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IN THE
COURT OF APPEALS OF INDIANA

ANDRE LEROI MCGHEE,
Appellant-Defendant,
vs.
STATE OF INDIANA,
Appellee-Plaintiff.

No. 79A05-0802-CR-91

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0603-FC-28

JULY 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Andre Leroi McGhee ("McGhee") appeals from the trial court's sentencing order after McGhee pled guilty to two counts of theft, Class D felonies.

We affirm.

ISSUE

McGhee raises the following issue for our review: whether his sentence is inappropriate in light of the nature of the offense and the character of the offender.

FACTS AND PROCEDURAL HISTORY

In November of 2005, McGhee and his wife were having trouble making their rent payments. In an effort to make some money, McGhee contacted two people he knew that were running a check deception scheme and agreed to assist them. On November 14, 2005, McGhee agreed to cash two counterfeit checks created by his acquaintances and made out in his name. McGhee cashed one check at the La Tapatia grocery store, and the other at Food Plus, both in Lafayette, Indiana. McGhee brought the proceeds from the checks back to the counterfeiters, who gave him $140.00 of the proceeds for assisting them.

Ultimately, the State charged McGhee with one count of conspiracy to commit forgery, a Class C felony; two counts of forgery, Class C felonies; and two counts of theft, Class D felonies. On July 5, 2007, McGhee entered into a plea agreement with the State wherein McGhee would plead guilty to two counts of theft, Class D felonies, in exchange for the dismissal of the remaining charges. The plea agreement left sentencing

to the trial court's discretion. On August 2, 2007, the trial court sentenced McGhee to two years executed on each count to be served consecutively, for an aggregate sentence of four years executed. McGhee appeals from the sentence imposed by the trial court.

DISCUSSION AND DECISION

Our review under 7(B) is straightforward without intensifiers, recognizing that under App. Rule 7 (B) we are to give "due consideration" to the trial court's sentencing process and that the trial court has a less abstract contact with the case and the defendant. Indeed, Ind. Appellate Rule 7(B) provides that "the court may revise a sentence ... if, after due consideration of the trial court's decision, the reviewing court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Stewart v. State*, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007).

At the time of McGhee's sentencing hearing, the new sentencing regime was in effect. The sentencing range in terms of imprisonment for a Class D felony is from six months to three years, with the advisory sentence being one and one-half years. Ind. Code §35-50-2-7. McGhee received two two-year sentences for each Class D felony conviction to be served consecutively.

McGhee argues that imposition of enhanced and consecutive sentences is inappropriate because, 1) his offense was significantly mitigated by his making full restitution to the victims prior to sentencing and by cooperating fully with police; and 2)

his criminal history was too distant from and different than the present offense to support aggravation of the sentence.

Our review of the nature of the offense reveals that when faced with financial difficulties McGhee turned to crime to solve those problems. McGhee sought out known counterfeiters and offered his services in assisting them with their schemes. To that end, McGhee cashed forged checks at two different businesses and received compensation from the counterfeiters for his efforts.

Our review of the character of the offender reveals that McGhee pled guilty to two Class D felonies. In exchange, the State dismissed three Class C felony counts against McGhee. McGhee did cooperate with police in their investigation of the counterfeiters and their scheme. Furthermore, McGhee did make restitution to the two businesses sometime prior to sentencing, although restitution was a term of his plea agreement. While somewhat mitigating, the above factors do not outweigh McGhee's criminal history or that McGhee was on probation at the time of the instant offenses.

A review of McGhee's criminal history reveals that his first contact with law enforcement was in 1991 as a juvenile when he was charged with theft. As an adult in January of 2000, McGhee was charged with possession of marijuana and failed to appear for court twice. Months later, in June of 2000, McGhee was charged with dealing in cocaine, a Class A felony; possession of cocaine, a Class B felony; conspiracy to commit dealing in cocaine, a Class A felony; two counts of dealing in marijuana, Class C felonies; three counts of possession of marijuana, Class A misdemeanors; dealing in marijuana, a Class A misdemeanor; and conspiracy to deal in marijuana, a Class C

felony. Nine days later, McGhee was charged with another count of possession of marijuana as a Class A misdemeanor. That charge was later dismissed. In March of 2002, McGhee pled guilty to the Class A felony conspiracy to commit dealing in cocaine offense and one of the Class C felony dealing in marijuana charges. The trial court sentenced McGhee to a term of twenty years, with ten years executed and ten years suspended to probation. The 2000 charge of possession of marijuana was dismissed. In October of 2002, the trial court modified McGhee's sentence and placed him on work release for one year with the remainder of his sentence suspended to probation.

In March of 2006, the instant charges arose while McGhee was still on probation for the 2002 convictions. In May of 2006, McGhee was released on his own recognizance. McGhee was charged with twelve felony counts, alleged to have occurred in January of 2007.[1] Those charges were pending at the time of McGhee's sentencing in the instant matter.

Given McGhee's criminal history and particularly his being on probation at the time of the instant offenses, the record supports the trial court's decision to enhance McGhee's sentence six months beyond the advisory sentence for each Class D felony, and the decision to order that the sentences be served consecutively. McGhee turned to crime to resolve his financial difficulties. The trial court considered McGhee's efforts at

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[1] The twelve counts were one count of Class A felony burglary, one count of Class A felony robbery, one count of Class B felony aggravated battery, one count of Class C felony battery resulting in serious bodily injury, one count of Class C felony battery committed by means of a deadly weapon, one count of Class D felony theft, one count of Class A felony conspiracy to commit burglary, one count of Class A felony conspiracy to commit robbery, one count of Class C felony conspiracy to commit aggravated battery, a Class C felony, one count of Class C felony conspiracy to commit battery, one count of Class C felony conspiracy to commit battery, and one count of Class D felony conspiracy to commit theft.

restitution and his agreement to plead guilty as mitigating factors, but of lesser weight than that of McGhee's criminal history.

After due consideration of the trial court's decision, we do not find McGhee's sentence to be inappropriate in light of the nature of the offense and the character of the offender. A trial court is not required to place the same value on a mitigating circumstance as does the defendant. *Plummer v. State*, 851 N.E.2d 387, 391 (Ind. Ct. App. 2006). Additionally, the weight of an individual's criminal history is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability. *Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006). Notwithstanding McGhee's argument that his criminal history was too distant from and different than the present offense to support aggravation of the sentence, the trial court specifically found as an aggravating factor that McGhee was on probation at the time of the commission of the instant offenses. Probation stands on its own as an aggravator. *Ryle v. State*, 842 N.E.2d 320, 323 n. 5 (Ind. 2005), cert. denied, --- U.S. ----, 127 S.Ct. 90, 166 L.Ed.2d 63 (2006). While a criminal history aggravates a subsequent crime because of recidivism, probation further aggravates a subsequent crime because the defendant was still serving a court-imposed sentence. *Id*. A single aggravating circumstance may be enough to justify both the enhancement of a sentence and the imposition of consecutive sentences. *Barber v. State*, 863 N.E.2d 1199, 1207 (Ind. Ct. App. 2007), *trans. denied*.

For the foregoing reasons, we affirm McGhee's sentence for two counts of Class D felony theft.

Affirmed.

DARDEN, J., and BRADFORD, J., concur.