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IN THE
COURT OF APPEALS OF INDIANA

GWENDOLYN LEWIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 03A01-0703-CR-125
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Chris D. Monroe, Judge
Cause No. 03D01-0603-CM-476
03D01-0604-CM-726

November 29, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Gwendolyn Lewis appeals her two one-year sentences for domestic battery and invasion of privacy, both Class A misdemeanors. Lewis raises two issues, which we expand and restate as three: 1) whether the trial court abused its discretion in ordering Lewis's sentences to run consecutively; 2) whether her sentence is inappropriate given the nature of the offenses and her character; and 3) whether the trial court improperly failed to give Lewis credit for time she served pending sentencing. Concluding the trial court acted within its discretion in ordering the sentences to run consecutively and that Lewis's sentence is not inappropriate, we affirm her sentence. However, we also conclude the trial court improperly denied Lewis credit for time she served pending sentencing; we therefore remand with instructions that the trial court give her such credit.

Facts and Procedural History

On February 15, 2006, Lewis violated a protective order held against her by her mother. In regard to this incident, the State charged Lewis with invasion of privacy, a Class A misdemeanor. On April 20, 2006, Lewis struck a man with whom she was living in the face, causing him bodily injury. In regard to this incident, the State charged Lewis with battery and domestic battery, both Class A misdemeanors. On August 21, 2006, the State and Lewis filed a plea agreement under which Lewis agreed to plead guilty to invasion of privacy and domestic battery, and the State agreed to drop the battery charge and all charges relating to a separate cause number involving an incident in 2005 (the "2005 charges"). On that same day, Lewis pled guilty to domestic battery, but a sufficient factual basis could not

be reached with regard to invasion of privacy, and the trial court scheduled a bench trial. On October 3, 2006, the trial court conducted a bench trial and found Lewis guilty of invasion of privacy.

On January 31, 2007, the trial court held a sentencing hearing on both charges and issued sentencing orders. The sentencing orders do not contain a discussion of aggravating or mitigating circumstances, but at the hearing, the trial court discussed at length Lewis's lack of remorse and failure to take responsibility for her actions. The trial court sentenced Lewis to one year for each Class A misdemeanor, and ordered the sentences to run consecutively. The trial court gave Lewis credit for one hundred and twenty-three days Lewis had served in 2006 while awaiting sentencing on the domestic battery charge, but refused to give Lewis credit for twenty-eight days she spent in jail prior to the sentencing hearing, January 3 through January 31, 2007. Lewis now appeals her sentences.

Discussion and Decision[1]

I. Consecutive Sentences[2]

Sentencing decisions, including the decision to order consecutive sentences, are within the discretion of the trial court. Newman v. State, 690 N.E.2d 735, 737 (Ind. Ct. App. 1998).

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[1] We remind Lewis's counsel of Indiana Appellate Rule 43(E), which indicates that briefs shall be double-spaced.

[2] In support of her argument, Lewis has cited and included in her appendix an unpublished decision by a panel of this court. We direct counsel to Indiana Appellate Rule 65(D): "Unless later designated for publication, a not-for-publication memorandum decision shall not be regarded as precedent and shall not be cited to any court except by the parties to the case to establish res judicata, collateral estoppel, or law of the case." See also Ind. Dep't of Natural Res. v. United Minerals, Inc., 686 N.E.2d 851, 857 n.1 (Ind. Ct. App. 1997) (recognizing that it is inappropriate to cite a memorandum decision of this court as precedent), trans. denied.

We will reverse a trial court's sentencing decision only for an abuse of discretion. Day v. State, 669 N.E.2d 1072, 1073 (Ind. Ct. App. 1996). Where, as in this case, consecutive sentences are not mandated by statute, a trial court must find at least one aggravating circumstance in order to properly order consecutive sentences. Ortiz v. State, 766 N.E.2d 370, 377 (Ind. 2002). If there are no aggravating circumstances, or if the aggravating and mitigating circumstances are in equipoise, concurrent sentences are required. See Marcum v. State, 725 N.E.2d 852, 864 (Ind. 2000).

Here, the trial court's written sentencing statement does not identify any aggravating circumstances. However, we are not limited to examining the written sentencing statement, but may also examine the trial court's oral sentencing statement. See McElroy v. State, 865 N.E.2d 584, 589 (Ind. 2007) ("The approach employed by Indiana appellate courts in reviewing sentences in non-capital cases is to examine both the written and oral sentencing statements to discern the findings of the trial court."); Newman, 690 N.E.2d at 738 (examining the trial court's oral sentencing statement in concluding the trial court's sentencing statement supported consecutive sentences).

At the sentencing hearing, the trial court made a lengthy statement to the defendant, stating in relevant part:

> Now you come in here and you tell me you've never done anything wrong in your life that was your fault. Get over it girl. Everyone in this room has done something that was their fault. Me too. You're the only person in this room who has never done anything that they weren't responsible for. That does not happen to adults. So I'm gonna give you a year on each case because you are completely irresponsible for your own behavior and you are dangerous when you do so.
> ***

> So you need an attitude adjustment. And that's not a question that is a statement of fact. You don't get it. And you know . . . I am sorry and happy that you are sad. Because now the question is what are you going to do with the sadness. . . . I am not convinced that the tears mean anything other than somebody is sad. They don't like what they're hearing today. That's okay. I'm telling you the truth. . . . Now the best predictor of future behavior is past relevant behavior. If you do not change your approach to life, you will get arrested again. Period.
> ***
> But you know you started off on a bad foot when you tell me that the State should have charged somebody else because you do not understand boundaries? That's not your job. That's being irresponsible because you're not taking resp . . , you know you don't need to worry about everybody else. You need to worry about you. You're the one who is sitting over in jail and you're going to be sitting over there until you start paying attention to you or until your time runs up. And then you will be back cause you . . , if you don't change it, you're going to be back in jail anyway.

Transcript at 28-34.

Although the trial court would have acted more properly had it explicitly labeled the factors it considered as aggravating circumstances, the trial court clearly considered Lewis's lack of remorse, failure to take responsibility for her actions, likelihood to commit future crimes, and general attitude in court in ordering the sentences to run consecutively. All four of these circumstances are proper aggravating circumstances, which may be used to support consecutive sentences. See Sowders v. State, 829 N.E.2d 18, 19 (Ind. 2005) (holding aggravating circumstances found by the trial court, including failure to accept responsibility, supported consecutive sentences); Totten v. State, 486 N.E.2d 519, 522-23 (Ind. 1985) (holding trial court properly found defendant's attitude in court to be an aggravating factor); Luhrsen v. State, 864 N.E.2d 452, 457-58 (Ind. Ct. App. 2007) (holding aggravating circumstance of risk of committing future crimes was sufficient to support consecutive

sentences), trans. denied; Shafer v. State, 856 N.E.2d 752, 758 (Ind. Ct. App. 2006) ("A trial court may find a defendant's lack of remorse to be an aggravating factor."), trans. denied.

The trial court's discussion does not indicate that it found any mitigating circumstances, and indeed, Lewis did not advance any mitigating circumstances at sentencing. See Anglemyer v. State, 868 N.E.2d 482, 492 (Ind. 2007) ("[T]he trial court does not abuse its discretion in failing to consider a mitigating factor that was not raised at sentencing."), clarified on reh'g, 875 N.E.2d 218. Despite her failure to advance her guilty plea to the battery charge as a mitigating circumstance, the trial court was aware that this plea was a mitigating circumstance. See Francis v. State, 817 N.E.2d 235, 237 n.2 (Ind. 2004) (recognizing that a trial court is "inherently aware of the fact that a guilty plea is a mitigating circumstance").[3] However, the trial court's lengthy discussion of Lewis's lack of remorse and failure to take responsibility clearly indicates that the trial court did not find this guilty plea to be a significant mitigating factor. See Primmer v. State, 857 N.E.2d 11, 16 (Ind. Ct. App. 2006) (recognizing a guilty plea's significance is reduced if the circumstances indicate the defendant is not taking responsibility for his or her actions), trans. denied; Payne v. State, 838 N.E.2d 503, 509 (Ind. Ct. App. 2005) (recognizing that the significance of the defendant's guilty plea was entitled to minimal weight where circumstances suggested it was not an expression of true remorse), trans. denied.

Our review of the trial court's statement at the sentencing hearing indicates the trial court found no significant mitigating circumstances and four aggravating circumstances.

Based on these findings, we conclude the trial court acted within its discretion in ordering the sentences to run consecutively.

II. Appropriateness of Lewis's Sentence

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). 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), trans. denied.

Lewis makes little argument regarding the inappropriateness of her sentence other than citing the appellate rule and pointing to her minimal criminal history, which the trial court did not find to be an aggravating circumstance. She makes no argument regarding the nature of the offenses. The State makes no argument regarding the appropriateness of Lewis's sentence, and did not identify it as an issue raised by Lewis on this appeal. Under certain circumstances, we may decline to address an argument that is not clearly defined and adequately supported by citation and argument. See Ind. App. R. 46(A)(8). However, given Lewis's citation to the appellate rule, her statements regarding the inappropriateness of her

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[3] Here, we do not need to rely on the trial court's inherent awareness, as the trial court engaged in a

sentence, and our strong preference against invoking waiver, see Welch v. State, 828 N.E.2d 433, 435-36 (Ind. Ct. App. 2005), we will address this argument as fully as permitted by the record before us.

We have little information about the nature of the offenses, as Lewis did not request a transcript of either the guilty plea hearing or the bench trial on the invasion of privacy charge.[4] However, from the sentencing hearing transcript and probable cause affidavits[5] we are able to discern some of the facts. Regarding the invasion of privacy conviction, Lewis violated a protective order held by her mother by going to her house and refusing to leave. Lewis explained that she went to her mother's home "because [she] had no where else to go and it was six degrees outside." Tr. at 21. Regarding the battery conviction, Lewis struck the victim repeatedly in the face, leaving him with "a large amount of blood on the front of his shirt . . . [and] scratches on his face." Appellee's Appendix at 4. Lewis explained to the arresting officer "she struck him . . . due to him calling her mother a whore." Id.

In regard to Lewis's character, at the sentencing hearing, she told the court, "[b]ut none of this is my fault and there's nothing I can do about it," tr. at 20, and indicated her belief that she had "[n]ever gotten in trouble a single day when it was [her] fault," tr. at 27. Such statements clearly demonstrate that Lewis has completely failed to take responsibility

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discussion with Lewis regarding her guilty plea at the sentencing hearing. See Tr. at 5-7.

[4] We direct counsel to Indiana Appellate Rule 9(F)(4) ("The Notice of Appeal shall designate all portions of the Transcript necessary to present fairly and decide the issues on appeal. . . . In Criminal Appeals, the Notice of Appeal must request the Transcript of the entire trial and evidentiary hearing, unless the party intends to limit the appeal to an issue requiring no Transcript.").

[5] Lewis also failed to include these affidavits in her appendix. The State filed an appendix with these documents.

for her actions.

Lewis's criminal history consists of a battery conviction in 2002,[6] and a misdemeanor conviction for trespass in 2003. Additionally, Lewis has been arrested three times for invasion of privacy, not including the instant charge. See Turnstill v. State, 568 N.E.2d 539, 545 (Ind. 1991) (recognizing that although an arrest record does not establish that the defendant committed a crime, it "is relevant to the court's assessment of the defendant's character and the risk that he will commit another crime"). We also note that Lewis had charges of conversion and driving while suspended pending at the time of her sentencing. See id. ("Pending charges . . . may be considered by a sentencing court as being reflective of the defendant's character and as indicative of the risk that he will commit other crimes in the future."). Although this criminal history is far from the worst we have seen, it also does not render a two-year sentence for the instant offenses inappropriate.

Although nothing about the nature of these offenses seems particularly egregious, we also know little about the surrounding circumstances. The insight we have into Lewis's character likewise gives us little reason to conclude a two-year sentence is inappropriate. In sum, our review of the record as it relates to the nature of the offenses and Lewis's character leaves us unconvinced that Lewis has carried her burden of persuading us that her sentence is inappropriate. See Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006) ("Of course a defendant must persuade the appellate court that his or her sentence has met this inappropriateness standard of review.").

III. Credit Time

Here, the chronological case summary indicates that Lewis was incarcerated from January 3, 2007 through January 31, 2007, as a result of an arrest warrant issued under the cause number for her invasion of privacy conviction.[7] At the time of the sentencing hearing, the 2005 charges were also pending in a different court.[8] Lewis's testimony at the sentencing hearing indicates the possibility that she was arrested in January as a result of these charges as well.[9] The trial court stated that it was not giving Lewis credit for this time "because there are two other reasons why you are in jail. One of which is civil. One of which is . . . a pre-existing criminal matter for which I am order[ing] this sentence to be run consecutive to that sentence." Tr. at 29. Lewis argues that she should have received credit for the twenty-eight days she served in January 2007 on either her battery or invasion of privacy sentence. We agree.

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[6] The record does not indicate whether this offense is a felony or misdemeanor.

[7] The State seems to concede that if Lewis was incarcerated pursuant to this warrant, she is entitled to credit on this sentence. The State's brief contains the following:

> [B]ecause Defendant admitted her confinement was the result of other unrelated charges, she is not entitled to credit time fro that period. However, to the extent that the record shows that Defendant's confinement was the result of the execution of the warrant for [invasion of privacy], which was served on January 3, 2007, she should receive credit for that time.

Appellant's Brief at 7 (citations omitted).

[8] Apparently, as the trial court accepted only one of Lewis's guilty pleas, the State did not drop the 2005 charges as it had agreed to do.

[9] Lewis's testimony is far from clear on this point. She testified that when she was arrested on January 3, 2007, the arresting officers had three pieces of paper, a warrant regarding the battery and conversion charges, a body attachment for child support, and something regarding the 2005 charges. Lewis then testified that she had been released from the bond set on the 2005 charges and that she had another hearing on these charges scheduled for the following month. Neither the chronological case summary regarding the 2005 charges nor the documentation relating to the arrest on January 3, 2007, is part of the record.

A criminal defendant is entitled to credit for time spent in confinement while awaiting trial or sentencing. Ind. Code § 35-50-6-3; Willoughby v. State, 626 N.E.2d 601, 602 (Ind. Ct. App. 1993). To earn credit, such confinement must be a result of the charge for which the defendant is sentenced. Willoughby, 626 N.E.2d at 602.

> Where a defendant is confined during the same time period for multiple offenses and the offenses are tried separately, the defendant is entitled to a "full credit" for each offense for which he is sentenced. Each "full credit" is determined by the number of days the defendant spent in confinement for the offense for which the defendant is sentenced up to the date of sentence for that offense. . . . The credit will be the number of days the defendant spent in confinement from the date of arrest for the offense to the date of sentencing for that same offense.

Diedrich v. State, 744 N.E.2d 1004, 1005 (Ind. Ct. App. 2001).

Based on the record, which clearly indicates that Lewis was incarcerated from January 3 through January 31 because of the invasion of privacy charge, we conclude Lewis is entitled to credit against this sentence. See Willoughby, 626 N.E.2d at 602 (defendant was entitled to credit time where defendant was sentenced as a result of violating probation and was arrested pursuant to a probation violation notice); Dolan v. State, 420 N.E.2d 1364, 1373-74 (Ind. Ct. App. 1981) (defendant was entitled to credit for time from arrest until sentencing). We recognize that "[i]t is well-settled that where a person incarcerated awaiting trial on more than one charge . . . received consecutive terms he is only allowed credit time against the total or aggregate of the terms." Stephens v. State, 735 N.E.2d 278, 284 (Ind. Ct. App. 2000), trans. denied. Therefore, if the court dealing with the 2005 charges enters a conviction and orders any sentence to run consecutively to the instant sentences, Lewis would not be entitled to credit on that sentence for the time she spent in jail in January 2007.

However, it was not this trial court's prerogative to either assume that there would be a conviction on these charges or assume the other trial court would order an executed jail sentence.[10] Indeed, if the trial court's decision was left undisturbed and Lewis is acquitted of the 2005 charges, the twenty-eight days she spent in jail as a result of the invasion of privacy charge would not be credited anywhere.

We conclude the trial court improperly denied Lewis credit for the twenty-eight days she spent in jail in January 2007. We therefore remand with instructions that the trial court revise its sentencing order to give her such credit.

Conclusion

We conclude the trial court acted within its discretion in ordering consecutive sentences and that the two-year sentence is not inappropriate given Lewis's character and the nature of the offenses. However, we also conclude the trial court improperly denied Lewis credit for the twenty-eight days she spent in confinement awaiting sentencing. We therefore remand with instructions that the trial court revise its sentencing order to give Lewis credit for these days.

Affirmed in part and remanded with instructions.

KIRSCH, J., and BARNES, J., concur.

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[10] We recognize that if the other trial court does enter a conviction and order an executed sentence, the sentences may be required to run consecutively, as it appears likely that Lewis committed the instant offenses either while released on her own recognizance or on bond for the 2005 offenses. See Ind. Code § 35-50-1-2(d).