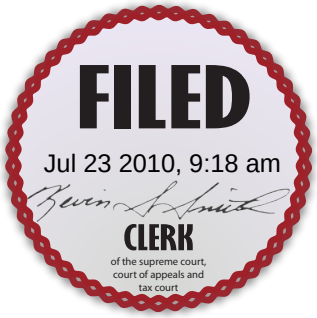

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IN THE
COURT OF APPEALS OF INDIANA

FRANK GUAJARDO,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 79A02-0912-CR-1234
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0703-FB-14

July 23, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Frank Guajardo appeals his conviction and sentence following a guilty plea to dealing in cocaine, a Class B felony. For our review, Guajardo raises two issues, which we expand, reorder, and restate as: 1) whether Guajardo may challenge on direct appeal whether the trial court properly accepted his guilty plea; 2) whether Guajardo's ten-year executed sentence is inappropriate in light of the nature of the offense and his character; and 3) whether the trial court erred by imposing a $200 public defender fee. Concluding Guajardo may not challenge his guilty plea on direct appeal, Guajardo's executed sentence is not inappropriate, and the trial court erred by imposing a public defender fee without finding Guajardo had the ability to pay, we affirm in part, reverse in part, and remand.

Facts and Procedural History

On August 30, 2005, Guajardo delivered cocaine to a confidential informant in Lafayette, Indiana. In March 2007, the State charged Guajardo with Count I, dealing in cocaine as a Class B felony, and Count II, possession of cocaine as a Class D felony. At the initial hearing, the trial court found Guajardo to be indigent and appointed the Tippecanoe County Public Defender to represent him. Guajardo executed a plea agreement whereby he agreed to plead guilty to Count I in exchange for the State dismissing Count II, with sentencing left to the trial court's discretion subject to a cap of ten years on executed time.

At the guilty plea hearing, the trial court heard the factual basis for the plea and verified that Guajardo understood the plea agreement. However, the trial court did not

advise Guajardo that by pleading guilty, he waived his rights to a public and speedy jury trial, to confront and cross-examine witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to require the State to prove his guilt beyond a reasonable doubt. The trial court issued a guilty plea order in which it found Guajardo understood the nature of the charge to which he pleaded guilty and the possible penalties, his plea was freely and voluntarily made, and the plea was accurate and supported by a factual basis. Thus, the trial court took Guajardo's guilty plea and plea agreement under advisement and set the case for sentencing.

At the sentencing hearing, the trial court accepted Guajardo's guilty plea and plea agreement. In its sentencing order, the trial court found as aggravating circumstances Guajardo's criminal history and that he committed the present crime while on probation and pre-trial release pending charges in an unrelated case.[1] The trial court sentenced Guajardo to ten years executed with the Department of Correction and also ordered him to pay court costs and a $200 reimbursement to the Tippecanoe County Public Defender. Guajardo now appeals.

Discussion and Decision

I. Guilty Plea

Guajardo asks this court for the "extraordinary relief" of vacating his guilty plea due to the trial court's failure to advise him of his constitutional rights prior to its acceptance of the plea. Brief of Appellant at 12. The State responds, and we must agree, that Guajardo's challenge to his guilty plea is not properly before this court on direct

[1] The record indicates Guajardo was out on bond at the time of the present offense. In its oral sentencing statement, the trial court noted the mitigating factor of hardship to Guajardo's family. However, the trial court's written sentencing order found no mitigating factors.

appeal and must be brought in a petition for post-conviction relief. Our supreme court has held that a defendant may not challenge on direct appeal the trial court's acceptance of a guilty plea. Tumulty v. State, 666 N.E.2d 394, 394-95 (Ind. 1996). This is so even when the record of the guilty plea would otherwise be adequate to resolve the issue presented. See id. at 395-96. Rather, any claim of error in the acceptance of a guilty plea must be presented in a petition for post-conviction relief under Indiana Post-Conviction Rule 1. Id. at 396.[2] Guajardo argues we should make an exception in this case, contending the failure to advise him of his constitutional rights was fundamental error.[3] Such a fundamental error exception, while embraced by a panel of this court in the opinion the supreme court vacated, see Tumulty v. State, 647 N.E.2d 361, 364 (Ind. Ct. App. 1995), was impliedly rejected by the supreme court's Tumulty opinion which did not mention such an exception. Therefore, even assuming the trial court erred by failing to advise Guajardo of his constitutional rights prior to accepting his guilty plea, we must affirm Guajardo's conviction without prejudice to his possible right to post-conviction relief.[4] See Stringer v. State, 899 N.E.2d 748, 750 (Ind. Ct. App. 2009).

[2] Our supreme court has since held a defendant challenging the denial of a motion to withdraw his guilty plea prior to sentencing is not barred from raising the issue on direct appeal. Brightman v. State, 758 N.E.2d 41, 44 (Ind. 2001). However, "once judgment is entered, a defendant may not subsequently challenge his guilty plea on direct appeal." Id. Guajardo did not move to withdraw his guilty plea prior to sentencing.

[3] It is well settled that trial courts must "inform a defendant pleading guilty that he is waiving his right to a public and speedy trial, to confront and cross-examine witnesses, to have witnesses testify in the defendant's favor and to require the State to prove guilt beyond a reasonable doubt." Tumulty, 666 N.E.2d at 395; see Ind. Code § 35-35-1-2(a).

[4] The record indicates Guajardo has already filed a petition for post-conviction relief, which is currently stayed pending this appeal.

II. Inappropriate Sentence

This court has authority to revise a sentence "if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). In making this determination, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans denied; cf. McMahon v. State, 856 N.E.2d 743, 750 (Ind. Ct. App. 2006) ("[I]nappropriateness review should not be limited . . . to a simple rundown of the aggravating and mitigating circumstances found by the trial court."). Nevertheless, the defendant bears the burden to "persuade the appellate court that his or her sentence has met this inappropriateness standard of review." Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). "[W]hether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." Cardwell v. State, 895 N.E.2d 1219, 1224 (Ind. 2008).

Initially we note that Guajardo's ten-year executed sentence is the advisory sentence for a Class B felony, see Ind. Code § 35-50-2-5, and regarding the nature of the offense, the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed," Childress, 848 N.E.2d at 1081. Guajardo does not dispute that the length of his sentence is appropriate. Rather, he requests his sentence be revised to six years executed with the Department of Correction, two years with Tippecanoe County Community Corrections, and two years suspended to probation.

In making this argument, Guajardo asks us to consider his guilty plea and acceptance of responsibility. While the guilty plea does weigh in Guajardo's favor, its weight is somewhat lessened due to the benefit received from the plea agreement capping his executed time at ten years. See Page v. State, 878 N.E.2d 404, 409 (Ind. Ct. App. 2007) (concluding guilty plea was not significant mitigator where defendant received significant benefits in exchange for plea), trans. denied. When asked by the trial court why he chose to plead guilty, Guajardo merely stated he "want[ed] to get it over with and done." Transcript at 3. Guajardo also asks us to consider his family circumstances, in that prior to his most recent incarceration he lived with his seventy-year-old mother, helped care for her, and paid part of her living expenses with the $400 per week he earned as a laborer. Guajardo has no spouse or children but reports "[g]ood" relationships with his mother and five sisters. Appellant's Green Appendix at 8. These circumstances reflect favorably upon Guajardo's character. However, Guajardo also has a criminal history that is not insignificant: in addition to seven misdemeanor convictions between 1988 and 1997, he had, prior to the present offense, 1997 convictions of burglary as a Class C felony and theft as a Class D felony. At the time he committed the present dealing offense, Guajardo had pending drug charges that were reduced to a 2006 conviction of acquisition of a controlled substance by misrepresentation, fraud, forgery, or deception, a Class D felony. Subsequent to the present offense, Guajardo was charged and convicted of possession of a schedule IV controlled substance, intimidation, and theft – all Class D felonies – and was adjudicated an habitual offender. We perceive an escalating pattern of criminal activity, including drug activity, in light of which

Guajardo's present offense is not an isolated incident. Based on the foregoing factors, Guajardo's ten-year executed sentence is not inappropriate.

III. Public Defender Fee

Finally, Guajardo argues the trial court erred by ordering him to pay a $200 public defender reimbursement as part of his sentence. A trial court's decision to impose costs or fees as part of a sentence is reviewed for an abuse of discretion. Kimbrough v. State, 911 N.E.2d 621, 636 (Ind. Ct. App. 2009). There is no abuse of discretion if the trial court imposes fees within the statutory limits. Id.

Three statutes provide authority for a trial court to impose a fee on a defendant for costs of appointed representation. Indiana Code section 35-33-7-6(c) provides: "If the court finds that the person is able to pay part of the cost of representation by the assigned counsel, the court shall order the person to pay . . .: (1) For a felony action, a fee of one hundred dollars ($100)." Indiana Code section 33-37-2-3(e) provides: "If, after a[n] [indigency] hearing under subsection (a) or (b), the court determines that a convicted person is able to pay part of the costs of representation, the court shall order the person to pay . . . not more than the cost of the defense services rendered on behalf of the person." Finally, Indiana Code section 33-40-3-6(a) provides:

> If at any stage of a prosecution for a felony or a misdemeanor the court makes a finding of ability to pay the costs of representation . . ., the court shall require payment . . . of the following costs in addition to other costs assessed against the person:
>
> (1) Reasonable attorney's fees if an attorney has been appointed for the person by the court.
>
> (2) Costs incurred by the county as a result of court appointed legal services rendered to the person.

The record does not indicate which statute or combination of statutes the trial court relied on to impose the $200 public defender fee.[5] Indiana Code section 35-33-7-6(c) does not alone suffice because it authorizes a fee of only $100. Nonetheless, each of the three statutes authorizes a public defender fee only upon a finding by the trial court that the defendant is able to pay part of the cost of representation. See Banks v. State, 847 N.E.2d 1050, 1052 (Ind. Ct. App. 2006) (where trial court made no finding that defendant had ability to pay $200 public defender fee, imposition of that fee was error), trans. denied; May v. State, 810 N.E.2d 741, 746 n.3 (Ind. Ct. App. 2004) ("[I]t is clear that the trial court must find that the defendant is able to pay part of the cost of representation before imposing a public defender services fee pursuant to Indiana Code [section] 35-33-7-6(c)."). No such finding appears in the record in this case. Thus, the trial court abused its discretion by imposing a public defender fee without finding that Guajardo had the ability to pay. We therefore reverse and remand for the trial court to reconsider the public defender fee by determining Guajardo's ability to pay.[6] The State concedes such a remand is appropriate.

Conclusion

Guajardo may not challenge his guilty plea on direct appeal, and his conviction is therefore affirmed. Guajardo's executed sentence is not inappropriate, and the sentence is in that respect affirmed. However, the trial court erred by imposing a public defender

[5] We have previously noted that the existence of multiple overlapping statutes is a potential source of confusion and that "[a] thorough legislative consideration of these provisions would be helpful." Lamonte v. State, 839 N.E.2d 172, 176 n.1 (Ind. Ct. App. 2005).

[6] Determination of ability to pay the cost of appointed representation is governed by Indiana Code section 33-40-3-7 and the factors identified therein.

fee without finding Guajardo had the ability to pay, and the fee is therefore reversed and the case remanded for a determination of Guajardo's ability to pay.

Affirmed in part, reversed in part, and remanded.

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