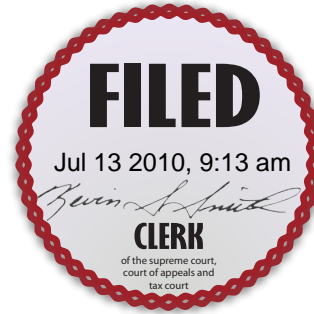


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

LEWIS VASQUEZ,

Appellant- Defendant,

vs.

STATE OF INDIANA,

Appellee- Plaintiff,

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No. 27A02-1002-CR-135

APPEAL FROM THE GRANT CIRCUIT COURT
The Honorable Mark Spitzer, Judge
Cause No. 27C01-0103-CF-23

July 13, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Lewis Vasquez appeals his forty-year executed sentence following a guilty plea to two counts of criminal confinement and one count of burglary while armed with a deadly weapon, all Class B felonies. Vasquez raises one issue for our review: whether the trial court properly imposed consecutive maximum terms of imprisonment for the two counts of criminal confinement. Concluding the trial court did not properly sentence Vasquez, we reverse and remand.

Facts and Procedural History

On October 24, 2001, Vasquez entered into a plea agreement, whereby he provided the following account of his crimes to the trial court:

Approximately about eight o'clock on the 13th of March of this year I entered a house by pushin [sic] in the back door to look for drugs and money and then while I was, after I got what I got, which was some marijuana and some pills, on my way out the door, the victim, Stephanie Collins and her daughter, had entered the house. I hid back in the back room when they came in. When I went to make a run for the door Stephanie was there and I freaked and I told her to freeze and then I took her into the room and put her on the ground and taped her arms and her mouth and her legs and then her little girl came in the room and I told her to have her little girl lay down beside her and then I had left the scene by takin' her car and her purse.

Transcript, Vol. I at 9-10. Vasquez was armed with a gun during these events and held the gun to Collins during the encounter. Vasquez pleaded guilty to two counts of criminal confinement and one count of burglary while armed with a deadly weapon, all Class B felonies.

On December 20, 2001, the trial court held a sentencing hearing and sentenced Vasquez to twenty years on the burglary while armed with a deadly weapon count, and

twenty years for each criminal confinement count, which were to run consecutively to each other, but concurrently with the burglary while armed with a deadly weapon count, for an aggregate sentence of forty years. After extensive procedural machinations, Vasquez was granted permission to pursue this belated direct appeal of his sentence.

Discussion and Decision

Generally the trial court has discretion to impose consecutive sentences based upon the aggravating and mitigating circumstances. Williams v. State, 891 N.E.2d 621, 630 (Ind. Ct. App. 2008). This discretion is constrained, however, by Indiana Code section 35-50-1-2(c), which provides:

The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. However, except for crimes of violence, the total of the consecutive terms of imprisonment . . . to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

Vasquez contends his sentence is contrary to this statutory provision.

An “episode of criminal conduct” is defined as “offenses or a connected series of offenses that are closely related in time, place, and circumstance.” Ind. Code § 35-50-1-2(b). The singleness of a criminal episode should be based upon whether the alleged conduct was so closely related in time, place, and circumstance that a complete account of one charge cannot be related without referring to the details of the other charge. Cole v. State, 850 N.E.2d 417, 419 (Ind. Ct. App. 2006). Vasquez’s crimes occurred simultaneously and contemporaneously, and he was therefore convicted of three crimes

based on a single episode of conduct.¹ See Williams, 891 N.E.2d at 631 (“In determining whether multiple offenses constitute an episode of criminal conduct, the focus is on the timing of the offenses and the simultaneous and contemporaneous nature, if any, of the crimes.”). Vasquez’s sentence is subject to the limitation imposed by section 35-50-1-2(c). According to Indiana Code section 35-50-1-2(a), criminal confinement is not a crime of violence. The advisory sentence for the next higher class of felony, Class A, is thirty years. Ind. Code § 35-50-2-4. Hence, the total of the consecutive sentences that Vasquez may properly be ordered to serve for criminal confinement is thirty years. The trial court therefore erred by imposing consecutive sentences totaling forty years on those counts.

Vasquez argues that this matter should be remanded to the trial court with instructions to enter sentences of fifteen years on the two criminal confinement charges, to be served consecutively to one another but concurrently with the burglary while armed with a deadly weapon charge, for an aggregate sentence of thirty years. We do agree that this matter should be remanded to the trial court; however, we will leave the sentencing to the discretion of the trial judge. In Ellis v. State, 736 N.E.2d 731, 737 (Ind. 2000), our supreme court held that the statute allows consecutive sentencing between a crime of violence and those that are not crimes of violence, however, “the limitation should apply for consecutive sentences between and among those crimes that are not crimes of violence.” Burglary while armed with a deadly weapon is a crime of violence, Ind. Code § 35-50-1-2(a)(12), and there are no consecutive sentence limitations between crimes of

¹ Although not conceding that the crimes were an episode of criminal conduct, the State does acknowledge the crimes “were probably part of a single episode of criminal conduct.” Brief of the Appellee at 4 n.1.

violence and crimes that are not; therefore, it is entirely possible that Vasquez's total sentence could be as great as fifty years. The trial court may order any combination of sentences as long as the consecutive sentences for criminal confinement do not exceed thirty years total. We conclude the trial court should have an opportunity to correct its legal error, and Vasquez's sentence should otherwise be left to the trial court's discretion. The trial court need not hold a new sentencing hearing.

Conclusion

The trial court improperly imposed consecutive maximum terms of imprisonment for the two counts of criminal confinement. We therefore reverse and remand for resentencing consistent with this opinion.

Reversed and remanded.

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