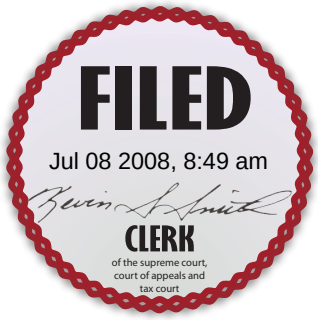

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IN THE
COURT OF APPEALS OF INDIANA

MIJELL REDDING,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0801-CR-25
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John Marnocha, Judge
Cause No. 71D02-0604-MR-07

July 8, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Mijell Redding appeals the forty-five-year sentence he received after pleading guilty to Attempted Robbery,[1] a class A felony. Specifically, he argues that the accomplice liability statute is unconstitutional and that his sentence is inappropriate in light of the nature of the offense and his character. Concluding that Redding's sentence is inappropriate, we reverse the judgment of the trial court and remand with instructions to vacate the sentence and impose a term of thirty years imprisonment.

FACTS

On April 21, 2006, eighteen-year-old Redding drove Jeffrey Finley to an apartment complex on the eastside of South Bend. Finley exited the vehicle after informing Redding that he was going to commit a robbery. Finley was wearing a ski mask and carrying a revolver when he exited the vehicle. While waiting for Finley to return, Redding heard gunshots. It was later determined that Finley shot off-duty South Bend Police Officer Scott Severns while attempting to rob him.[2] Officer Severns also shot Finley during the encounter. After Finley ran back to the vehicle, he informed Redding that he "believed that he had hit the other person with all of the bullets that were in the gun" and instructed him to drive away from the scene. Tr. p. 19. Redding drove

[1] Ind. Code §§ 35-41-2-4, 35-41-5-1, 35-42-5-1(1).

[2] As the trial court acknowledged, neither Finley nor Redding knew that the victim was a police officer. Tr. p. 65.

Finley to a hospital and later hid Finley's revolver under a rock at an intersection. Officer Severns died as a result of his injuries.

On April 24, 2006, the State charged Redding with class A felony attempted robbery, felony murder, and class C felony assisting a criminal. Redding pleaded guilty to class A felony attempted robbery on January 24, 2007, and the remaining charges were dismissed. The trial court held a sentencing hearing on October 3, 2007. During the hearing, the trial court stated that

> the sentence for murder is forty-five to sixty-five years. The sentence for an A robbery is twenty to fifty years. There is a five[-]year overlap. And it seems to me that in nature of that, the maximum sentence which I should consider safely as it relates to appellate review, is a sentence within the range of twenty years to forty-five years. And I have done that.
>
> And Mr. Redding, because of the extreme violence in this situation, because of the extreme nature of the offense in this situation, as I have stated. Because I do not heavily weigh the proposed mitigators, except I have considered as a significant mitigator your plea of guilty and willingness to testify [against Finley], and because of the extreme result, which is the death of Scott Severns, I think that the only appropriate sentence is in my analysis of the law of murder and robbery as an A felony, that the most extreme possible sentence within that view of those offense[s] in your plea, is the appropriate sentence.
>
> And I think to do less than I'm going to do, would seriously depreciate the serious nature of this offense. . . . Having weighed all of that, I find that aggravators outweigh mitigators, I considered the nature and circumstances of the offense as an aggravator, and I sentence you to the Indiana Department of Corrections [sic] for a period of forty-five years.

Tr. p. 74-76. Redding now appeals.

DISCUSSION AND DECISION

I. Accomplice Liability Statute

Redding argues that Indiana Code section 35-41-2-4[3] (the accomplice liability statute) is unconstitutional as applied to him because it violates his "fundamental right to be treated equally under the eyes of the law." Appellant's Br. p. 8. Specifically, Redding argues that the accomplice liability statute is unconstitutional because it allows him to be punished for offenses that he did not personally commit, regardless of whether the principal actor is convicted.

Challenges to the constitutionality of a criminal statute must be raised through a motion to dismiss to the trial court. Adams v. State, 804 N.E.2d 1169, 1172 (Ind. Ct. App. 2004). Failure to do so waives the issue on appeal. Id. Because Redding raises his challenge to the accomplice liability statute for the first time on appeal, he has waived this argument.

Moreover, as the State notes, Redding may have also waived the right to challenge the constitutionality of the accomplice liability statute by pleading guilty. Appellee's Br. p. 6. While his plea agreement preserved his right to challenge his sentence on appeal, Redding waived his right to appeal his conviction by entering into the plea agreement. Appellant's App. p. 9. It is well established that a defendant may waive the right to

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[3] The accomplice liability statute provides:

> A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense, even if the other person:
>
> (1) has not been prosecuted for the offense;
> (2) has not been convicted of the offense; or
> (3) has been acquitted of the offense.

I.C. § 35-41-2-4.

challenge his conviction on appeal. Mapp v. State, 770 N.E.2d 332, 334-35 (Ind. 2002). Thus, we decline to address the merits of Redding's constitutional argument.

II. Appropriateness

Redding argues that his forty-five-year sentence is inappropriate in light of the nature of the offense and his character. When reviewing a sentence imposed by the trial court, we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). In conducting an appropriateness review, we must examine both the nature of the offense and the defendant's character. Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004). We may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied.

We recognize that the advisory sentence for an offense "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). A person who commits a class A felony shall be imprisoned for a fixed term of between twenty and fifty years, with the advisory sentence being thirty years. Ind. Code § 35-50-2-4.

Regarding the nature of the offense, Redding drove Finley to an apartment complex so that Finley could commit armed robbery. Redding knew that Finley was armed and that he planned to commit robbery upon exiting Redding's vehicle. Tr. p. 17-18. Finley attempted to rob Officer Severns and both men sustained gunshot wounds. Ultimately, Officer Severns died. As the trial court acknowledged, because Officer

Severns was not acting in an official capacity during the crime and Redding had no knowledge of his profession, Officer Severns's status as a police officer "cannot [be] consider[ed] in the decision." Id. at 65.

Turning to Redding's character, he had lived a law-abiding life with no prior criminal history or juvenile adjudications before the night in question. We have previously held that "leniency is encouraged toward defendants who have not previously been through the criminal justice system." Beck v. State, 790 N.E.2d 520, 522 (Ind. Ct. App. 2003). Additionally, Redding pleaded guilty and assisted law enforcement officers throughout the investigation. Tr. p. 68. Redding's lack of criminal history, decision to plead guilty, and willingness to help law enforcement officers illustrate several positive aspects of his character.

A trial court's sentencing statement often provides insight into the decisionmaking process it used to impose a sentence on a defendant. Here, we are troubled by the trial court's repeated references to the statutory sentencing range for murder because Redding did not plead guilty to murder—he pleaded guilty to class A felony attempted robbery. Nonetheless, the trial court admitted that it sentenced Redding to forty-five years imprisonment because it believed that a sentence within the overlapping range between the class A felony and murder sentencing statutes was "in my analysis of the law of murder and robbery as an A felony, that the most extreme possible sentence within that view of those offense[s] in your plea, is the appropriate sentence." Id. p. 75. While we acknowledge that the forty-five-year term the trial court imposed falls within the statutory sentencing range for a class A felony, the trial court made it clear that it chose to impose

this sentence because it also fell within the sentencing range for murder. Because Redding did not plead guilty to murder, it was inappropriate for the trial court to rely on the sentencing range for that crime when imposing the sentence.

Although we do not want to discount the severity of Redding's offense, we cannot agree that it warranted a sentence near the statutory maximum. Redding pleaded guilty, assisted law enforcement officers during their investigation, and had no prior criminal history. While we agree with the trial court that the nature and circumstances of the crime were greater than the elements necessary to prove the commission of the offense, we find the trial court's imposition of a forty-five-year sentence to be inappropriate. Thus, we exercise our authority to revise the sentence pursuant to Indiana Appellate Rule 7(B) and remand with instructions to vacate the sentence and impose the advisory term for class A felony attempted robbery—thirty years imprisonment.

The judgment of the trial court is reversed and remanded with instructions to revise the sentence accordingly.

KIRSCH, J., concurs.

BAILEY, J., concurs in part and dissents in part.

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MIJELL REDDING,	)	
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Appellant-Defendant,	)	
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vs.	)	No. 71A03-0801-CR-25
	)	
STATE OF INDIANA	)	
	)	
Appellee-Plaintiff.	)	

BAILEY, Judge, concurring in part and dissenting in part

I concur with the Majority's resolution of Issue One, but I cannot agree that a sentence of thirty years is appropriate in light of the nature of the offense and the character of the offender.

First, I am not convinced that the court chose its sentence "because it also fell within the sentencing range for murder." Slip op. at 7. Regarding sentencing ranges, the trial court explained:

> [T]hey're relevant because . . . and as it *relates to Mr. Redding's plea of guilty* . . . . the sentence for murder is forty-five to sixty-five years. The sentence for an A robbery, is twenty to fifty years. There is a five[-]year overlap.
>
> And it seems to me that in nature of that, *the maximum sentence which I should consider safely as it relates to appellate review*, is a sentence within the range of twenty years to forty-five years. And I have done that.
>
> . . . .

> . . . I think that the only appropriate sentence is in my analysis of the law of murder and robbery as an A felony, that the most extreme possible sentence *within that view of those offense[s] in your plea*, is the appropriate sentence.

Tr. pp. 74-75 (emphasis added). I read these comments as the trial court's attempt to honor the plea agreement, not circumvent it. By setting the maximum sentence at forty-five years, the court recognized the seriousness of the crime yet avoided the five-year overlap between the sentences for attempted robbery as a Class A felony and for murder, the dismissed charge.

My main disagreement with the lead opinion, however, is that I do not believe the revised advisory thirty-year sentence takes into account the egregious nature of the offense. The Majority acknowledges that the nature and circumstances of the crime were greater than the elements necessary to prove the commission of the offense. Slip op. at 7; see Ind. Code § 35-38-1-7.1(a)(1) (naming such as aggravating circumstance). Indeed, attempted robbery as a Class A felony requires only "serious bodily injury." See Ind. Code § 35-42-5-1. Here, the victim died. The attendant loss to family and society is immeasurable. In addition, the offense involved a loaded handgun used in "essentially a residential area . . . during the cover of night," and the perpetrators targeted not only the victim but also his companion. Tr. pp. 72-73.

Although I recognize that Redding has no prior criminal history, was only eighteen, and cooperated with police, in my view the advisory thirty-year sentence overcompensates Redding for those facts. I would impose a sentence of not less than thirty-five years. For the foregoing reasons, I respectfully dissent.