ATTORNEY FOR APPELLANT:

KIMBERLY A. JACKSON
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

STEPHEN R. CREASON
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

TONY L. RICHEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 60A01-0802-CR-34
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE OWEN CIRCUIT COURT
The Honorable Frank M. Nardi, Judge
Cause No. 60C01-9401-CF-22

October 24, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Tony L. Richey brings this belated appeal of the fifty-six year aggregate sentence imposed by the trial court after his plea of guilty to three counts of burglary as a class B felony; three counts of burglary as a class C felony; one count of auto theft as a class D felony; and one count of arson as a class C felony.

We reverse and remand.

ISSUES

1. Whether the trial court abused its discretion in sentencing Richey.

2. Whether the sentence imposed by the trial court is inappropriate.

FACTS

In late December of 1993 and early January of 1994, Richey (age 21) and Danny Miller went on a crime spree in Owen County. They broke and entered Spencer Bait and Tackle and stole a "substantial number of firearms" from the business. (Ex. 3, p. 13). They broke and entered the dwelling of Wayne and Doris Herring and stole a number of items – including guns and the Herrings' pickup truck. They later set the truck on fire "to cover up fingerprints on the inside of the truck." *Id.* at 19. They broke and entered Parker's Archery and stole "guns and ammunition and some other items" from the business. *Id.* at 15. Richey, Miller and Miller's brother broke and entered the dwelling of Billy Welch and stole items including a gun safe. Richey and the Miller brothers also broke and entered the dwelling of William Jones and stole various items. Finally, Richey and the Miller brothers broke and entered the barn of Jeff Gale and stole items.

On January 13th, February 2nd, and April 20th, 1994, the State filed a total of eight criminal charges against Richey alleged to have been committed within a period of ten days. Specifically, the State charged Richey with Count I, burglary as a class C felony as to the Bait and Tackle shop; Count II, burglary as a class B felony as to the Herring dwelling; Count III, burglary as a class C felony as to Parker's Archery; Count IV, auto theft as a class D felony as to the Herring truck; Count V, arson as a class B felony as to the truck; Count VI, burglary as a class B felony as to the Welch dwelling; Count VII, burglary as a class B felony as to the Jones dwelling; and Count VIII, burglary as a class C felony as to the Gale barn.

On October 4, 1994, Richey signed a plea agreement with the State providing as follows. Richey would plead guilty to seven of the offenses as charged and arson as a class C felony (rather than the class B felony offense charged). The State would make no recommendation at sentencing "condition[ed] upon [Richey] providing a truthful cleanup statement concerning all criminal action in Owen County," and the State further agreed to give Richey "use immunity in any such truthful cleanup statement" and not charge him "with any additional offenses." (App. 152). That same day, October 4, 1994, the trial court held a change of plea hearing. Richey testified to the facts of the crimes as reflected above. The trial court found a factual basis for Richey's guilty pleas, found him guilty of the offenses, and entered judgment of conviction.

On January 11, 1995, the trial court conducted the sentencing hearing. The State acknowledged that Richey had "provided a full clean up statement" of his crimes. (Ex. 4, p. 27). The State noted that Richey reached his plea agreement and provided information

after Danny Miller had already done so. Richey acknowledged that he was "a criminal," and that he committed the crimes "for the money." (Ex. 4, p. 32). Despite Richey's cooperation with the police, some of the guns he had stolen remained unrecovered.

The trial court found as "aggravating circumstances" Richey's "history of delinquent and criminal activity," specifically his three separate juvenile adjudications in 1986 -- for criminal trespass,[1] conversion, and hunting without consent; his 1993 adult conviction for theft; and that Richey "failed to appear on a pending charge of receiving stolen property on January 31, 1994." (App. 14). The trial court found that the aggravators outweighed "any mitigating circumstances, such as cooperation with the State." (Ex. 4, p. 56). In its written sentencing order, the trial court stated that "any mitigating circumstances are outweighed by the severity of the present offenses and the other known, but uncharged, offenses which the defendant has committed." (App. 14-15).

The trial court then imposed twenty-year terms for each of the class B felonies (the Herring, Jones, and Welch dwelling burglaries); eight-year terms for each of the class C felonies (the Bait and Tackle, Parker's Archery, and Gale burglaries, and the truck arson); and a three-year term for the class D felony (theft of the Herring truck). The trial court ordered that the three sentences as to the Herring offenses (burglary as a class B offense; auto theft as a class D offense; and arson as a class C offense) be served concurrently but consecutive to the other sentences and suspended four years of the burglary sentence and

[1] The trial court's initial sentencing order labeled this offense as "burglary," but after Richey's motion to correct error brought the detail to the trial court's attention, it amended the sentencing order to reflect that the 1986 juvenile adjudication was "amended to an adjudication for criminal trespass." (App. 14, 215).

four years of the arson sentence – for an executed sentence of sixteen years. The trial court ordered that the sentences for the Welch, Jones and Gale burglaries (two as class B felonies and one as a class C felony) be served concurrently but consecutive to the other sentences and suspended four years of each sentence – for an executed sentence of sixteen years. Finally, the trial court ordered that the sentences for the Bait and Tackle burglary and the Parker's Archery burglary, both as class C offenses, be served consecutive to each other and to all other counts but that four years of each sentence be suspended – for an executed sentence of eight years. The result was an aggregate term of fifty-six years – with forty years executed and sixteen years suspended to probation.

Richey filed a motion to correct error, challenging *inter alia* the sentence imposed. The record reflects several *pro se* communications with the trial court by Richey seeking records of the proceedings. On December 21, 2007, Richey filed his *pro se* verified motion for leave to file a belated appeal. The motion was granted that same day, and this appeal proceeded.

DECISION

1. Abuse of Discretion

At the time of the crimes, Indiana's sentencing laws consisted of "a 'presumptive' sentence and a 'range for each class of felony.'" *Gutermuth v. State*, 868 N.E.2d 427, 431 (Ind. 2007). A sentence could be enhanced or reduced from the presumptive sentence based on aggravating or mitigating circumstances found by the trial court. *Id.* For the trial court to "enhance[] a presumptive sentence, the record 'must demonstrate that the determination was based upon the consideration of the facts of the specific crime,

the aggravating and mitigating circumstances involved, and the relation of the sentence imposed to the objectives which will be served by that sentence.'" *Jones v. State*, 600 N.E.2d 544, 548 (Ind. 1992) (quoting *Fointno v. State*, 487 N.E.2d 140, 144 (Ind. 1986)). The trial court's statement of the reason for selecting the sentence it imposed "should contain three elements: 1) identification of all significant mitigating and aggravating circumstances found, 2) specific facts and reasons which le[]d the court to find the existence of each such circumstance, and 3) articulation demonstrating that the mitigating and aggravating circumstances have been evaluated and balanced in determination of the sentence." *Scheckel v. State*, 620 N.E.2d 681, 685 (Ind. 1993).

Richey contends that the trial court abused its discretion in its finding of aggravating circumstances and then imposing "the maximum individual sentences for each individual offense." Richey's Br. at 13. He first argues that the trial court erred when it found as an aggravating circumstance his "commission of the uncharged offenses revealed in his 'clean-up' statement" because his plea agreement provided that he was "given use immunity" for the information provided in that statement. *Id.* at 15. We note that the trial court did not expressly find such to be an aggravator.[2] The plea agreement provided for Richey to give "a truthful cleanup statement" and that he would "be given use immunity in any such truthful cleanup statement and will not be charged with any additional offenses." (App. 152). However, Richey provides no authority for the proposition that use immunity includes sentencing limitations, and there is no provision

[2] The sentencing order provides that the trial court found "that any mitigating circumstances are outweighed by the severity of the present offenses and the other known, but uncharged, offenses which the defendant has committed." (App. 14-15).

in the plea agreement to the effect that information provided by Richey in the cleanup statement about additional uncharged offenses would not be considered by the trial court in imposing sentence.

Richey next argues that the trial court abused its discretion "in considering as part of Richey's criminal history" his "alleged failure to appear at a pretrial conference in a prosecution in Johnson County," a matter the "record fails to substantiate." Richey's Br. at 16. The Pre-Sentence Investigation report states that Richey failed to appear on January 31, 1994 in the Johnson County court on his pending charge for receiving stolen property. Further, at the March 1, 1994, hearing before the trial court, Richey testified that he was "presently out on bond in Johnson County," and that the bond was posted October 15, 1993, after his arrest there for "receiving stolen property." (Tr. 28). We do not find the record in this regard so lacking as to render the mention of Richey's failure-to-appear as part of his criminal history to constitute an abuse of discretion by the trial court.

In addition, Richey argues that his criminal history was a fairly minor one. In this regard, Richey had three juvenile adjudications (for criminal trespass, conversion, and hunting without consent) at age fourteen, and his single adult conviction, for theft, was seven years later. Shortly before the current Owen County offenses, Richey had been charged with one count of receiving stolen property in Johnson County. Thus, Richey does have a criminal history, albeit not one of substantial weight. A prior criminal history is an aggravating circumstance, and an enhanced sentence can be imposed when

the only aggravating circumstance is a criminal history. *Sweany v. State*, 607 N.E.2d 387, 389 (Ind. 1993).

Finally, Richey argues that the sentence imposed by the trial court is an abuse of discretion because the trial court failed "to find as mitigating circumstances [his] cooperation with police and guilty plea." Richey's Br. at 17. As noted above, the State acknowledged that he had provided a complete cleanup statement. At the sentencing hearing, the trial court arguably indicated that it considered Richey's cooperation as a mitigating circumstance when it stated that the prior criminal history aggravators outweighed "any mitigating circumstances, such as cooperation with the State." (Ex. 4, p. 56). However, there was no mention of this matter in the written sentencing order. Further, long before Richey's sentence, our Supreme Court held that "a defendant who willingly enters a plea of guilty has extended a substantial benefit to the state and deserves to have a substantial benefit extended to him in return." *Williams v. State*, 430 N.E.2d 759, 765 (Ind. 1982).

The record before us is unusually sparse. The facts elicited at the change-of-plea hearing were absolutely minimal, as were those presented at the sentencing hearing. In sum, there is evidence to support the trial court's finding that Richey had a prior criminal history sufficient to constitute an aggravating circumstance for sentencing; yet, it is undisputed that Richey did (1) provide the required cooperation and truthfulness as to information about other crimes, and (2) plead guilty as charged.

The trial court's oral and written sentencing statements fail to articulate its evaluation and balancing of mitigating and aggravating circumstances that it considered

to reach the resulting sentence – the maximum possible term for each offense. Essentially, we find the record before us to be inadequate for appellate review on the issue of whether the trial court abused its discretion. However, because Richey also asserts that his sentence is inappropriate, we will resolve his challenge to the sentence imposed by addressing it in that context.

2. Inappropriate Sentence

Even though a trial court may have acted within its lawful discretion in determining a sentence, *i.e.*, not having abused its discretion in determining a sentence, there remains a separate avenue for review of a sentence imposed by the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 490-491 (Ind. 2007), *clarified on reh'g. on other grounds*, 875 N.E.2d 218. The Indiana Constitution vests us with the authority to conduct independent review and revision of sentencing decisions. *Id.* This "authority is implemented through Appellate Rule 7(B), which provides that 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.'" *Id.* at 491.

As to the nature of the offenses, the record does not reflect an encounter with a single victim during the commission of any of the eight offenses. Hence, all the offenses were purely property crimes. Further, although firearms were stolen, there is no evidence that Richey or the Millers were armed while committing any of the offenses. Moreover, Richey's cooperation with the State resulted in the return of some stolen property to the

victims. Richey's offenses were serious ones, warranting an enhancement beyond the presumptive term but not so horrific as to warrant the maximum penalty.

As to the character of the offender, we have noted that Richey had three juvenile adjudications at the age of fourteen; seven years later, in 1993, he was convicted for theft as an adult; and at the time of the current offenses, he was out on bail with a pending charge of stolen property. Richey's previous contact with law enforcement is a circumstance that does not reflect well upon his character, but it does not render his character utterly without any redemptive possibility. Further, the State's acknowledgment of his truthfulness in providing a cleanup statement, and his willingness to enter a guilty plea and save the State the expense of a trial, are circumstances that reflect positively on his character.

Viewing the foregoing together, we find that Richey's character and the nature of the offenses committed by Richey do not warrant the imposition of the maximum sentence, the aggregate sentence of fifty-six years. Accordingly, consistent with our authority pursuant to Indiana Appellate Rule 7(B), we choose to revise the sentence herein by ordering that Richey be sentenced as follows:

- Count I, burglary as a class C felony (Bait and Tackle), six years;
- Count II, burglary as a class B felony (Herring), fourteen years;
- Count III, burglary as a class C felony (Parker's Archer), six years;
- Count IV, auto theft, as a class D felony (Herring), two years;
- Count V, arson as a class C felony (Herring), six years;
- Count VI, burglary as a class B felony (Welch), fourteen years;

- Count VII, burglary as a class B felony (Jones), fourteen years;
- Count VIII, burglary as a class C felony (Gale), six years.

We further order, as did the trial court, that the sentences for Count II, Count IV, and Count V (the Herring offenses) be served concurrently; that the sentences for Count VI, Count VII, and Count VIII be served concurrently but consecutive to Counts II, IV, and V (the Herring offenses); and that the sentences for Count I and Count III be served consecutive to each other and to all other sentences. This provides for an aggregate sentence of forty years. However, we also order that as to Counts I, II, III, V, VI, VII and VIII, two years of each sentence be suspended to probation, with the trial court to determine the terms and conditions of probation. The revised sentence provides for an executed sentence of thirty-two years with eight years suspended to probation.

Reversed and remanded.

FRIEDLANDER, J., and BARNES, J., concur.