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IN THE COURT OF APPEALS OF INDIANA

BRENT D. MULLIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 03A01-0802-CR-41
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BARTHOLOMEW CIRCUIT COURT
The Honorable Stephen R. Heimann, Judge
Cause No. 03C01-0606-FC-1126

July 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Brent D. Mullis appeals his convictions and sentence for two counts of class C felony burglary and an habitual offender adjudication. We affirm but remand for proper treatment of the habitual offender enhancement.

Issues

Mullis raises the following issues:

I. Whether the trial court abused its discretion in holding Mullis's trial in his absence?

II. Whether the trial court properly sentenced Mullis?

The State raises the following issue:

III. Whether the habitual offender enhancement was attached to a specific underlying offense?

Facts and Procedural History

On June 2, 2006, Columbus police investigated a burglary at the La Mode Hair Salon. A rock had been thrown through a window to gain entry, and several items had been removed, including money. The police found a shoe impression on a piece of glass, which they preserved for comparison.

On June 5, 2006, Randy Hicks saw two men in front of the Yee Kee Chinese Restaurant in Columbus. Hicks observed one of the men throw something through one of the restaurant's windows, and both men entered the Yee Kee through the broken window. Hicks called 9-1-1, and Columbus police quickly responded. Mullis attempted to flee, but a K-9 unit apprehended him nearby. Peter Lankey was also apprehended in the vicinity. Hicks identified both men as the men he saw at the restaurant. Police also found a glove near the

restaurant that matched a glove discovered close to where Mullis was apprehended. The owner of the restaurant found that various items had been disturbed, but that nothing of value had been taken.

The police confiscated Mullis's shoes upon his arrest. The glass fragments found in the soles of the shoes were similar to the glass fragments collected from the broken window at the La Mode Salon and those collected from the Yee Kee Restaurant. Also, the sole of Mullis's left shoe matched the shoe impression on the La Mode Salon glass.

On June 8, 2006, the State charged Mullis with two counts of class C felony burglary.[1] Appellant's App. at 11-12. On September 27, 2006, the State charged Mullis with being a habitual offender.[2] *Id*. at 88.

On June 25, 2007, the trial court held a hearing on Mullis's motion for a trial continuance. Mullis was present. The trial court granted the motion and reset the jury trial date for October 30, 2007. The trial court also set a change of plea hearing for October 15, 2007.

On October 12, 2007, the State filed an amended charging information as to the habitual offender count. *Id*. at 132.

On October 15, 2007, a change of plea hearing was held. Mullis and his counsel, David Nowak, were present.[3] Nowak informed the trial court that Mullis did not wish to

[1] Ind. Code § 35-43-2-1.

[2] Ind. Code § 35-50-2-8.

[3] Court-appointed counsel had previously represented Mullis, but both had withdrawn. Mullis hired Nowak, who filed his appearance on April 3, 2007.

enter a guilty plea that day. Tr. at 3. He explained that Mullis wanted more time to consider his plea and moved for a one-week continuance. The trial court declined the motion, but agreed to a hearing later that afternoon to allow Nowak and Mullis to confer. The trial court then permitted the filing of the amended habitual offender count and held the initial hearing on that count. The trial court reminded Mullis that his jury trial was scheduled for October 30, 2007. *Id*. at 8. The record does not indicate that the afternoon hearing was held.

On October 22, 2007, Mullis attended a probation revocation hearing in a different cause in the Johnson County Circuit Court. Mullis told the Johnson Circuit Court that he worked out an agreement with the State and did not want a lawyer. State's Ex. 30, p. 2. Apparently, in exchange for the State's recommendation for a very lenient sentence in the Johnson County Jail, Mullis agreed, inter alia, to admit that he committed the two counts of class C felony burglary that he had been charged with in the case at bar. *Id*. at 4. The Johnson Circuit Court explained to Mullis that if he admitted to committing a crime at the probation revocation hearing it could be used against him in his trial. *Id*. at 4-5. At that point, Mullis admitted only to being *arrested* for the burglaries. *Id*. at 5. The State responded, "I guess we don't have an agreement then." *Id*. Mullis then told the court that he had a deal worked out to plead guilty to one count of burglary. *Id*. The State accepted Mullis's admission to one count of burglary, rather than two. *Id*. at 7. As a result, Mullis received fourteen days in jail with credit for seven days served, and he was released from the Johnson County Jail that day.

On October 30, 2007, Mullis's jury trial began. Nowak was present, but Mullis was not. After the jury was sworn in, the trial court held a sidebar conference to discuss Mullis's

absence. The trial court asked Nowak whether Mullis knew about the trial, and he replied yes. The trial court then asked Nowak whether he had any conversations with Mullis about the trial. Nowak responded:

> I have had several and the last conversation in person was a week ago yesterday on a Monday, while he was still incarcerated in the Johnson County Jail. I advised him of this trial date and the clothing, what he needed to do if he was still incarcerated, to bring clothing to this trial. And told him to call me back collect from jail immediately following the Johnson County hearing at 1:30 last Monday and tell me what happened.
>
> ….
>
> He was released. And I have not heard back from him since that point in time, with the exception that he called my office yesterday evening, according to my computerized voice mail system. He called at 4:14 but due to the delay in the implementation of Daylight Savings Time, the computer error, that is really 5:14. He left a message indicating he needed to talk to me. You can say this, my interpretation was that he was aware of the trial.

Id. at 12-13. Nowak also informed the trial court that he telephoned Mullis's mother that morning and she indicated that she believed Mullis was at his trial. *Id*. at 15.

Lankey, who had pled guilty to the burglary of the Yee Kee Restaurant, testified that he and Mullis had committed the burglary together.

On October 31, 2007, the jury found Mullis guilty as charged and found him to be a habitual offender. The trial court entered judgment of conviction accordingly and issued a warrant for Mullis's arrest. On November 19, 2007, Mullis was served with the warrant. Also on that date, Nowak filed a motion to withdraw his appearance on the grounds that Mullis had advised him by telephone that he no longer wished Nowak to represent him, he did not want Nowak to appear for him at any future hearings, and he did not want Nowak to visit him in jail. Appellant's App. at 200-01. Mullis also sent the trial court a letter indicating that he was terminating Nowak's representation. *Id*. at 202.

On December 6, 2007, a presentence investigation report ("PSI") was completed, in which Mullis claimed that he had missed his trial because his attorney had told him that it would be continued. Appellant's App. at 246.

On December 12, 2007, a sentencing hearing was held. Nowak and Mullis were present. The first matter the trial court addressed was Mullis's wish to terminate Nowak's representation and Nowak's motion to withdraw his appearance. The trial court informed Mullis that it would not appoint a public defender to represent him at the sentencing hearing because Mullis had already paid Nowak to represent him. Mullis stated that he wished to proceed pro se. The trial court then determined that Mullis knowingly and voluntarily waived his right to counsel. In so doing, the trial court specifically informed Mullis that an attorney might be able to find mitigating circumstances to present to the court that Mullis might not be able to find. Tr. at 341-42. The trial court then granted Nowak's motion to withdraw his appearance.

Matters pertaining to Mullis's sentence were then addressed. The trial court asked Mullis if he would like to exercise his right of allocution. Mullis stated that he "would like to object to my trial being held without me. … Other than that, no. I'd like to appeal my decision of my sentence and my trial and have a court appointed lawyer due to the fact that I can't afford one. Other than that, I have nothing further to say." *Id*. at 347. Detective Thomas Faust testified for the State. He testified that he had investigated a break-in at Karma Records that had led to charges being filed against Mullis. He also stated that Mullis told him that he was not present at his jury trial because his attorney had informed him that there was going to be a continuance. *Id*. at 355.

In the State's summation of the aggravating factors, the prosecutor included Mullis's history of failing to appear for court hearings. *Id*. at 358. The trial court noted that Mullis had stated that his attorney had informed him that the jury trial was going to be continued and called Nowak to testify. The trial court asked Nowak whether he had told Mullis that his jury trial was going to be continued. Nowak declined to answer pursuant to Indiana Professional Conduct Rule1.6.[4] *Id*. at 361. The trial court asked Mullis whether he had any objection to Nowak answering the question, and Mullis stated that he did. The trial court responded, "Then what I'm going to do is I'm going to discount your statement that your attorney advised you that there's going to be a continuance, so that you wouldn't need to appear." *Id*. at 362. The trial court also took judicial notice of the statements Nowak made at the sidebar conference before trial, namely, that he believed Mullis was aware that the trial was to be held that day.

The trial court found the following significant aggravating circumstances: an extensive juvenile and criminal history, numerous violations of probation and parole, and Mullis's character and attitude indicated that he is likely to continue committing crimes. *Id*. at 363-64. The trial court found no mitigating circumstances. The trial court sentenced Mullis to eight years for each burglary conviction, to be served consecutively, and added twelve years for the habitual offender finding, for an aggregate sentence of twenty-eight years. Mullis now appeals.

[4] Professional Conduct Rule 1.6(a) prohibits a lawyer from revealing information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by paragraph (b).

Discussion and Decision

I. Trial In Absentia

Mullis claims that the trial court abused its discretion in trying him in absentia. A criminal defendant has a right to be present during his trial under the Sixth Amendment of the U.S. Constitution and under Article 1, Section 13 of the Indiana Constitution. *Fennell v. State*, 492 N.E.2d 297, 299 (Ind. 1986). In a non-capital case, a defendant may waive his right to be present at trial, but "the waiver must be voluntarily, knowingly, and intelligently made." *Holtz v. State*, 858 N.E.2d 1059, 1061 (Ind. Ct. App. 2006); *see also Williams v. State*, 526 N.E.2d 1179, 1180 (Ind. 1988) ("It is well established that a criminal defendant can waive his right to be present at his trial when his absence evidences a knowing and voluntary absence."). Where the defendant knows the scheduled trial date but fails to appear, a presumption of waiver arises. *Bullock v. State*, 451 N.E.2d 646, 647 (Ind. 1983). The best evidence that defendant knew the trial date is the defendant's presence in court on the day the trial is set. *Fennell*, 492 N.E.2d at 299.

"An absent defendant who later appears in court must be afforded the opportunity to present evidence that the absence was not voluntary." *Walton v. State*, 454 N.E.2d 443, 444 (Ind. Ct. App. 1983) "This does not require a *sua sponte* inquiry; rather the defendant cannot be prevented from explaining." *Hudson v. State*, 462 N.E.2d 1077, 1081 (Ind. Ct. App. 1984). We review the trial court's finding that the defendant voluntarily, knowingly, and intelligently waived the right to be present at trial for an abuse of discretion. *Brown v. State*, 839 N.E.2d 225, 231 (Ind. Ct. App. 2005) (citing *Taylor v. State*, 178 Ind. App. 650, 653, 383 N.E.2d 1068, 1071 (1978)), *trans denied* (2006). We consider the entire record to

determine whether the defendant voluntarily, knowingly, and intelligently waived his right to be present at trial. *Soliz v. State*, 832 N.E.2d 1022, 1029 (Ind. Ct. App. 2005), *trans. denied*.

Mullis appears to concede that he was in court when the date for the jury trial was announced and that therefore a presumption arose that he voluntarily, knowingly, and intelligently waived his right to be present. Apparently, however, Mullis argues that he was not "'afforded an opportunity to explain his absence and thereby rebut the initial presumption of waiver.'" Appellant's Br. at 21 (quoting *Diaz v. State*, 775 N.E.2d 1212, 1216 (Ind. Ct. App. 2002), and citing *Ellis v. State*, 525 N.E.2d 610, 612 (Ind. Ct. App. 1987)). He further asserts, "Surely, the opportunity to explain required by *Diaz* and *Ellis* must be a meaningful opportunity." *Id*. at 22. He argues that he did not have a meaningful opportunity to explain his absence and rebut the initial presumption of waiver because he was not represented by an attorney at the sentencing hearing. He insists that this situation is unique because his attorney was the cause of his failure to appear. He asks that we "remand to the trial court for a hearing at which Mullis would have the benefit of appointed counsel in order to have a meaningful opportunity to explain his absence." *Id*. at 23.

To the extent Mullis suggests that a hearing is required, we reject any such claim. In both *Walton*, 454 N.E.2d at 444, and *Holtz*, 858 N.E.2d at 1062-63, this Court clearly ruled that a hearing is not necessary and that the trial court is required only to provide an opportunity to the defendant to explain his or her absence. In *Holtz* we specifically rejected the argument that *Ellis* required a hearing. 858 N.E.2d at 1062.

Further, we are unpersuaded that remand is necessary. In *Holtz*, we found no error where the trial court offered the defendant the opportunity to speak on his behalf, but he

declined. *Id*. at 1062-63. Here, the trial court afforded Mullis several opportunities to make statements at the sentencing hearing. When the trial court asked if he wished to exercise the right of allocution, Mullis said he wished to object to the trial being held in his absence, but he offered no further explanation, details, or evidence to support the objection. After the close of the State's presentation, the trial court offered Mullis additional opportunities to make statements on his behalf. Tr. at 356-57. Mullis did not make use of those opportunities to elaborate on why he failed to appear. Although on appeal he vigorously argues that the Johnson County probation revocation hearing demonstrates that he thought there was a plea agreement in the works, he never mentioned the possibility of a plea agreement to the trial court. He does not contend that he was prevented from presenting his side of the story or introducing evidence to support it. Moreover, on appeal, he fails to argue that he has a reasonable possibility of prevailing in a new hearing. We conclude that remand is not necessary and that the trial court did not abuse its discretion in holding Mullis's trial in his absence.

II. Sentencing

Mullis argues that the trial court erred in sentencing him. So long as a sentence lies within the statutory range, we review sentencing decisions for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. "An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Id*. (citation and quotation marks omitted).

> One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that explains reasons for imposing a sentence–including a finding of aggravating and mitigating factors if any–but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.

Id. at 490-91.

Here, the trial court found three aggravating circumstances: a lengthy juvenile and criminal history, probation and parole violations, and a character evincing the likelihood of continued criminal activity. Mullis concedes that the first two aggravating factors found by the trial court support his twenty-eight year sentence. Appellant's Br. at 28. However, Mullis asserts that the trial court abused its discretion in failing to consider the seven-year sentence received by Lankey. However, the sentence received by a co-defendant is simply not a mitigating factor. A co-defendant's sentence might be a useful aid in determining whether a sentence is inappropriate, but it is not a factor that can be mitigating or aggravating in terms of sentencing. Mullis agrees that the aggravating factors support his sentence. We find no abuse of discretion here.

Mullis also asserts that his sentence is inappropriate. Under Article 7, Section 6 of the Indiana Constitution, we have the constitutional authority to review and revise sentences. Indiana Appellate Rule 7(B) states: "The Court 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."

"Although appellate review of sentences must give due consideration to the trial court's sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." *Purvis v. State*, 829 N.E.2d 572, 588 (Ind. Ct. App. 2005) (quotation marks and internal citations omitted), *trans. denied*. The defendant has the burden of persuading us that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

Regarding the nature of the offense, our consideration of an appropriate sentence begins with the advisory sentence for the offense committed. *Id*. at 1081. The advisory sentence for a class C felony is four years' imprisonment, while the maximum sentence, which the trial court imposed here, is eight years. *See* Ind. Code § 35-50-2-6(a). The habitual offender term must not be less than the advisory sentence of the underlying offense nor more than three times the advisory sentence for that crime. Ind. Code § 35-50-2-8. "Maximum sentences ordinarily are appropriate for the 'worst' offenders and offenses." *Marlett v. State*, 878 N.E.2d 860, 865 (Ind. Ct. App. 2007) (citing *Buchanan v. State*, 767 N.E.2d 967, 973 (Ind. 2002)), *trans. denied*.

The State agrees that the nature of the two burglaries is not particularly egregious. Appellee's App. at 13. However, the State contends that Mullis's character demonstrates that he is among the worst offenders, and therefore, the imposition of maximum consecutive sentences is appropriate. We agree.

Our review of the PSI reveals that Mullis's criminal history spans twenty-seven years. There have been twenty-six criminal causes filed against Mullis covering forty-five separate crimes. Appellant's App. at 246-251. He has been convicted of eight felonies, either as a

juvenile or an adult. Six of these were burglaries, and three were committed by Mullis as an adult, along with felony escape from prison. Mullis has violated probation numerous times, and he committed the instant offense only two months after he was released on parole from his escape conviction. He admitted to using methamphetamine every other day for the six months preceding the PSI. *Id*. at 255. His employment history is very poor, and he has never paid court-ordered child support. *Id*. at 254. He has taken no responsibility for the instant offenses. All this demonstrates a complete lack of respect for the law and a dire need of long-term corrective treatment. In sum, Mullis has failed to carry his burden to demonstrate that his sentence is inappropriate.

III. Habitual offender Enhancement

The State notes that the trial court imposed the habitual offender enhancement separately from the underlying convictions. "A habitual offender finding has no independent status as a separate crime and exists only as an integral part of a sentence imposed for a specific independent felony." *Roark v. State*, 829 N.E.2d 1078, 1080 n.5 (Ind. Ct. App. 2005). The proper procedure would be for the habitual offender enhancement to be attached to one of the burglary convictions. We remand for the trial court to do so.

Affirmed.

BARNES, J., and BRADFORD, J., concur.