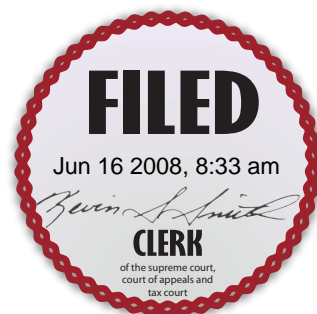


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ANTHONY STATZER,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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) No. 49A02-0712-CR-1078
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APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49G02-0112-FB-236380

June 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Anthony Statzer appeals his sentence after pleading guilty to armed robbery¹ as a Class B felony, criminal confinement² as a Class B felony, possession of a controlled substance³ as a Class D felony, carrying a handgun without a license⁴ as a Class A misdemeanor, and criminal mischief⁵ as a Class B misdemeanor. Statzer raises one issue on appeal, which we restate as: whether the trial court improperly relied on his use of a firearm as an element of the offenses and as a factor to justify running his sentences consecutively to each other.

We affirm.

FACTS AND PROCEDURAL HISTORY

Statzer entered the Tucker pharmacy on East Raymond Street in Indianapolis, Indiana armed with a handgun he was not authorized to carry. Upon his entry, Statzer pointed the handgun in J.M.'s face, ordered her to lie on the ground, threatened to kill her if she did not comply, and fired a shot into the ceiling. Statzer then ran behind the counter and stole several prescription drugs. Statzer then fled.

¹ See IC 35-42-5-1.

² See IC 35-42-3-3.

³ See IC 35-48-4-7.

⁴ See IC 35-47-2-1; IC 35-47-2-23(c).

⁵ See IC 9-30-13-3.

He was later arrested in connection with the armed robbery of a Walgreen's drugstore (cause number 49G02-0202-FB-17505). After his arrest, he broke a glass window in an interrogation room at the Indianapolis Police Department.

Statzer entered into plea agreements regarding both robberies. In regard to the Tucker pharmacy robbery, Statzer pled guilty to armed robbery, criminal confinement, possession of a controlled substance, carrying a handgun without a license, and criminal mischief and the State dropped several unrelated charges and agreed to cap the trial court's sentencing discretion to thirty years executed.⁶

At the sentencing hearing, the trial court found Statzer's young age and the hardship on his family as mitigating factors. It found the nature and circumstances of the crimes, specifically, Statzer firing a shot into the ceiling of the pharmacy, and his criminal history, including convictions for domestic battery, as aggravating factors. The trial court stated that it ran his sentences consecutively to one another based on his firing of the weapon. The trial court imposed ten years for the armed robbery, ten years for the criminal confinement, one-and-a-half years for possession of a controlled substance, one year for carrying a handgun without a license, and six months for criminal mischief. The trial court ran all sentences concurrently for a total executed sentence of ten years but ordered the sentences be served consecutive to Statzer's sentence in the Walgreen's robbery. Statzer now brings this belated appeal.

⁶ Statzer agreed to plead guilty to all charges under cause numbers ending 1236380(Tucker) and 2017505(Walgreen's) in exchange for the dismissal of the charges pending in cause numbers ending 2021667 and 2021665. For purposes of this appeal, we discuss only those charges that pended and convictions that resulted under cause number ending 1236380 and 2017505. *Appellant's App.* at 47.

DISCUSSION AND DECISION

Statzer claims that the trial court improperly ran his sentences consecutively based on an element of his convictions, namely, the use of a firearm. Sentencing decisions are left to the trial court's sound discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. (citing *Smallwood v. State*, 773 N.E.2d 259, 263 (Ind. 2002)). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances and the reasonable inferences drawn therefrom. *Id.* We can only review the presence or absence of reasons justifying a sentence for an abuse of discretion, but we cannot review the relative weight given to the reasons. *Id.* at 491.

Statzer contends that the trial court improperly relied on the use of the firearm as a material element of the offenses and as a reason to run his sentences consecutively to one another. Statzer cites *Townsend v. State*, 498 N.E.2d 1198, 1201 (Ind. 1986) to argue that a fact used to support an element of a crime may not also be used as an aggravating factor to enhance the sentence or to run a sentence consecutively to another. In *Townsend*, our Supreme Court reviewed an armed robbery and confinement case and held that of all the aggravators used by the trial court, the criminal history was sufficiently particularized from the use of the firearm so as to support an enhancement, but since the use of the firearm during the commission of the crimes was a material element of each conviction, the use of the firearm could not also be used to elevate the sentences. 498 N.E.2d at 1202.

Here, unlike the defendant in *Townsend*, the trial court noted that Statzer's sentences were to run consecutively not because of Statzer having possessed the handgun, but, instead, because he fired his handgun as a part of the nature and circumstance of the crime. Neither

armed robbery nor criminal confinement required proof that the armed defendant fired his weapon. Since Statzer's firing of his handgun was not a material element of the crime, the trial court was within its discretion to use it to run his sentences consecutively to each other. Statzer's firing of the handgun into the ceiling where people were present went beyond mere "use" and posed a risk to all in the vicinity. *Guyton v. State*, 771 N.E.2d 1141, 1143-44 (Ind. 2002) (citing *Mickens v. State*, 742 N.E.2d 927, 931 (Ind. 2001) (carrying a gun and using it are separate acts); cf. *Skaggs v. State*, 751 N.E.2d 318, 322 (Ind. Ct. App. 2001) (Riley, J., concurring in result) (carrying handgun and firing handgun are separate and distinct acts) (Sullivan, J., dissenting in part) (carrying handgun and firing handgun are inextricably intertwined).

Finally, Statzer ignores the fact that he committed two separate armed robberies against separate victims. This fact standing alone distinguishes this case from *Townsend* and justifies consecutive sentences. See *French v. State*, 839 N.E.2d 196, 197 (Ind. Ct. App. 2005).

Affirmed.

FRIEDLANDER, J., and BAILEY, J., concur.