in his bathroom, and that the drugs were worth approximately $1.5 million. Quizaman also told UC 151 that he had agreed to hold the narcotics in his home in exchange for $2,000 per month and that he would be paid an additional $150 for every delivery of narcotics that he made. Quizaman gave information to the police regarding at least one person that the police may have found to be of interest. Lastly, we note that an immigration hold has been placed on Quizaman and that Quizaman's attorney and the prosecutor both indicated at the sentencing hearing that Quizaman will be deported after serving his sentence.

After due consideration and under the circumstances, we conclude that the imposition of the forty-year concurrent sentences on Counts II and III to be served consecutive to Count I is inappropriate. Accordingly, we reverse and remand with instructions to impose concurrent sentences of forty years on each conviction for an aggregate sentence of forty years. See Williams v. State, 891 N.E.2d 621, 635 (Ind. Ct.

[5] The presentence investigation report reveals that Rojas was incarcerated in the Indiana Department of Correction after being convicted of four counts of neglect of a dependent as class C felonies.

App. 2008) (holding that the defendant's aggregate sentence of seventy-three years for possession of cocaine as a class A felony, two convictions for dealing in cocaine as class A felonies, two convictions for possession of cocaine as class C felonies, and possession of marijuana as a class D felony, was inappropriate and ordering that each of the defendant's sentences run concurrent with each other for an aggregate sentence of forty years); cf. Winbush v. State, 776 N.E.2d 1219, 1227 (Ind. Ct. App. 2002) (affirming the defendant's aggregate executed sentence of forty years for possession of cocaine with intent to deal as a class A felony and dealing in cocaine as a class B felony), trans. denied.

For the foregoing reasons, we affirm the imposition of forty years to be served on each count but reverse and remand to revise Quizaman's sentences to run concurrently.

Affirmed in part, reversed in part, and remanded.

FRIEDLANDER, J., and BAILEY, J., concur.