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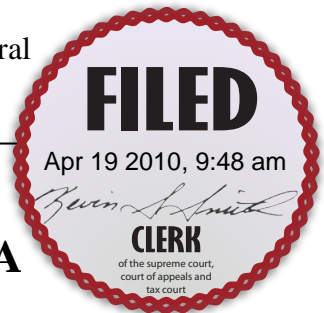
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**IN THE
COURT OF APPEALS OF INDIANA**

JESSE L. TROXELL,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 24A04-0911-CR-652

APPEAL FROM THE FRANKLIN CIRCUIT COURT
The Honorable J. Steven Cox, Judge
Cause No. 24C01-0812-FB-776

April 19, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Jesse L. Troxell appeals his sentence for receiving stolen property as a class D felony.¹ Troxell raises one issue, which we revise and restate as:

- I. Whether the trial court abused its discretion in sentencing Troxell;
and
- II. Whether Troxell's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

The relevant facts follow. On October 8, 2008, Troxell knowingly or intentionally received, disposed of, or retained the property of another person that was subject to theft, that being a laptop computer belonging to Tracy Little. On December 1, 2008, the State charged Troxell with burglary as a class B felony.

On August 13, 2009, the trial court held a guilty plea and sentencing hearing. At the beginning of the hearing, the court granted the State's oral motion to amend the charge against Troxell from burglary as a class B felony to receiving stolen property as a class D felony, and Troxell pled guilty to receiving stolen property as a class D felony. During the guilty plea portion of the August 13, 2009 hearing, Troxell's counsel stated that Troxell had prior convictions for "driving while suspended and an OWI." See Plea and Sentencing Transcript at 4. The trial court then asked for the State's recommendation regarding sentencing.² The State recommended three years with the Indiana Department of Correction, with one year suspended to probation, and restitution

¹ Ind. Code § 35-43-4-2 (2004) (subsequently amended by Pub. L. No. 158-2009, § 8 (eff. July 1, 2009)).

² The record does not include a presentence investigation report or show that one was prepared.

in the amount of \$1,928.00. Troxell by counsel stated that he “was in agreement with that recommendation.” Plea and Sentencing Transcript at 7. Troxell asked the court to take into consideration the fact that Troxell “is pleading open to the Court,” that Troxell “will be able to be gainfully employed,” and that Troxell had a “limited criminal history.” Id. Troxell then stated that these factors “support the recommendation of two years with one year suspended as well, Your Honor.” Id.

Immediately after the recommendations given by the State and Troxell, the trial court stated: “The Court will sentence you then to two years.” Id. The court then elaborated: “Two years then with the Department of Correction, . . . and uh, nineteen twenty-eight restitution.” Id. at 8. Defense counsel for Troxell then stated: “I’m sorry the Court said two years. Is the Court suspending one year or is it two years?” Id. In response, the trial court stated: “I didn’t suspend any.” Id. However, in its written sentencing order dated August 13, 2009, the trial court sentenced Troxell “to a term of Two (2) years with the Indiana Department of Correction with Two (2) months suspended to probation.” Appellant’s Appendix at 9. The trial court also ordered Troxell to make restitution in the amount of \$1,928.00.³

I.

The first issue is whether the trial court abused its discretion in sentencing Troxell. Troxell argues that the trial court abused its discretion: (A) “by offering conflicting oral

³ In addition, the abstract of judgment indicates that Troxell received a sentence of two years, two months of which was suspended to probation. Also, the trial court’s chronological case summary indicates that Troxell was sentenced to two years with two months suspended to probation and that Troxell was ordered to make restitution in the amount of \$1,928.00.

and written sentencing statements;” and (B) in failing to “provide any reason for the sentence imposed.” See Appellant’s Brief at 7-8.

A. Conflicting Oral and Written Sentencing Statements

Troxell first argues that “[t]he trial court abused its discretion in sentencing Troxell by offering conflicting oral and written sentencing statements.” Appellant’s Brief at 7. Troxell “respectfully requests this Court [to] either find that the written sentencing statements control or remand for resentencing.” Id. at 8. The State argues that “[i]n the present case, the written sentencing order most accurately reflects the trial court’s intent of sentencing [Troxell] to a term of two years with two months suspended to probation.” Appellee’s Brief at 5. The State also argues that “there is no need to remand this case to the trial court for resentencing.” Id. at 5-6.

When a trial court gives oral and written sentencing statements which are in conflict, “[r]ather than presuming the superior accuracy of the oral statement, we examine it alongside the written sentencing statement to assess the conclusions of the trial court.” McElroy v. State, 865 N.E.2d 584, 589 (Ind. 2007). When a conflict occurs between oral and written sentencing statements, the court on review has the “option of crediting the statement that accurately pronounces sentence or remanding for resentencing.” Dowell v. State, 873 N.E.2d 59, 60 (Ind. 2007) (quoting McElroy, 865 N.E.2d at 589).

Here, at the August 13, 2009 plea and sentencing hearing, the State recommended a total term of three years with one year suspended to probation. Troxell’s counsel initially stated that he “was in agreement with that recommendation,” then asked the

court to consider several factors which “support the recommendation of two years with one year suspended” Plea and Sentencing Transcript at 7. After the recommendations by the State and Troxell’s counsel, the trial court stated that “[t]he Court will sentence you then to two years. . . . Two years then with the Department of Correction, . . .” Id. at 8. When Troxell’s counsel asked for clarification regarding what portion of the total sentence was ordered suspended, the trial court responded: “I didn’t suspend any.” Id. However, the trial court’s written sentencing order on that same day sentenced Troxell “to a term of Two (2) years with the Indiana Department of Correction with Two (2) months suspended to probation.” See Appellant’s Appendix at 9. We further note that the abstract of judgment entered by the trial court indicated that it sentenced Troxell to an aggregate term of two years, two months of which was suspended to probation. Also, the trial court’s entry dated August 13, 2009 in its chronological case summary indicates that Troxell was sentenced to two years with two months suspended to probation.

Upon examination of the trial court’s oral sentencing statement alongside the court’s written sentencing order, we conclude that the trial court’s written statements accurately reflect the trial court’s intent to impose an aggregate sentence of two years, two months of which was to be suspended to probation. See Dowell, 873 N.E.2d at 60-61 (concluding that the trial court’s intent was to impose the sentence recommended in the pre-sentence report).

B. Adequacy of Sentencing Statement

Troxell next argues that the trial court abused its discretion in failing to “provide any reason for the sentence imposed.” Appellant’s Brief at 8. Troxell argues that “[a]t no time did the trial court offer the basis for its sentencing decision” and that “[a]ccordingly, Troxell’s sentence must be reversed.” Id. at 9.⁴

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). Also, a trial court may impose any legal sentence “regardless of the presence or absence of aggravating circumstances or mitigating circumstances.” Ind. Code § 35-38-1-7.1(d). Under Indiana’s current sentencing scheme, when sentencing a defendant for a felony, “the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence.” Anglemyer v. State, 868 N.E.2d 482, 490-491 (Ind. 2007), clarified on reh’g, 875 N.E.2d 218. A trial court abuses its discretion if it fails “to enter a sentencing statement at all.” Id. at 490; see also Cardwell, 895 N.E.2d at 1222-1223 (citation omitted). However, if the trial court has abused its discretion, we will remand for resentencing only “if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.” Anglemyer, 868 N.E.2d at 491. Also, under the new statutory scheme, the relative weight or value assignable to reasons

⁴ We observe that the State did not respond to Troxell’s argument that the trial court abused its discretion by failing to provide a proper sentencing statement. “An appellee’s failure to respond to an issue raised by an appellant is akin to failure to file a brief,” and Troxell may win reversal if he establishes prima facie error, i.e., “error that is evidence at first sight, on first appearance, or on the face of it.” See Frenz v. State, 875 N.E.2d 453, 464 n.9 (Ind. Ct. App. 2007) (citation omitted), trans. denied.

properly found, or to those which should have been found, is not subject to review for abuse of discretion. Id.

Here, our review of the record reveals that the trial court's sentencing order did not include "a statement including reasonably detailed reasons or circumstances for imposing a particular sentence," see Anglemyer, 868 N.E.2d at 490, either as a part of its written sentencing order, or during the plea and sentencing hearing. See Plea and Sentencing Transcript at 7-8; Appellant's Appendix at 9. Further, although Troxell's counsel stated during the guilty plea portion of the hearing that Troxell had prior convictions for "driving while suspended and an OWI," see id. at 4, the trial court never mentioned Troxell's criminal history during the sentencing portion of the hearing or in its written sentencing order. See id. at 7-8; Appellant's Appendix at 9.⁵

Based upon our review of the written sentencing order and the transcript of the sentencing hearing, we conclude that the trial court's sentencing order is not an adequate sentencing statement, and that therefore the trial court abused its discretion. However, "even if the trial court is found to have abused its discretion in the process it used to sentence the defendant, the error is harmless if the sentence imposed was not inappropriate." Mendoza v. State, 869 N.E.2d 546, 556 (Ind. Ct. App. 2007), trans. denied; see also Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007) (holding that, in the absence of a proper sentencing order, we may either remand for resentencing or exercise

⁵ Similarly, as previously mentioned, the chronological case summary and the abstract of judgment do not contain a statement which includes reasons for the sentence imposed by the trial court. See Appellant's Appendix at 7, 35.

the authority to review the sentence pursuant to Ind. Appellate Rule 7(B)), reh'g denied; Ramos v. State, 869 N.E.2d 1262, 1264 (Ind. Ct. App. 2007) (“Where we find an irregularity in the trial court’s sentencing decision, we may (1) remand to the trial court for a clarification or new sentencing determination, (2) affirm the sentence if the error is harmless, or (3) reweigh the proper aggravating and mitigating circumstances independently at the appellate level.”). Under the circumstances of this case, we will address whether Troxell’s sentence is inappropriate under Ind. Appellate Rule 7(B).

II.

Indiana Appellate Rule 7(B) provides that 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.” Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Troxell argues that the laptop computer “was recovered by police within two days after the offense” and that “the record contains no indication of any damage to the computer.” Appellant’s Brief at 10. Troxell also argues that “even if damage occurred, Little seemingly has been fully compensated for any loss she did suffer as a result of Troxell’s offense. Nothing about this offense suggests a sentence above the advisory level was appropriate.” Id. at 11. Troxell also argues that he “received no benefit from pleading guilty” because the “amendment of the charges was based on the evidence

available to the State and not as a concession to induce Troxell's guilty plea." Id. at 11-12.

Our review of the nature of the offense reveals that Troxell knowingly or intentionally received, disposed of, or retained the property of another person that was subject to theft, that being a laptop computer belonging to Tracy Little. The record also shows that Troxell was ordered to pay restitution in the amount of \$1,928.00.

Our review of the character of the offender reveals that Troxell's defense counsel indicated that Troxell, who was twenty-two years of age at the time of the offense, had prior convictions for "driving while suspended and an OWI." See Plea and Sentencing Transcript at 4.⁶

After due consideration, we cannot say that the sentence imposed by the trial court was inappropriate in light of the nature of the offense and the character of the offender.

For the foregoing reasons, we affirm Troxell's sentence for receiving stolen property as a class D felony.

Affirmed.

NAJAM, J., and VAIDIK, J., concur.

⁶ As previously mentioned, a presentence investigation report was not included in the record.