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IN THE COURT OF APPEALS OF INDIANA

BRADLEY J. SCOTT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0706-CR-284
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane Ross Boswell, Judge
Cause No. 45G03-0611-FA-61

January 28, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a guilty plea, Bradley Scott appeals his sentence for robbery, a Class B felony, and for operating a vehicle while an habitual traffic violator ("operating while HTV"), a Class D felony. Bradley argues his aggregate sixteen-year sentence is inappropriate given the nature of the offenses and his character. Concluding his sentence is not inappropriate, we affirm.

Facts and Procedural History

On November 2, 2006, Scott entered the residence of the victim, and took money, jewelry, a computer, and other items. In the course of this act, Scott encountered the victim. During the ensuing struggle, the victim ruptured his bicep. Scott left the victim's house by driving a vehicle, even though his driving privileges has been suspended because of his status as an HTV.

On November 3, 2006, the State charged Scott with burglary, a Class A felony, robbery, a Class A felony, and operating while HTV, a Class D felony. On April 12, 2007, the State added the charge of robbery, a Class B felony. Scott agreed to plead guilty to this charge and the operating while HTV charge in exchange for the State dropping the two Class A felony charges, as well as charges of burglary, a Class B felony, and attempted battery, a Class B misdemeanor, under another cause number. The parties also agreed that the sentences for robbery and operating while HTV would run concurrently.

On May 14, 2007, the trial court held a sentencing hearing at which the victim, Scott, and Scott's girlfriend gave statements. Following the hearing, the trial court entered a

sentencing order in which it found two mitigating factors: 1) Scott's admission of guilt and acceptance of responsibility; and 2) his expression of remorse and apology to the victim. The trial court found Scott's criminal history, including four felonies, six misdemeanors, and four juvenile adjudications, to be an aggravating circumstance. The trial court found the aggravating circumstance outweighed the mitigating circumstances and sentenced Scott to sixteen years in the Department of Correction for robbery and three years for operating while HTV, with the sentences to run concurrently. Scott now appeals his sentence.[1]

Discussion and Decision

When reviewing a sentence imposed by the trial court, we "may revise a sentence authorized by statute 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). We have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). When determining whether a sentence is inappropriate, we recognize that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). We must examine both the nature of the offense and the defendant's character. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When conducting this inquiry, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007),

[1] Scott argues that his sentence for robbery is inappropriate, but makes no argument regarding his sentence for operating while HTV.

trans. denied. The burden is on the defendant to demonstrate that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

The advisory sentence for a Class B felony is ten years, with a maximum sentence of twenty years. Ind. Code § 35-50-2-4. Thus, the trial court sentenced Scott to a term six years above the advisory, and four years below the maximum legal sentence.

Regarding the nature of the offense, the victim indicated at the sentencing hearing that "I no longer have full use of my left arm. By [Scott's] actions, he was able to rip my bicep muscle from the bone. I subsequently endured a three-hour operation and several months of physical therapy. My arm will never be 100 percent again." Sentencing Transcript at 6. Scott argues that although he injured the victim, "it was not his intent to cause injury . . . . Rather the victim attempted to subdue Scott thereby re-injuring a previously torn biceps muscle." Appellant's Brief at 5. We initially note that the trial court did not find the injury to the victim to be an aggravating circumstance. If Scott is arguing that the fact that he did not intend to harm the victim should be considered in mitigation, we disagree. Not only did Scott's act of entering another's home to steal property actually cause bodily injury, such an act clearly created a substantial risk of such harm. Cf. Ind. Code § 35-38-1-7.1(b)(1) (recognizing that a court may consider as a mitigating circumstance that "the crime neither caused nor threatened serious harm to persons or property, or the person did not contemplate that it would do so") (emphasis added)); Clay v. State, 416 N.E.2d 842, 844 (Ind. 1981) ("The court is permitted to consider as a mitigating circumstance the fact that the crime neither caused nor threatened serious harm. Both factors must be absent from the crime.

Since one factor was present there was no ground for considering mitigation on the basis of the absence of the other factor."). We also note that the robbery statute clearly indicates that intent to harm the victim is not necessary. Ind. Code § 35-42-5-1 (indicating robbery is a Class B felony if it "results in bodily injury" (emphasis added)); see Clay, 416 N.E.2d at 844 ("The sentencing court may consider mitigation only in the absence of a threat of serious harm. That such a threat necessarily accompanies the [crime] is irrelevant on the issue of mitigation."); Wilkie v. State, 813 N.E.2d 794, 801 (Ind. Ct. App. 2004) (recognizing that the mitigating factor of lack of intent to cause harm did not apply where the defendant was convicted of causing death when operating a motor vehicle with a controlled substance in his body, as "lack of intent to cause death is irrelevant to [that crime]"), trans. denied.

Further, none of the articles stolen from the victim's residence were returned. Cf. Frye v. State, 837 N.E.2d 1012, 1014 (Ind. 2005) (recognizing that the pecuniary value of the items stolen by the defendant was marginal and that the victim recovered many of the stolen items). In Frye, our supreme court found a forty-year sentence for burglary, consisting of a fifteen years for the offense, enhanced by twenty-five years because of the defendant's status as an habitual offender, inappropriate. Our supreme court noted that the offense involved "no violence and marginal pecuniary loss," and that many of the stolen items were returned to the victim. The court found that instead, a twenty-five year sentence was appropriate. Here, we recognize that the State did not charge Scott with being an habitual offender. However, the record clearly indicates that Scott is indeed an habitual offender, as he has at least three prior unrelated felonies. See Ind. Code § 35-50-2-8 ("[T]he state may seek to

have a person sentences as a habitual offender for any felony by alleging . . . that the person has accumulated two (2) prior unrelated felony convictions."); cf. Kent v. State, 675 N.E.2d 332, 341 (Ind. 1996) (recognizing that a trial court may consider uncharged crimes in sentencing a defendant). Also, unlike in Frye, Scott's crime involved violence to the victim, and none of the stolen items, including a computer and family items of sentimental value, were recovered. In sum, the circumstances of this offense are far worse than those in Frye, for which a twenty-five year sentence was found appropriate.

In regard to Scott's character, by the age of twenty-eight, Scott had accumulated a criminal history consisting of four felonies, including two counts of burglary, possession of a controlled substance, and attempted residential entry; six misdemeanors, including battery by bodily waste, two counts of possession of marijuana, driving while suspended, domestic battery, and operating while HTV; and five juvenile adjudications, including burglary, robbery, attempted residential entry, criminal mischief, and resisting law enforcement. Additionally, the pre-sentence report indicates that Scott has been charged with additional crimes—including drug-related offenses, battery, possession of a stolen vehicle, and aggravated possession of a stolen vehicle—which were either dismissed or disposed of on pre-trial diversion programs. See Cox v. State, 780 N.E.2d 1150, 1157 (Ind. Ct. App. 2002) ("[A] trial court may consider an arrest record as reflective of the defendant's character and as indicative of the risk that the defendant will commit other crimes in the future."). It also appears that Scott was released from prison on his previous conviction for burglary and attempted residential entry only two years prior to the instant offense. See Cardwell v. State,

666 N.E.2d 420, 423 (Ind. Ct. App. 1996), trans. denied (noting that the defendant had been released a short time before committing the instant offense). During this two-year period, Scott was convicted of a misdemeanor and charged with six other offenses, five of which were dismissed and one of which appears to be pending. In sum, Scott's recent and related criminal history and arrest record indicates that there is a substantial risk that he will commit further crimes against persons and property. See Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006) (recognizing that the weight of a defendant's criminal history "is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability").

We acknowledge that Scott pled guilty, and that such an act is inherently considered mitigating, as it suggests the defendant is taking responsibility for his actions. See Cloum v. State, 779 N.E.2d 84, 90 (Ind. Ct. App. 2002). However, in exchange for this plea, the State dropped two Class A felonies, a Class B felony, and a Class B misdemeanor. The law is clear that where a defendant has already received a benefit in exchange for a guilty plea, the mitigating weight of the plea may be reduced. See Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999); Fields v. State, 852 N.E.2d 1030, 1034 (Ind. Ct. App. 2006), trans. denied (noting that the defendant "received a significant benefit from the plea, and therefore it does not reflect as favorably upon his character as it might otherwise"). Also, Scott's defense counsel indicated he had taken depositions of the victim and the victim's son, and that "[the victim] impressed [defense counsel] as a very good witness at deposition; his son also."

Guilty Plea Transcript at 13. Also, both witnesses saw Scott drive away from the scene of the robbery, and Scott admitted to a police officer that he had driven the vehicle knowing of his suspension. Id. at 14. The strength of the evidence against Scott also reduces the weight of his guilty plea by suggesting that the plea may have been more of a strategic decision than a true expression of remorse and acceptance of responsibility. See Scott v. State, 840 N.E.2d 376, 383 (Ind. Ct. App. 2006), trans. denied.

Scott also makes references to his drug use. See Appellant's Br. at 5 ("The severe and lengthy drug addiction of Scott provides the impetus for the commission of the burglary."). Scott has wholly failed to convince this court that his drug habits comment favorably on his character. See Reyes v. State, 848 N.E.2d 1081, 1083 (Ind. 2006) (considering defendant's drug use in declining to revise sentence under Rule 7(B)); Roney, 872 N.E.2d at 199 (recognizing that a trial court may properly consider a history of substance abuse as an aggravating circumstance).

After considering the nature of the offense and Scott's character, particularly as evidenced by his criminal history, we conclude that he has failed to persuade us that a sixteen-year sentence is inappropriate.

Conclusion

We conclude Scott's sentence is not inappropriate given his character and the nature of the offense.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.