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COURT OF APPEALS OF INDIANA

CHARLES A. BOSWELL, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0910-CR-455
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-0611-FA-67
Cause No. 45G02-0702-FB-13

April 21, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Charles A. Boswell, Jr. appeals the twenty-year sentence that was imposed after he pleaded guilty to Aggravated Battery,[1] a class B felony, and Attempted Residential Entry,[2] a class D felony. Specifically, Boswell argues that the trial court abused its discretion by failing to consider his mental illness and substance abuse as mitigating factors. Additionally, Boswell requests that this court revise his sentence pursuant to Indiana Appellate Rule 7(B), contending that his sentence is inappropriate in light of the nature of the offenses and his character. Finding that the trial court did not abuse its discretion and declining to revise the sentence, we affirm the judgment of the trial court.

FACTS

In the early morning hours of November 22, 2006, Boswell pounded on the door of Anthony Udowski's condominium in Munster. Boswell was under the influence of cocaine and appeared to be in need of assistance because he was shivering and wearing only a T-shirt. When Udowski asked if he could assist Boswell, Bosell replied, "are you ready to die?" Tr. p. 94. When Udowski turned away from the door, Boswell attacked him from behind, forcing him to the ground. Boswell repeatedly stomped on Udowski's head and upper body. When the police arrived, Boswell was still stomping on Udowski's head. Udowski was eighty-three years old at the time of the attack.

[1] Ind. Code § 35-42-2-1.5.

[2] Ind. Code § 35-43-2-1.5; Ind. Code § 35-41-5-1.

After placing Boswell in handcuffs, the police went to Udowski's apartment, where his daughter, Nancy Gustaitis, and his son-in-law, Dr. John Gustaitis, were staying while in the process of moving to a new home. The police would not allow Nancy to see her father, but Dr. Gustaitis was permitted to examine Udowski to see if he could provide medical assistance. Dr. Gustaitis testified that he "couldn't believe what [he] had seen," despite having served in the Vietnam War and witnessing severe injuries. Id. at 103. Dr. Gustaitis stated that he had difficulty recognizing his father-in-law.

Perhaps the most serious physical injury that Udowski suffered was to his only eye. Udowski is a World War II veteran and lost one eye during the Battle of Guadalcanal. Unfortunately, Udowski's remaining eye suffered the brunt of Boswell's attack, and his vision was severely compromised. Udowski's physicians did not perform surgery because they feared that he would lose vision in his only remaining eye.

As the result of the attack, Udowski also suffers from post-traumatic stress syndrome involving paranoid delusions. Udowski requires care twenty-four hours a day and lives in a controlled access home.

On November 22, 2006, the State charged Boswell with attempted murder, a class A felony; aggravated battery, a class B felony; battery, a class C felony; and two counts of intimidation, both class D felonies, under Cause Number 45G02-0611-FA-00067 (FA-67). On November 24, 2006, Boswell was released on a $7,000 bond.

Less than three months later, on February 10, 2007, Boswell attempted to enter a residence belonging to Edward Strbjak. Strbjak confronted Boswell, telling him to leave

his property. Nevertheless, Boswell continued to push on the door handle but was unable to gain entry and eventually left the property in his white van. Shortly thereafter, Officer Joseph Pacheco, of the Munster Police Department, noticed the white van and initiated a stop. Boswell consented to a search of his vehicle, which revealed cocaine. On February 12, 2007, the State charged Boswell with possession of cocaine, a class B felony, and trespass, a class A misdemeanor, under Cause Number 45G02-0702-FB-00013 (FB-13).

On June 19, 2009, the State amended the information in FB-13 by adding attempted residential entry, a class D felony. On the same day, Boswell entered into a plea agreement in which he agreed to plead guilty to class B felony aggravated battery in FA-67 and class D felony attempted residential entry in FB-13. In exchange for Boswell's guilty plea, the State dismissed the remaining charges in FA-67 and FB-13.

On August 31, 2009, the trial court held a sentencing hearing. The trial court concluded that the aggravating circumstances were that the harm to Udowski was significant and greater than what was necessary to prove the elements of the offense, that Boswell had had "extensive contact with the criminal justice system," including being released on bond in FA-67 when he committed the offense in FB-13, that Udowski was eighty-three years old at the time of the attack, and that the beating was "unprovoked and incredibly vicious." Appellant's App. p. 142-143.

In mitigation, the trial court observed that Boswell had pleaded guilty but declined to give this significant weight because "the evidence strongly favored guilty verdicts had these cases gone to trial." Id. at 143. Additionally, the trial court noted that Boswell's

drug addiction was a contributing factor in his criminal conduct but again declined to give this factor significant weight in light of the fact that Boswell had not sought treatment even though he had the monetary means. Finally, the trial court found Boswell's remorse for his crimes to be genuine.

After concluding that the aggravating factors far outweighed the mitigating factors, the trial court sentenced Boswell to consecutive terms of eighteen years for aggravated battery and two years for attempted residential entry, for a total executed sentence of twenty years imprisonment. Boswell now appeals.[3]

DISCUSSION AND DECISION

I. Sentencing—Abuse of Discretion

Boswell argues that the trial court abused its discretion by rejecting properly presented mitigating circumstances, namely, his history of mental illness and substance abuse. Initially, we observe that sentencing decisions rest within the trial court's sound discretion and are reviewed on appeal only for an abuse of that discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (2007).

Trial courts are required to enter sentencing statements whenever imposing a sentence for a felony offense. 868 N.E.2d at 490. The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. Id. If the recitation includes the finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating

[3] FA-67 and FB-13 were consolidated for the purposes of appeal.

factors and explain why each circumstance has been determined to be mitigating or aggravating. Id. A trial court may abuse its discretion by entering a sentencing statement that includes reasons for imposing a sentence not supported by the record, omits reasons clearly supported by the record, or includes reasons that are improper as a matter of law. Id. at 490-91.

A. Mental Illness

Boswell maintains that the trial court abused its discretion by failing to consider his history of mental illness as a mitigating factor. In support of this assertion, Boswell directs us to Williams v. State, 840 N.E.2d 433 (Ind. Ct. App. 2006).

In Williams, this court stated that "[d]ocumented mental illness, especially if it has some connection to the crime involved, must be given some, and sometimes considerable weight in mitigation." Id. at 439. After noting that two mental health professionals had determined that Williams suffered from mental illness, this court concluded that the trial court "improperly failed to consider Williams's . . . documented mental illness as [a] mitigating circumstance[]." Id.

In the instant case, Dr. Gary Durak, a licensed clinical psychologist who examined Boswell, testified that Boswell "had no history of any kind of previous mental disorder . . . [and] no history of ever having any personal in-patient psychiatric hospitalizations or out-patient counseling other than the marital therapy." Tr. p. 36, 50-51. Additionally, Dr. Durak noted that there was "a possibility of an underlying bipolar disorder." Id. at 51 (emphasis added). Under these circumstances, we cannot say that Boswell's history of

mental illness was clearly supported by the record. See Anglemyer, 868 N.E.2d at 490 (stating that a trial court can abuse its discretion by issuing a sentencing statement that omits reasons for imposing a sentence that are clearly supported by the record). Moreover, Boswell failed to establish a nexus between his possible bipolar disorder and the offenses to which he pleaded guilty. Therefore, we cannot say that the trial court abused its discretion when it did not consider Boswell's history of mental illness as a mitigating circumstance.

B. Substance Abuse

Boswell contends that the trial court abused its discretion by failing to give mitigating weight to his substance abuse. This argument is somewhat perplexing, inasmuch as the trial court concluded that Boswell's "drug addiction was a contributing factor in the defendant's criminal conduct in the causes at bar. The Court assigns low mitigating weight to this factor noting that this defendant had the monetary means to get treatment for the drug addiction and did no[t] do so." Appellant's App. p. 56. Thus, the trial court did give some mitigating weight, albeit low mitigating weight, to Boswell's substance abuse. Furthermore, if Boswell intended to argue that the trial court should have given more mitigating weight to his substance abuse, this argument is no longer available on appeal. See Anglemyer, 868 N.E.2d at 491 (recognizing that "[b]ecause the trial court no longer has any obligation to 'weigh' aggravating and mitigating factors against each other when imposing a sentence, . . . a trial court can not now be said to have abused its discretion in failing to 'properly weigh' such factors"). Accordingly, this

argument must fail.

II. Inappropriate Sentence

In a related argument, Boswell contends that his twenty-year sentence is inappropriate in light of the nature of the offenses and his character pursuant to Indiana Appellate Rule 7(B). When reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

As for the nature of the offenses, Boswell attacked an eighty-three-year-old man and stomped on his head repeatedly. Indeed, Boswell was still stomping on Udowski's head when the police arrived. The attack was unprovoked; to the contrary, Udowski opened his home to Boswell because he appeared to be in distress.

Moreover, Udowski's injuries were so severe that his son-in-law did not recognize him. Additionally, Udowski's vision in his only eye is severely compromised. Perhaps even worse, Udowski, who used to live independently prior to the attack, now suffers from post-traumatic stress syndrome involving paranoid delusions and requires care at all times. The nature of this offense was brutal to say the least.

As for Boswell's character, he has a significant criminal history, including prior convictions for reckless driving, reckless conduct, and battery. Additionally, Boswell had been released on bond in FA-67 when he committed the offense in FB-13. Furthermore, Boswell has an extensive history of substance abuse, including a self-

professed daily cocaine habit and was under the influence of cocaine when he attacked Udowski. And although Boswell had the financial means to seek treatment, he failed to do so. Thus, in light of the nature of the offenses and Boswell's character, he has failed to persuade this court that his twenty-year sentence is inappropriate.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and KIRSCH, J., concur.