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IN THE
COURT OF APPEALS OF INDIANA

JASON L. REED,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A04-0706-CR-310
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable J. Richard Campbell, Judge
Cause No. 29D04-0604-FD-3103

January 24, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Jason L. Reed appeals from his conviction and sentence for Possession of a Controlled Substance, as a Class D felony, and two counts of Driving While Suspended, as Class A misdemeanors, after a jury trial. Reed raises three issues for review, which we restate as:

1. Whether the trial court abused its discretion when it admitted into evidence statements Reed made to the arresting officer.

2. Whether Reed's trial counsel rendered ineffective assistance.

3. Whether the trial court abused its discretion when it sentenced Reed.

We affirm.

FACTS AND PROCEDURAL HISTORY

In the early evening of April 19, 2006, Officer Josh Blocher of the Noblesville Police Department was on patrol for Operation Pullover. A federal grant funded Operation Pullover, which allowed officers to work overtime to look for various traffic offenses. Officer Blocher was traveling south on State Road 37 in Noblesville when he ran the license plate of a vehicle driven by Reed, who was accompanied by one passenger. The plate came back "false and fictitious," meaning it did not match the vehicle, so Officer Blocher initiated a traffic stop. In response to Officer Blocher's emergency lights, Reed pulled off State Road 37 into a gas station.

Officer Blocher informed Reed that the plate on Reed's vehicle did not match the vehicle. Officer Blocher then asked for Reed's driver's license and registration. Reed produced an Indiana identification card and "informed [Office Blocher] that he knew he was suspended and that he wasn't supposed to be driving." Transcript at 75. Reed did

not make eye contact with Office Blocher, was "very nervous[,]" and "was literally shaking[,]" and Officer Blocher could see Reed's carotid artery pulsing, also signifying nervousness. Id. Based on "that information[,]" Officer Blocher removed Reed from the vehicle and had him step to the rear of Reed's vehicle. After running Reed's information with dispatch, Officer Blocher learned that Reed's license was indeed suspended and that Reed's current suspension arose from driving while convicted prior, meaning driving while suspended due to a conviction for driving while suspended. After reviewing Reed's record, Officer Blocher informed Reed that he was under arrest for "driving while suspended prior," and he placed Reed in hand restraints. Id. at 79.

Officer Blocher then turned to Reed's passenger, Anthony Ledford, to find out whether Ledford could drive Reed's vehicle. Ledford produced an Indiana identification card.[1] Upon checking, Officer Blocher learned that Ledford's license was also suspended and there was possibly a warrant for Ledford's arrest out of Marion County. As a result, Officer Blocher placed Ledford in hand restraints as well.

Upon confirming that Ledford was not the subject of the Marion County warrant, Office Blocher released Ledford. Officer Blocher then asked Reed for permission to search Reed's vehicle. He gave Reed a Pirtle warning to inform him that Officer Blocher did not have a right to search the vehicle and that he was asking for permission to do so. After Officer Blocher read the Pirtle warning, Reed signed a written copy of the warning, giving permission for the search.

[1] On cross-examination, Officer Blocher testified that Ledford provided only verbal information regarding his identity and that Ledford had not provided an identification card or driver's license. See Transcript at 79, 123. We merely note this inconsistency; it is not material to the issues before us.

Officer Blocher visually searched the front seat of Reed's vehicle, which was a bench seat separated so that the driver and passenger could adjust their respective seats' distance from the dash separately. Officer Blocher saw the cap of a pill bottle in between the cushions between the driver's and passenger's seats, "inches" from the driver's seat. Transcript at 87-88. He removed the bottle and noticed that it contained no markings or label, but it contained approximately twenty pills. Officer Blocher contacted poison control, described the pills, and was informed that the pills were likely Vicodin.[2] Officer Blocher knew from his training that Vicodin is a controlled substance that one cannot legally possess without a prescription.

Officer Blocher set the pill bottle on top of Reed's vehicle. He testified that "[o]nce [Reed] saw the pill bottle being placed on top of his car, and basically I just held it up and showed it to him at that point, he then made the comment that those were his sister's pills and that, his sister's Vicodin pills and that she buys those in Indianapolis." Transcript at 93. Officer Blocher then continued his search of the vehicle.

After completing the search, Officer Blocher picked up the bottle from the roof of the vehicle and approached Reed. At that point, Officer Blocher testified that Reed stated "you're going to arrest me for the possession of those pills, aren't you?" Transcript at 94. Officer Blocher replied, "the problem is we have a pill bottle with no names on it, no markings on the bottle at all and your sister's not present to account for those. That's the problem. That's the issue." Transcript at 94. Before releasing Ledford, Officer Blocher

[2] Subsequent laboratory testing confirmed that the bottle contained Vicodin.

had a brief conversation with him about the pill bottle. Officer Blocher asked Ledford if the pills were his, and Ledford replied that they belonged to Reed.

As a result of the traffic stop, the State charged Reed with possession of a controlled substance, as a Class D felony, and two counts of driving while suspended, as Class A misdemeanors. After a jury trial, the trial court entered judgment on a verdict convicting Reed as charged, merging the driving while suspended counts. The court sentenced Reed to three years for possession of a controlled substance, as a Class D felony, with all but 545 days suspended and 72 days credit. The court further ordered that Reed could serve 365 days of the sentence on work release. The court sentenced Reed to a concurrent 72-day sentence for driving while suspended, and suspended Reed's license for 180 days. Reed now appeals.

DISCUSSION AND DECISION

Issue One: Admission of Evidence

Reed contends that the trial court abused its discretion when it admitted statements he made to Officer Blocher at the time of Reed's arrest. In particular, Reed contends that, because Officer Blocher had not Mirandized Reed before Reed made two self-incriminating statements, Reed did not knowingly and intelligently waive his Fifth Amendment right against self-incrimination. As such, Reed's statements should not have been admitted at trial. We cannot agree.

We first address the State's argument that Reed did not preserve the issue for appeal. Reed's counsel initially objected at trial when the State asked a line of questions about what occurred before Reed made his first incriminating statement. The trial court

sustained that objection. But the State later renewed that line of questioning, and Reed's counsel did not object again to any testimony regarding self-incriminating statements made by Reed. Thus, Reed did not preserve for review any issue regarding the admission of that evidence. Waiver notwithstanding, we address the merits of Reed's claim.[3]

Reed ultimately argues that the trial court should not have admitted Officer Blocher's testimony regarding Reed's self-incriminating statements at the time of his arrest. The trial court has inherent discretionary power on the admission of evidence, and its decisions are reviewed only for an abuse of that discretion. Vasquez v. State, 868 N.E.2d 473, 476 (Ind. 2007). 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), trans. denied.

"The Fifth Amendment privilege against self-incrimination prohibits admitting statements given by a suspect during 'custodial interrogation' without a prior warning." Illinois v. Perkins, 496 U.S. 292, 296 (1990). Police officers are not required to give Miranda warnings unless the defendant is both in custody and subject to interrogation. Reed v. State, 875 N.E.2d 706, 716 (Ind. 2007). The State does not argue that Reed was not in custody at the time of his statements, nor does it argue that the Miranda warning was given before Reed made those statements. Thus, the issue before us is whether Officer Blocher's behavior at the time constitutes interrogation.

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[3] In the Argument section of his brief, Reed does not specify which purportedly self-incriminating statements were improperly admitted. We discern the objectionable statements from Reed's short argument regarding the effectiveness of trial counsel. We remind counsel that the "argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning." Ind. Appellate Rule 46(A)(8)(a). The failure to analyze each issue through cogent reasoning, including the failure to specify the facts and issues being addressed, results in waiver. Roush v. State, 875 N.E.2d 801, 808 (Ind. Ct. App. 2007). Nevertheless, we address the merits of Reed's claim.

The United States Supreme Court has explained "interrogation" in the context of the Miranda warning protections as follows:

> [T]he Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response[] from the suspect.[] The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.[] But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.

Rhode Island v. Innis, 446 U.S. 291, 300-02 (1980) (footnotes omitted, emphasis in original). Interrogation includes both express questioning and words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. State v. Linck, 708 N.E.2d 60, 62 (Ind. Ct. App. 1999), trans. denied. However, interrogation must involve a measure of compulsion beyond that inherent in custody itself. Id.

In Innis, officers arrested Innis for the robbery of a cab driver with a sawed-off shotgun a few hours earlier. After being Mirandized, Innis requested to speak to a lawyer. While being transported to the central police station, Innis heard the three accompanying officers converse about their concern as to the whereabouts of the shotgun, noting that several handicapped children lived in the area and "God forbid one

of them might find a weapon with shells in it and they might hurt themselves." Innis, 446 U.S. at 294-95. Innis then "interrupted the conversation, stating that the officers should turn the car around so he could show them where the gun was located." Id. at 295. The Court held that such circumstances did not constitute "interrogation" within the meaning of Miranda v. Arizona, 384 U.S. 436 (1966). The Court reasoned:

> It is undisputed that the first prong of the definition of "interrogation" was not satisfied, for the conversation between [the patrolmen] included no express questioning of [Innis]. Rather, that conversation was, at least in form, nothing more than a dialogue between the two officers to which no response from [Innis] was invited.
>
> Moreover, it cannot be fairly concluded that [Innis] was subjected to the "functional equivalent" of questioning. It cannot be said, in short, that [the officers] should have known that their conversation was reasonably likely to elicit an incriminating response from [Innis]. There is nothing in the record to suggest that the officers were aware that [Innis] was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children. Nor is there anything in the record to suggest that the police knew that [Innis] was unusually disoriented or upset at the time of his arrest.

Innis, 446 U.S. at 302-03.

Here, Officer Blocher arrested Reed for driving while suspended, then he conducted a consensual search of Reed's vehicle. In that search, Officer Blocher found an unlabeled prescription bottle, which he placed on the roof of Reed's vehicle, showing them to Reed. At that point, Reed volunteered that the bottle contained his sister's Vicodin pills. Reed's statement was not in response to a direct question, nor does the record indicate that Officer Blocher should have known that showing the pill bottle to Reed was reasonably likely to elicit an incriminating response. In sum, Reed has not shown that his comment was the result of interrogation or its functional equivalent. Thus,

Reed's Fifth Amendment right against self-incrimination was not implicated and, as a result, we conclude that the trial court did not abuse its discretion when it admitted the challenged statement into evidence at trial.

Reed also contends that the trial court abused its discretion when it admitted into evidence his inquiry to Officer Blocher regarding whether he was going to arrest him. Specifically, when Officer Blocher concluded the vehicle search, he picked up the pill bottle and approached Reed. At that point, Reed said, "you're going to arrest me for the possession of those pills, aren't you." Transcript at 94. Again, Reed's statement was not in response to a direct question, and the record does not indicate that Officer Blocher should have known that approaching Reed with the pill bottle was reasonably likely to elicit an incriminating response from Reed. As a result, Reed has not shown that his question was the result of interrogation or its functional equivalent. Thus, again, Reed's Fifth Amendment right against self-incrimination was not implicated. Therefore, we conclude that the trial court did not abuse its discretion when it admitted that statement into evidence at trial.

Reed argues that "Officer Blocher's conduct prior to the advisement of Miranda [warnings] was investigatory in nature and reasonably perceived to elicit a response." Appellant's Brief at 9. He maintains that Officer Blocher Mirandized him only after the vehicle search had been completed and then asked him no questions. But, as noted above, the safeguards of the Miranda warnings come into play only when a suspect in custody is subjected to express questioning or its functional equivalent. Innis, 446 U.S. at 300-01. Reed does not cite to any authority in support of his argument that conducting a

search before Mirandizing a suspect in custody constitutes questioning or its functional equivalent, either generally or on the facts before us. Thus, Reed's argument must fail.

Issue Two: Effective Assistance of Counsel

Reed also contends that his trial counsel was ineffective because he did not object to Officer Blocher's testimony that Reed said the pill bottle contained Vicodin and that Reed asked whether he was going to be arrested.[4] As noted above, Reed's trial counsel initially objected to the line of questioning about what occurred leading up to Reed's statement about the contents of the pill bottle. But Reed's counsel did not preserve that issue for appeal because he did not renew the objection when Officer Blocher later testified to the self-incriminating statements discussed above. Reed apparently argues that the failure to renew the objection constitutes ineffective assistance of counsel. We cannot agree.

There is a strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment, and the burden falls on the defendant to overcome that presumption. Gibson v. State, 709 N.E.2d 11, 13 (Ind. Ct. App. 1999), trans. denied. To make a successful ineffective assistance claim, a defendant must show that: (1) his attorney's performance fell below an objective standard of reasonableness as determined by prevailing professional norms; and (2) the lack of reasonable representation prejudiced him. Mays v. State, 719 N.E.2d 1263, 1265 (Ind. Ct. App. 1999) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)), trans.

[4] In support of this argument, Reed cites in his brief to "Generally App. pp. 35, 36, 51, 42, et al." and to "App. p. 45, 46, et al." Appellant's Brief at 11-12. Citation to pages in the appendix without analysis of the supporting information on those pages and citation to "et al." do not satisfy Appellate Rule 46(A)(8)(a). Thus, Reed has waived his ineffective assistance argument. Waiver notwithstanding, we address Reed's ineffective assistance claim briefly.

denied. The failure to establish either prong will cause the claim to fail. Vermillion v. State, 719 N.E.2d 1201, 1208 (Ind. 1999).

As discussed above, the trial court did not abuse its discretion when it admitted Officer Blocher's testimony conveying self-incriminating statements Reed made during and after Officer Blocher's search of Reed's vehicle. As a result, Reed cannot show that his trial counsel's failure to object to that testimony fell below an objective standard of reasonableness. Therefore, Reed's ineffective assistance of counsel claim must fail.

Issue Three: Sentence

Reed contends that the trial court abused its discretion when it did not identify certain mitigating factors when it sentenced him for possession of a controlled substance. We engage in a four-step process when evaluating a sentence under the current "advisory" sentencing scheme. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007) ("Anglemyer I"), modified on other grounds on reh'g, 874 N.E.2d 219 (Ind. 2007) ("Anglemyer II"). First, the trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Anglemyer I, 868 N.E.2d at 491. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e., to particular aggravators or mitigators, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id. Even if a trial court abuses its discretion by not issuing a reasonably detailed sentencing statement or in its findings or non-findings of aggravators and mitigators, we may choose to review the

appropriateness of a sentence under Rule 7(B) instead of remanding to the trial court. See Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007).

Reed argues that the trial court should have found as mitigators that Reed was a productive worker, the crime was the result of circumstances unlikely to recur, and Reed was likely to respond favorably to probation. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is not only supported by the record but also that the mitigating evidence is significant. Anglemyer II, 875 N.E.2d at 220-21. Here, Reed has not cited to the record in support of his argument that the trial court should have found certain mitigators. Indeed, Reed merely states his argument in summary fashion, but he provides no analysis. As a result, Reed's argument is waived because it is not supported by cogent reasoning. See App. R. 46(A)(8)(a).

Waiver notwithstanding, Reed's argument is without merit. Reed contends that the court should have found as mitigators that he was a productive worker, that the crime was the result of circumstances unlikely to recur, and that Reed was likely to respond favorably to probation. We first observe that "an allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is not only supported by the record but also that the mitigating evidence is significant." Anglemyer II, 875 N.E.2d at 220-21. And gainful employment is not necessarily a mitigating factor. See Newsome v. State, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003), trans. denied. Thus, Reed has not shown that being a productive worker should have been identified as a significant mitigator.

Nor has he demonstrated that the trial court should have found as significant mitigators that the circumstances were unlikely to recur or that Reed would respond favorably to probation. Indeed, Reed's criminal history includes convictions for theft, robbery, driving offenses, and possession of marijuana. And Reed was arrested twice after he was released in the instant case. And although the court found that the aggravator outweighed the mitigator and sentenced Reed to 1095 days, the court suspended 550 days, half of the sentence, and ordered that Reed could serve 365 days on work release. Given the relative leniency in sentencing, especially in light of Reed's criminal history, we cannot say that Reed's sentence is inappropriate.

Affirmed.

BAILEY, J., and CRONE, J., concur.