ATTORNEY FOR APPELLANT:

ELIZABETH A. GABIG
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

LARRY BUNTAIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0907-CR-388
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kurt Eisgruber, Judge
Cause No. 49G01-0904-FC-40530
49G01-0904-FD-38629

March 2, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Larry Buntain appeals his six-year sentence for Class D felony theft and Class C felony burglary. We affirm.

Issue

Buntain raises three issues, which we consolidate and restate as whether his sentence is inappropriate.

Facts

On April 8, 2009, Buntain stole a saw from a man at a McDonald's in Indianapolis. Buntain was later apprehended on a bicycle carrying the saw. The State charged Buntain with Class D felony theft, and he was released on his own recognizance. On April 16, 2009, Buntain broke into Indianapolis Radiator Work and took tools from inside the building. Buntain was seen dragging a trashcan from the building and was arrested. The State charged Buntain with Class C felony burglary, Class D felony theft, and Class A misdemeanor possession of paraphernalia.

On June 4, 2009, Buntain pled guilty to Class D felony theft for the April 8, 2009 incident and Class C felony burglary for the April 16, 2009 incident, and the State agreed to dismiss the other two charges. Pursuant to the plea agreement, Buntain's sentence was capped at six years executed, and the State agreed not to file an habitual offender enhancement. The plea agreement also provided that Buntain waived his right to appeal any sentence imposed by the trial court so long as he was sentenced within the terms of the plea agreement. However, at the guilty plea and sentencing hearings, the trial court informed Buntain that he could appeal his sentence.

On June 12, 2009, the trial court sentenced Buntain to one year on the Class D felony theft conviction and five years on the Class C felony burglary conviction to be served consecutively. Buntain now appeals his sentence.

Analysis

Buntain first argues that he should be permitted to challenge his sentence on direct appeal because, notwithstanding the terms of his plea agreement, he was misinformed at the guilty plea hearing and the sentencing hearing. See Ricci v. State, 894 N.E.2d 1089, 1093-94 (Ind. Ct. App. 2008) (holding that the defendant retained his right to appeal his sentence where the trial court stated at the guilty plea hearing that it had read the plea agreement and that, according to its reading of the agreement, defendant had not surrendered the right to appeal his sentence and neither the prosecutor nor defense counsel contradicted the trial court's statement), trans. denied. The State agrees with Buntain. See Appellee's Br. p. 5 ("Defendant's waiver of his right to appeal his sentence cannot be found to be complete and knowing. Thus, Defendant's right to an appeal is preserved"). Thus, Buntain may challenge his sentence on direct appeal.

Buntain goes on to argue that, even though the State concedes he did not waive his right to appeal his sentence, we should revisit our supreme court's holding in Creech v. State, 887 N.E.2d 73 (Ind. 2008). In that case, the court held, "a defendant may waive the right to appellate review of his sentence as part of a written plea agreement." Creech, 887 N.E.2d at 75. Buntain argues, "the right to appellate review of discretionary sentences is so fundamental to the fair and functional operation of Indiana's criminal justice system that its waiver should not be allowed." Appellant's Reply Br. p. 5. Even

if we were to agree with Buntain, and we do not, we are bound by decisions of our supreme court. See Terry v. State, 857 N.E.2d 396, 409 (Ind. Ct. App. 2006), trans. denied. Thus, we may not revisit our supreme court's decision in Creech.

Regarding the merits of Buntain's sentencing claim, he asserts that his six-year sentence is inappropriate in light of the nature of the offense and the character of the offender. See Ind. Appellate Rule 7(B). Although Indiana Appellate Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. "Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id. Buntain has not met this burden.

The State agrees that Buntain's crimes were "run of the mill" but argues that his character warrants the six-year sentence. As the State points out, Buntain's criminal history includes at least twenty misdemeanor convictions, at least five felony convictions, and several other convictions in Kentucky. Buntain's probation was repeatedly revoked, he has had numerous charges dismissed, and he had nine charges pending in Kentucky at the time of the sentencing hearing. Buntain's criminal history is extensive to say the least. Moreover, several of Buntain's convictions are property offenses, indicating that he continues to repeat the same offenses and has not benefited from less severe punishments. Regardless of Buntain's health issues, his eighth-grade education, and his

guilty plea, Buntain's criminal history supports the imposition of a six-year sentence for the Class D felony theft and Class C felony burglary convictions.

Conclusion

Buntain has not established that his six-year sentence is inappropriate. We affirm.

Affirmed.

MATHIAS, J., and BROWN, J., concur.