ATTORNEY FOR APPELLANT:

VICTORIA L. BAILEY
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

WILLIE Q. POINDEXTER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0910-CR-991
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven J. Rubick, Magistrate
Cause No. 49G01-0204-PC-118786
The Honorable Tanya Walton Pratt, Judge
The Honorable Heather S. Welch, Commissioner
Cause No. 49G01-0201-FB-118786[1]

May 13, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

[1] The parties have designated this appeal as coming from the post-conviction court which granted Poindexter relief. We, however, have included the judges and cause number of the sentence from which Poindexter appeals following the grant of relief.

VAIDIK, Judge

Case Summary

Willie Q. Poindexter appeals his forty-one-year sentence for Class B felony unlawful possession of a firearm by a serious violent felon, Class D felony battery, and his habitual offender finding. Specifically, he contends that his sentence is inappropriate and should be reduced to twenty-six years. Although the nature of the offenses is not particularly egregious, given Poindexter's significant criminal record and the multiple chances he has been given, we affirm his forty-one-year sentence.

Facts and Procedural History

Upon returning home on the evening of April 27, 2002, Trisha Poindexter was met at her apartment door by her eleven-year-old daughter J.M. J.M. was crying because Poindexter, Trisha's husband and J.M.'s stepfather, had hit her as a result of a letter she had allegedly written. Poindexter struck J.M. about three additional times that evening. At some point, Poindexter told Trisha that he wanted to go to J.M.'s father's house because he was going to show J.M. "that her father was a bitch" and that "he was going to shoot him." Tr. p. 40. Trisha did not oppose Poindexter's plan because she "was scared of [him]." *Id.* Trisha heard Poindexter say something about a gun. Poindexter, Trisha, and Poindexter's nephew went to J.M.'s father's house, but he was not there.

Trisha went to bed when they arrived home. Poindexter woke up Trisha around 1 or 2 a.m. and told her that he had gone to the ATM and withdrawn all her money because he felt like she had lied to him about having money. Poindexter then went on a rant about not giving Trisha back her money and about not falling asleep because he "knew he

was going to wake up with the police in his face." *Id.* at 44-45. Poindexter also said that if "he woke up with the police . . . knocking on the door, then he was going to start shooting." *Id.* at 45. When Poindexter fell asleep, Trisha called 911.

Several Marion County Sheriff's Deputies responded to the call. Poindexter was still sleeping when they arrived, so Trisha met the officers outside. Trisha told the officers that Poindexter had battered J.M., had a gun on his person, and had threatened to shoot the police if they showed up. The officers drew their guns and approached Poindexter, who was still sleeping on the couch. One of the officers observed a gun in Poindexter's sweatshirt pocket and removed it without waking him up. The gun was loaded. The officers then grabbed Poindexter and took him down to the ground, handcuffed him, and placed him under arrest.

The State charged Poindexter with Class B felony unlawful possession of a firearm by a serious violent felon, two counts of Class B felony criminal confinement (both involving Trisha), Class C felony intimidation (Trisha), and Class D felony battery (J.M.). The State later added a habitual offender count. In a bench trial, the trial court found Poindexter guilty of Class B felony unlawful possession of a firearm by a serious violent felon, Ind. Code § 35-47-4-5, and Class D felony battery, Ind. Code § 35-42-2-1, and acquitted him of the other charges. The court then found that Poindexter was a habitual offender based on the following prior unrelated offenses: Class D felony dealing in a sawed-off shotgun (1994) and Class C felony auto theft (1997). Finding several aggravators, including Poindexter's extensive criminal history, and no mitigators, the court sentenced Poindexter to eleven years for unlawful possession of a firearm by a

serious violent felon and enhanced that by thirty years for his habitual offender finding. The court then sentenced Poindexter to three years for battery, to be served concurrent with his unlawful possession of a firearm sentence, for an aggregate term of forty-one years. Appellant's App. p. 25.

On direct appeal, Poindexter raised the following issue: whether the evidence was sufficient to support his conviction for unlawful possession of a firearm by a serious violent felon. We affirmed. *Poindexter v. State*, No. 49A04-0212-CR-593 (Ind. Ct. App. Aug. 19, 2003). In February 2006 Poindexter filed a *pro se* petition for post-conviction relief, which was later amended by counsel. In September 2009 the post-conviction court granted Poindexter relief on grounds that Indiana Appellate Rule 7(B) had just been amended at the time of Poindexter's direct appeal but his appellate counsel was not aware of the amendment. As such, the post-conviction court found that inappropriate sentence was a much stronger issue than sufficiency of the evidence and concluded that Poindexter's sentence should have been reviewed on direct appeal. Poindexter now directly appeals his sentence.

Discussion and Decision

Poindexter contends that his forty-one-year sentence for Class B felony unlawful possession of a firearm by a serious violent felon, Class D felony battery, and his habitual offender finding is inappropriate and should be reduced to twenty-six years. It is well settled that the sentencing statute in effect at the time the crime is committed governs the sentence for the crime. *Gutermuth v. State*, 868 N.E.2d 427, 431 n.4 (Ind. 2007). At the time of the crimes in this case, the legislature had not yet amended Indiana's sentencing

statute, and consequently, the presumptive sentencing scheme applies. Specifically, in 2002, Indiana Code section 35-50-2-5 provided that "A person who commits a Class B felony shall be imprisoned for a fixed term of ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances." Ind. Code Ann. § 35-50-2-5 (West 2004). In addition, Indiana Code section 35-50-2-7 provided that "A person who commits a Class D felony shall be imprisoned for a fixed term of one and one-half (1 1/2) years, with not more than one and one-half (1 1/2) years added for aggravating circumstances or not more than one (1) year subtracted for mitigating circumstances." Ind. Code Ann. § 35-50-2-7 (West 2004). Finally, Indiana Code section 35-50-2-8(h) provided that the trial court shall sentence a person found to be a habitual offender to an additional fixed term that is not less than the presumptive sentence for the underlying offense nor more than three times the presumptive sentence for the underlying offense. However, the additional sentence may not exceed thirty years. Ind. Code Ann. § 35-50-2-8(h) (West 2004). Here, the trial court sentenced Poindexter to eleven years for his Class B felony, three years for his Class D felony, and thirty years for his habitual offender enhancement.

Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a court "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." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer v. State*, 868 N.E.2d 482,

491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007)). The defendant has the burden of persuading us that his or her sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

Poindexter asserts only that his thirty-year habitual offender enhancement is inappropriate and asks us to slice it in half to fifteen years. He "has no quarrel" with his eleven- or three-year sentences. Appellant's Br. p. 8. As our Supreme Court has instructed:

> Ultimately the length of the aggregate sentence and how it is to be served are the issues that matter. In the vast majority of cases, whether these are derived from multiple or single counts, involve maximum or minimum sentences, and are concurrent or consecutive is of far less significance than the aggregate term of years. And whether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case.

Cardwell v. State, 895 N.E.2d 1219, 1224 (Ind. 2008). We thus consider the appropriateness of Poindexter's aggregate sentence of forty-one years and decline to look at the habitual offender enhancement in isolation.

As for the nature of the offenses, Poindexter battered his stepdaughter and possessed a loaded gun, which he was prohibited from possessing because he was considered a serious violent felon as a result of a prior conviction for escape.[2] Though Poindexter was asleep with his loaded gun when the police arrived, he had threatened to use the gun on several people and presented a very real threat to both his family and the

[2] Poindexter argues that the facts underlying his escape conviction are mitigating because they did not involve "actual violence." Appellant's Br. p. 9. However, the facts underlying this conviction are simply not relevant for our purposes here. Because our legislature has delineated escape as a serious violent felony, *see* I.C. § 35-47-4-5, Poindexter qualifies as a serious violent felon by virtue of that conviction.

officers. *See* Tr. p. 210 (defense counsel's concession at sentencing hearing, "I'm not saying that this was not a severe crime, Your Honor, it was . . . ."). *Cf. Frye v. State*, 837 N.E.2d 1012, 1014 (Ind. 2005) (reducing defendant's sentence, including habitual offender enhancement, from 40 to 25 years in part because defendant was not armed and "there was no violence."), *reh'g denied*.

As for the character of the offender, Poindexter concedes on appeal that his criminal history is "extensive." Appellant's Br. p. 10. As the trial court summarized at Poindexter's 2002 sentencing hearing:

> [Y]ou have a conviction on April 30, 1990, for resisting law enforcement, as an A Misdemeanor; you have a conviction on February 13, 1991, for disorderly conduct, as a B Misdemeanor; you have a conviction on September 12, 1991, for [th]eft, as a D Felony; a conviction on August 15, 1991, for auto theft as a D Felony and resisting law enforcement as a[n] A Misdemeanor[.]
>
> A conviction on . . . August 28, 1991, for criminal recklessness as a D Felony and battery as a Class B Misdemeanor; a conviction on August 8, 1991, for escape [as a Class C felony]; a conviction on January 20, 1994, for dealing in a saw[ed]-off shotgun, a Class D felony; a conviction on August 5, 1997, for auto theft, a C Felony and auto theft as a D Felony[.]
>
> You have a conviction on November 4, 1999, for battery as a[n] A misdemeanor; you have a conviction on April 30, 2001, for driving while suspended and criminal trespass, both A Misdemeanors; a conviction on November 7, 2001, for domestic battery as an A misdemeanor.

Tr. p. 216-17 (formatting of dates altered); *see also* PSI p. 3-7. The trial court highlighted that Poindexter had been arrested twenty-six times in thirteen years. Tr. p. 218. In addition, the court noted that Poindexter had been on probation at least four times and had his probation revoked on most, if not all, of those occasions. In fact, Poindexter was on probation for the domestic battery of Trisha at the time of the offenses in this case. Poindexter also had the benefit of parole twice, but he had his parole revoked once

and was sent back to the Department of Correction. Poindexter also has an extensive history of both alcohol and drug use. From this evidence, it is abundantly clear that Poindexter is a career criminal and that prior imprisonment has not deterred his behavior. *Cf. Frye*, 837 N.E.2d at 1015 (reducing defendant's sentence, including habitual offender enhancement, from 40 to 25 years in part because "we cannot conclude that [his prior convictions] even when aggregated demonstrate a character of such recalcitrance or depravity to justify a sentence of 40 years.").

Despite Poindexter's "absolutely horrendous record," Tr. p. 210 (defense counsel's concession at sentencing hearing), and the non-deterrence of the previous efforts of the criminal justice system, Poindexter asserts the following evidence contained in his Presentence Investigation Report weighs in favor of reducing his forty-one-year sentence to twenty-six years: (1) Poindexter was a member of a gang when he was younger but left the gang when he was sixteen or seventeen years old; (2) Poindexter's sister was "murdered" when she was fifteen years old, PSI p. 10; (3) Poindexter's mother abused him as a child; (4) Poindexter was in a car accident when he was seventeen years old and suffered head trauma; and (5) Poindexter was diagnosed in 2000 with paranoid schizophrenia and was prescribed medication, and he attempted suicide during one of his stints of incarceration. Although this evidence is indeed contained in the PSI, it was neither argued to the sentencing judge nor otherwise developed in the record below. Even taking this information at face value, it is outweighed by Poindexter's significant criminal history, his extensive alcohol and drug use, and the fact that all prior efforts at

rehabilitation have failed. Poindexter has failed to persuade us that his forty-one-year sentence is inappropriate.[3]

Affirmed.

NAJAM, J., and BROWN, J., concur.

[3] We decline the State's invitation to revise upward Poindexter's unlawful possession of a firearm by a serious violent felon conviction from eleven to fifteen years pursuant to *McCullough v. State*, 900 N.E.2d 745 (Ind. 2009).