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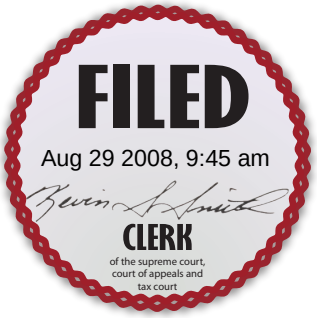

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IN THE
COURT OF APPEALS OF INDIANA

CURTIS N. COOPER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0712-CR-743
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert R. Altice, Jr., Judge
Cause No. 49G02-0204-MR-106697

August 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Curtis Cooper ("Cooper") challenges the sixty-five-year sentence imposed upon him following his conviction for Murder, a felony.[1] We affirm.

Issue

Cooper presents a sole issue for review: Whether he is entitled to be re-sentenced because his sentence was imposed in violation of Blakely v. Washington, 542 U.S. 296 (2004), reh'g denied.

Facts and Procedural History

On prior appeal to the Indiana Supreme Court, the pertinent facts were recited as follows:

> Cooper began dating Selena in March of 2000. On December 30th of that year, they started arguing when Cooper discovered that Selena had been talking to another man. The argument escalated into a physical altercation during which Cooper "grabbed her by her hair, [and] drug her to the top of the stairs. Once they got at the top of the stairs he took his boot and kicked her in her mouth. He then drug her down the stairs by the hair." Tr. at 60. Police apprehended Cooper only after he led them on a high-speed chase at speeds approaching 100 miles per hour. As a result, Cooper was charged and pleaded guilty to resisting law enforcement as a Class D felony and domestic battery as a Class A misdemeanor. On February 19, 2001, Cooper was sentenced to a total term of 545 days, 494 days of which were suspended, and 365 days ordered to be served on probation. See Ex. at 43.
>
> On the evening of April 8, 2001, after discovering some misplaced items in Selena's garage and not being able to reach her on her cell phone, several of Selena's family members filed a missing persons report and police began an investigation. Tr. at 227-34. On April 10, two of Cooper's friends

[1] Ind. Code § 35-42-1-1. Cooper does not challenge his concurrent sentences for Auto Theft, a Class D felony, Ind. Code § 35-43-4-2.5, or Carrying a Handgun without a License, a Class A misdemeanor, Ind. Code § 35-47-2-1.

> saw what appeared to be Selena's sports utility vehicle in the parking lot of a housing complex. Noting a small hole in the passenger door and observing what appeared to be something covered up in the cargo area, Cooper's friends called the police. Selena's body was discovered in the vehicle wrapped in a blanket. She had been shot five times, twice in her chest, once in her abdomen, and twice in her upper thigh. See id. at 526-39.
>
> About a year later, the State charged Cooper with murder, auto theft as a Class D felony, and possession of a handgun without a license as a Class A misdemeanor. The State also filed a request for life without parole listing as an aggravator that Cooper was on probation for resisting law enforcement at the time the murder was committed. After a four-day jury trial that began May 17, 2004 the jury found Cooper guilty as charged. The following day the jury reconvened for the penalty phase of trial, after which the jury found that Cooper intentionally killed Selena and that the State proved the charged aggravator beyond a reasonable doubt. The jury also found that Cooper's proffered mitigating circumstances were outweighed by the charged aggravator. The jury thus recommended life imprisonment without parole, and the trial court sentenced Cooper accordingly.

Cooper v. State, 854 N.E.2d 831, 834 (Ind. 2006). The Indiana Supreme Court affirmed Cooper's convictions but remanded the case for a new sentencing hearing. Id. at 841-42. The State withdrew its request for a sentence of life without the possibility of parole. The trial court conducted a sentencing hearing on November 16, 2007 and sentenced Cooper to sixty-five years imprisonment. He now appeals.

Discussion and Decision

At the time of Cooper's offense, Indiana Code Section 35-50-2-3 provided that a person who committed murder should be imprisoned for a fixed term of fifty-five years, with not more than ten years added for aggravating circumstances or not more than ten years subtracted for mitigating circumstances.

The trial court imposed a sixty-five year sentence, upon finding three aggravators and

two mitigators. The trial court found Cooper's criminal history, the fact that he was on probation, and the nature and circumstances of the crime to be aggravating. More specifically, the trial court found that Cooper "conceal[ed] his whereabouts" and "used a gun in order to get [Selena] out of the scene." (Sent. Tr. 31.) The trial court found hardship to Cooper's fourteen and eighteen-year-old children and his good conduct while incarcerated to be mitigating.

Cooper now contends that the trial court's finding of the third aggravator, i.e., the nature and circumstances of the crime, is in violation of his Sixth Amendment right to have a jury determine whether or not there existed aggravating circumstances to support his sentence enhancement, according to Blakely.[2] The Blakely Court applied the rule set forth in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." The Blakely Court defined the relevant statutory maximum for Apprendi purposes as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."

In Smylie v. State, 823 N.E.2d 679, 686 (Ind. 2005), cert. denied, 546 U.S. 976 (2005), our Supreme Court applied Blakely to invalidate portions of Indiana's sentencing

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[2] Cooper may raise a Sixth Amendment challenge to his sentence in reliance upon Blakely because his case was "not yet final" when Blakely was decided. See Smylie v. State, 823 N.E.2d 679, 690-91 (Ind. 2005), cert. denied, 546 U.S. 976 (2005) (holding that Blakely would be applied retroactively to all cases on direct review at the time Blakely was announced and the defendant need not have objected at trial in order to raise a

scheme that allowed a trial court, without the aid of a jury or a waiver by the defendant, to enhance a sentence where certain factors were present. Thus, in the wake of Blakely, a trial court could only enhance a presumptive sentence based upon those facts that "are established in one of several ways: 1) as a fact of prior conviction; 2) by a jury beyond a reasonable doubt; 3) when admitted by a defendant; and 4) in the course of a guilty plea where the defendant has waived Apprendi rights and stipulated to certain facts or consented to judicial factfinding." Trusley v. State, 829 N.E.2d 923, 925 (Ind. 2005).

Cooper admitted in his trial testimony that he had a gun. However, he did not admit that he concealed his whereabouts or removed Selena from her home at gunpoint. Thus, the presumptive sentence for murder could not properly be aggravated based upon the trial court's consideration of these facts as constituting the "nature and circumstances of the crime." Nevertheless, in a case where a trial court has relied on some Blakely-permissible aggravators and others that are not, the "sentence may still be upheld if there are other valid aggravating factors from which we can discern that the trial court would have imposed the same sentence." Edwards v. State, 822 N.E.2d 1106, 1110 (Ind. Ct. App. 2005).

Here, the record discloses that Cooper had an extensive criminal history consisting of both felony and misdemeanor convictions. He was convicted in Michigan of a lesser-included offense of conspiracy to embezzle, a lesser-included offense of breaking and entering with intent to commit a felony, attempted criminal sexual conduct, domestic violence, and a lesser-included offense of escape. In Indiana, he was convicted of domestic

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Blakely claim on appeal, although a defendant who did not appeal his or her sentence at all would have

battery and resisting law enforcement. The prior convictions have already been proven beyond a reasonable doubt and are thus exempt from the Apprendi rule as clarified in Blakely.

Moreover, at the time of the murder, Cooper was on probation for resisting law enforcement and for a prior battery upon Selena. We agree with the State that the mitigators were not compelling, because Cooper would be imprisoned during the remainder of his daughters' minority regardless of leniency in sentencing, and because Cooper's conduct during his most recent incarceration was not directly relevant to his commission of the murder. We are confident that the trial court would have imposed the sixty-five-year sentence without additional findings. A remand for re-sentencing is unnecessary.

Conclusion

Cooper has not demonstrated that the trial court erred in imposing sentence upon him.

Affirmed.

RILEY, J., and BRADFORD, J., concur.

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forfeited a Blakely claim).