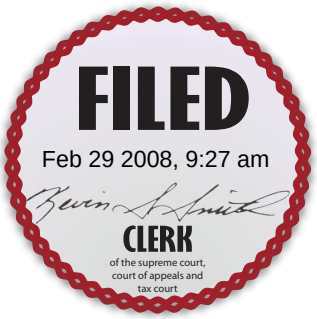

ATTORNEY FOR APPELLANT:

ALISON T. FRAZIER
Dupont, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

SCOTT L. BARNHART
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

GARY MITCHELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 78A01-0710-CR-495
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE SWITZERLAND SUPERIOR COURT
The Honorable John D. Mitchell, Judge
Cause Nos. 78D01-0606-FC-335 and 78D01-0602-FC-71

February 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Gary Mitchell appeals his modified sentence following convictions in two cases for two counts of Operating During Habitual Traffic Violator Lifetime Suspension ("Operating During a Lifetime Suspension"), Class C felonies, and two counts of Operating a Vehicle While Intoxicated ("OVWI"), as Class A misdemeanors, pursuant to guilty pleas. Mitchell presents two issues for review, namely:

1. Whether the trial court imposed illegal sentences as modified.

2. Whether Mitchell's sentences are inappropriate in light of the nature of the offenses and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

On February 5, 2006, police stopped Mitchell for driving while intoxicated. As a result, the State charged Mitchell under Cause No. 78D01-0602-FC-71 ("FC-71") with Operating During a Lifetime Suspension, a Class C felony; OVWI, as a Class A misdemeanor; OVWI, as a Class C misdemeanor; false and fictitious registration, a Class A infraction; and being an habitual traffic offender. And on June 28, 2006, police again stopped Mitchell for driving while intoxicated near Switzerland High School. As a result, the State charged Mitchell in Cause No. 78D01-0606-FC-335 ("FC-335") with Operating During a Lifetime Suspension, a Class C felony; OVWI, as a Class A misdemeanor; and OVWI, as a Class C misdemeanor.

On July 10, 2007, the trial court held a combined plea hearing in FC-71 and FC-335, at which Mitchell pleaded guilty as charged in both cases. On August 15, 2007, the court heard evidence for sentencing in both cases and took the matter under advisement.

And on August 27, 2007, the court entered a judgment of conviction in FC-71, convicting Mitchell of Operating During a Lifetime Suspension, a Class C felony, and OVWI, as a Class A misdemeanor.[1] In FC-335, the court entered judgment convicting him of Operating During a Lifetime Suspension, a Class C felony, and OVWI, as a Class A misdemeanor.[2]

In FC-71, the court sentenced Mitchell to the maximum possible sentence of eight years for Operating During a Lifetime Suspension, with four years suspended, and one year for OVWI, to be served concurrently and with credit for time served. The court ordered Mitchell to serve probation for the four-year suspended portion of his sentence. And in FC-335, the court sentenced Mitchell to the maximum of eight years for Operating During a Lifetime Suspension, with four years suspended, and one year for OVWI, to be served concurrently and with credit for time served. The court further ordered Mitchell to serve the sentences in FC-71 consecutive to the sentences in FC-335.

On September 7, 2007, Mitchell filed a motion to stay the remainder of sentence, or, in the alternative, motion for change of placement in both FC-71 and FC-335 ("Motions for Change of Placement"). On September 10, 2007, Mitchell filed his notice of appeal. And on October 22, 2007, the court entered orders granting the Motions for Change of Placement ("Order"). The Order in FC-71 provides, in relevant part:

[1] The court rejected the guilty plea to the charge alleging Mitchell to be an habitual offender, citing Indiana Code Section 35-50-2-8(b)(2). The court also dismissed the charge of OVWI, as a Class C misdemeanor, as a lesser included offense of OVWI, as a Class A misdemeanor, and the false and fictitious registration charge.

[2] The court again dismissed the charge of OVWI, as a Class C misdemeanor, as a lesser included offense of the Class A misdemeanor charge.

1. The placement for Defendant is cha[n]ged such as to require Defendant to serve the executed part of the sentence of four (4) years in this case on work release at the Dearborn County Law Enforcement Center in Lawrenceburg, Indiana under the supervision of the sheriff of Dearborn County and Southeast Regional Community Correction;

* * *

4. The sentence as set forth in the judgment of conviction shall remain as entered except as herein modified[.]

Appellant's App. at 63-64. And the Order in FC-335 provides, in relevant part:

1. The placement for Defendant is cha[n]ged so as to require Defendant to serve the executed part of the sentence of four (4) years in this case on in[-]home detention under the supervision of Southeast Regional Community Correction which sentence shall be served consecutive to the sentence in Case No. [FC-71];

2. The judgment of conviction is modified such as to require the Defendant to be on probation for a period of eight (8) years upon the conditions set forth in the judgment of conviction and the order of probation except as herein modified[.]

Id. at 124. Mitchell now appeals.

DISCUSSION AND DECISION

Issue One: Modified Sentence

Mitchell contends that the trial court erred when it modified his sentence. Specifically, he argues that the trial court imposed an illegal sentence when it ordered him to spend four years on in-home detention and eight years on probation in FC-335 because the total twelve-year sentence exceeds the statutory maximum for a Class C felony.[3] The State responds that the sentence in the modified Order is ambiguous because

[3] "'A sentence that is contrary to or violative of a penalty mandated by statute is illegal in the sense that it is without statutory authorization.'" Reffett v. State, 844 N.E.2d 1072, 1073 (Ind. Ct. App. 2006) (quoting Murray v. State, 798 N.E.2d 895, 903 (Ind. Ct. App. 2003)). Here, Mitchell did not raise

it is unclear whether the in-home detention is part of the executed sentence or a condition of the eight-year probationary period. Thus, we first consider whether the modified Order in FC-335 requires construction.

We construe judgments in the same way we construe contracts. Singh v. Singh, 844 N.E.2d 516, 524 n.1 (Ind. Ct. App. 2006). A judgment is ambiguous if it would lead two reasonable persons to different conclusions about its meaning and effect. Id. Here, the trial court's original Order in FC-335 provided for Mitchell to serve eight years, with four years suspended to probation, for Operating During a Lifetime Suspension, for a total sentence of eight years. See Ind. Code § 35-50-2-6. On Mitchell's motion, the court modified that sentence, ordering Mitchell to serve four years of in-home detention and eight years on probation.

The modified Order in FC-335 can be read one of two ways: to provide either that the period of in-home detention is the executed portion of Mitchell's sentence or that the period of in-home detention is a condition of probation. If the modified Order directs Mitchell to start probation at the conclusion of his four-year period of in-home detention, the aggregate sentence is twelve years. See Collins v. State, 835 N.E.2d 1010, 1017 (Ind. Ct. App. 2005) (a "prison sentence, the imposition of probation, or any combination of the two, may not exceed the maximum term for the conviction."), trans. denied. A twelve-year sentence would be illegal because it would exceed the statutory maximum for a Class C felony. See Ind. Code § 35-50-2-6 (providing that maximum sentence for

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the illegality of the sentence to the trial court, arguably resulting in waiver. See Brown v. State, 783 N.E.2d 1121, 1125 (Ind. 2003). But a sentence that exceeds statutory authority constitutes fundamental error. Reffett, 844 N.E.2d at 1073. Thus, we review the alleged sentencing error.

Class C felony is eight years). But, as the State points out, the court did not specify whether the term of in-home detention was part of an executed sentence or was a condition of probation. Thus, the modified Order in FC-335 is ambiguous and requires construction.

If a judgment is ambiguous, we determine its meaning by examining the judgment as a whole, without isolating particular words. Singh, 844 N.E.2d at 524 n.1. Judgments should be liberally construed as to make them serviceable and not useless. Id. Here, construing the modified Order to provide for an executed term of in-home detention would result in a sentence that exceeds the statutory maximum. The trial court could not have intended such a result. Thus, we hold that the trial court intended the period of in-home detention in FC-335 to be a condition of probation. Such a construction renders the Order "serviceable" and "not useless." See id. We hold that the aggregate sentence is eight years probation, with four years of in-home detention as a condition of probation. That sentence does not exceed the statutory maximum for a Class C felony. As a result, Mitchell's claim that the sentence is illegal must fail.

Issue Two: Appellate Rule 7(B)

Mitchell also contends that his consecutive sixteen-year sentence in FC-71 and FC-335 is inappropriate in light of his character and the nature of the offenses. Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review and revision of a sentence imposed by the trial court." Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007) (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind.

2006)), (alteration original), clarified on other grounds on reh'g, 875 N.E.2d 218 (Ind. 2007). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Under Appellate Rule 7(B), we assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, "a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." Anglemyer, 868 N.E.2d at 494 (quoting Childress, 848 N.E.2d at 1080) (alteration in original). And on appeal, the relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse. Id. at 491.

Mitchell's sentence is not inappropriate in light of his character. Mitchell points out that he pleaded guilty in the present cases without a reduction in sentence or sentence recommendation. He argues that his guilty pleas conferred a substantial benefit on the State and, therefore, "warrant[]" a substantial benefit to him. Appellant's Reply Brief at 1. In essence, Mitchell contends that the trial court should have accorded more weight to his guilty pleas. But "the trial court no longer has any obligation to 'weigh' aggravating and mitigating factors . . . [and] can not now be said to have abused its discretion in failing to 'properly weigh' such factors." Anglemyer, 868 N.E.2d at 491.

In any event, we cannot say that his guilty pleas, when balanced against his criminal history, render his sentence inappropriate. At the time of sentencing, Mitchell was thirty-four years old, had accrued six alcohol-related driving convictions between 1993 and 1999, and had served nine months in prison for one of those convictions.

Mitchell also stated that he began drinking when he was eight years old and admitted that he is an alcoholic. While Mitchell had obtained treatment in the past and was in treatment at the time of sentencing, he has never completed a treatment program.

Mitchell's aggregate sentence is also not inappropriate in light of the nature of the offenses. Mitchell was convicted of two counts each of Operating During a Lifetime Suspension, Class C felonies, and OVWI, as Class A misdemeanors, for incidents that occurred only three months apart. When he was arrested on the second of those offenses, he was driving while intoxicated near a local high school, where there is a potential for a large volume of pedestrian traffic. And in each case he was aware that his license was suspended, but he drove anyway.

Conclusion

We conclude that the modified Order in FC-335 provides for eight years of probation with four-years of in-house detention as a condition of probation. Thus, the total sentence in that case does not exceed the statutory maximum for a Class C felony. We further conclude that Mitchell's aggregate sentence is not inappropriate in light of his character and the nature of his offenses. Mitchell has a long history of alcohol-related traffic offenses and he knowingly disregarded his lifetime suspension of driving privileges by driving twice in a three-month period. Thus, we decline Mitchell's request that we revise his sentence downward.

Affirmed.

BAILEY, J., and CRONE, J., concur.