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IN THE COURT OF APPEALS OF INDIANA

DONALD MALLARD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0802-CR-39
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John M. Marnocha, Judge
Cause No. 71D02-0605-FB-47

August 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Donald Mallard appeals his convictions and sentence for six counts of Robbery, as Class B felonies, and one count of Robbery, as a Class C felony, following a jury trial. We address four issues on review:

1. Whether the trial court abused its discretion by admitting evidence obtained as the result of a traffic stop.

2. Whether the evidence is sufficient to support Mallard's convictions.

3. Whether the trial court abused its discretion in sentencing Mallard.

4. Whether his sentence is inappropriate in light of the nature of the offenses and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

Between April 27 and April 30, 2008, the following venues in South Bend and Mishawaka were robbed: the 7-Eleven on Lincoln Way West, the 7-Eleven on Eddy Street, the Council Oaks Tobacco Discount Store on Portage, the Speedway gas station on S.R. 933, Low Bob's Discount Tobacco store on Lincoln Way East, the Speedway gas station on Ireland Street, and the Days Inn on S.R. 933. In each instance, Willie Anderson entered the venues and conducted the robberies then fled in a minivan driven by Mallard. With regard to the Days Inn robbery, Mallard entered the motel before Anderson and asked for "Mr. Smith." Transcript at 281-82. Mallard left after Helen Simpson, the front desk supervisor, told him that no one staying at the hotel had that name. Anderson then entered and robbed the motel.

Anderson used a sawed-off shotgun, provided by Mallard, to commit all of the robberies. He wore a blue hoody during the April 27 robberies. After each robbery, Anderson and Mallard split the proceeds, with Mallard usually receiving more than half.

In the course of investigating the robberies, the St. Joseph County Police Department and the South Bend Police Department disseminated reports identifying as suspects two black males traveling in a beige Pontiac minivan. The reports contained a photo of a van similar to the one that witnesses had described as being used in the robberies. Galen Pelletier, a South Bend police officer, observed a minivan resembling that description parked on Van Buren Street. While watching that minivan, Pelletier saw another minivan, which also fit the description sent out by the police department. The second minivan paused for several seconds before proceeding through the intersection and passing Pelletier. Pelletier saw two black males in the vehicle. The passenger was wearing a blue hoody and was slouching down in the seat.

At that point, Pelletier made a traffic stop. Mallard stopped and got out of the vehicle. While Officer Pelletier was waiting for backup, Mallard jumped back into the van, fled the scene, and crashed the van into a fence. Mallard then fled on foot. Officer Pelletier found Anderson in the van with a sawed-off shotgun between his legs. Other officers searched the area and found Mallard underneath a car on a nearby street. Mallard again attempted to flee, but officers caught and handcuffed him.

The State charged Mallard with six counts of robbery, as Class B felonies, and one count of robbery, as a Class C felony. After an evidentiary hearing, the trial court denied Mallard's motion to suppress evidence obtained as a result of the traffic stop. At trial

Mallard denied driving the van and renewed his motion to suppress evidence, but the trial court denied that motion. A jury found Mallard guilty on all counts, and the trial court sentenced him to twenty years on the Class B felonies and eight years on the class C felony, to be served consecutively, for an aggregate sentence of 128 years. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Admission of Evidence

Mallard contends that the evidence police obtained as a result of the traffic stop should have been suppressed. But Mallard is challenging the admission of evidence following his conviction. Thus, the issue is more appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial. Bentley v. State, 846 N.E.2d 300, 304 (Ind. Ct. App. 2006), trans. denied. A trial court is afforded broad discretion in ruling on the admissibility of evidence, and we will reverse such a ruling only upon a showing of an abuse of discretion. Id. An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. Id.

According to Mallard, the evidence from the stop should not have been admitted because Officer Pelletier did not have reasonable suspicion for the stop. If an officer has reasonable suspicion of criminal activity, the officer has the authority to briefly stop the person for investigative purposes. Williams v. State, 754 N.E.2d 584, 587 (Ind. Ct. App. 2001) (citing Terry v. Ohio, 392 U.S. 1, 30 (1968)). "Reasonable suspicion is satisfied where the facts known to the officer, together with the reasonable inferences arising from

such facts, would cause an ordinarily prudent person to believe that criminal activity has or is about to occur." Id. Reasonable suspicion is determined by looking at the totality of the circumstances. Person v. State, 764 N.E.2d 743, 748 (Ind. Ct. App. 2002).

In particular, Mallard contends that the vehicle police stopped was not identical to the vehicle described to Officer Pelletier. Although Officer Pelletier incorrectly described the van as a Montana at trial, the van in the police department photo and the van that Officer Pelletier pulled over were both gold minivans that resembled each other. "A vehicle fitting the description of one used by the crime suspect provides reasonable suspicion for making an investigatory stop." Baker v. State, 485 N.E.2d 122, 124 (Ind. 1985). Thus, Mallard's claim that the van does not match the getaway vehicle described in the police reports is without merit.

Additionally, the passenger in the van matched the description in the police reports of one of the suspects. And the van and passengers were in the vicinity of the crimes. Reasonable suspicion exists where the vehicle and defendant fit the victim's descriptions and the defendant was in the vicinity of the crime. See Coates v. State, 534 N.E.2d 1087, 1092 (Ind. 1989). Moreover, Mallard fled from the traffic stop, first in the van and then on foot. Mallard's flight after the initial stop, together with the other factors, presented Officer Pelletier with reasonable suspicion of criminal activity. See Wilson v. State, 670 N.E.2d 27, 31 (Ind. Ct. App. 1996).

Nevertheless, Mallard contends that Officer Pelletier did not have reasonable suspicion to initiate the stop. In support, Mallard relies on Cash v. State, 593 N.E.2d 1267 (Ind. Ct. App. 1992), a case involving a stop because the car allegedly had a

swinging license plate, and State v. Snyder, 538 N.E.2d 961 (Ind. Ct. App. 1989), a case involving a stop due to the driver's avoidance of a roadblock. But after citing these cases, Mallard presents no cogent analysis of how these cases are relevant to the instant case. Instead, he merely states, "However, this was not enough to create reasonable suspicion." Appellant's Brief 5. Since Mallard did not present cogent reasoning in his purported analogy, Mallard has waived any argument based on these cases. See Ind. Appellate Rule 46(A)(8).

Waiver notwithstanding, even if Mallard had made a rational argument based on caselaw, the cases that Mallard cites are unpersuasive. In Cash, the evidence demonstrated that the license plate had not been swinging at the time of the stop. Thus, the officer lacked reasonable suspicion that criminal activity had been or was being committed. Cash, 593 N.E.2d at 1269. And citing Snyder, Mallard claims that "merely turning off the road where a roadblock is located did not create a reasonable suspicion that the car was stolen." Appellant's Brief at 7. But in Snyder we held the contrary, concluding that "a driver's attempt to avoid the roadblock, by making a turn around, does raise a 'specific and articulable fact' which rises to a reasonable suspicion on the part of a police officer that the driver may be committing a crime." Id. at 965. Thus, Snyder does not support Mallard's contention.

Considering the totality of the circumstances, Officer Pelletier had reasonable suspicion to support the investigatory stop. The vehicles and passenger descriptions match the police department's descriptions. Mallard was in the vicinity of the crimes. Mallard fled from the police. And Mallard does not present cogent reasoning based on

relevant authority. Thus, Officer Pelletier's stop was valid and the trial court did not abuse its discretion by admitting the evidence from the stop at trial.

Issue Two: Sufficiency of the Evidence

Mallard next contends that the State presented insufficient evidence to support his convictions. When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We will affirm the conviction, "if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt." Id.

Mallard contends that the evidence is insufficient because Anderson, who is the only person placing Mallard at the scene of the robberies, benefited from his plea and testimony. However, "[t]he uncorroborated testimony of even one witness is sufficient to support a conviction." Thompson v. State, 612 N.E.2d 1094, 1098 (Ind. Ct. App. 1993), trans. denied. Anderson testified that Mallard initiated the robbery plan, provided the shotgun, drove the van used for the robberies, chose the locations to be robbed, and took more than half of the proceeds from the robberies. In exchange for that testimony, Anderson did receive a plea agreement where he pleaded guilty to three counts of robbery and four were dismissed. And Anderson would only receive a sentence of between six and thirty years. However, the details of the plea agreement were disclosed to the jury during Anderson's testimony. Therefore, the jury had already weighed that factor in arriving at the verdicts. Mallard's contention on appeal amounts to a request that we

reweigh the evidence and judge the credibility of Anderson as a witness, which we will not do. See McHenry, 820 N.E.2d at 126.

Moreover, Simpson, the Days Inn front desk supervisor, identified Mallard as the individual who entered the Days Inn minutes before Anderson committed the robbery. Simpson also testified that Mallard drove Anderson away from the Days Inn in a brown van after the robbery. And the Director of the Crime Lab of the South Bend Police Department identified Mallard's fingerprint as one of the fingerprints found on the van. Anderson's and Simpson's identifications of Mallard, together with the fingerprint evidence and his flight from officers, were adequate grounds for a reasonable trier of fact to find Mallard guilty beyond a reasonable doubt. The State presented sufficient evidence to support Mallard's convictions.

Issue Three: Abuse of Discretion in Sentencing

Mallard contends that the trial court abused its discretion in sentencing him because it did not acknowledge the presence or lack of any mitigating circumstances and then balance aggravators with mitigators. The trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular felony sentence. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007) clarified in part on other grounds, 875 N.E.2d 218 (Ind. 2007). We review the sentence for an abuse of discretion. Id. An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Id. A trial court abuses its discretion if it (1) fails "to enter a sentencing statement at all[,]" (2) enters "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," (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration," or (4) considers reasons that "are improper as a matter of law." Id. at 490-91.

Mallard asserts that the trial court should have considered that he had "acknowledged his drug problem and the failure of 'the system' to address his addiction." Appellant's Brief 8. But Mallard did not argue at the sentencing hearing that his drug problem or the failure of "the system" were mitigators. "A defendant who fails to raise proposed mitigators at the trial court level is precluded from advancing them for the first time on appeal." Johnson v. State, 837 N.E.2d 209, 215 (Ind. Ct. App. 2005). Thus, Mallard has waived the claim that the trial court abused its discretion in sentencing him because it did not acknowledge the presence or lack of any mitigating circumstances. Waiver notwithstanding, "[a]n allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." Id. at 493. Mallard does not present significant mitigating evidence showing that his history of drug abuse warranted a lesser sentence. Thus, his claim must fail.

And Mallard's claim that the trial court abused its discretion in sentencing him because it did not balance the aggravators versus mitigators is flawed and outdated. First, as mentioned above, Mallard presented no mitigators to weigh against the aggravators at trial. Second, "[b]ecause the trial court no longer has the obligation to 'weigh' aggravating and mitigating factors against each other when imposing a sentence . . . a trial court can not now be said to have abused its discretion in failing to 'properly weigh'

such factors." Anglemyer, 868 N.E.2d at 491. Thus, the trial court did not abuse its discretion when it considered aggravators and mitigators at sentencing.

Issue Four: Appellate Rule 7(B)

Mallard asserts that his 128-year sentence is inappropriate in light of the nature of the offenses and his character. We may revise a sentence authorized by statute if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). Mallard must persuade the appellate court that his sentence has met the inappropriateness standard of review. See Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Mallard has not met that burden of persuasion.

A. Nature of the Offenses

Mallard's sentence is not inappropriate in light of the nature of the offenses. Mallard contends that the consecutive running of the maximum sentence on each count is essentially a lifetime sentence for a "'career criminal,'" which is inappropriate. Appellant's Brief at 6. In particular, Mallard asserts that a lesser sentence is warranted because he has never injured anyone. We are not persuaded by Mallard's "no harm, no foul" argument. Mallard developed and carried out a four-day robbery scheme, which involved providing Anderson, a crack addict, with a sawed-off shotgun. Such conduct is inherently dangerous, even if Mallard did not actually harm or intend to harm anyone. Thus, the sentence is not inappropriate in light of the nature of the offenses.

B. Character of the Offender

Second, the sentence is not inappropriate in light of Mallard's character. Mallard contends that maximum sentences are reserved for the worst criminals. But "[i]f we were to take this language literally, we would reserve the maximum punishment for only the single most heinous offense." See Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002). We could always imagine a worse scenario, thus the maximum sentence would never be justified. Id. Therefore, we will concentrate "less on comparing the facts of this case to others, whether real or hypothetical, and more on . . . the offense for which the defendant is being sentenced, and what it reveals about the defendant's character." Id.

Mallard has a lengthy criminal history dating back to 1973. Mallard has had two misdemeanor convictions and seven felony convictions, which occurred in several states and included armed bank robberies in 1985 and 1986. Mallard's sentences have included juvenile detention, "IBS/IGS," license suspension, probation, jail, parole, residential placement, and prison. Appellant's Supp. App. at 1. Mallard also attended substance abuse treatment in 2003, yet he reported that he last consumed alcohol and crack cocaine in May 2006, the month of his arrest for the present offenses. Mallard has had numerous opportunities for rehabilitation. Yet, at fifty-one years of age, Mallard continues to commit crimes. The 128-year sentence is not inappropriate in light of Mallard's character.

Affirmed.

DARDEN, J., and BROWN, J., concur.