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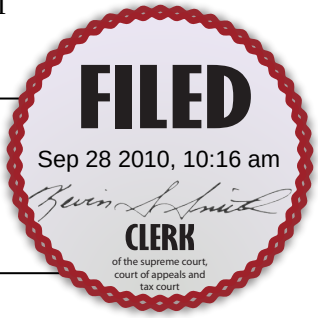

IN THE COURT OF APPEALS OF INDIANA

JOSHUA LINDSEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A02-1002-CR-318
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable William J. Hughes, Judge
Cause No. 29D03-0811-FA-450

September 28. 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Joshua Lindsey appeals his sentence for attempted murder as a class A felony, kidnapping as a class A felony, and attempted escape as a class B felony. Lindsey raises one issue which we revise and restate as whether the trial court abused its discretion in sentencing Lindsey. We affirm.

The relevant facts follow. On November 14, 2008, Lindsey, while in the custody of the Hamilton County Sheriff's Department, knocked Deputy Daniel Trowbridge down and gained control over Deputy Trowbridge's gun. Lindsey struck Deputy Trowbridge during the struggle, and at some point, the gun discharged. Lindsey held the gun to Deputy Trowbridge's head. Lindsey then placed Deputy Trowbridge between him and other officers and used Deputy Trowbridge as a shield in an attempt to avoid arrest.

On November 19, 2008, the State charged Lindsey with: Count I, attempted murder as a class A felony; Count II, attempted murder as a class A felony; Count III, attempted murder as a class A felony; Count IV, kidnapping as a class A felony; Count V, kidnapping as a class A felony; Count VI, attempted escape as a class B felony; Count VII, unlawful possession of a firearm by a serious violent felon as a class B felony; and Count VIII, disarming a law enforcement officer as a class C felony. The State also alleged that Lindsey was an habitual offender.

Lindsey entered into a plea agreement with the State in which Lindsey pled guilty to Count I, attempted murder as a class A felony; Count IV, kidnapping as a class A felony, and Count VI, attempted escape as a class B felony. The plea agreement indicated that the State would recommend an executed sentencing cap of thirty-five years

for Counts I and IV, and an executed sentencing cap of twenty years for Count VI. The plea agreement stated that all counts would be served concurrent with each other and consecutive to Lindsey's sentence imposed under cause number 29D03-0811-FB-000445 ("Cause No. 445"). The court accepted the plea agreement, and the State dismissed the remaining charges.

At the sentencing hearing, the court described Lindsey's criminal history as an "escalating situation" and that Lindsey was "a substantial risk for the commission of additional criminal offenses." Transcript at 54. The court observed that the offense was rare because it occurred in a courthouse. The court also observed that it knew Deputy Trowbridge professionally and stated: "And I'll be very honest with you. I've considered that." Id. at 56. The court listed the following aggravating factors: (1) Lindsey's criminal history; (2) Lindsey has "little regard for other individuals who [he] disagree[s] with" and has a tendency to hurt them; (3) Lindsey's actions were more than necessary to commit the crime and resulted in significantly greater harm to the victims; and (4) the scene, circumstances, and resulting injury of the offense. Id. at 59.

In its sentencing order, the court found the following aggravators: (1) Lindsey's criminal history; (2) the harm, injury, loss or damage suffered by the victim was significant and greater than the elements necessary to prove the commission of the offense; and (3) "[t]he scene, timing, location, and circumstances surrounding the crimes resulted in substantial harm to the Hamilton County criminal justice system."

Appellant's Appendix at 177. The court found the fact that Lindsey took immediate responsibility for his actions by pleading guilty as a mitigator.

The court sentenced Lindsey to thirty-five years for Count I, attempted murder as a class A felony, thirty-five years for Count IV, kidnapping as a class A felony, and twelve years for Count VI, attempted escape as a class B felony. The court ordered the sentences to be served concurrent with each other and consecutive to Lindsey's sentence in Cause No. 445.

The issue is whether the trial court abused its discretion in sentencing Lindsey. The Indiana Supreme Court has held that "the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). We review the sentence for an abuse of discretion. Id. An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Id.

A trial court abuses its discretion if it: (1) fails "to enter a sentencing statement at all;" (2) enters "a sentencing statement that explains reasons for imposing a sentence--including a finding of aggravating and mitigating factors if any--but the record does not support the reasons;" (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration;" or (4) considers reasons that "are improper as a matter of law." Id. at 490-491. If the trial court has abused its discretion, we will remand for resentencing "if we cannot say with confidence that the

trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." Id. at 491. However, the relative weight or value assignable to reasons properly found, or those that should have been found, is not subject to review for abuse of discretion. Id.

Lindsey focuses on the following statements made by the trial court regarding Deputy Trowbridge:

> It is rare that we find crime making it's [sic] way to a courthouse other than in the aftermath of the crime. It's not usually that crimes are committed in courthouses. It is not usual that crimes are committed within feet of the very courtrooms in which Defendants and State present their cases before juries so that justice can be approached. It is an unusual crime in that the victim of the crime was a person who was charged and required to make sure that the very Defendant who committed the crime against him, was adequately transported to and from his facility of incarceration to the courtroom where his case was being heard and justice could be approached in a safe and secure manner. Not only for the rest of the community, but also for the Defendant. Daniel Trowbridge is an individual that is known to this Court, not personally, but professionally because Daniel Trowbridge, until November 14, 2008, routinely, regularly, consistently on several days per week would bring Defendants through that door of this courtroom in the secure area and into this courtroom. Over those years, that Daniel Trowbridge was doing that until November 14, 2008, this Court watched Daniel Trowbridge deal with individuals who are facing some of the most significant events of their lives. When people come into the courtroom frequently they're facing the potential for incarceration. They're facing the potential of loss of income, loss of family members, loss of relationships, they're not generally happy people. The Court has often seen Officer Trowbridge deal with people that I would consider to be in a state that made them difficult to deal with and never once, never once, have I seen him deal with somebody other than in a kind and compassionate manner. Never saw him lose his temper. Never saw him say an unkind word to another person. That's the person who was escorting Mr. Lindsey in that same secure area to the courtroom next door and is the victim of this offense. And I'll be very honest with you. I've considered that.

Transcript at 55-56.

Lindsey argues that the trial court "improperly relied on intimate, personal knowledge and opinion of the victim in this case that it gleaned from its observations of him over a number of years and over a number of events that occurred outside the record in this cause." Appellant's Brief at 5. Lindsey argues that the reliance on Deputy Trowbridge's character was "improper and cannot be used to enhance Lindsey's sentence because it is fraught with extraneous information unrelated to Lindsey." Id. at 6. Lindsey cites to Ind. Code of Judicial Conduct Rule 2.11 which states:

> A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

Lindsey states that "he is not alleging any judicial misconduct by" the trial court and "only offers citations to the judicial canons and rules as guidance to this Court as it considers the issue before it and fashions the relief requested." Appellant's Brief at 6 n.1. Lindsey argues that the "proper remedy in this matter is a remand for resentencing with directions not to consider any evidence of Deputy Trowbridge or Josh Lindsey gained from outside the record in this cause." Id. at 8.

Initially, we observe that while the court stated at one point at the sentencing hearing that it considered its knowledge of Deputy Trowbridge in the court's professional capacity, the court did not mention this fact during its listing of the aggravating factors at

the end of the sentencing hearing or include it as an aggravating factor in its sentencing order.

At the sentencing hearing, the court found that Lindsey had "little regard" for others that he disagrees with and Lindsey's tendency to hurt them as a "significant aggravator." Transcript at 59. The trial court also appeared to focus on Lindsey's criminal history at the sentencing hearing. Specifically, the court stated:

> Now, how do aggravators and mitigators weigh? Frankly, I find that one aggravator is of substantial weight, that's your prior criminal history, and I find that one mitigator is of substantial weight, that is your willingness to accept responsibility.

Id. at 60-61. As to Lindsey's criminal history, the presentence investigation report reveals that as a juvenile, Lindsey, who was born March 2, 1977, was adjudicated a delinquent for theft, assault, and rape. As an adult, Lindsey was convicted of possession of marijuana as a class D felony, three counts of pointing a firearm as class D felonies, carrying a handgun without a license as a class C felony, resisting law enforcement as a class A misdemeanor, battery as a class C felony, armed robbery as a class B felony, criminal confinement as a class B felony, and being an habitual offender.

Lindsey does not challenge the use of his criminal history as an aggravator or the remaining aggravators including the finding that the harm, injury, loss or damage suffered by the victim was significant and greater than the elements necessary to prove the commission of the offense and that "[t]he scene, timing, location, and circumstances

surrounding the crimes resulted in substantial harm to the Hamilton County criminal justice system." Appellant's Appendix at 177.

Based upon our review of the record, we conclude that the trial court's statement regarding Deputy Trowbridge was error but it was harmless considering the valid aggravating factors that were specifically identified by the trial court. Given these aggravators and the court's statements at sentencing, we can say with confidence that the trial court would have imposed the same sentence without consideration of Deputy Trowbridge's character.[1]

For the foregoing reasons, we affirm Lindsey's sentence for attempted murder, kidnapping, and attempted escape.

Affirmed.

DARDEN, J., and BRADFORD, J., concur.

[1] Lindsey cites Patterson v. State, in which the court held that the defendant's trial counsel was ineffective in failing to file a motion for change of judge prior to his sentencing when the judge had previously participated in the case on behalf of the State. 926 N.E.2d 90, 93-95 (Ind. Ct. App. 2010). Here, unlike in Patterson, Lindsey does not argue and the record does not reveal that the trial judge previously served as a lawyer in the case. Thus, we do not find Patterson instructive.