ATTORNEY FOR APPELLANT:

ADAM G. FORREST
Boston Bever Klinge Cross & Chidester
Richmond, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JOBY D. JERRELLS
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DARRELL S. AUBUCHON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 89A04-0909-CR-517
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WAYNE CIRCUIT COURT
The Honorable David A. Kolger, Judge
Cause No. 89C01-0607-FC-28

March 5, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Darrell S. Aubuchon appeals his convictions for Attempted Residential Entry,[1] a class D felony, Auto Theft,[2] a class D felony, Resisting Law Enforcement,[3] a class D felony, and Operating a Motor Vehicle while Intoxicated,[4] a class A misdemeanor, and the four-and-one-half-year sentence enhancement that was imposed following the determination that he was a Habitual Offender.[5]

More particularly, Aubuchon contends that the trial court erred in denying his motion for dismissal and discharge pursuant to Indiana Criminal Rule 4, that the trial court improperly ordered the habitual offender enhancement to be served consecutively to a previously imposed habitual offender enhancement that arose from a separate trial on unrelated charges, and that the sentence enhancement on the habitual offender count is inappropriate in light of the nature of the offenses and his character.

We conclude that the trial court properly denied Aubuchon's motion for discharge. We also find that while Aubuchon's sentence was appropriate in light of the nature of the offense and his character, we are compelled to remand this case to the trial court with instructions that it order the habitual offender enhancement to run concurrently with the enhancements that were imposed in the unrelated cases.

FACTS

[1] Ind. Code § 35-41-5-1; Ind. Code § 35-43-2-1.5.

[2] I.C. § 35-43-4-2.5(b)(1).

[3] Ind. Code § 35-44-3-3(a)(3); -3(b)(1)(A).

[4] Ind. Code § 9-30-5-2(b).

[5] Ind. Code § 35-50-2-8.

On May 14, 2006, at approximately 3:45 a.m., Indiana State Police Officer Brian Bunner received a call concerning a suspicious vehicle located in a ditch near Toschlog Road and Test Road in Wayne County. Officer Bunner investigated the vehicle and learned that it was a 2001 Ford Mustang that was owned by Richmond resident Joe Price.

Price reported to Officer Bunner that he last saw the vehicle parked in his driveway at approximately 1:00 a.m. Price telephoned his son and they went to retrieve the vehicle. The Mustang was off road in the mud and the key was stuck in the ignition. Price smelled the odor of beer in the backseat and observed that the Mustang was scraped and had a broken tailpipe.

Shortly after taking the report regarding the Mustang, Officer Bunner received a dispatch regarding a prowler near Stephen Creviston's residence. Creviston lived on Test Road and had awakened to the sound of his barking dog. When Creviston stepped outside, he saw an individual with a mustache wearing jeans, a grey shirt, and a baseball cap standing at the corner of his garage. After the man ran toward a wooded area, which was about 1/4 mile from the Mustang's location, Creviston contacted the police.

Officer Bunner arrived at the scene and Creviston pointed out that a storm window had been removed and a screen on the backside of his residence had been cut. Creviston also noticed that several dollars were missing from his vehicle.

That same morning, the Breedens—who also lived in a Richmond neighborhood—had parked their van in their driveway. The Breedens typically kept the

keys under the floorboard and had not experienced any problems with break-ins or theft in nearly twenty-five years.

At approximately 4:30 a.m., Indiana State Trooper Shane Stephens observed a van traveling at a high rate of speed on Abington Pike in Wayne County. Although the van initially stopped for a stop sign, the driver accelerated and sped away. In response, Trooper Stephens turned around and followed the van, which continued to travel in excess of the posted speed limit. Trooper Stephens then activated his lights and attempted to conduct a traffic stop. The van failed to stop and "peeled out" at a stop light. Tr. p. 239. Trooper Stephens pursued the van until it hit a sign, "blew out a tire," and crashed. Appellant's App. p. 142. The driver, who was later identified as Aubuchon, ran from the van through the neighborhood. Aubuchon had a mustache and was wearing a grey sweatshirt and blue jeans. The officers apprehended Aubuchon and observed that he had red, watery eyes, and smelled of alcohol. During the investigation, it was discovered that Aubuchon was in possession of a bottle of cologne that belonged to Price. Trooper Stephens confirmed that the van was owned by the Breedens.

At some point, the police transported Aubuchon to Creviston's residence. Although Creviston was unable to identify Aubuchon by his face, he noticed that Aubuchon was wearing the same baseball cap and clothing as the man who was standing by his garage earlier that morning.

The police contacted the Breedens and informed them that their van had been involved in an accident. Bob Breeden noticed that the vehicle's hood was dented and one of the aluminum rims had been broken.

On May 15, 2006, the State charged Aubuchon under Cause Number 89C01-0605-FD-069 (FD-069 case), with Count I, auto theft, a class D felony; Count II, resisting law enforcement, a class D felony,[6] and Count III, operating while intoxicated, a class A misdemeanor. The State subsequently alleged that Aubuchon was a habitual offender.

On July 12, 2006, the State charged Aubuchon in Cause Number 89C01-0607-FC-028 (FC-028 case), with Count I auto theft, a class C felony, alleging that he had a prior conviction for that offense; Count II, attempted residential entry, a class D felony, and Count III, receiving stolen property, a class D felony.[7]

The trial court scheduled a pretrial hearing in the FD-069 case for September 11, 2006. However, Aubuchon did not appear because he was incarcerated in the Fayette County Jail on several unrelated charges. As a result, the trial court issued an arrest warrant and the matter was reset for a pretrial conference on September 25. However, the trial court rescheduled the hearing for September 29.

On September 27, 2006, Aubuchon's counsel sent a letter to the deputy prosecutor and the trial court informing them that Aubuchon was incarcerated in the Fayette County

[6] Counts I and II stemmed from the theft of the Breeden's van and Aubuchon's flight from Officer Stephens in the vehicle. Appellant's App. p. 140.

[7] These charges stemmed from Aubuchon's theft of Price's Mustang, his attempt to enter Creviston's residence, and "receiving or retaining" Price's cologne. Appellant's App. p. 8.

jail. At the September 29, 2006, pretrial conference, the trial court was again advised that Aubuchon was incarcerated.[8] As a result, the trial court entered an order—which is memorialized in the Chronological Case Summary (CCS)—indicating that the matter would be reset for pre-trial conference and trial "upon the apprehension of [Aubuchon] on the warrant issued on September 11, 2006."

Aubuchon was arrested on the outstanding arrest warrant on December 3, 2008, and processed into the Wayne County Jail. Aubuchon then filed a motion to dismiss the charges and for discharge on December 5, 2008, alleging that

> 5. As a result of the State being placed on notice of the Defendant's incarceration in Fayette County, the State was obligated to proceed with the Defendant's prosecution in a timely manner but failed to do so.
>
> 6. The Defendant has been made to answer a criminal charge for a period in aggregate embracing more than one year in violation of the Indiana and United States Constitutions and Ind. Rule of Crim. Proc. 4(C).
>
> 7. The court should therefore immediately discharge the Defendant. . . .

Appellant's App. p. 155-56.

At a hearing on the motion for discharge that commenced on February 23, 2009, the parties acknowledged that Aubuchon's counsel had sent a letter to the trial court and the State on September 27, 2006, informing them that Aubuchon was incarcerated in Fayette County. Although the letter is not included in the appendix, the parties agreed in open court that the correspondence did "not request any relief." Tr. p. 26.

[8] This hearing may not have been recorded, as the Notice of Appeal requested a transcript of all hearings "to the extent they were recorded." Appellant's App. p. 134.

Aubuchon's counsel noted that there had not been an initial hearing in the FC-028 Case and the letter inquired as to whether a transport could occur or whether the Fayette County cases should first be resolved. Thereafter, the deputy prosecutor commented that

> In this case, there was correspondence sent advising that Mr. Aubuchon was, in fact, in the Fayette County Jail asking the Court whether a transport order should be done or whether we should wait until the Fayette County cases were resolved. And I . . . spoke briefly in chambers with defense counsel and the Court regarding this.
>
> My recollection was that we had talked about this on the September 29th date when the pre-trial entry was made and that it was understood we would, based on that correspondence, wait until the Fayette County cases were resolved and that's why the Court's entry indicated the pre-trial conference and trial dates will be scheduled upon apprehension of the defendant on the warrant issued September 11, 2006.
>
> THE COURT: Where . . . does that entry—is that in both of them?
>
> DEPUTY PROSECUTOR: September 29th and I pull the CCS, it's just because they're easier to manage than all the papers from the Court's file, and it's at the bottom of page three of the CCS. And that—that entry was not made with regard to the FC cause because an original pre-trial date was never set since there was never an initial hearing until December of 2008. So, . . . there was an acquiescence or waiver of the CR 4 issue by failure to object in a timely period to the setting of the trial date.

Id. at 32-33 (emphasis added).

Aubuchon did not dispute the deputy prosecutor's comments that the parties had agreed to first resolve the cases in Fayette County before setting the instant case for trial. Following the hearing, the trial court denied Aubuchon's motion to dismiss and for discharge on April 6, 2009. The trial court also granted Aubuchon's motion to join the two causes for trial.

A jury trial commenced on April 28, 2009, and following the presentation of evidence, the jury convicted Aubuchon of renumbered Count II (attempted residential entry), Count IV (auto theft), Count V (resisting law enforcement), and Count VI (operating while intoxicated).[9] Aubuchon admitted the habitual offender allegation, and on July 13, 2009, the trial court sentenced Aubuchon to three years of incarceration on Counts II, IV, and V, with all sentences to run concurrent to one another, and to one year on Count VI, with that sentence to run concurrent to the other counts. The trial court then enhanced the sentence on the auto theft conviction (Count IV) by an additional four-and-one-half years pursuant to the habitual offender determination, for a total executed term of seven-and-one-half years.

In support of the sentence, the trial court identified Aubuchon's criminal history as an aggravating factor, noting that Aubuchon has accumulated ten felony convictions, numerous misdemeanor convictions, and four probation revocations. Tr. p. 433-35. The trial court also found that Aubuchon's decision to plead guilty to the habitual offender count and the hardship that incarceration were mitigating circumstances. The trial court concluded that the "aggravators far outweigh the mitigators." Id. at 438.

The trial court also ordered Aubuchon to serve the sentence consecutively to other sentences that had been imposed on August 15, 2008, in three unrelated Fayette County cases.

[9] The trial court granted Aubuchon's motion to dismiss the receiving stolen property charge and the jury found Aubuchon not guilty of auto theft as alleged in count I.

In one of those cases (Case FD-575), Aubuchon was sentenced to three years for auto theft, a class D felony, of which six months were suspended, and to two-and-one-half years for theft, a class D felony, with those sentences to run concurrently with each other. Aubuchon was also sentenced to one-and-one-half years following a habitual offender finding. These sentences were ordered to run consecutively to those imposed in the other two Fayette County cases.

In Case FC-237, Aubuchon was sentenced to eight years for forgery with four years suspended. He was also sentenced to six years on a habitual offender count and those sentences were ordered to run consecutively to those in the other Fayette County cases.

Finally, in Case FD-203, Aubuchon was sentenced to six months of incarceration for a violation of probation. That sentence was also ordered to run consecutively to the sentences that were imposed in the other cases. Aubuchon now appeals.

DISCUSSION AND DECISION

I. Motion for Discharge

Aubuchon first claims that the trial court should have granted his motion for discharge. Specifically, Aubuchon contends that he should have been discharged because the State failed to bring him to trial within one year pursuant to the requirements of Criminal Rule 4.

We initially observe that the right of an accused to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and by Article I, Section 12 of the

Indiana Constitution. Cole v. State, 780 N.E.2d 394, 386 (Ind. Ct. App. 2002). Moreover, Criminal Rule 4 is designed to implement the right to a speedy trial by providing deadlines by which a criminal trial must be held. Dean v. State, 901 N.E.2d 648, 652 (Ind. Ct. App. 2009), trans. denied.

Criminal Rule 4(C) provides in relevant part that:

> (C) Defendant discharged. No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act. . . .

(Emphasis added).

Although Criminal Rule 4(C) places an affirmative duty on the State to bring a defendant to trial within one year of being charged or arrested, extensions are permitted for various reasons. Cook v. State, 810 N.E.2d 1064, 1066 (Ind. 2004). Indeed, we have determined that "[i]f a delay is caused by the defendant's own motion or action, the one-year time limit is extended accordingly." Frisbie v. State, 687 N.E.2d 1215, 1217 (Ind. Ct. App. 1997). In other words, "when a defendant takes action which delays the proceeding, that time is chargeable to the defendant and extends the one-year time limit regardless of whether a trial date has been set at the time or not." Cook, 810 N.E.2d at 1066-67.

We also note that when a trial court, acting within the one-year period of the rule, schedules a trial to begin beyond the one-year limit, the defendant must make a timely

objection to the trial date or waive his right to a speedy trial. Vermillion v. State, 719 N.E.2d 1201, 1204 (Ind. 1999). The defendant's failure to object in a timely manner will be deemed an acquiescence in the setting of that date. Id. In keeping with this duty on the part of the State, the defendant "has no obligation to remind the court of the State's duty, nor is he required to take any affirmative action to see that he is brought to trial within that period." Leek v. State, 878 N.E.2d 276, 277 (Ind. Ct. App. 2007). However, a defendant extends the one-year period by seeking or acquiescing in delay resulting in a later trial date. Pelley v. State, 901 N.E.2d 494, 498 (Ind. 2009).

As discussed above, Aubuchon did not dispute the deputy prosecutor's comments that they had agreed to "just wait" until the Fayette County cases were finished before "deal[ing] with the issue here based on that correspondence." Id. at 32. The deputy prosecutor further explained that the CCS entry of September 29, 2006, reflected the parties' agreement and Aubuchon did not object to that comment.

In our view, when considering the evidence that was presented, the judicial notice that the trial court may take of its own files, and the deputy prosecutor's recollection of the purpose of the CCS entry to which Aubuchon did not object, it was reasonable for the trial court to conclude that Aubuchon waived his Rule 4(C) objection by agreeing to wait until the Fayette County cases were resolved. Therefore, because Aubochon acquiesced in the delay, we conclude that the trial court properly denied Aubuchon's motion for discharge.

II. Sentencing—Habitual Offender

Aubuchon argues that the trial court erred in ordering the habitual offender enhancement to be served consecutively to the previously imposed habitual offender enhancements in the unrelated Fayette County charges. Aubuchon contends—and the State concedes—that the habitual offender enhancement in this instance should be ordered to run concurrently with the habitual offender enhancements in the Fayette County cases.

We initially observe that sentencing is principally a discretionary function in which the trial court's judgment should receive considerable deference. Cardwell v. State, 895 N.E.2d 1219, 1222 (Ind. 2008). And Indiana Code section 35-50-1-2 provides that the trial court has discretion to determine whether terms of imprisonment are to be served concurrently or consecutively. However, our Supreme Court has determined that a trial court cannot order consecutive habitual offender sentences. Breaston v. State, 907 N.E.2d 992, 994 (Ind. 2009); Starks v. State, 523 N.E.2d 735, 737 (Ind. 1988).

The underlying facts in Breaston were as follows:

> In December, 2003, Byron Breaston was convicted of Class D felony theft and sentenced to two years. Breaston was placed on work release, but on February 1, 2004, he did not return to detention. Breaston was apprehended and charged with, and ultimately convicted of, Class D felony escape and being a habitual offender. On November 17, 2004, he was sentenced to three years for the felony escape conviction, enhanced by four and one-half years for being a habitual offender.
>
> The instant case arises from a different set of charges. On February 18, 2004, the State charged Breaston with theft, a Class D felony, and being a habitual offender. A jury found Breaston guilty of both counts. On November 29, 2004, he was sentenced to three years for the theft conviction, enhanced by four and one-half years due to the habitual offender finding. These sentences, including the new habitual offender

> enhancement, were ordered to be served consecutively to the prior habitual offender enhancement.

907 N.E.2d at 993 (emphasis added).

On appeal, the Breaston court held that consecutive habitual offender sentences cannot run consecutively "whether the concurrent enhanced sentence is imposed in a single proceeding or in separate proceedings." Id. at 995. As a result, the case was remanded to the trial court with instructions to order the habitual offender enhancement to be served concurrently with the prior enhancement. Id. at 995-96.

As discussed above, Aubuchon was sentenced in Case FD-575 for auto theft, which was enhanced by one-and-one-half years in light of the habitual offender determination. Appellant's App. p. 196. That same day, in Case FC-237, the trial court sentenced Aubuchon to eight years for forgery, a class C felony, of which four years were suspended. However, it also enhanced the sentence by six years on the habitual offender finding. Id. at 210.[10]

In light of our Supreme Court's pronouncement in Breaston and Starks, we must conclude that the trial court erred in ordering Aubuchon's enhanced sentence in light of the habitual offender count to run consecutively to those enhancements that were imposed in the Fayette County cases. As a result, we remand this case to the trial court with instructions that it order the four-and-one-half year enhancement in the instant case to run concurrently with the six-year enhancement that was imposed in Case FC-237 and

[10] The trial court did not enhance the sentence in Case FD-203.

the one-and-one-half year enhancement that was imposed in Case FD-575. We note, however, that the underlying sentence in this case may run consecutively to the sentences that were imposed in the Fayette County cases.[11]

III. Inappropriate Sentence

Aubuchon argues that his sentence was inappropriate. In particular, Aubuchon maintains that the imposition of a maximum habitual offender sentence enhancement[12] was inappropriate in light of the nature of the offense and his character when considering the hardship that incarceration would have on his family, his show of remorse, and his decision to plead guilty to the habitual offender count. Therefore, Aubuchon argues that we must revise the imposition of the enhancement "such that it is less than that currently imposed." Appellant's Br. p. at 25.

Indiana Appellate Rule 7(B) provides that this court "may review 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." Although Rule 7(B) does not require us to be "very

[11] As an aside, we note that Aubuchon and the State both point out that the sentence enhancements in Case FD-575 and Case FD-069 may also run afoul of the principles set forth in Breaston and Starks because there exists a habitual offender enhancement of one-and-one-half years in Case FD-575 that was ordered to run consecutively to the six-year habitual offender enhancement in Case FC-237, and vice versa. However, we decline to address the propriety of those sentences, inasmuch as the matter is not properly before us at this time.

[12] Indiana Code section 35-50-2-8(h) provides that "the court shall sentence a person found to be a habitual offender to an additional fixed term that is not less than the advisory sentence for the underlying offense nor more than three (3) times the advisory sentence for the underlying offense." As noted above, the trial court enhanced Aubuchon's conviction for auto theft, a class D felony. The advisory sentence for a class D felony is one and one-half years. I.C. § 35-50-2-7.

deferential" to a trial court's sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. Finally, the defendant bears the burden of persuading the appellate court that the sentence is inappropriate. Id.

When considering the nature of the offense, we note that Aubuchon committed multiple offenses against multiple victims. More specifically, Aubuchon stole a vehicle, attempted to enter another person's home, led police on a car chase, and was driving while intoxicated.

With regard to Aubuchon's character, the record shows that he has accumulated a substantial criminal history since 1990. PSI at 3. He has been convicted of burglary, multiple counts of receiving stolen property, theft, and auto theft as Class D felonies. Aubuchon also has been convicted of false reporting, possession of marijuana, dealing in marijuana, and forgery. Id. at 3-5. Notwithstanding efforts to rehabilitate Aubuchon, he has continued to disrespect our laws and re-offend. Therefore, we cannot say that the nature of the offense or Aubuchon's character warrants a revision of his sentence.

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions to order the four-and-one-half year enhancement that was imposed on the habitual offender count to run concurrently with the enhancements that were imposed in the Fayette County cases.

BAILEY, J., and ROBB, J., concur.