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ATTORNEY FOR APPELLANT:

ANDREW B. ARNETT
Indianapolis, Indiana

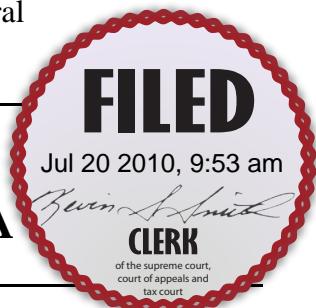
ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JANINE STECK HUFFMAN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

MICHAEL J. SHEPHERD,)
)
Appellant-Defendant,)
)
vs.) No. 70A01-0911-CR-529
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)



APPEAL FROM THE RUSH SUPERIOR COURT
The Honorable Brian D. Hill, Judge
Cause No. 70D01-0408-FA-259

July 20, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Michael J. Shepherd appeals from the trial court's order resentencing him after he successfully pursued post-conviction relief. Shepherd raises the following restated issues for our review:

1. Did the trial court abuse its discretion by using Shepherd's criminal history to both enhance the sentence for one of the offenses and as a basis for the habitual offender enhancement?
2. Is Shepherd's sentence inappropriate in light of the nature of the offense and the character of the offender?

We affirm.

On August 11, 2004, Mary Jane Smiley contacted Rush County Sheriff's Detective Joseph Jarman and offered to make a controlled buy of cocaine from Shepherd. Smiley then went to visit Shepherd at his house where he lived with Smiley's daughter and her children. Smiley told Shepherd that she had "hooked up with somebody" and "needed an eight ball." *Defendant's Exhibit 4* at 386. Shepherd replied, "That's what I'm talking about." *Id.* Smiley left the house to obtain the buy money from the officers who searched her and gave her \$125. Smiley returned to Shepherd's house and gave him the money.

Shepherd told Smiley he needed to go to Indianapolis and drove away from the house in a silver Chrysler Sebring. Smiley had told Shepherd that she would be at the Rushville Holiday Inn and would call him to let him know the number of the room in which she was staying. When Smiley arrived at the Holiday Inn she met with Detective Jarman, Detective Hatfield, and a female officer who strip-searched Smiley. Detective Hatfield searched the hotel room they were using. Smiley called Shepherd a couple of times, during the last of which Shepherd indicated that he was on his way there.

Shepherd arrived at the hotel room and gave Smiley the cocaine, which she handed to Detective Jarman. Detective Jarman asked Shepherd if he could obtain any more cocaine, and Shepherd responded that he could, but that he needed to “score some weed first.” *Id.* at 392. The officers then arrested Shepherd and read him the *Miranda* warnings.

Police officers then searched the silver Chrysler Sebring that Shepherd had driven to the hotel and discovered a cigarette package containing cocaine inside the vehicle. Laboratory testing revealed that the cocaine in the baggie Shepherd had given to Smiley weighed 1.53 grams and the cocaine in the cigarette package weighed .68 grams.

The State charged Shepherd with one count of dealing in cocaine as a class A felony and one count of possession of cocaine as a class B felony, and later amended the information to add the allegation that Shepherd was a habitual offender. At the conclusion of Shepherd’s jury trial he was found guilty as charged and was found to be a habitual offender. The trial court sentenced Shepherd to forty years for his class A felony conviction and to fifteen years for his class B felony conviction, to be served concurrently. The trial court then imposed a thirty-year habitual offender enhancement to Shepherd’s class A felony conviction for an aggregate sentence of seventy years. Shepherd’s convictions were upheld on appeal.

See Shepherd v. State, No. 70A01-0504-CR-166 (Ind. Ct. App. Jan. 20, 2006), *trans. denied*.

Shepherd successfully pursued post-conviction relief and his convictions were reduced to a class B felony and a class D felony. At Shepherd’s resentencing hearing, the trial court sentenced him to eighteen years on the class B felony conviction and enhanced it by twenty-five years for the habitual offender finding, and two years for the class D felony conviction to be served concurrently, for an aggregate sentence of forty-three years. The trial

court found as mitigating circumstances that the primary people involved were extended family, Shepherd did not cause or attempt to cause serious harm to anyone or to damage property, and found that Shepherd had maintained employment during his incarceration. The trial court found as aggravating circumstances that Shepherd was on probation at the time he committed the offenses and Shepherd's criminal history. The trial court found that the aggravating circumstances outweighed the mitigating circumstances. Shepherd now appeals.

1.

We note that Shepherd's offenses were committed prior to the April 25, 2005 revisions to the sentencing statutes; thus, the presumptive sentencing scheme applies to Shepherd's sentence and we review it accordingly. *See Robertson v. State*, 871 N.E.2d 280 (Ind. 2007) (we apply the sentencing scheme in effect at the time of the defendant's offense). Sentencing decisions are left to the discretion of the trial court and are reviewed on appeal only for an abuse of that discretion. *Upton v. State*, 904 N.E.2d 700 (Ind. Ct. App. 2009). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances. *Id.*

Shepherd makes two claims regarding the trial court's treatment of his criminal history. First, Shepherd claims that the trial court abused its discretion by finding Shepherd's criminal history as an aggravating factor because much of his criminal history was remote. Our review of the record reveals that in 1977 Shepherd was convicted in Louisiana of attempted robbery and aggravated battery for which he was sentenced to fifteen years and ten years, to be served consecutively. After Shepherd's release from prison he was convicted of possession of cocaine in Louisiana in 1997 and was given a three-year sentence. In 1999

Shepherd was convicted of delivery of cocaine for which he received a six-month jail sentence in Texas. He was convicted of domestic battery in 2004 in Indiana and was on probation for that crime at the time of the commission of the instant offenses. The lack of criminal history between the commission of the offenses listed can best be explained by Shepherd's incarceration. We cannot say that the trial court abused its discretion by finding Shepherd's criminal history to be an aggravating factor and remoteness of the offenses constituting his criminal history is not an issue here.

Next, Shepherd argues that the trial court abused its discretion by using his criminal history both as an aggravating circumstance to enhance the underlying offense and to support the sentence for the habitual offender determination. The Supreme Court has held that it is permissible for the trial court to consider the same prior offenses for both enhancement of an instant offense and to establish habitual offender status. *Jones v. State*, 600 N.E.2d 544 (Ind. 1992). So to the extent the trial court in this case may have used the same criminal history to enhance the sentence for the underlying offense and to support Shepherd's sentence for the habitual offender determination, the trial court did not abuse its discretion. Additionally, the trial court noted that it relied upon one of the 1977 convictions and the 1997 conviction to support the finding that Shepherd had habitual offender status. Shepherd's criminal history consisted of additional offenses that could have been used separately and were not elements of the present offenses.

We note that only a single valid aggravator is needed to sustain an enhanced sentence. *Id.* The trial court also found that Shepherd was on probation for another offense at the time he committed the present offenses. Even if we were to find that the trial court erred by using

Shepherd's criminal history in two different ways, a conclusion we do not reach, there is another valid aggravating offense which would support the imposition of an enhanced sentence.

Further, to the extent Shepherd seems to argue that the trial court abused its discretion by failing to find as a mitigating factor that the amount of cocaine involved was small the trial court is not obligated to explain why it has found that the mitigating factor argued by counsel does not exist. *Fugate v. State*, 608 N.E.2d 1370 (Ind. 1993). The trial court is not required to weigh or credit the mitigating evidence the way a defendant suggests it should be weighed or credited. *Id.*

2.

Shepherd argues that his sentence is inappropriate in light of the nature of the offense and the character of the offender and asks this court to revise his sentence. Appellate courts may revise a sentence after careful review of the trial court's decision if they conclude that the sentence is inappropriate based on the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). Even if the trial court followed the appropriate procedure in arriving at its sentence, the appellate court still maintains a constitutional power to revise a sentence it finds inappropriate. *Hope v. State*, 834 N.E.2d 713 (Ind. Ct. App. 2005). Although we are not required under App. R. 7(B) to be "extremely" deferential to a trial court's sentencing decision, we recognize the unique perspective a trial court brings to such determinations. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). Moreover, we observe that Shepherd bears the burden of persuading this court that his sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867.

The sentencing range for a class B felony is a fixed term of between six and twenty years with the presumptive sentence being ten years. Ind. Code Ann. § 35-50-2-5 (West, PREMISE through 1st Sess. 2004), amended by P.L. 71-2005, eff. April 25, 2005. The sentencing range for a class D felony is a fixed term of between 6 months and 3 years with the presumptive sentence being 1 ½ years. Ind. Code Ann. § 35-50-2-7 (West, PREMISE through 1st Sess. 2004), amended by P.L. 71-2005, eff. April 25, 2005. Shepherd received an eighteen-year sentence enhanced by twenty-five years for the class B felony conviction. He received a two-year sentence for the class D felony conviction to be served concurrently.

Our legislature determined that the offense of delivery of cocaine up to three grams in weight was serious enough to be classified as a class B felony. As for the character of the offender, Shepherd has been convicted of attempted robbery, aggravated battery, possession of cocaine, delivery of a controlled substance and domestic battery. Shepherd was on probation at the time of his current offenses and has avoided further criminal activity only while incarcerated. His criminal history reflects his disregard for the law. Shepherd has failed to establish that his sentence is inappropriate in light of the nature of the offense and the character of the offender.

Judgment affirmed.

KIRSCH, J., and ROBB, J., concur.