

STATEMENT OF THE CASE

Adam Gibson appeals his sentence following his convictions for two counts of Burglary, Class B felonies, pursuant to a plea agreement. Gibson presents a single issue for review, namely, whether the trial court abused its discretion when it ordered him to serve the sentences consecutive to each other and to the sentence imposed in another case. We conclude that the court's sentencing statement is sufficient to support the imposition of consecutive sentences and that the reason cited by the court for such a sentence is supported in the record. Therefore, we affirm.

FACTS AND PROCEDURAL HISTORY

On August 11, 2008, Sandra Cooper arrived home to find a white truck pulling out of her driveway. In the truck were a male and a female. The male asked Cooper if she had a car for sale. When Cooper said she did not, the male re-entered his vehicle, and the truck drove away. When Cooper then entered her home, she found that it had been burglarized. She was missing a handgun, medication, jewelry, and other items.

Cooper reported the burglary to police and gave a description of the white van and its occupants. Police located a truck matching the description Cooper gave them. Gibson and his mother, Ruth Gentry, were in the truck. At the request of police, Cooper drove to the location of the traffic stop, and she positively identified Gibson and Gentry as the people she had seen in the truck when she arrived home. Cooper also inspected items recovered from Gibson and Gentry's home and identified a pistol, a lock box, medication, and jewelry as belonging to her. Gentry later admitted to police that she had driven Gibson to several homes that he burglarized.

The State charged Gibson with burglary, as a Class B felony. With Gibson's cooperation, the police were able to attribute several other home burglaries to him. As a result, the State later amended the information to charge Gibson with three additional counts of burglary, as Class B felonies, for breaking into the homes of Paul Keith, Jeffrey Elkins, and Steve Wilson. Gibson entered into a plea agreement, under which he agreed to plead guilty to the Keith and Elkins burglaries, the State agreed to dismiss the charges regarding the Cooper and Wilson burglaries, and Gibson agreed to pay restitution to eight individuals or couples, including the victims added in the amended information. In total Gibson agreed to pay more than \$10,000 in restitution. Sentencing was left to the trial court's discretion.

The trial court held a sentencing hearing on November 24. After hearing evidence, the court made the following statement:

Having heard argument of counsel, having reviewed the presentence report and the defendant's sentencing memorandum, let me first say this. I think . . . if this really was despite [Gibson's] criminal history, a one[-]time as counsel stated major crisis in his life or downfall when he chose to go on this spree, he made it a large one and not only, you know, not only over a large area of Indiana and chose to take a family member down with him[.] I don't necessarily agree that [sic] with the statement that he did it with the approval of his mother. I more see it as he drug her down with him. And to me that, I can't find that as an aggravator but to me that somewhat taints the whole scenario here that he put her in a position where she is now incarcerated as well[. A]nd that involvement tends to leave this court to believe that he was in a state of mind where he really didn't care who he was harming or what he was doing at the time[. A]nd I know that drug seeking behavior puts a lot of people in that position where they don't care what happens [to] themselves, their family or the people whose homes they are breaking into and he is really lucky he probably didn't end up with either himself or his mother harmed too because when you break into people's homes that is a high likelihood that those kind of things are going to happen. Having said that I think there are some, there are aggravating circumstances[:] he does have a history of criminal behavior as evidenced

by the presentence report, although some of it is old, . . . most of it is[] not in the recent past. He does have a criminal history that this court is going to find does aggravate the sentence[.] He also has previously violated the conditions of probation that were granted to him, although technical[ly] he has violated those terms and conditions and the court takes any violation seriously because I do expect as any court would for all terms and conditions to be taken seriously. There are some mitigators and [I] do believe that he did cooperate with authorities by helping to get those things retrieved and back to the victims and also he has accepted responsibility as stated. I am, he does agree that he will make restitution. . . . He does have somewhat of a minimal history of delinquency or criminal activity but boy when he committed this criminal activity he did it in a large way and a very destructive and dangerous way so based on what I am finding that there is kind of a balancing here of the mitigating and aggravating circumstances and I think the appropriate sentence here is to go somewhat in an advisory capacity with Mr. Gibson with my sentence for him and on Count II [the Keith burglary] I am going to sentence him at this time to 10 years to the Indiana Department of Correction[] with no time suspended[.] I am going to also on Count III [the Elkins burglary] sentence him to 10 years with no time suspended and I am running those consecutive [sic]. I think that it is appropriate that he serve some time. There were a lot of victims, a lot of criminal behavior here[. T]he fact that he involved his mother really bothers me even though that is not a formal aggravating circumstance[.] I just think that I can take that into consideration just thinking about the whole picture here and I think that, I do not know what his Jackson County sentence is, that wasn't brought to my attention[,] but I am running this consecutive to that sentence. The restitution I am going to enter as a judgment I assume.

Transcript at 39-43. Gibson now appeals.

DISCUSSION AND DECISION

Gibson contends that the trial court abused its discretion by ordering him to serve consecutive sentences. The trial court generally has discretion whether to order sentences to be served consecutively. See Cardwell v. State, 895 N.E.2d 1219, 1226 (Ind. 2008) (citing Ind. Code § 35-50-1-2). Our supreme court has addressed the basis for imposing consecutive sentences as follows:

In order to impose consecutive sentences, the trial court must find at least one aggravating circumstance. The same aggravating circumstance may be used to both enhance a sentence and justify consecutive terms. Here, however, because the trial court found the aggravating and mitigating circumstances to be in balance, there is no basis on which to impose consecutive terms.

Marcum v. State, 725 N.E.2d 852, 864 (Ind. 2000).

But in Lopez v. State, 869 N.E.2d 1254 (Ind. Ct. App. 2007), trans. denied, we considered whether consecutive sentences were appropriate where the trial court found the aggravators and mitigators to balance but also found at least one additional circumstance that warranted consecutive sentences.

As a preliminary matter in our review of Lopez’s sentence, we observe the trial court’s statement that the aggravators and mitigators were in equipoise. In cases of such balance, our Supreme Court has said that a trial court may not impose consecutive sentences. See Wentz v. State, 766 N.E.2d 351, 359 (Ind. 2002); Marcum v. State, 725 N.E.2d 852, 863-64 (Ind. 2000). Despite its finding of balance, however, the trial court subsequently considered the additional non-statutory aggravating factor that Lopez had killed two children, not one, and that failure to impose consecutive sentences would diminish the life of one of the children. See Serino v. State, 798 N.E.2d 852, 857 (Ind. 2003); O’Connell v. State, 742 N.E.2d 943, 952 (Ind. 2001); see also Walton v. State, 650 N.E.2d 1134, 1136-37 (Ind. 1995) (overturning enhanced sentence due to improper aggravator but affirming imposition of consecutive sentences due to multiple killings). Because the court based its imposition of consecutive sentences upon this free-standing aggravating factor, its initial finding of balance does not serve to invalidate the consecutive nature of the sentences. See Gleaves v. State, 859 N.E.2d 766, 771 (Ind. Ct. App. 2007).

Id. at 1258-59. Thus, “[e]ven if a trial court has stated that aggravators and mitigators are in equipoise but then considers an additional freestanding aggravating factor to impose consecutive sentences, the initial finding of balance does not serve to invalidate the consecutive nature of the sentences.” Upton v. State, 904 N.E.2d 700, 703 (Ind. Ct. App. 2009) (quoting Lopez v. State, 869 N.E.2d at 1259), trans. denied.

Gibson argues that the sentencing statement is insufficient to support the imposition of consecutive sentences. He also argues that the statement made by the court in support of consecutive sentences is not supported in the record. We address each contention in turn.

The trial court found the aggravators and mitigators to be in equipoise and, therefore, imposed advisory sentences for both burglary counts. But when ordering the sentences to be served consecutively, the court stated:

I think that it is appropriate that he serve some time. There were a lot of victims, a lot of criminal behavior here, the fact that he involved his mother really bothers me even though that is not a formal aggravating circumstance, I think that I can take that into consideration just thinking about the whole picture here

Transcript at 42. Clearly the court found that Gibson's burglaries of multiple homes, with multiple victims, was a basis for imposing consecutive sentences. Likewise, the court found that his involvement of his mother in his crimes also weighed in favor of consecutive sentences. Neither of these factors was listed as an aggravator used in determining Gibson's underlying sentence.

While the better practice may be to explicitly label the presence of multiple victims as an aggravating circumstance for the purposes of consecutive sentencing, we are convinced in this case that the trial court actually found multiple victims to be an aggravator and that it based the imposition of consecutive sentences on that aggravator. See Townsend v. State, 860 N.E.2d 1268, 1273 (Ind. Ct. App. 2007), trans. denied. A finding of multiple victims is a sufficient basis for ordering sentences to be served

consecutively. See Upton, 904 N.E.2d at 703. Gibson's argument that the sentencing statement is inadequate must fail.

Gibson also contends that the reasons given by the court for imposing consecutive sentences are unsupported in the record. For instance, he argues that there is "no evidence before the court as to the number of robberies" that he committed. Appellant's Brief at 9. While the exact number of robberies may not be in the record, the evidence clearly supports a finding of multiple victims. Gibson pleaded guilty to burglarizing the homes of Keith and Elkins. And he agreed to pay six other restitution sums to other individuals and couples. Gibson's contention that the record does not support a finding of multiple victims is without merit.¹ We conclude that the trial court did not abuse its discretion when it ordered Gibson to serve consecutive sentences.

Affirmed.

VAIDIK, J., and BROWN, J., concur.

¹ Gibson also argues that the evidence does not support the court's statement that he involved Gentry, his mother, in his crimes. The finding of multiple victims is sufficient to support the imposition of consecutive sentences in this case. See Upton, 904 N.E.2d at 703. Thus, we need not address Gibson's contention regarding the finding that he involved his mother. However, we observe that the affidavit in support of the charging information states that Gentry admitted to driving Gibson to houses that he burglarized, and the trial court noted in this context at sentencing that Gentry is now incarcerated.