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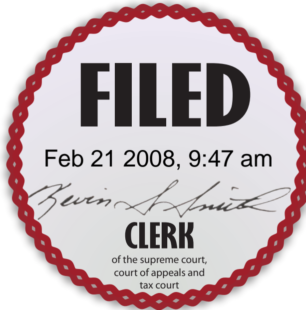



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# IN THE
# COURT OF APPEALS OF INDIANA

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| VICTOR BARNES, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 24A01-0704-CR-177 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

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APPEAL FROM THE FRANKLIN CIRCUIT COURT
The Honorable J. Steven Cox, Judge
Cause No. 24C01-0405-FB-291

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**February 21, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

Victor Barnes makes a multi-faceted challenge to the sentence that he received for his conviction of manufacturing methamphetamine.[1] Concluding that the twenty-year sentence was inappropriate under Indiana Appellate Rule 7(B), we reverse and remand with instructions to revise the sentence to fifteen years, with three suspended.

On May 20, 2004, several officers responded to a report of trespassing on a remote property on U.S. Highway 52. As the police arrived, two white, shirtless males ran out of a building. Franklin County Deputy Sheriff Jason Lovins recognized one of the men to be Daniel Somers. Somers and the other man hurried down an embankment to a creek and disappeared from the police. At that point, the officers searched the two buildings on the property and found an active methamphetamine lab, complete with a recipe for making methamphetamine, diagrams on how to obtain anhydrous ammonia, methamphetamine precursors, .20 grams of methamphetamine, a "canoe" for ingesting methamphetamine, and the remains of what appeared to have been an explosion. Tr. at 396, 406-10, 432-34.

When told the following day that police had found methamphetamine at the property, a man, whom police had stopped near the property the previous day, identified Somers and Barnes as the men who had been at the property cooking methamphetamine. Upon viewing a mugshot, Deputy Lovins confirmed that Barnes was the man with Somers at the property. The State brought three counts against Barnes: class B felony manufacturing methamphetamine, fleeing law enforcement, and trespass, the latter two as class A misdemeanors. On February 27, 2007, a jury found Barnes guilty of manufacturing and fleeing, but not guilty of trespassing.

[1] Ind. Code § 35-48-4-1(a)(1)(A).

At the conclusion of a March 21, 2007 sentencing hearing, the court stated:

> Um, well, the Court will um, reference the um, Pre-Sentence Investigation Report uh, for purpose of the record indicate that where in the – where the uh, juvenile history uh, and it says not applicable or n/a that there is a uh, prior juvenile history that has been discussed of record that the adult record is as it has been outlined uh, and that spans um, a period of time from 2004 basically to 2007. And uh, over four (4) different counties and another juvenile matter in [Decatur County]. … Um, um, this not being a contained uh, legal history to one (1) geographic location or one – one (1) geographic area or one (1) county anyway, uh, would cite to that uh, record in support of the Court's uh, finding that the uh, sentence should be uh, in a range above that which is advisory. And um, we'll follow the State's recommendation in this matter to twenty (20) years with the Indiana Department of Corrections [sic], five (5) of that suspended to probation[.]

Sent. Tr. at 10-11. As for the fleeing conviction, the court ordered a one-year concurrent sentence.

We begin with the observation that between the date of Barnes' offenses, May 20, 2004 and the date of sentencing, March 21, 2007, Indiana Code Section 35-50-2-5 was amended to provide for "advisory" sentences rather than "presumptive" sentences. *See* P.L. 71-2005, § 9 (eff. Apr. 25, 2005). However, because the sentencing statute in effect at the time a crime is committed governs the sentence for that crime, *Gutermuth v. State*, 868 N.E.2d 427, 431 n.4 (Ind. 2007), the earlier "presumptive" sentencing scheme should have been applied.

In general, sentencing lies within the discretion of the trial court. *Henderson v. State*, 769 N.E.2d 172, 179 (Ind. 2002). As such, we review sentencing decisions only for an abuse of discretion, "including a trial court's decision to increase or decrease the presumptive sentence because of aggravating or mitigating circumstances." *Id*. Furthermore, when enhancing a sentence, a trial court must: (1) identify significant aggravating and mitigating

circumstances; (2) state the specific reasons why each circumstance is aggravating or mitigating; and (3) evaluate and balance the mitigating against the aggravating circumstances to determine if the mitigating offset the aggravating circumstances. *Vazquez v. State*, 839 N.E.2d 1229, 1232 (Ind. Ct. App. 2005), *trans. denied*.

Indiana Appellate Rule 7(B) provides, "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." *Weiss v. State*, 848 N.E.2d 1070, 1072 (Ind. 2006). When the wording of Appellate Rule 7(B) was altered from "manifestly unreasonable" to "inappropriate" in 2003, our supreme court "changed its thrust from a prohibition on revising sentences unless certain narrow conditions were met to an *authorization to revise sentences when certain broad conditions are satisfied*." *Neale v. State*, 826 N.E.2d 635, 639 (Ind. 2005) (emphasis added). In keeping with this newer approach, our supreme court has been proactive in reducing sentences that it finds to be inappropriate. *See Cotto v. State*, 829 N.E.2d 520, 527 (Ind. 2005); *Estes v. State*, 827 N.E.2d 27, 29 (Ind. 2005); *Neale v. State*, 826 N.E.2d 635, 639 (Ind. 2005); *Ruiz v. State*, 818 N.E.2d 927, 929-30 (Ind. 2004); *Francis v. State*, 817 N.E.2d 235, 239 (Ind. 2004); *Saylor v. State*, 808 N.E.2d 646, 650-51 (Ind. 2004); *Serino v. State*, 798 N.E.2d 852, 858 (Ind. 2003).

Regarding the nature of the offense, the presumptive/advisory sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed. *See Childress v. State*, 848 N.E.2d 1073, 1081 (Ind. 2006). Therefore, the starting point for an appropriate sentence for Barnes' conviction of manufacturing methamphetamine was ten

years. *See* Ind. Code § 35-50-2-5.

Barnes, eighteen years old at the time of the crime, was one of two men using unoccupied buildings in a remote area to make methamphetamine. The police search of the two buildings uncovered, *inter alia*, a small amount of methamphetamine, .2 grams to be exact, and a device for ingesting methamphetamine, both of which would suggest this was not an extensive business, but more likely a personal use situation. Further, no violence occurred and no weapons were displayed when the police appeared on the scene. This instance of manufacturing methamphetamine does not seem demonstrably worse or more egregious than other convictions for similar drug offenses. In short, we can find nothing about the manner in which Barnes committed this offense to justify a maximum sentence. *See Nelson v. State*, 792 N.E.2d 588, 596 (Ind. Ct. App. 2003) (decreasing ninety-year sentence by thirty years where defendant sold less than one gram of cocaine to an undercover officer, was not armed at the time, and was cooperative), *trans. denied*; *cf. Weiss*, 848 N.E.2d at 1070-72 (affirming forty-year sentence where defendant was involved in large-scale drug operation and had prior convictions for selling drugs).

Turning to the nature of Barnes' character, we acknowledge that he has a prior criminal history, which was the only aggravating circumstance the sentencing court noted. Our supreme court has explained:

> We Indiana judges often recite that "a single aggravator is sufficient to support an enhanced sentence." While there are many instances in which a single aggravator is enough, this does not mean that sentencing judges or appellate judges need do no thinking about what weight to give a history of prior convictions. The significance of a criminal history "varies based on the gravity, nature and number of prior offenses as they relate to the current offense." We observed in *Wooley* [*v. State*, 716 N.E.2d 919, 929 n.4 (Ind.

> 1999)] that "a criminal history comprised of a prior conviction for operating a vehicle while intoxicated may rise to the level of a significant aggravator at a sentencing hearing for a subsequent alcohol-related offense. However, this criminal history does not command the same significance at a sentencing hearing for murder." A different example might help illustrate the same point. A conviction for theft six years in the past would probably not, standing by itself, warrant maxing out a defendant's sentence for class B burglary. But, a former conviction for burglary might make the maximum sentence for a later theft appropriate.
>
> Certainly not all cases will produce as clear-cut a separation between significant and nonsignificant prior convictions as these examples. The need for clarity and careful weighing, made by reference to appropriate prior criminal convictions, is more pronounced than ever given the increased importance prior criminal convictions play in the sentencing process in a post-*Blakely* world.

*Morgan v. State*, 829 N.E.2d 12, 15-16 (Ind. 2005) (citations omitted).

At the time Barnes committed the manufacturing offense at issue here, his previous brushes with the law consisted of only misdemeanor driving offenses. His prior history contained no charges for, let alone convictions of, felonies. Sometime after the events in question, Barnes was convicted of class A marijuana possession for which he received a suspended sentence. Obviously, we do not condone driving while suspended/never licensed or possession of marijuana. However, Barnes' offenses are neither crimes of violence nor do they clearly cry out for a maximum sentence. They were also committed when he was quite young. In short, his character does not bring to mind the worst of the worst.

Due consideration of the trial court's decision convinces us that Barnes' sentence is not appropriate. Given Barnes' age, the specific circumstances of this crime, and his limited criminal history, we conclude that an aggregate sentence of fifteen years, with twelve years executed in the Indiana Department of Correction and three years on probation, is appropriate. *Cf. Feeney v. State*, 874 N.E.2d 382, 385-86 (Ind. Ct. App. 2007) (revising

eighteen-year-old's sentence under Appellate Rule 7(B); acknowledging defendant was "certainly a young man in need of reformation," but noting the concern that unduly harsh sentence could place defendant "under the tutelage of experienced criminals").

Reversed and remanded with instructions to revise Barnes' manufacturing methamphetamine sentence consistent with this opinion.

BAILEY, J., and NAJAM, J., concur.