

Appellant-Defendant Sylvario Wilson appeals following his convictions, pursuant to a guilty plea, for two counts of Class B felony Robbery¹ and one count of Class B felony Attempted Robbery,² for which he received an aggregate sentence of twenty-four years in the Department of Correction, with twenty years executed and four years suspended to probation. Upon appeal, Wilson claims that the trial court abused its discretion in denying his motion to withdraw his plea and in imposing consecutive sentences. In addition, Wilson claims that his sentence is inappropriate. We affirm in part and remand in part.

FACTS AND PROCEDURAL HISTORY

According to the factual basis entered at the time of the plea hearing, on April 10, 2009, Wilson and certain of his friends, at least one of whom was armed with a firearm, BB gun, or bat, took property from Joshua Lee or Lindsey Harlow in Tippecanoe County by using force and placing them in fear. Again on April 18, 2009, Wilson and some friends, who had agreed to rob an apartment on Vinton Street in Tippecanoe County, forced entry into certain apartments while armed with firearms, BB guns, or a bat, and forcibly gathered the persons in those apartments by using force and threatening the use of force. This constituted a substantial step toward the crime of robbery. Prior to the above two events, on March 9, 2009, Wilson and some friends, while armed with a deadly weapon, handgun, BB gun, or air pistol, attempted to take money, marijuana,

¹ Ind. Code § 35-42-5-1 (2008).

² Ind. Code §§ 35-41-5-1; 35-42-5-1 (2008).

and/or personal property from a person in Tippecanoe County by threatening the use of force and placing that person in fear.

On May 13, 2009, the State charged Wilson with Class B felony conspiracy to commit robbery (Count I), Class B felony robbery (Count II), and Class D felony theft (Count III) relating to the April 10, 2009 incident; and four counts of Class B felony criminal confinement (Counts IV-VII), and Class B felony attempted robbery (Count VIII) relating to the April 18, 2009 incident. On July 15, 2009, the State filed an amended Count I as well as additional charges relating to the March 9, 2009 incident, including Class B felony robbery (Count IX) and Class D felony theft (Count X). On September 25, 2009, Wilson pled guilty to Counts II, VIII, and IX pursuant to a plea agreement with the State in which he agreed to plead guilty to these counts, and the State agreed to dismiss the remaining charges. At the plea hearing, the trial court found that Wilson understood the nature of the charges against him, the possible sentence that he faced, and that the plea was freely and voluntarily made.

On October 26, 2009, Wilson filed a motion to withdraw his guilty plea. The trial court held a hearing on the matter on October 30, 2009, and denied the motion on November 2, 2009. At Wilson's November 12, 2009 sentencing hearing, the trial court sentenced him to consecutive terms of eight years on each count, for an aggregate sentence of twenty-four years with twenty years executed and four years suspended to probation. In announcing Wilson's sentence, the trial court stated that the aggravating and mitigating circumstances balanced. This appeal follows.

DISCUSSION AND DECISION

Upon appeal, Wilson claims that the trial court abused its discretion in denying his motion to withdraw his guilty plea and in imposing consecutive sentences after finding that the aggravating and mitigating circumstances balanced.

I. Denial of Motion to Withdraw Guilty Plea

After a guilty plea is entered, but before a sentence is imposed, a defendant may move to withdraw his guilty plea for any fair and just reason unless the State has been substantially prejudiced by its reliance upon the plea. *See* Ind. Code § 35-35-1-4(b) (2008); *Brightman v. State*, 758 N.E.2d 41, 44 (Ind. 2001). The defendant must prove by a preponderance of the evidence that the withdrawal is necessary to correct a manifest injustice. *See* Ind. Code § 35-35-1-4(b). Absent such a showing, the decision to grant or deny the motion is solely within the trial court's discretion. *Id.* Accordingly, we review the trial court's denial of a motion to withdraw guilty plea for an abuse of discretion. *Brightman*, 758 N.E.2d at 44. On appeal, the trial court's ruling is cloaked with a presumption of validity. *See id.* We will not reverse the trial court's ruling if it was based on conflicting evidence. *Johnson v. State*, 734 N.E.2d 242, 245 (Ind. 2000).

In contesting the trial court's denial of his motion to withdraw his guilty plea, Wilson claims that he was unable to review the plea agreement until the day of the plea hearing and did not understand it; that he was not fully apprised of his charges, particularly Count IX; that he was not informed of the minimum executed or maximum sentence he faced; and that he entered his plea because he believed he had no other choice.

At the hearing on his motion to withdraw, Wilson testified that his attorney showed him the plea agreement the day of the hearing but did not explain it to him, and that he believed that he had no choice but to sign it. In support of his claim, Wilson's pastor's wife testified that she had contacted defense counsel the day of Wilson's guilty plea out of concern, based upon her conversations with Wilson, that Wilson did not understand the terms of his plea. According to this witness, Wilson's lawyer indicated his belief that Wilson did understand the terms of the plea agreement. This witness acknowledged that she was unaware whether Wilson and his attorney subsequently discussed the terms of the plea.

Lafayette Police Detective Michael Humphrey, who took Wilson's clean-up statement after the plea, indicated that Wilson had stated to him that he was aware of the plea agreement, that he had discussed it with his attorney and knew it involved three charges, and that he was aware of the range of years he was facing, including the possibility of a maximum sixty-year sentence.

Wilson's challenge is based largely upon conflicting evidence, much of it his own testimony. Under such circumstances, we defer to the trial court's assessment of the facts. *See Johnson*, 734 N.E.2d at 245. During the plea hearing, the prosecutor outlined the facts underlying each separate charge, including Count IX. Wilson initially indicated that he had been unaware of Count IX until that point, but he later indicated that he understood each count. With respect to the sentencing terms, the trial court may not have explained to Wilson the maximum range of his aggregate sentence, but it reviewed the sentencing range for each count, including the fact that the minimum portion of his

sentence would be executed, and Wilson indicated unequivocally that he understood. In addition, Detective Humphrey's testimony indicated that Wilson was fully aware of the maximum total sentence he faced. The trial court was within its fact-finding discretion to credit this testimony. As for Wilson's contention that he was pressured into entering his plea, the trial court confirmed that Wilson had signed the plea agreement, and it questioned him extensively about his mental and emotional stability and wish to enter his plea. Wilson's unequivocal answers were that he was of sound mind and wished to proceed. Given the trial court's extensive questioning, Wilson's responses to this questioning, and Detective Humphrey's confirmation regarding Wilson's understanding of the plea, we are unpersuaded that the trial court's refusal to permit Wilson to withdraw his plea was either an abuse of discretion or created a manifest injustice.

II. Consecutive Sentences

Wilson additionally argues that the trial court abused its discretion in imposing consecutive sentences without listing an aggravating factor in support. In sentencing Wilson, the trial court found as mitigating circumstances his guilty plea and acceptance of responsibility, the fact that his incarceration would cause hardship to his two dependent children, and the fact that he had the support of family and friends. The trial court found as aggravating circumstances his prior criminal history, including the fact that he was on probation at the time of his crimes; his history of illegal alcohol and drug use; and the nature and circumstances of his crimes. Upon weighing the aggravating and mitigating circumstances, the trial court concluded that they balanced. Tr. p. 109; App. p. 53. The court then stated as follows:

I should sentence you to ten years on each of those counts and that ... they should run consecutively however because of your plea of guilty because you have accepted consequences of your actions by pleading guilty I am going to reduce that sentence and I am going to sentence you to eight years on count two, eight years on count eight and eight years on count nine to run consecutively for a total of twenty-four years.

Tr. pp. 109-10.

The trial court initially found that the sentencing factors balanced. It also determined, however, that the sentences should be reduced based upon the mitigating factor of the guilty plea and that they should nevertheless be served consecutively. The reasoning behind the court's imposition of consecutive sentences, therefore, is not entirely clear, and is arguably based upon some unnamed aggravator perhaps serving somehow to counter the guilty plea mitigator. In cases where the aggravators and mitigators stand in equipoise, and no aggravating factor is used to justify the imposition of consecutive sentences, consecutive sentences cannot stand. *See Lopez v. State*, 869 N.E.2d 1254, 1258-59 (Ind. Ct. App. 2007) (citing *Wentz v. State*, 766 N.E.2d 351, 359 (Ind. 2002); *Marcum v. State*, 725 N.E.2d 852, 864 (Ind. 2000)), *trans. denied*. If the aggravators and mitigators in this case are truly in balance, and no specific aggravator justifies Wilson's consecutive sentences, they are improper. Here, however, the sentencing statement is sufficiently irregular that we cannot determine whether the factors truly stood in balance, nor can we conclude that no specific aggravating factor supported the imposition of consecutive sentences. Accordingly, we remand to the trial court for a clarification or new sentencing determination. *See Merlington v. State*, 814 N.E.2d 269, 273 (Ind. 2004) (concluding that in cases of irregularity in sentencing

decision, appellate court may remand to the trial court for a clarification or new sentencing determination).

III. Appropriateness

Having decided that it is necessary to remand for clarification or a new sentencing determination, we find it unnecessary to address the parties' challenges to the appropriateness of Wilson's sentence.

IV. Conclusion

We have concluded that the trial court did not abuse its discretion in denying Wilson's motion to withdraw his guilty plea but that its sentencing statement is sufficiently irregular to require clarification or a new sentencing determination. Accordingly, we affirm in part and remand in part.

The judgment of the trial court is affirmed in part and remanded in part.

RILEY, J., and MATHIAS, J., concur.