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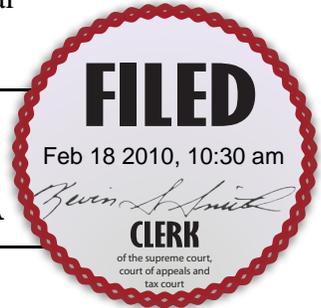
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**IN THE
COURT OF APPEALS OF INDIANA**



THOMAS ARNOLD,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A04-0907-CR-385

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa Borges, Judge
Cause No. 49G04-0809-FC-215546

February 18, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Thomas Arnold appeals his sentence for Class C felony driving while intoxicated with a prior conviction of driving while intoxicated.¹ He asserts his six-year sentence, with two years in the Department of Correction, two years work release, and two years probation, is inappropriate in light of his character and his offense. In response, the State asks us to increase Arnold's sentence. We affirm.

FACTS AND PROCEDURAL HISTORY

On September 16, 2008, Arnold was driving a motorcycle with his friend, John Bruner, on the back. They were travelling westbound on 56th Street in Indianapolis. When they came to a light where a line of traffic was stopped, Arnold decided to "pass by traffic that had been stopped at the light, on the left, at a high rate of speed, attempting to get to the front of traffic." (Tr. at 16.) Arnold lost control of the motorcycle and hit a car. Bruner ended up unconscious in the middle of the road, bleeding from his head, arms, and legs. He was taken to the hospital.

Police noticed Arnold smelled of alcohol, had slurred speech, and had red, bloodshot eyes. Arnold was also taken to the hospital. He refused a blood alcohol test, so officers obtained a warrant to collect his blood. His blood alcohol concentration was 0.28, which is three and a half times the legal limit.

The State charged Arnold with Class D felony operating a motor vehicle with a blood alcohol content of 0.08 or greater causing serious bodily injury,² Class D felony operating a motor vehicle while intoxicated causing serious bodily injury,³ Class C felony operating a motor vehicle with a blood alcohol content of 0.08 or greater causing serious

¹ Ind. Code § 9-30-5-4(a).

² Ind. Code § 9-30-5-4(a)(1)(A).

³ Ind. Code § 9-30-5-4(a)(3).

bodily injury with a prior conviction,⁴ and Class C felony operating a motor vehicle while intoxicated causing serious bodily injury with a prior conviction.

Arnold pled guilty to the Class C felony driving while intoxicated pursuant to an agreement that capped the executed portion of his sentence at four years, but left all other terms open to argument. The Court pronounced the following sentence: six years, with two years in the Department of Correction, two years on work release, and two years on probation.

DISCUSSION AND DECISION

“Sentencing is principally a discretionary function in which the trial court’s judgment should receive considerable deference.” *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). Nevertheless, we may review a sentence on appeal for appropriateness under Indiana Appellate Rule 7(B). *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh’g* 875 N.E.2d 218 (Ind. 2007). That rule provides 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.” App. R. 7(B). The appellant has the burden to show the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). In reviewing the sentence, we look to any factors appearing in the record. *Roney v. State*, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), *trans. denied* 878 N.E.2d 217 (Ind. 2007).

The sentencing range for a Class C felony is two to eight years, with an advisory sentence of four years. Ind. Code § 35-50-2-6. Arnold’s six-year sentence is thus longer

⁴ Ind. Code § 9-30-5-4(a).

than the advisory, but is not a maximum sentence. The trial court found aggravators in Arnold's criminal history, his failure to modify his behavior after prior treatment for alcohol abuse, and his blood alcohol content being much higher than the legal limit. As mitigators the court noted Arnold's acceptance of responsibility, Bruner's request for leniency, and Arnold's remorse.

Arnold now asserts:

To take an individual such as Mr. Arnold, an admitted addict who is actively participating in a treatment program, and to place him into the Department of Correction, is counter productive [sic] to the goal of rehabilitation. This is especially harsh in light of the facts that he was not actively using alcohol and the victim was specifically not asking for jail time for Mr. Arnold.

(Appellant's Br. at 10.) As Arnold has failed to rehabilitate himself when given leniency by the court following three prior convictions of driving while intoxicated, we cannot agree his incarceration "is counter productive [sic] to the goal of rehabilitation." (*Id.*)

In 1996, Arnold was convicted of Class A misdemeanor operating while intoxicated, for which he received a 365-day sentence suspended to probation. In 1997, Arnold was found guilty of Class D felony operating while intoxicated with a prior conviction; he received alternate misdemeanor sentencing as a Class A misdemeanor, a 365-day sentence with 305 days suspended and 180 days of probation. In 2003, Arnold was convicted of Class A misdemeanor operating while intoxicated; he received a 365-day sentence suspended to probation. Thus, prior to this sentencing, Arnold's total punishment for three driving while intoxicated convictions was 60 days of jail time and

two-and-a-half years of probation.⁵

Arnold was well aware of his drinking problem prior to this offense. He participated in a 12-week outpatient substance abuse treatment in 1999 and a one-year intensive outpatient program after his conviction in 2003. Substance abuse treatment was a condition of his probations beginning in 1993 and 1997.

The trial court was not obliged to believe that providing Arnold with leniency a fourth time would lead to a result different from the first three times. That Arnold has re-offended three times after receiving probation and substance abuse treatment suggests incarceration is appropriate to impress on Arnold the gravity of driving while intoxicated.

Arnold's character and offense do not suggest his sentence is inappropriate. Arnold admits he drank six to eight beers and a shot of tequila on the night of this offense. He then got onto his motorcycle to drive a friend home. Rather than wait behind traffic at a stoplight, Arnold tried to speed past on the left side of the line of traffic to get to the front of the line. Blood tests after the accident revealed his blood alcohol content was three and a half times the legal limit, which as the trial court noted, might kill a person who does not have the tolerance Arnold has developed. (*See* Tr. at 42.) Arnold drank excessively and then drove recklessly, on a motorcycle, in traffic, with a passenger he described as his friend. His sentence is not inappropriate.

The State asks that we exercise our authority under Ind. App. R. 7(B) to increase Arnold's sentence. *See McCullough v. State*, 900 N.E.2d 745, 740 (Ind. 2009) ("the

⁵ Arnold had been charged with two other offenses that were dismissed because the police witness did not appear for trial. In 1993 he was charged with Class B misdemeanor engaging in a speed contest, and in 2003 he was charged with Class B misdemeanor public intoxication. While arrests and convictions are not synonymous, we note these charges because of their similarity to the facts herein.

appellate review and revise authority derived from Article 4 of the Indiana Constitution likewise includes the power to either reduce or increase a criminal sentence on appeal”). The State believes the trial court should have sentenced Arnold to eight years, with four years in the Department of Correction and four years on supervised probation.

However, the plea agreement capped at four years the amount of executed time the trial court could order. The trial court did order four years of executed time. (*See* Tr. at 43) (“I would sentence you to a total of six years. Of that, four years would be executed, two years at the Department of Corrections followed by two years in Work Release . . . and then two years suspended and I’ll place you on probation for that two year period.”). The State urges us to order all four of those years served in the Department of Correction, but we decline to reassess the trial court’s decision where Arnold should spend his executed sentence. Neither will we exercise our authority to add two years of probation to the two already ordered by the trial court.

Affirmed.

KIRSCH, J., and DARDEN, J., concur.