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IN THE COURT OF APPEALS OF INDIANA

DAVID MICHAEL HARRIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A04-0909-CR-528
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0705-FC-28

June 2, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, David Michael Harris (Harris), appeals his sentence for forgery, a Class C felony, Ind. Code § 35-43-5-2(b); identity deception, a Class D felony, I.C. § 35-43-5-3.5; failure to register as a convicted sex offender, a Class D felony, I.C. § 11-8-8-17, and his adjudication as an habitual offender, I.C. § 35-50-2-8.

We affirm.

ISSUES

Harris raises two issues on appeal, which we restate as the following three issues:

(1) Whether the trial court abused its discretion when it sentenced Harris without providing a sentencing statement;

(2) Whether the trial court abused its discretion by ordering him to serve his sentences consecutively; and

(3) Whether his sentence was inappropriate in light of the nature of his offense and his character.

FACTS AND PROCEDURAL HISTORY

On March 1, 2007, a police officer in Tippecanoe County, received information that Harris, who was wanted on a warrant for a parole violation, was living at North 25th Street in Lafayette, Indiana. The officer learned that Harris' address on the Indiana Sex Offender Registry was incorrect; it listed that he was living at an Indianapolis, Indiana, address. The officer further learned that Harris had assumed the identity of Richard Blair (Blair), who had been deceased for several years. The officer found several items in Harris' residence with

Blair's name but with Harris' information and picture, including pay slips, an Indiana identification and driver's license cards, a social security card, and proof that he had purchased a car in Blair's name.

On May 17, 2007, the State filed an Information, charging Harris with Count I, forgery, a Class C felony, Ind. Code § 35-43-5-2(b); Count II, application fraud, a Class D felony, I.C. § 35-43-5-2(c); Counts III and IV, identity deception, Class D felonies, I.C. § 35-43-5-3.5; Count V, forgery, a Class C felony, I.C. § 35-43-5-2(b); Count VI, identify deception, I.C. § 35-43-5-3.5; Count VII, failure to register as a sex offender, a Class D felony, I.C. § 11-8-8-17; and Count VIII, failure to possess a valid driver's license, a Class A misdemeanor, I.C. § 11-8-8-15. The State also filed an habitual offender enhancement, I.C. § 35-50-2-8. Following a bench trial, Harris was found guilty on all Counts.

On August 11, 2008, Harris was sentenced to five years on Count I; two years each on Counts II, III, and IV; six years on Count V; two years on Count VI; two and one-half years on Count VII; and one year on Count VIII. The trial court also found Harris to be an habitual offender and enhanced Count I by eleven years. The trial court ordered Counts I, II, IV, V, VII, and VIII to be served consecutively for an aggregate sentence of 29 and one-half years.

Harris appealed his sentence for five reasons, three of which we found dispositive. First, he challenged Counts II and VIII, arguing that there was insufficient evidence to convict him of those crimes. Second, he argued that his two forgery Counts were for a single criminal episode, and that based on I.C. § 35-50-2-5(c), the aggregate of the consecutive

sentences could not exceed ten years. Finally, he claimed that the trial court abused its discretion by using certain aggravating circumstances.

On July 9, 2009, this court issued a memorandum decision in which it ordered his convictions for failure to possess a valid driver's license and application fraud be vacated and set aside based on insufficient evidence. *See Harris v. State*, Case No. 79A04-0809-CR-546, slip op. at 2 (Ind. Ct. App. July 9, 2009). Additionally, we remanded for resentencing on the forgery counts, holding that the offenses were part of the same criminal episode and, thus, the aggregate eleven-year sentence was excessive by one year pursuant to I.C. § 35-50-1-2(c). Finally, this court concluded that the trial court had abused its discretion by using improper aggravating circumstances, specifically: (1) considering Harris' LSI-R score[1] and (2) treating Harris' criminal history and the fact that "prior attempts at rehabilitation [had] been unsuccessful" as two separate aggravating circumstances, since the latter is derivative of criminal history and cannot be used separately. *See id* at 4. As a result, this court remanded for resentencing on all Counts.[2] *See id.*

On August 31, 2009, the trial court held a rehearing and sentenced Harris to four years on Count I; one and one-half years on Count III; two years on Count IV; two and one-half years on Count V; one and one-half years on Count VI; two and a half years on Count VII;

[1] A LSI-R (Level of Service Inventory) is a "standardized actuarial instrument containing some fifty-four items producing a summary risk score to reflect the propensity to commit future criminal acts." *Harris*, Case No. 79A04-0809-CR-54, slip op. at 1, 4.

[2] Harris also argued in his first appeal that his sentence was inappropriate given the nature of the offense and the character of the offender. However, in light of our decision to remand the case, we did not address that argument.

and eleven years for the habitual offender enhancement, all consecutive for an aggregate sentence of 26 and one-half years.

Harris now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

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). A sentence that is within the statutory range is subject to review only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." *Id*.

II. *Amended Sentencing Order*

Harris contends that the trial court abused its discretion on remand by failing to enter a sentencing statement that set forth the reasons or circumstances justifying his sentence. The State argues that the trial court was not required to provide another explanation of Harris' sentence because the court could rely on mitigating and aggravating circumstances from the original sentencing hearing and Order.

A trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." *Anglemyer*, 868 N.E.2d at 491. If a trial court finds aggravating or mitigating circumstances, a sentencing statement must identify all the significant aggravating or mitigating circumstances and explain the basis for

their determination. *Id*. at 490. When a trial court "fails to enter a sentencing statement at all," or enters "a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reason," or enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration," or considers reasons that "are improper as a matter of law," it has abused its discretion. *Id*. at 490-491.

However, if the trial court has abused its discretion, we will remand for resentencing only "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." *Id.* at 491. Additionally, the trial court is under no obligation to weigh aggravating or mitigating factors when imposing a sentence. *Id*.

We note that "[a] sentencing statement serves two purposes: (1) it guards against the imposition of arbitrary or capricious sentences by ensuring that the sentencing judge will consider only proper factors; and (2) it facilitates appellate review of the sentence." *Shaw v. State*, 771 N.E.2d 85, 88 (Ind. Ct. App. 2002). When reviewing a sentencing statement this court is not limited to the written sentencing order but may examine the record as a whole to determine that the trial court made a sufficient statement of its reasons for selecting the sentence imposed. *Id.*

This case was remanded for resentencing because two Counts were vacated, his combined sentence for his forgery convictions was excessive pursuant to I.C. § 35-50-1-2(c), and the trial court had used improper aggravating circumstances. "Where a case has been

remanded for resentencing, 'a trial court's responsibility in that circumstance is to produce a new sentencing order that responds to the concerns' raised by our court." *Shaw*, 771 N.E.2d at 89 (citing *O'Connell v. State*, 742 N.E.2d 943, 951 (Ind. 2001)). In responding to an appellate court's concerns, on remand a trial court may (1) issue a new sentencing order without taking any further action; (2) order additional briefing on the sentencing issue and issue a new order; or (3) order a new sentencing hearing at which the court may allow additional factual submissions and issue a new order based on the presentation of the parties. *Shaw*, 771 N.E.2d at n3.

During the resentencing hearing, Harris offered into evidence a transcript of the original sentencing hearing, without any objection. He stated:

> []Since this is a re-sentencing to try and simplify matters just to make—rather then [sic] repeating things. I've made a copy of the original sentencing hearing . . . . Which would be marked as defendant's exhibit A and introduced as evidence so we don't have to repeat some of the things that took place then.

(Transcript p. 1). No other evidence was presented by either side. The trial court then allowed the parties to reargue their respective positions. Harris acknowledged that his criminal history was still a valid aggravating circumstance, as was found in the original sentencing hearing and by this court, and also reiterated the mitigating circumstances that the trial court initially found, *i.e.*, that he had expressed remorse for his crime and there was evidence of mental health issues. He also argued that the trial court on remand should consider the fact that the victim did not suffer any financial loss or physical harm. Finally, he

asked the trial court to order the advisory sentences on each of the felony counts and for those sentences to run concurrent.

The State recommended that Harris receive five years each for the Class C felonies. Additionally, the State recommended the advisory sentence for two of the four Class D felonies. However, on Count VI, identity deception, the State recommended two years, or one-half year above the advisory sentence for a Class D felony. With respect to Count VII, failure to register as a sex offender, the State made the following recommendation:

> Count seven is failure to register. And that's a very important crime and it deserves an aggravated sentence of two and a half years. That being the case because of his extremely aggravated criminal history. History—standing criminal history that [] started out back in nineteen ninety with four separate child molesting victims. All boys, all very young ages[,] that he repeatedly molested over and over even after he was tried and pled guilty to his first set of charges he molested more boys . . . and so the fact that he failed to register and came up with this scheme to avoid having to register is the reason why that should be aggravated at two and a half years . . . . And then [] to say that nobody was hurt because of these forgeries[,] [w]ell the community was hurt. Here's a man that we need to know about. I have been tracking him since nineteen ninety and in his original sentencing hearing, [his probation officer] said of all the hundreds and hundreds of child molesters, and sex offenders that he's supervised, [Harris] is in the top given as far as dangerousness and as far as likely to repeat and we need to know about him. We need him on the registry and we need to know where he is at all times and that's why this crime was so aggravated.

(Tr. pp. 7-8). The State also argued that the sentences should run consecutive. The trial court issued the following amended sentencing Order on remand:

> []The [c]ourt sentences [Harris], [] on Count One to four years[,] Count Three to one and one half years, Count Four to two years, Count Five to four years, Count Six to one and one half years, Count Seven to two and one half years *for the reasons underlined by the prosecutor* and Count Nine the Habitual Offender enhancement eleven years. All to run consecutively for a total of twenty-six and one half years . . . .

(Appellant's App. p. 64) (emphasis added). We first note that in Harris' first appeal, he did not argue that the trial court's sentencing statement was insufficient; it was remanded on the grounds that the trial court used improper aggravating circumstances. Although the sentencing statement on remand does not specifically restate the aggravating and mitigating circumstances, each party raised these aggravators and mitigators while arguing their positions. This court can engage in review of the entire record to determine that the trial court made a sufficient statement of its reasons for selecting the sentence imposed. *See Shaw*, 771 N.E.2d at 89. In conjunction with the original sentencing hearing that was introduced into evidence by Harris, we know from the record that the State argued that Harris' criminal history should be regarded as a considerable aggravating circumstance. Based on this information, we can ascertain that the trial court opted to assign more weight to Harris' criminal history than to his mitigating circumstances. While we acknowledge that the trial court's sentencing statement on remand could have been more detailed in order to assist this court, taken in conjunction with the original sentencing hearing and the record as a whole, we hold that the trial court provided a sufficient sentencing Order and did not abuse its discretion.

III. *Consecutive Sentence*

Next, Harris argues that the trial court failed to articulate its reasons for imposing consecutive sentences. The decision to impose consecutive or concurrent sentences is within the trial court's sound discretion and is reviewed only for an abuse of discretion. *Williams v.*

State, 891 N.E.2d 621, 630 (Ind. Ct. App. 2008). Although a trial court is required to state its reasons for imposing consecutive sentences, it may rely on the same reasons to impose a maximum sentence and also impose consecutive sentences. *Id.*; *see also Smith v. State*, 770 N.E.2d 818, 821 (Ind. 2002) (concluding that the "trial court is not obligated to identify the aggravators that support consecutive sentences separately from the factors that support the sentence enhancement"). A single aggravating circumstance may support the imposition of consecutive sentences. *Hampton v. State*, 873 N.E.2d 1074, 1082 (Ind. Ct. App. 2007).

The record indicates that Harris acknowledged that his criminal history was still considered a valid aggravating circumstance. Based on his criminal history, which was found to be an aggravating circumstance in the original sentencing hearing, and because a single aggravating circumstance may support the imposition of consecutive sentences, we hold that this aggravator could properly serve as a basis for imposing Harris' consecutive sentences. *Hampton*, 873 N.E.2d at 1082.

IV. *Appropriateness of Harris' Sentence*

Harris contends that his sentence is inappropriate considering the nature of his offense and his character. Specifically, he states that no one was injured by his crimes and he was simply attempting to start a new life. Thus, he argues, his actions do not "demand that he receive a disproportionately long sentence." (Appellant's Br. p. 8).

Regardless of whether the trial court has sentenced the defendant within its discretion, we have the authority to independently review the appropriateness of a sentence authorized by statute through Indiana Appellate Rule 7(B). *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct.

App. 2008). That rule permits us to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Anglemyer*, 868 N.E.2d at 491. "Ultimately the length of the aggregate sentence and how it is to be served are the issues that matter." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). "The principle role of appellate review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived correct result in each case." *Id*. at 1225. The defendant carries the burden to persuade us that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

Harris was convicted of Class C felonies, for which the minimum sentence is two years, the maximum sentence is eight years, and the advisory sentence is four years. I.C. § 35-50-2-6. Harris was also convicted of Class D felonies, for which a minimum sentence is one-half year, the maximum sentence is three years, and the advisory sentence is one and one-half years. I.C. § 35-50-2-7. In addition, the trial court enhanced Count I by eleven years for the habitual offender finding pursuant to I.C. § 35-50-2-8(h), which provides in pertinent part: "[t]he court shall sentence a person found to be a habitual offender to an additional fixed term that is not less than the advisory sentence for the underlying offense nor more than three (3) times the advisory sentence for the underlying offense . . . ."

With regard to the nature of the offense, Harris assumed the identity of another person who had been dead for several years in an attempt to avoid registering as a lifetime sex offender. Harris attempts to lessen the impact of his crime by claiming that he was simply

trying to start a new life when he assumed Blair's identity. However, the fact remains that he admitted that he was attempting to avoid the sex offender registry requirements. Harris was so entrenched in this scheme to circumvent his obligatory registration that he had pay slips, Indiana identification and driver's license cards, and a social security card all in Blair's name. Harris even purchased a car using Blair's identity. His claim that no one was injured sounds hollow in light of his probation officer's testimony, who stated that Harris ranks "[i]n the top five" as an individual who has the potential to be a repeat sex offender. (Defendant's Exh. A, p. 224). Thus, Harris' attempts to elude law enforcement of his whereabouts posed a threat to the safety of the community as a whole. Second, despite the fact that Harris argues that he "did not run up any debts that the victim's family was forced to deal with[,]" we do not have any evidence in the record of the impact his actions had on Blair's family. (Appellant's Br. p. 17).

Turning to the character of the offender, we note that rather than accept responsibility for his actions, Harris made several excuses as to why he assumed the identity of Blair, stating he used the new identity to get a job instead of "using his new persona to pick up young children." (Appellant's Br. p. 18). Even assuming that his claim is valid, it in no way justifies committing the offenses. In addition, Harris has a lengthy criminal history, starting in 1990. Harris was convicted of two counts of child molesting in 1991 and three counts in 1995. Despite being granted the privilege of probation for his 1991 and 1995 convictions, probation was revoked on both occasions because he violated the terms of his probations. As reflected in his criminal history, it is clear that although Harris has been given opportunities

to change his behavior, he has refused to do so and is unable to comply with the law. Even more egregious is the fact that he purposely evaded the law to avoid registering as a sex offender. Ultimately, Harris has not persuaded us that his sentence is inappropriate after considering the nature of the offense and his character.

CONCLUSION

Based on the foregoing, we conclude that the trial court properly relied on the original sentencing hearing and thus entered a proper sentencing statement; ordered a consecutive sentenced based on his criminal history; and that his sentence was not inappropriate in light of his character and the nature of his offense.

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.