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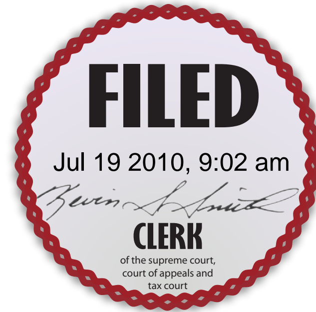

ATTORNEY FOR APPELLANT:

GILDA W. CAVINESS
Caviness Law Office, LLC
Rushville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

NICOLE DONGIEUX WIGGINS
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

SHAWN CHRISTOPHER MCWHORTER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

No. 73A01-0912-CR-573

APPEAL FROM THE SHELBY CIRCUIT COURT
The Honorable Charles D. O'Connor, Jr., Judge
Cause No. 73C01-0711-FA-14

July 19, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Shawn Christopher McWhorter appeals his sentence for criminal deviate conduct as a class B felony[1] and robbery as a class C felony.[2] McWhorter raises two issues, which we revise and restate as follows:

I. Whether he waived the right to appeal his sentence; and

II. Whether his sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

The relevant facts follow. On or about July 25, 2007, during the early morning hours, McWhorter was driving his car when he saw two girls, who were under the age of sixteen at the time, on the side of the road. McWhorter admitted at his guilty plea hearing that he used the threat of force to cause one of the girls to submit to deviate sexual conduct and to commit robbery by taking money from the other girl.

On November 14, 2007, the State charged McWhorter with criminal deviate conduct as a class A felony, sexual misconduct with a minor as a class A felony and as a class B felony, two counts of criminal confinement as class B felonies, attempted sexual misconduct with a minor as a class A felony, armed robbery as a class B felony, impersonation of a public servant as a class D felony, and intimidation as a class D felony.

McWhorter and the State entered into a Joint Motion to Enter Plea of Guilty and Advisement of Rights and Waiver dated September 18, 2009 and file-stamped on

[1] Ind. Code § 35-42-4-2 (2004).

[2] Ind. Code § 35-42-2-2 (Supp. 2006).

September 23, 2009. In the Joint Motion, McWhorter agreed to enter a plea of guilty for criminal deviate conduct as a class B felony and robbery as a class C felony. Section A of the Joint Motion indicated that the sentence was "OPEN." Appellant's Appendix at 31. Section D included the additional term of the plea that "[t]he Judge to determine whether counts . . . run concurrent or consecutive to each other and whether our case is concurrent/consecutive to Marion County." Id. at 32. Paragraph 6 of a separate Advisement of Rights and Waiver, also dated September 18, 2009 and signed by McWhorter and the State, provided in part:

> If you plead guilty to an offense with sentencing to be determined by the Court, you waive your right to have any court review the reasonableness of the sentence, including but not limited to appeals under Indiana Rule of Appellate Procedure 7(B) and you agree and stipulate that the sentence of the court is reasonable and appropriate in light of your nature and character.

Id. at 33-34.

On October 20, 2009, the trial court conducted a guilty plea hearing and took McWhorter's plea under advisement. Also at the hearing, the court told McWhorter that the agreement between the State and McWhorter contained a provision under which McWhorter waived the right to appeal his sentence.

On November 19, 2009, the trial court held a sentencing hearing. The court accepted McWhorter's plea of guilty as set forth in the Joint Motion. The court found several aggravating factors and one mitigating factor, assigned the aggravating factors substantial weight and the mitigating factor minimal weight, and found that the aggravating factors justified an enhanced sentence. The court then sentenced McWhorter

to twenty years executed for the criminal deviate conduct conviction and eight years executed for the robbery conviction, and ordered the sentences to be served consecutive to each other and consecutive to a sentence imposed in a separate case in Marion Superior Court 3 under Cause Number 49G03-0710-FA-210802 ("Cause No. 210802"). The court also confirmed that McWhorter understood that he "may be entitled to take an appeal" and that any appeal must be filed within thirty days after sentencing or the denial of a motion to correct error. Id. at 37.

We first address whether McWhorter waived his right to appeal his sentence. McWhorter admits that he "signed a guilty plea that contained a waiver of his right to appeal the sentence," but argues that "the discussion at the guilty plea hearing and advisement by the trial court at that time provided contradictory and confusing information to McWhorter which would have lead [sic] him to believe that he had a right to appeal his sentence under certain circumstances, particularly as to the issue of concurrent vs. consecutive sentence imposition." Appellant's Brief at 5-6. The State argues that McWhorter was "specifically told that he was waiving the right to appeal his sentence twice" and that "[a]ny possible ambiguity in the court's statement was not enough to overcome [McWhorter's] express waiver." Appellee's Brief at 5.

Although an individual who pleads guilty is generally not permitted to challenge his conviction on direct appeal, he is typically entitled to contest the merits of his sentence where the trial court has exercised discretion at sentencing. Holsclaw v. State, 907 N.E.2d 1086, 1087 (Ind. Ct. App. 2009) (citing Collins v. State, 817 N.E.2d 230, 231

(Ind. 2004)). However, in Creech v. State, the Indiana Supreme Court held that a defendant may waive the right to appellate review of his or her sentence as part of a written plea agreement. 887 N.E.2d 73, 74-77 (Ind. 2008). The Court in Creech noted that such a waiver may be valid even where the trial court does not specifically advise the defendant that he is waiving the right to appeal his sentence. See id. at 77 (noting that neither the Indiana Rules of Criminal Procedure nor the Indiana Code requires trial courts to make specific findings regarding the defendant's waiver of his appellate rights). Instead, the Court held that the "[a]cceptance of the plea agreement containing the waiver provision is sufficient to indicate that, in the trial court's view, the defendant knowingly and voluntarily agreed to the waiver." Id.[3]

Here, Paragraph 6 of an Advisement of Rights and Waiver dated September 18, 2009 and signed by McWhorter and the State included language stating that "you waive your right to have any court review the reasonableness of the sentence, including but not limited to appeals under Indiana Rule of Appellate Procedure 7(B) and you agree and stipulate that the sentence of the court is reasonable and appropriate in light of your nature and character." Appellant's Appendix at 33-34.

At the guilty plea hearing on October 20, 2009, the trial court advised McWhorter that the agreement between the State and McWhorter contained a provision under which

[3] The holding in Creech does not alter the "very long-standing policy that a defendant who can establish in a post-conviction proceeding that his plea was coerced or unintelligent is entitled to have his conviction set aside" or "case law invalidating provisions that waive post conviction rights." Creech, 887 N.E.2d at 75.

McWhorter waived the right to appeal his sentence. Specifically, the following exchange took place at the plea hearing:

> The Court: Okay, thank you very much. There is one thing that I didn't . . . Mr. McWhorter before you leave, the uh plea agreement you signed uh has a provision that you waive the right to appeal your sentence in this case. Do you understand that?
>
> [Defense Counsel]: He (the Defendant) was asking whether or not that meant sometime in the future whether he could ask for a modification of his sentence.
>
> The Court: No, that doesn't preclude the modification but it does under the circumstances uh prohibit you from appealing the sentence that the Court will impose. I just want to be sure that you understand that. Now whether that also affects the um any right to appeal as to whether the sentences are imposed concurrently or consecutively, I would assume uh that would be the state's argument so you need to understand the parameters of of [sic] that waiver that you signed as far as that those [sic] issues are concerned.
>
> Mr. McWhorter: Okay.
>
> The Court: Any questions about that?
>
> Mr. McWhorter: No, sir.
>
> The Court: Okay, we're finished. Thank you.

Transcript at 14-15. The trial court took McWhorter's plea under advisement. During the sentencing hearing, the trial court accepted McWhorter's plea. The record shows that the trial court did explain to McWhorter at the plea hearing and before accepting the plea that McWhorter was waiving the right to appeal his sentence, and McWhorter nevertheless agreed to plead guilty. We cannot say that the comments of the trial court at

the plea hearing, including those comments made in response to defense counsel's question to the court regarding whether McWhorter may seek a sentence modification in the future, were confusing, contradictory, or otherwise unclear to the extent that they invalidated the express language of McWhorter's written waiver.

Based upon the express language of Paragraph 6 of the September 18, 2009 Advisement of Rights and Waiver and the trial court's advisement at the guilty plea hearing, we conclude that McWhorter has waived the right to appeal his sentence. See Creech, 887 N.E.2d at 75 (holding that the defendant waived the right to appeal his sentence where the plea agreement contained a sentence stating that the defendant "waive[d] [his] right to appeal [his] sentence so long as the Judge sentence[d] [him] within the terms of [the] plea agreement"); Brattain v. State, 891 N.E.2d 1055, 1057 (Ind. Ct. App. 2008) (concluding that the defendant waived his right to appeal his sentence where the plea agreement stated that the defendant "further waives the right (under Indiana Appellate Rule 7 and I.C. 35-38-1-15 or otherwise) to review of the sentence imposed" and noting that the trial court's action to appoint appellate counsel pursuant to the defendant's request did not invalidate his plea); cf. Ricci v. State, 894 N.E.2d 1089, 1094 (Ind. Ct. App. 2008) (holding that the defendant had not waived the right to appeal his sentence under Creech because, unlike in Creech, the trial court "clearly and unambiguously stated at the plea hearing that it read the plea agreement and that, according to its reading of the agreement, [the defendant] had not surrendered the right to appeal his sentence"), trans. denied; Bonilla v. State, 907 N.E.2d 586, 590 (Ind. Ct. App.

2009) (concluding that the defendant did not waive the right to appeal his sentence where the trial court advised the defendant that he may have waived the right to appeal but then promptly advised him of the right to appeal and noting that the advisement occurred at the guilty plea hearing before the defendant received the benefit of his bargain and then occurred again at the sentencing hearing), trans. denied.

In addition, we note that under Creech the fact that the trial court here made a statement at the sentencing hearing, after accepting McWhorter's plea and after imposing a sentence, informing McWhorter that he may be entitled to take an appeal does not invalidate McWhorter's plea or his waiver of his right to appeal. In Creech, the trial court, after accepting the guilty plea and pronouncing sentence, told the defendant that he did have the right to appeal his sentence. Creech, 887 N.E.2d at 74. The Court stated that although it was important for trial courts to avoid such confusing remarks, the trial court's statements were not grounds for allowing the defendant to circumvent the terms of his plea agreement. Id. at 76. The Court explained that "[b]y the time the trial court erroneously advised [the defendant] of the possibility of appeal, [the defendant] had already pled guilty and received the benefit of his bargain" and that "[b]eing told at the close of the [sentencing] hearing that he could appeal presumably had no effect on that transaction." Id. at 77. Similarly, the trial court here indicated that McWhorter may be able to appeal only after the court had accepted McWhorter's plea and imposed a sentence. Further, McWhorter received the benefit of his bargain as he pled to criminal deviate conduct as a class B felony (as a lesser included offense of the criminal deviate

conduct class A felony for which he was charged) and robbery as a class C felony (as a lesser included offense of the armed robbery class A felony for which he was charged) and the remaining counts, which included two class A felony charges, three class B felony charges, and two class D felony charges, were dismissed. The trial court's comments at the sentencing hearing did not invalidate the waiver provision to which McWhorter agreed.

We also note that even if we were to conclude that McWhorter did not waive the right to appeal his sentence, McWhorter would not prevail. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute 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." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

McWhorter argues that "[m]easuring [his] character and his actions against other offenders and offenses does not support a finding that either is 'the worst' so as to justify the imposition of both the maximum sentence on both counts and all consecutive sentences." Appellant's Brief at 8. McWhorter also argues that "[w]hile [his] criminal history and admitted conduct in this case are repugnant, his remorse and desire to save the victim and the State the emotional and financial costs of a trial should count for something" and that "[t]he aggregate sentence of twenty-eight (28) years served consecutively to McWhorter's Marion County sentence is not justified . . . ." Id. at 8.

The State points to the nature of McWhorter's offenses as described in the probable cause affidavit and argues that "the fact that [McWhorter] has a prior rape conviction indicates a pattern of sexual violence and inability to reform criminal behavior." Appellee's Brief at 7. In his appellant's reply brief, McWhorter argues that "[t]he probable cause affidavit is an inappropriate basis for the State's argument that McWhorter's sentence is appropriate in light of the nature of the offenses." Appellant's Reply Brief at 2.

We initially observe that to the extent that McWhorter argues that the probable cause affidavit is an inappropriate basis for the State's argument that his sentence is appropriate, McWhorter does not cite to authority for that proposition or develop a cogent argument, and thus the argument is waived. See Lyles v. State, 834 N.E.2d 1035, 1050 n.2 (Ind. Ct. App. 2005) ("A party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record."), trans. denied. Further, we note that the probable cause affidavit was attached to the presentence investigation report (PSI) and that McWhorter did not challenge the affidavit or its contents at the sentencing hearing.

Our review of the nature of the offense reveals that McWhorter stopped two girls who were traveling "by roller blades and . . . by bicycle" on the side of a road, and, acting "in a police like fashion," he ordered M.M. and A.K. "to put their hands behind their back and interlace their fingers," "patted them both down and acted like a cop by asking them if they knew how dangerous it was to be out at night." Appellant's Appendix at 61,

63-64. McWhorter ordered the girls to "lay down in the grass beside the road on their bellies" and "show some ass," threatened to shoot them if they did not comply, said "to give him some pussy and he would not kill them," placed a hard object which one of the girls believed was a gun against the girl's head, fondled the girl, and "put his penis in her butt hole" or "against her butt cheeks." Id. at 61, 63, 64, 67. McWhorter took money out of the other girl's back pocket, ordered the two girls to run into the corn field, claimed to know where the girls lived, and threatened to kill them if they called the police.

Our review of the character of the offender reveals that McWhorter admitted at the sentencing hearing to his previous conviction for rape, for which McWhorter was sentenced to an aggregate term of forty years under Cause No. 210802. McWhorter's conviction in this case for criminal deviate conduct and his prior conviction for rape were both sex-related offenses.[4] In addition, the PSI shows that McWhorter committed the rape on June 4, 2003, and that charges were filed on November 8, 2007. The instant offense occurred on or about July 25, 2007, and charges were filed on November 14,

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[4] McWhorter stated at the sentencing hearing that he had no recollection of one of the prior convictions listed in the PSI (a conviction for contributing to the delinquency of a minor) and that he was exercising his Fifth Amendment right against self incrimination and, except for the rape conviction; declined to admit to the other convictions listed in the PSI which included burglary, resisting law enforcement, and failure to report property damage accident. Even considering only McWhorter's conviction for rape, we nevertheless conclude as set forth above that the sentence imposed by the trial court was not inappropriate. Thus, we do not address whether McWhorter expressed a challenge to those convictions to which he did not admit on Fifth Amendment grounds. However, we do observe that "where a defendant vigorously contests his criminal history, and that criminal history is highly relevant to his sentence, it is incumbent upon the State to produce some affirmative evidence, e.g., docket sheets, certified copies of judgment of convictions, affidavits from appropriate officials, etc., to support a criminal history alleged in a PSI and urged as the basis for sentence enhancement." Carmona v. State, 827 N.E.2d 588, 599 (Ind. Ct. App. 2005).

2007. McWhorter's criminal history is significant given the proximity in time and the similarity of the prior conviction for rape.

Waiver notwithstanding, we conclude after due consideration that the sentence imposed by the trial court was not inappropriate. See Payne v. State, 838 N.E.2d 503, 507-509 (Ind. Ct. App. 2005) (concluding that the defendant's maximum sentence for felony criminal deviate conduct was not inappropriate considering the heinousness of the offense and the defendant's criminal history, which included a prior conviction for a similar offense), trans. denied.

For the foregoing reasons, we affirm the sentence imposed by the trial court.

Affirmed.

NAJAM, J., and VAIDIK, J., concur.