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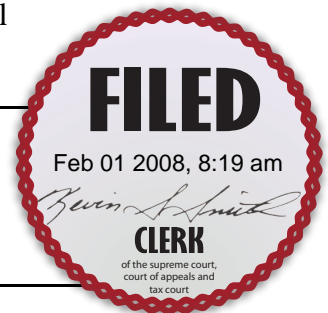
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**IN THE
COURT OF APPEALS OF INDIANA**



SCOTT KIEFNER,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A05-0706-CR-352

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila Carlisle, Judge
Cause No. 49G03-0701-FA-13866

February 1, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Scott Kiefner challenges his sentencing, following his entry into a guilty plea to battery¹ and operating a motor vehicle after the lifetime forfeiture of his driving privileges,² both class C felonies; and for being an habitual offender.

We affirm.

ISSUE

Whether Kiefner's sentence is inappropriate.

FACTS

On January 24, 2007, Officer Douglas Arnold of the Indianapolis Police Department was on routine patrol in the 2700 block of East Raymond Street in Marion County. Near the intersection of Raymond Street and Sherman Drive, he ran the license plate of a gray 1993 Pontiac and learned that it belonged on a teal 1993 Chevrolet. Officer Arnold activated his overhead lights and attempted to initiate a traffic stop. The driver, later identified as Kiefner, disregarded Officer Arnold's lights, proceeded northbound on Sherman Drive, and turned onto Minnesota Street, where he stopped his vehicle.

Officer Arnold approached the Pontiac and was near its rear bumper when Kiefner sped away, continuing eastbound on Minnesota Street. Officer Arnold gave chase, passed the Pontiac, and tried to cut off its path. Kiefner then rammed Officer Arnold's

¹ Indiana Code § 35-42-2-1.

² Ind. Code § 9-30-10-17.

squad car, bringing both vehicles to a halt at Sloan Avenue and Minnesota Street. Officer Arnold exited his squad car with his service weapon drawn. He approached the Pontiac and shouted verbal orders to Kiefner, which Kiefner disregarded.

With his weapon in his left hand, Officer Arnold tried to open Kiefner's driver's side door with his right hand. Kiefner shifted the Pontiac into reverse and began to back up the vehicle, steering it toward Officer Arnold. Kiefner pinned Officer Arnold's left foot and ankle underneath his left rear tire, knocking him partially underneath the Pontiac. As Kiefner continued to drive in reverse and inched closer to Officer Arnold's body, Officer Arnold fired his weapon approximately nine times at the Pontiac.

Kiefner drove away, heading northbound on Sloan Avenue. Officer Arnold got to his feet and radioed dispatch that he had been run down, had fired his weapon, and that the suspect was driving in the direction of Southeastern Avenue. Officer Arnold hobbled to his vehicle and again gave chase. He observed Kiefner driving northbound on Sherman Drive. Officer Arnold ultimately stopped Kiefner at Pleasant Run Parkway North Drive and Young Avenue. This time, Officer Arnold positioned his squad car to block the path of Kiefner's Pontiac. Again, he approached the Pontiac with his weapon drawn and ordered Kiefner to open his driver's side door. Kiefner complied. Officer Arnold removed Kiefner from the vehicle and discovered that Kiefner had been wounded twice by the gunfire. Kiefner received medical treatment for gunshots to his face and right arm, and was placed under arrest.

On January 26, 2007, the State charged Kiefner with the following: count I, attempted murder as a class A felony;³ count II, battery as a class C felony;⁴ count III, operating a motor vehicle after a lifetime suspension of his driving privileges, as a class C felony;⁵ and counts IV and V, two counts of resisting law enforcement as class D felonies.⁶ On April 11, 2007, the trial court permitted the State to amend the charging information to add count VI, an habitual offender enhancement.⁷

On April 26, 2007, the parties tendered a plea agreement to the trial court. Pursuant to the plea agreement, Kiefner agreed to plead guilty to counts II, III, and the habitual offender enhancement. The parties agreed to a sentencing range of eight to fifteen years of executed time. They also agreed that the habitual offender enhancement would be applied to count II. In exchange, the State agreed to dismiss the remaining counts. At Kiefner's guilty plea hearing the following day, the trial court accepted the

³ I.C. § 35-41-5-1; I.C. § 35-42-1-1.

⁴ I.C. § 35-42-2-1.

⁵ I.C. § 9-30-10-17.

⁶ I.C. § 35-44-3-3.

⁷ Indiana Code section 35-50-2-8(a) provides, "Except as otherwise provided in this section, the state may seek to have a person sentenced as a[n] habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two (2) prior unrelated felony convictions." Further, Indiana Code section 35-50-2-8(c) provides,

A person has accumulated two (2) prior unrelated felony convictions for purposes of this section only if:

- (1) the second prior unrelated felony conviction was committed after sentencing for the first prior unrelated felony conviction; and
- (2) the offense for which the state seeks to have the person sentenced as a[n] habitual offender was committed after sentencing for the second prior unrelated felony conviction.

proffered plea agreement and entered judgments of conviction on counts II and III, as well as the habitual offender enhancement.

The trial court conducted a sentencing hearing on May 11, 2007. Although Kiefner advanced his expression of remorse as a mitigating circumstance, the trial court did not find Kiefner's remorse to be compelling.⁸ The trial court did, however, find that Kiefner's acceptance of responsibility was a mitigating circumstance, but noted its limited weight because Kiefner had derived a significant benefit from his guilty plea -- namely, the State's dismissal of the remaining charges, including attempted murder.

With regard to aggravating circumstances, the trial court identified Kiefner's criminal history as "clearly [] significant" and recounted Kiefner's extensive criminal history, excluding the two convictions that qualified Kiefner as an habitual offender. (Tr. 49). The trial court also found Kiefner's status as a parolee at the time of the instant offense to be an aggravating circumstance.

Before imposing its sentence, the trial court made the following statement:

[W]hat's appalling is you keep doing the same thing over and over and over again. It's clear when I look at your criminal history that you've had a problem with alcohol or drugs. It's clear from looking at your criminal history that you've had a problem with operating vehicles when you weren't supposed to. Some of those occasions, you were also intoxicated. And it's clear now . . . , that you will continue, even after . . . go[ing] to prison for operating after being forfeited for life, [to] driv[e] when you're not supposed to. Even after you go to prison for that [offense], it's clear you're going to get out of prison and you're going to do it again because that's what happened with this case.

⁸ During the guilty plea hearing, Kiefner apologized to the trial court and to his attorneys for "any inconvenience that I've caused." (Tr. 40). The trial court was struck by the fact that Kiefner failed to acknowledge or apologize to Officer Arnold, who was also in attendance. Thereafter, the trial court concluded that Kiefner's remorse was not a significant factor.

* * *

And I find [the fact that you were on parole at the time of this incident] to be quite significant as well because this case now shows us the extremes that you will go to when you choose to continue to violate the law by driving when you're not supposed to drive. I mean, how simple is that to know that you shouldn't be getting behind a wheel? That's pretty simple to know that. I recognize life may not be as easy for people who can't drive, but at least you were out with a job and had the freedom to make a choice. You could have gotten a ride. You have people that have come to court for you If they couldn't give you a ride, we all know there's other ways.

* * *

But despite all these numerous times that you've been involved with the law and you know you're going to go to jail if you do it, you continue to do it. And what's scary about our case is when you get caught – and you must have known you were facing the parole violation, you must have known you were on parole when this occurred, knowing that you were going to go back to jail, you did everything you could, including putting someone else's life at risk to avoid that, to avoid the law, to avoid going to jail.

So the State is right that you, at times, have been intoxicated and you have a history that involves drugs, not on this case, but your history reflects that. The State is also right that you're going to apparently continue to drive when you're not supposed to. And I think they're also right when they suggest that an aggravated sentence is appropriate because I don't see anything here other than the fact that you've admitted guilt by pleading guilty, which I don't find to be significant for the reasons I've previously stated * * * [T]he aggravating circumstances outweigh the mitigating circumstances. * * * You were given breaks along the way. You were given short term incarceration. You were given probation. You were given suspended sentences. And then when none of that worked and you continued to do this behavior that brought you in[to court], you were sent to prison, you served your prison time and you get on parole and you do it again.

To the Court, that kind of person is someone that you need to just lock up then because if I let you back out, your pattern shows me that you're going to continue to do this. And now we know, that not only are you going to drive when you're not supposed to, but you're going to put people's lives at risk in this community to avoid getting caught. And that certainly merits a strong punishment.

(Tr. 49-52).

Thereafter, the trial court imposed sentence as follows: as to count II, class C felony battery, eight years; with the habitual offender enhancement of ten years, for an aggregate sentence of eighteen years with fourteen years executed and four years suspended. As to count III, operating a motor vehicle with a lifetime suspension, the trial court imposed an eight-year sentence, to be served concurrently with count II. Kiefner now appeals.

Additional facts will be provided as necessary.

DECISION

Kiefner argues that his eighteen-year sentence is inappropriate in light of the nature of the offenses and his character. He contends that “both the nature of the offense and the character of the offender warrant no more than the advisory term⁹ of years.” Kiefner’s Br. 7. He also argues that “while the trial court . . . segregated those convictions supporting the habitual offender enhancement for sentencing purposes, it is unclear how [Kiefner’s] several non-battery convictions” warranted such an enhanced sentence. Kiefner’s Br. 8.

Pursuant to Indiana Appellate Rule 7(B), this court 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. “[A] defendant must persuade the appellate court that his or her sentence has

⁹ Indiana Code section 35-50-2-6 provides that the advisory sentence for a class C felony is four years, “with not more than four (4) years added for aggravating circumstances or not more than two (2) years subtracted for mitigating circumstances.”

met the inappropriateness standard of review. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007).

With regard to the nature of the offenses, the facts reveal that although Kiefner's driving privileges had been suspended for life, he operated a motor vehicle on the date in question. After being stopped by Officer Arnold regarding his license plate and facing a parole violation and possible prison time, Kiefner fled. He led Officer Arnold on a chase, during which he rammed Officer Arnold's squad car with his vehicle and, subsequently, backed his vehicle over Officer Arnold's left foot and ankle. Officer Arnold was injured when he was knocked to the pavement, falling partially underneath Kiefner's vehicle. When Kiefner continued to drive in reverse, risking further injury to Officer Arnold, Officer Arnold fired his weapon. Kiefner then drove off, leading Officer Arnold on a second chase.

As regards Kiefner's character, we are truly taken aback at his disregard for the law and authority; for the safety of the public-at-large; and for the consequences associated with re-offending. Kiefner's extensive criminal record, his inclination to re-offend, and his dangerous interaction with Officer Arnold demonstrate plainly that he does not respect law and order or the officers charged with upholding the same. As noted by the trial court, Kiefner's criminal history boasts approximately twenty convictions, a number of which involve operation of a motor vehicle, as follows:

[I]n 1974, a conviction for violation of the 35 Beverage Act; in 1974, a conviction for possession of an unregistered firearm and that was from Kentucky; in 1978, fleeing a police officer; in 1981, driving under the influence of liquor, that's in Florida. In 1981, possession of a controlled substance, two counts, that's in Tennessee; 1981, public intoxication;

1982, driving while suspended; 1990, operating while intoxicated; 1991, criminal recklessness, that was a misdemeanor; 1992, operating while intoxicated with a prior, that was a misdemeanor; 1993, battery and conversion; 1995, operating while an HTV [Habitual Traffic Violator]. Again, that was reduced to a misdemeanor. 1995, resisting law enforcement. Also in 1995, disorderly conduct. In 1999, three different cases. First one, operating while HTV and operating while intoxicated were the charges. The second one, operating while HTV; operating while intoxicated were the charges. The third one, operating while HTV were the charges. In 2000, you were convicted of operating while HTV; and in 2003, operating after [your driving privileges were] forfeited for life. That's a separate case from the one that qualified you for the habitual. So, I show almost eighteen or nineteen separate convictions aside from those convictions that were used for your Habitual Enhancement. And that's a clearly a significant aggravating circumstance. You started in the '70's and you just keep going.

(Tr. 48-49) (emphasis added).

Given Kiefner's history of chronically re-offending, we agree with the trial court's conclusion that Kiefner is extremely likely to re-offend and, therefore, poses a considerable threat to public safety. Sadly, despite numerous opportunities to stay on the right side of the law, Kiefner has continued to offend. "[Kiefner] was given breaks along the way. [He] was given short term incarceration. [He] was given probation. [He] was given suspended sentences" to no avail, because time after time, he re-offended. (Tr. 52). In fact, even after serving a prison term and subsequently being granted the opportunity to be a law-abiding parolee, Kiefer continued to drive in violation of the law.

During the instant offense, Kiefner led Officer Arnold on two chases through public roadways, rammed Officer Arnold's car, struck Officer Arnold with his vehicle and knocked him to the pavement, injuring him. While Officer Arnold's body was positioned partially underneath his vehicle, Kiefner continued to reverse toward him.

Officer Arnold ultimately discharged his service weapon approximately nine times toward the vehicle, injuring Kiefner. As the trial court aptly stated, “[N]ow we know, that not only [is Kiefner] going to drive when [he’s] not supposed to, but [he’s] going to put people’s lives at risk in this community to avoid getting caught.” (Tr. 52).

In light of the foregoing, we can find no redeeming character traits that merit the reduction of Kiefner’s sentence and the imposition of a lesser advisory sentence. To the contrary, we agree with the trial court’s conclusion that Kiefner’s conduct “certainly merits a strong punishment” in the form of an enhanced sentence. (Tr. 52). We wholly reject Kiefner’s suggestion that his criminal history does not warrant an enhanced sentence, given the sheer number of his convictions.

After due consideration of the trial court’s decision, Kiefner’s enhanced sentence of eighteen years is not inappropriate in light of the nature of the offenses and the character of the offender.

Affirmed.

BAKER, C.J., and BRADFORD, J., concur.