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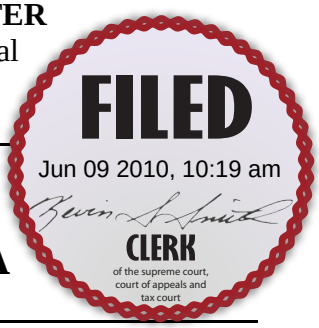

IN THE COURT OF APPEALS OF INDIANA

GARY PARSLEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 28A05-0911-CR-650
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GREENE SUPERIOR COURT
The Honorable Dena A. Martin, Judge
Cause No. 28D04-0906-FB-310

June 9, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Gary Parsley appeals his sentence following a plea of guilty to attempted aggravated battery, a class B felony.[1]

We reverse and remand.

ISSUE

Whether Parsley's sentence is inappropriate pursuant to Indiana Appellate Rule 7(B).

FACTS

During the afternoon of November 19, 2008, Michael Tennant was driving eastbound on State Road 54 in Greene County when Parsley passed him. Tennant later attempted to pass Parsley; as he did so, Parsley apparently increased his speed. Tennant overtook and passed Parsley. Parsley again passed Tennant. Once Parsley completed the pass, he applied his brakes. As a result, Tennant rear-ended Parsley. Neither Tennant nor Parsley stopped, and both continued driving. Tennant subsequently passed Parsley on the right side and continued driving east.

Parsley telephoned 911 and advised dispatchers that he had been rear-ended. He described the vehicle and its direction of travel. He also advised dispatchers that he was following the other vehicle.

Approximately one minute later, Tennant telephoned 911 and advised dispatchers that he was being chased by another driver. He informed the dispatchers that the chase

[1] Ind. Code §§ 35-41-5-1; 35-42-2-1.5

had ensued following an accident and that he thought the other driver might have a gun. Tennant proceeded to drive south on State Road 67; Parsley continued to follow him.

Approximately two minutes later, Parsley overtook Tennant. As Parsley passed Tennant's vehicle on the left side, he fired a .9 mm handgun at Tennant's vehicle. The bullet traveled through the lower part of the driver's side front fender and lodged in the driver's footwell. Tennant then executed a U-turn and drove north on State Road 67; Parsley did the same and followed Tennant.

Shortly thereafter, deputies with the Greene County Sheriff's Department intercepted Tennant and Parsley. Paramedics transported Parsley to a hospital after he complained of back pain. After receiving a warrant, deputies obtained a sample of Parsley's blood for chemical analysis.

Parsley and Tennant traveled a total of fourteen miles from the place where they first encountered each other to where the deputies stopped them. After Tennant rear-ended Parsley, both drove at speeds from 80 to 100 miles per hour over a distance of approximately four miles.

On November 24, 2008, the State charged Parsley with Count I, attempted aggravated battery, a class B felony; Count II, attempted battery as a class C felony; Count III, criminal recklessness as a class D felony; and Count IV, reckless driving as a class B misdemeanor. On March 16, 2009, the State filed an amended information, charging Parsley with Count V, operating vehicle with a controlled substance in the body,

a class C misdemeanor. On September 21, 2009, however, the State filed a motion to dismiss Count V, which the trial court granted.

On September 25, 2009, the State and Parsley entered into a plea agreement. Parsley agreed to plead guilty to Count I, attempted aggravated battery, a class B felony, in return for which the State agreed to dismiss the remaining charges. The plea agreement provided that sentencing would be within the trial court's discretion but that the sentence shall not exceed twelve years.

The trial court held a guilty plea hearing on September 25, 2009, after which it took the plea under advisement and ordered a pre-sentence investigation report ("PSI"). The PSI revealed no prior criminal history. The PSI further reported that Parsley owns a business, installing and repairing heating and cooling equipment. According to an alternative sentencing evaluation filed with the trial court, Parsley reported that he had a conviction for driving with a suspended license in 1997. It also indicated that he had been "involved in an altercation . . . where he went to a residence and confronted someone" approximately one week prior to the sentencing hearing. (App. 193).

The trial court accepted the plea agreement and held a sentencing hearing on October 28, 2009. Several people testified on behalf of Parsley. They testified that he provides services at no or reduced charge for his church and others in need; and that he is always willing to help others. They deemed him to be a pillar of the community and expressed shock when they learned of the charges against Parsley. Parsley testified that he and his wife of twenty years have three children, with one minor child still living with

them. He further testified that his incarceration would impose an extreme hardship on his family as his wife earns only $400.00 every two weeks. Parsley testified that he was "so sorry" for his actions. (Tr. 41).

The trial court found as follows:

> I am going to show that the aggravating factor that was stated in the [PSI] exist[s]. That to impose a reduced sentence or suspension of the sentence and imposition of probation would depreciat[e] the seriousness of this crime. . . . I find that . . . it is an aggravator that you are not really showing any real remorse. I am also showing that the actions that took place in this crime exceed those required to satisfy the elements of the crime. I am also showing as mitigators that you have no real criminal history and I am going to show as a mitigator that you have come in today and you have pled guilty . . . .

(Tr. 105). In its written sentencing statement, the trial court also noted Parsley's recent confrontation as an aggravating circumstance and ordered restitution in the amount of $3,101.34. The trial court sentenced Parsley to twelve years, with four years suspended.

DECISION

Parsley asserts that his sentence is inappropriate. We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). It is the defendant's burden to "'persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.'" *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007) (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007).

In determining whether a sentence is inappropriate, the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime

committed." *Childress*, 848 N.E.2d at 1081. Indiana Code section 35-50-2-5 provides that a person who commits a class B felony "shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years."

Considering the nature of Parsley's offense, we acknowledge that Parsley engaged in dangerous behavior, which could have had tragic consequences. It is Parsley's character, however, that it critical to our review of his sentence.

Other than Parsley's self-reported conviction for driving with a suspended license eleven years prior to the current offense, Parsley has no prior criminal history.[2] He has an outstanding history of employment and currently owns a business. He is the primary wage-earner for his family and provides services—often free of charge to those unable to pay—to the community.

Furthermore, Parsley accepted responsibility for his crime by pleading guilty to aggravated battery. A guilty plea is not automatically a significant mitigating circumstance, particularly where the defendant reaps a benefit from pleading guilty. *See Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005) ("[A] guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea . . . ."), *trans. denied*. In this case, however, Parsley did not reap a significant benefit from the dismissal of the attempted battery charge in return for his plea of guilty to attempted aggravated battery.

[2] Again, the PSI does not reflect this conviction. It is unclear whether Parsley had participated in a diversion program, whether charges were ever filed, or whether the charges were dismissed.

The State charged Parsley with both attempted aggravated battery and attempted battery as a class C felony; the State based the charges upon the same conduct. Thus, the State charged Parsley with attempted battery as a lesser-included offense of attempted aggravated battery. *See Watts v. State*, 885 N.E.2d 1228, 1231 (Ind. 2008) (stating that an offense may be either inherently included in another offense based upon the material elements of the offense or factually included based upon the charging information). Accordingly, even if a jury found Parsley guilty of both charges, the trial court would have been obligated to vacate the conviction for the lesser-included offense. *See* I.C. § 35-38-1-6 (establishing that a trial court may not enter judgment of conviction and sentence a defendant on both a greater and lesser-included offense).

Regarding the aggravators cited by the trial court, the trial court found that "the actions that took place in this crime exceed those required to satisfy the elements of the crime." (Tr. 105). While this may be a proper aggravating circumstance, see I.C. § 35-38-1-7.1, the trial court did not recite its reasons for finding the nature and circumstances of this case to be an aggravator. We therefore cannot say that the trial court properly relied on this as an aggravating circumstance. *See Anglemyer*, 868 N.E.2d at 490 (stating that a trial court must "explain why each circumstance has been determined to be mitigating or aggravating . . .").

Furthermore, we cannot say that a reduced sentence would depreciate the seriousness of Parsley's crime constitutes a proper aggravating circumstance in this case. Generally, consideration of this circumstance is improper where there is nothing in the

record to indicate that the trial court was considering less than the advisory sentence. *See Cotto v. State*, 829 N.E.2d 520, 524 (Ind. 2005); *Davidson v. State*, 849 N.E.2d 591, 595 (Ind. 2006) ("This circumstance is properly considered only when the trial court is imposing a sentence below the presumptive [now advisory] term."); *but cf. Mathews v. State*, 849 N.E.2d 578, 590 (Ind. 2006) ("[I]t is not error to enhance a sentence based upon the aggravating circumstance that a sentence less than the enhanced term would depreciate the seriousness of the crime committed."). Here, we find nothing in the record to suggest that the trial court considered a sentence of less than ten years.

As to the trial court's finding that Parsley's failed to show remorse, we agree that he did not take full responsibility for his behavior. We note, however, that he did express that he was sorry for acting irresponsibility; we further note that he did not act alone. Tennant also engaged in imprudent behavior. It is clear that both men behaved irresponsibly, and both had ample opportunities to diffuse the situation. Thus, we cannot say that Parsley's failure to take complete responsibility for his crime is indicative of a lack of remorse.

In light of the above factors, particularly Parsley's character, we find that a twelve-year sentence is inappropriate. We therefore remand this case to the trial court with instructions that it vacate Parsley's sentence and impose a sentence of eight years, with four years executed, followed by four years of probation.

Reversed and remanded with instructions.

BAKER, C.J., concurs.

CRONE, J., dissents with separate opinion.

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CRONE, Judge, dissenting

I agree with the majority's assessment of the aggravating circumstances found by the trial court and its determination that Parsley's twelve-year sentence is inappropriate. That said, I believe that the evidence in the record regarding Parsley's character and the nature of his offense supports the imposition of the ten-year advisory sentence for a class B felony, with six years executed and four years suspended to probation. Therefore, I respectfully dissent.