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**IN THE
COURT OF APPEALS OF INDIANA**

DENNIS BERGER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 03A01-0709-CR-406

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Chris D. Monroe, Judge
Cause No. 03D01-0705-FD-821

March 19, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Dennis Berger challenges the sentence he received after pleading guilty to possession of a controlled substance,¹ theft,² and resisting law enforcement,³ all class D felonies, and battery resulting in bodily injury, a class A misdemeanor.⁴ Citing *Cole v. State*, 850 N.E.2d 417 (Ind. Ct. App. 2006), he contends that his offenses constituted one episode of criminal conduct. Therefore, Berger's argument continues, his aggregate sentence should not have exceeded four years, which is the advisory sentence for a C felony.⁵ We affirm.

Facts⁶ and Procedural History

On May 1, 2007, at approximately 10:30 p.m., Courtney James sat in her vehicle in front of her residence, 745 California Street, Columbus. A blue and cream colored Ford SUV driven by Jessica Caudill pulled up next to James' vehicle. Berger exited the SUV, walked toward James' vehicle, yelled at her, lunged at her, and began punching her in the face and back of the head. James was able to push away from Berger and race away in her vehicle.

¹ Ind. Code § 35-48-4-7(a).

² Ind. Code § 35-43-4-2(a).

³ Ind. Code § 35-44-3-3(a)(3) and Ind. Code § 35-44-3-3(b)(1).

⁴ Ind. Code § 35-42-2-1(a)(1)(A).

⁵ Ind. Code § 35-50-2-6.

⁶ Within the materials presented on appeal, we have located no transcript of a guilty plea hearing/change of plea hearing, which ordinarily would provide the factual basis for a guilty plea. Despite this omission, both Berger and the State recite in their briefs very similar "facts," which have been extracted from a multiple-page Columbus Police Department Incident Data Sheet attached to the affidavit for probable cause. App. at 31-44. We shall use this information as well.

Caudill and Berger pursued in the SUV, sideswiped James' vehicle, drove in front of James, and forced her to stop. Berger exited the SUV, ran to James' vehicle, opened the door, grabbed James by the hair, wrenched her out of her vehicle, and punched her until she was unconscious. Upon regaining consciousness, James was lying face down on the ground as Berger punched her in the back of the head. James tried to stand, at which point Caudill began punching her in the face. Again, James was able to break free, re-enter her vehicle, and proceed quickly back to her home, where she drove onto the lawn, exited her vehicle, and ran into her residence. Minutes later, Berger kicked in the front door, struck Keith Griner, who was also in the residence, and hit James several times. James escaped to a neighbor's residence and called police. Meanwhile, Berger removed several speakers, CDs, a CD player, and keys from James' vehicle, placed them in the SUV, broke the windshield and side mirror of James' vehicle, and drove off with Caudill.

Over her police radio, Columbus Police Lieutenant Ruth Stillinger heard: the report of crimes against James; descriptions of Berger, Caudill, and the SUV; and information that a male forced a female into a blue-and-cream SUV at a nearby intersection. Lieutenant Stillinger responded, arrived at the intersection, and observed Berger driving the SUV with Caudill in the passenger seat. Berger drove through a stop sign and made an abrupt U-turn, at which point Lieutenant Stillinger activated her emergency lights to initiate a stop. Berger responded by accelerating away, disregarding stop signs, eventually stopping the SUV, and fleeing on foot. Additional police arrived on the scene, apprehended Berger, and brought him to the Bartholomew County Jail. During a search incident to arrest, police found in Berger's pants pocket five white hydrocodone pills, one Alprazolam pill, and the keys to

James' vehicle. That same day, police interviewed James at a hospital and noted that she had suffered several scratches, bruises, and a chipped tooth, and had blood on her lips and ear.

On May 3, 2007, the State charged Berger with thirteen counts, including possession of a controlled substance (the pills), receiving stolen property, theft, residential entry, resisting law enforcement, driving while suspended, criminal mischief, and battery resulting in bodily injury. App. at 31. On July 30, 2007, the State and Berger entered into an agreement whereby Berger would plead to four counts and the State would dismiss the nine remaining charges. *Id.* at 67-71. Specifically, he pled guilty to Count II (possession), possessing Alprazolam without a valid prescription; Count IV (theft), exerting unauthorized control over James' speakers, CDs, CD player, and/or keys with the intent to deprive her of their use/value; Count VI (resisting), fleeing from Lieutenant Stillinger by driving away; and Count XII (battery), touching James in a rude, insolent, or angry manner resulting in bodily injury. *Id.* at 7, 11, 15, and 27.

On August 29, 2007, the court held a hearing, noted its acceptance of the plea agreement, and sentenced Berger as follows:

[Berger] shall be committed to the custody of the Department of Correction for two (2) years on Count II, Count IV, and Count VI, for a total of six (6) years; and to Bartholomew County Jail for one (1) year for Count XII. All Counts are consecutive to each other and no time suspended. The Court has no recommendation as to type of facility.

The Court finds that [Berger] has served 121 actual jail days and should receive 242 days credit toward the sentence of imprisonment for time spent in confinement. All credit days are applied to Count XII and the Court shows that Count served in full (5/3/07-08/29/07) No credit days to apply to felony sentences to Department of Correction.

Id. at 73-74; Sent. Tr. at 3, 17-19.

Discussion and Decision

Indiana Code Section 35-50-1-2(c) provides:

[E]xcept for crimes of violence, the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under IC 35-50-2-8 and IC 35-50-2-10, to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

This section applies to both felony and misdemeanor convictions. *Purdy v. State*, 727 N.E.2d 1091, 1094 (Ind. Ct. App. 2000), *trans. denied*.

Despite James' injuries, none of Berger's convictions fall within the statutory definition of "crimes of violence." *See* Ind. Code § 35-50-1-2(a). Class D was the only, and therefore most serious, class of felony for which Berger was convicted. Thus, *if* Berger's offenses constituted one episode of criminal conduct, then Indiana Code Section 35-50-1-2 would preclude a total sentence greater than the four-year advisory sentence for class C felonies.

An "episode of criminal conduct" means "offenses or a connected series of offenses that are closely related in time, place, *and* circumstance." Ind. Code § 35-50-1-2(b) (emphasis added). To reiterate, Berger's initial battery of James occurred at her residence (battery). Thereafter, James fled, was intercepted elsewhere, and was beaten again. Not until James escaped back to her house did Berger follow her, beat her again, and steal items from her vehicle (theft). Still later and having left James' residence, Berger resisted arrest (resisting). Stated otherwise, the battery was not simultaneous with the theft or the resisting, nor was the theft simultaneous with the resisting. Accordingly, we have little difficulty

concluding that the battery, theft, and resisting are separate and distinct crimes justifying consecutive sentences. The more interesting question is whether the possession count merited a consecutive sentence.

Another panel of this Court recently concluded that “consecutive sentences [were] allowed” where the defendant’s possession of a handgun and possession of marijuana were not closely related in time, place, and circumstance to his acts of resisting arrest. *Deshazier v. State*, 877 N.E.2d 200, 213 (Ind. Ct. App. 2007), *trans. denied* (2008). Before reaching its conclusion, the *Deshazier* court provided an extensive examination and analysis of various cases that have addressed whether crimes of possession are part of an episode of criminal conduct. *See id.* at 211-13 (discussing, *inter alia*, *Ratliff v. State*, 741 N.E.2d 424 (Ind. Ct. App. 2000), *trans. denied*, *Johnican v. State*, 804 N.E.2d 211 (Ind. Ct. App. 2004), and *Cole*, 850 N.E.2d 417). We highlight relevant lessons from *Deshazier* below.

In *Ratliff*, the court concluded that an OWI and resisting law enforcement charge were part of an episode of criminal conduct, but that a possession of marijuana charge was a separate and distinct act, which did not “bear a direct relation to the others.” 741 N.E.2d at 428. *Johnican* and *Cole* disagreed with *Ratliff*’s analysis and held possession charges to be part of an episode of criminal conduct. *See Deshazier*, 877 N.E.2d at 211-12. The *Ratliff* decision relied heavily upon *Tedlock v. State*, 656 N.E.2d 273 (Ind. Ct. App. 1995). *Id.* at 212. The *Tedlock* court had stated: “the singleness of a criminal episode should be based on whether the alleged conduct was so closely related in time, place and circumstances that a *complete account* of one charge cannot be related without referring to details of the other charge.” 656 N.E.2d at 276 (emphasis added).

A few years after *Ratliff* was decided, our supreme court acknowledged that it too had used *Tedlock*'s "complete account" language, but then signaled a retreat from that language, terming it "a bit of an overstatement." *Reed v. State*, 856 N.E.2d 1189, 1200-01 (Ind. 2006) (citing *O'Connell v. State*, 742 N.E.2d 943, 950-51 (Ind. 2001)); see also *Harris v. State*, 861 N.E.2d 1182, 1188 (Ind. 2007). The court in *Reed* clarified:

We are of the view that although the ability to recount each charge without referring to the other can provide additional guidance on the question of whether a defendant's conduct constitutes an episode of criminal conduct, it is not a critical ingredient in resolving the question. Rather, the statute speaks in less absolute terms: "a connected series of offenses that are closely connected in time, place, and circumstance." I.C. § 35-50-1-2(b). And as we have observed, "*Tedlock* emphasizes the timing of the offenses" and "refers to the 'simultaneous' and 'contemporaneous' nature of the crimes which would constitute a single episode of criminal conduct." *Smith v. State*, 770 N.E.2d 290, 294 (Ind. 2002) (citing *Tedlock*, 656 N.E.2d at 276).

856 N.E.2d at 1200. Further, to the extent that *Deshazier*'s "holding is at odds with the decisions of other panels in *Cole* and *Johnican*," *Ratliff* offers "the more appropriate analysis of possession crimes under Indiana Code section 35-50-1-2(b)." *Deshazier*, 877 N.E.2d at 213 n.11.

Here, no evidence exists as to when Berger came into possession of the pills that were found in his pants pockets during the search incident to arrest. Possession is inherently a "continuing offense," which occurs from the time the defendant comes into possession of the contraband until the time he relinquishes control. *Id.* at 212. Presumably, Berger, like *Deshazier*, came into possession of the controlled substances at some point before he encountered the police. Although the pills may have been in Berger's pocket while he battered James, stole items from her vehicle, and resisted arrest, "we do not find this fact to

bring his act of possession into the same episode of conduct as his” other crimes. *Id.* at 212-13. That is, the possession was a separate and distinct act, which did not “bear a direct relation to the others.” *Ratliff*, 741 N.E.2d at 428. Based on the facts of this case, Berger’s possession of the controlled substance/Alprazolam without a valid prescription was not “closely related in time, place, and circumstance” to his battery, theft, and resisting for purposes of Indiana Code Section 35-50-1-2(b). *Deshazier*, 877 N.E.2d at 213. Consequently, “consecutive sentences were not improper,” and the court did not err in ordering an aggregate sentence in excess of four years. *Id.*⁷

Affirmed.

BAILEY, J., and NAJAM, J., concur.

⁷ Incidentally, given Berger’s extensive, violent criminal history, his violations in jail, and the fact that Berger already received a substantial benefit (dismissal of nine charges) from his guilty plea, the court could very well have aggravated his sentence even more. *See* Sent. Tr. at 17-19 (outlining Berger’s criminal history, which started at age ten and includes theft, twelve misdemeanor convictions, battery convictions for hitting girlfriends, resisting law enforcement, etc.).