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IN THE
COURT OF APPEALS OF INDIANA

MARK A. JONES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 89A01-0912-CR-566
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WAYNE CIRCUIT COURT
The Honorable David A. Kolger, Judge
Cause No. 89C01-0807-FD-74

May 19, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Mark A. Jones (Jones), appeals his sentence following his guilty plea for intimidation, a Class D felony, Ind. Code § 35-45-2-1, and his adjudication as an habitual offender, I.C. § 35-50-2-8.

We affirm in part, reverse in part and remand with instructions.

ISSUES

Jones raises two issues on appeal, which we restate as follows:

(1) Whether the trial court erred in ordering Jones' habitual offender enhancement to be served consecutively to a previously imposed habitual offender enhancement arising from a prior case; and

(2) Whether his sentence was inappropriate in light of the nature of his offense and his character.

FACTS AND PROCEDURAL HISTORY

In December of 2007, Jones was incarcerated in the Wayne County Jail for forgery and being an habitual offender under cause number 89C01-0711-FC-041. During May and June of 2008, while still incarcerated and awaiting trial, Jones sent threatening letters to Sierra Catt (Catt), a co-defendant, threatening to harm her if she did not post a bond for his release from jail or take responsibility for another charge he was facing. Catt reported this information to Officer Pam Mertz (Officer Mertz) of the Richmond Police Department.

On July 9, 2008, the State filed an Information, charging Jones with intimidation, a Class D felony, I.C. § 35-45-2-1 and being an habitual offender, I.C. § 35-50-2-8. On

September 1, 2009, a jury trial commenced, and prior to the State's first witness being called, Jones pled guilty to intimidation and being an habitual offender.

On September 8, 2009, during the sentencing hearing, the trial court noted the following aggravating factors: Jones' criminal history, consisting of two misdemeanor and eleven felony convictions; the fact that he committed two felonies while he was incarcerated; his probation had been revoked in 2003, although the trial court assigned this moderate aggravating weight; and that he threatened Catt with bodily harm and death while she was listed as a witness against him, and that he attempted to persuade her to drop the charges against him. As a mitigating factor, the trial court only assigned limited weight to the fact that Jones pled guilty, because he only entered into the plea after the jury had been selected and sworn in and opening statements by both parties had been made. Ultimately, the trial court found that "[Jones'] criminal history alone far outweighs any mitigation." (Transcript pp. 200-201). The trial court sentenced Jones to the maximum sentence of three years on the intimidation charge and enhanced his sentence by four and one-half years on the habitual offender enhancement, for a total of seven and one-half years, to be served consecutively with a sentence previously imposed in cause number 89C01-0711-FC-041.

Jones now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Sentencing- Habitual Offender*

Jones argues that the trial court erred when sentencing him. Specifically, he argues that the trial court erred when ordering his habitual offender enhancement to be served

consecutively to a previously imposed habitual offender enhancement. Jones contends—and the State concedes—that the habitual offender enhancement in this instance should be ordered to run concurrently with the habitual offender enhancement in cause number 89C01-0711-FC-041.

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). 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).

Jones cites to *Breaston v. State*, 907 N.E.2d 992 (Ind. 2009) in support of his argument. In that case, Breaston committed his second offense after having been arrested for, but before being discharged from, his first offense. *Breaston*, 907 N.E.2d at 993. Our supreme court was faced with a challenge to the imposition of habitual offender enhancements, where a trial court's sentencing order required a habitual offender enhancement in one case to run consecutively to an habitual offender enhancement order to be served in a prior, unrelated case. *Id*.

On appeal, the *Breaston* court held that subsequent 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.

In the instant case, Jones' sentence for the underlying felony conviction was enhanced by four and one-half years due to his habitual offender admission. The trial court ordered the habitual offender enhancement to run consecutively to a habitual offender enhancement issued in a prior, unrelated case.

Pursuant to *Breaston*, we must conclude that the trial court erred in ordering Jones' enhanced sentence to run consecutively to the habitual offender count enhancement in cause number 89C01-0711-FC-041, and 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 run concurrent to the habitual offender enhancement previously ordered in cause number 89C01-0711-FC-041.

II. *Appropriateness of Jones' Sentence*

Jones contends that his sentence is inappropriate considering the nature of his offense and his character. Regardless of whether the trial court has sentenced the defendant within its discretion, we have the authority to independently review the appropriateness of a sentence authorized by statute through Indiana Appellate Rule 7(B). *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008). That rule permits us to revise a sentence 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. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). "Ultimately the length

of the aggregate sentence and how it is to be served are the issues that matter." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). "The principle role of appellate review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived correct result in each case." *Id*. at 1225. The defendant carries the burden to persuade us that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

Jones was convicted of a Class D felony, for which a minimum sentence is one-half year, the maximum sentence is three years, and the advisory sentence is one and one-half years. I.C. § 35-50-2-7. In addition, the trial court enhanced Jones' sentence by four and one-half years for the habitual offender finding pursuant to I.C. § 35-50-2-8(h), which provides in pertinent part: "[t]he 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. . . ."

With regard to the character of the offender, we note that Jones has a lengthy criminal history, consisting of eleven prior felony and two misdemeanor convictions, ranging from theft, robbery, forgery, attempted escape from jail and reckless driving. All of these convictions occurred within the past nine years prior to the instant offense, which speaks volumes to his character and his apparent refusal to obey the law. In addition to this being his second designation as a habitual offender, he has had his probation revoked and has been imprisoned in the past for intimidation—a clear indication that he is unable to follow a law

abiding life. Finally, he committed the instant offense while he was in jail, demonstrating a complete lack of respect for the criminal justice system.

Turning to the nature of the offense, we note that Jones not only intimidated and threatened Catt with death if she did not bond him out of jail or take responsibility for a crime he committed and was in jail for, but he did so while he was incarcerated and therefore warrants this sentence.

CONCLUSION

Based on the foregoing, we conclude that: (1) the trial court erred when sentencing him to serve his habitual offender enhancement consecutively to his habitual offender enhancement in a prior, unrelated offense, and we remand with instructions to order his sentences to run concurrently; and (2) his sentence was not inappropriate when the nature of his offense and the character are considered.

Affirmed in part, reversed in part and remanded with instructions.

MATHIAS, J., and BRADFORD, J., concur.