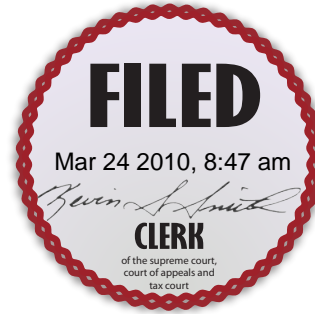


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JAMAR LAMONT LEWIS,
Appellant- Defendant,

vs.

STATE OF INDIANA,
Appellee- Plaintiff,

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No. 20A04-0908-CR-492

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0606-MR-6

March 24, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Jamar Lewis was convicted, following a guilty plea, of murder, a felony, and sentenced to sixty-three years. Lewis appeals his sentence, raising the sole issue of whether the sentence is inappropriate in light of the nature of the offense and his character. Concluding Lewis's sentence is not inappropriate, we affirm.

Facts and Procedural History¹

On April 20, 2005, Lewis and Robert Shorter went to the apartment of Franklin Stotts, Jr., intending to rob Stotts of money and illegal drugs. Lewis was armed with a handgun and under the influence of alcohol and marijuana. Lewis and Shorter kicked in the front door of Stotts's apartment and found Stotts in the living room where his two-year-old daughter was lying on the sofa. Stotts begged that no violence occur in the child's presence and began running out of the living room into the common area of the apartment building. As Stotts was doing this, Lewis fired his handgun at Stotts, and Stotts later died from multiple gunshot wounds.²

On June 7, 2006, the State charged Lewis with murder and felony murder.³ On June 25, 2007, the first day of trial, following a recess in jury selection, Lewis pled guilty to murder. The transcript reflects Lewis's guilty plea was pursuant to a plea agreement whereby the State dismissed the felony murder charge and sentencing was left to the trial court's discretion.

¹ Because Lewis pled guilty, the facts are limited to those referenced in the probable cause affidavit or adduced through the factual basis at the guilty plea hearing.

² Shorter was also armed with a gun, and it is not clear from the record whether all of the shots that hit Stotts were fired by Lewis or whether some were fired by Shorter. However, Lewis admitted he knowingly fired the fatal shot, and a forensic examination traced back to Lewis's gun a bullet recovered from Stotts's body.

³ The record reflects Shorter was also charged and convicted of murder and sentenced to sixty-three years.

The trial court held a sentencing hearing on July 26, 2007. The trial court found the following aggravating circumstances: (1) at the time of the murder, Lewis used marijuana and consumed alcohol despite being under legal age; (2) Lewis had a juvenile criminal history; (3) Lewis admitted using marijuana since age eight; (4) Lewis committed the murder to take money and illegal drugs from Stotts; (5) during the murder, Lewis carried an unlicensed handgun; (6) Lewis shot Stotts after he begged not to be shot in the presence of his child and while Stotts was attempting to flee; (7) the shooting endangered other persons present in the apartment; and (8) “as an extreme aggravator,” Lewis committed the murder in the presence of a toddler. Appellant’s Appendix at 84. The trial court found these aggravators outweighed the mitigating circumstances of (1) Lewis’s guilty plea on the first day of trial; (2) Lewis’s “potential” addiction issues; (3) Lewis’s apology to Stotts’s family; and (4) Lewis’s age of seventeen when he committed the murder. Id. at 85. The trial court sentenced Lewis to sixty-three years with the Department of Correction.

On August 6, 2009, the trial court granted Lewis’s petition for permission to file a belated notice of appeal. Lewis now appeals his sentence.

Discussion and Decision

I. Standard of Review

This court has authority to revise a sentence “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.” Ind. Appellate Rule 7(B). We recognize

“the presumptive sentence^[4] is the starting point the Legislature has selected as an appropriate sentence for the crime committed.” Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006) (footnote omitted). When examining the nature of the offense and the character of the offender, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied; cf. McMahon v. State, 856 N.E.2d 743, 750 (Ind. Ct. App. 2006) (“[I]nappropriateness review should not be limited . . . to a simple rundown of the aggravating and mitigating circumstances found by the trial court.”). Ultimately, the burden is on the defendant to demonstrate his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

II. Inappropriate Sentence

Initially, we note Lewis murdered Stotts on April 20, 2005, five days before the April 25, 2005, amendments to Indiana’s sentencing statutes. See P.L. 71-2005. We apply the sentencing scheme in effect at the time of the defendant’s offense. See Robertson v. State, 871 N.E.2d 280, 286 (Ind. 2007). Under the pre-April 25, 2005, presumptive sentencing scheme, “[a] person who commits murder shall be imprisoned for a fixed term of fifty-five (55) years, with not more than ten (10) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances.” Ind. Code § 35-50-2-3(a) (2004). The trial court, applying this rule, enhanced Lewis’s presumptive sentence by eight years for aggravating circumstances, with the result that his sixty-three year sentence is two years less than the maximum he could have received.

⁴ As noted below, the pre-April 25, 2005, presumptive sentencing scheme applies to Lewis’s offense.

A. Nature of the Offense

The nature of Lewis's crime is particularly egregious. Lewis attempts to characterize the murder as "committed during a 'simple' robbery that went wrong." Brief of Appellant at 9. We cannot agree. Lewis participated in a home invasion burglary, he shot a man who was apparently unarmed and fleeing in order to protect his family, and Lewis committed the murder in the presence of a small child. These facts make the nature of Lewis's offense worse than a typical murder. See Ind. Code § 35-38-1-7.1(4) (aggravating circumstance that defendant knowingly commits a crime of violence in the presence of a child who is not the crime's victim); Houser v. State, 823 N.E.2d 693, 700 (Ind. 2005) (aggravating circumstance that murder was committed during a residential burglary was "entitled to weight in the high range"); Rawson v. State, 865 N.E.2d 1049, 1059 (Ind. Ct. App. 2007) (noting it was relevant to nature of offense under Rule 7(B) that defendant shot at victim who was running away), trans. denied. As a result, Lewis's enhanced sentence is not inappropriate based on the nature of his offense.

B. Character of the Offender

The bulk of Lewis's argument that his sentence is inappropriate focuses on factors related to his character. Lewis asks us to consider his guilty plea and acceptance of responsibility, citing Scheckel v. State, 655 N.E.2d 506, 511 (Ind. 1996), in which our supreme court noted "a defendant who willingly enters a plea of guilty has extended a substantial benefit to the state and deserves to have a substantial benefit extended to him in return." When the defendant obtains a substantial benefit from a plea agreement, however, the plea may be less of a mitigator. See Sensback v. State, 720 N.E.2d 1160,

1165 (Ind. 1999). Lewis did not obtain a substantial benefit from his plea agreement. At the same time, the benefit the State obtained from Lewis's plea was somewhat lessened because Lewis did not plead guilty until the morning of trial, and thus, the State was not spared the full expense of trial preparation. See Payne v. State, 838 N.E.2d 503, 509 (Ind. Ct. App. 2005) (noting defendant's guilty plea entitled to minimal weight in part because plea entered after jury was empanelled did not benefit State in terms of expense and preparation), trans. denied.

A defendant's remorse also weighs in his favor in assessing his character and affects the weight given to a guilty plea. See id. Lewis apologized to Stotts's family at the sentencing hearing, and the trial court apparently found his apology to be genuine. However, certain of Lewis's remarks following his guilty plea failed to express full appreciation of the wrongfulness of his actions. See Appellant's App. at 118 (during interview for pre-sentence investigation report, explaining the murder by stating "[Stotts] ran, that's the only reason on why somebody will fire a shot. If he hadn't ran, nobody would have ever fired a shot."); Transcript at 113-14 (stating at sentencing hearing, "I never even no robber. I was going off stupidity listen to somebody else . . ."). For these reasons, Lewis's guilty plea and expression of remorse weigh in his favor in assessing his character, but neither is entitled to great weight.

Lewis also asks us to consider his youthful age of seventeen when he committed the murder. Our supreme court has found such youth to be a significant factor in similar cases. See, e.g., Widener v. State, 659 N.E.2d 529, 534 (Ind. 1995). However, our supreme court has also noted an age of seventeen does not represent the same degree of

immaturity or diminished culpability, or call for the same treatment, as an age less than sixteen. See Carter v. State, 711 N.E.2d 835, 842-43 (Ind. 1999). Lewis does not argue his offense was the product of youthful inexperience or naivety – as might have been the case if Shorter had been the only shooter and Lewis had neither expected nor intended anyone to be shot. To the contrary, Lewis carried a handgun to aid in the burglary and he shot Stotts without provocation or instigation. Under these circumstances, Lewis’s age weighs somewhat, but not overwhelmingly, in his favor.

Further, our assessment of Lewis’s character cannot overlook his pattern of juvenile delinquency and other disregard for the law. Lewis’s juvenile record consists of referrals for disorderly conduct, being a runaway, and possession of marijuana, as well as an adjudication for possession with intent to deliver marijuana. Further, Lewis admitted using marijuana since childhood, and he killed Stotts as part of an attempt to obtain illegal drugs. For these reasons, although we do not regard Lewis’s character as among the worst of offenders, we also cannot say his character renders an enhanced sentence of sixty-three years inappropriate given the grievous nature of his offense. Lewis bears the burden to persuade this court that his sentence is inappropriate, see Childress, 848 N.E.2d at 1080, and he has failed to do so.

Conclusion

Lewis’s sentence of sixty-three years for murder is not inappropriate in light of the nature of the offense and his character, and is therefore affirmed.

Affirmed.

BAKER, C.J., and BAILEY, J., concur.