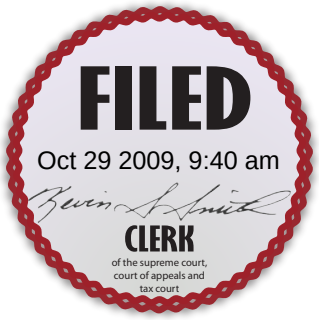


ATTORNEY FOR APPELLANT:

**KIMBERLY A. JACKSON**
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

**GREGORY F. ZOELLER**
Attorney General of Indiana

**NICOLE M. SCHUSTER**
Deputy Attorney General
Indianapolis, Indiana

# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| MICHAEL G. GRAVES, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 61A04-0906-CR-314 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE PARKE CIRCUIT COURT
The Honorable Sam A. Swaim, Judge
Cause No. 61C01-0804-FB-61
61C01-0704-FD-91

**October 29, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BROWN, Judge**

Michael Graves appeals his sentence for theft as a class D felony,[1] criminal recklessness as a class D felony,[2] possession of paraphernalia as a class A misdemeanor,[3] and possession of marijuana as a class A misdemeanor.[4] Graves raises one issue, which we revise and restate as whether his sentence is inappropriate in light of the nature of the offense and the character of the offender. We affirm.

The relevant facts follow. In June 2007, Graves pled guilty to intimidation as a class D felony under cause number 61C01-0704-FD-91 ("Cause No. 91"), and the trial court sentenced him to three years imprisonment with two years suspended to probation. In March 2008, the Parke County Probation Department alleged that Graves violated his probation by operating a vehicle while intoxicated, operating a vehicle with a blood alcohol content of .08 or more, and reckless driving.

On April 4, 2008, Felix Grimes went to the house of a friend, Alta Bedford, who Grimes had known for about thirty years, to visit. Grimes was fifty-three years old, approximately five feet and seven inches tall, and disabled due to a previous motorcycle accident. During Grimes's visit, Bedford introduced Grimes to Graves. Graves was about six feet two inches tall and about 205 pounds. At some point during the visit, Graves asked Grimes if he knew anyone who wanted to buy a Jeep Cherokee. Graves

[1] Ind. Code § 35-43-4-2(a) (2004) (subsequently amended by Pub. L. No. 158-2009, § 8 (eff. July 1, 2009).

[2] Ind. Code § 35-42-2-2 (Supp. 2006).

[3] Ind. Code § 35-48-4-8.3 (2004).

[4] Ind. Code § 35-48-4-11(2004).

indicated that he would take "$500 with the stereo and $400 without the stereo." Transcript at 121. Grimes called his nephew to see if he was interested in purchasing the Jeep. Grimes's nephew asked Grimes "to take a look at [the Jeep] and see if it was worth it." Id. Graves told Grimes that the Jeep was out of gas and "was up by Sky King Airport." Id. at 122. In order to look at the Jeep, Bedford drove Grimes to the airport where the Jeep was parked. Grimes and Bedford put gas in the tank and drove the Jeep back to Bedford's home. Grimes decided that the Jeep "was worth what [Graves] was asking." Id. After arriving at Bedford's home, Grimes asked Graves about title to the Jeep, and Graves stated that the title was at his mother's house and could be retrieved the following morning.

The following morning, on April 5, 2008, Grimes went back to Bedford's home to meet with Graves and "to see about going and getting the title." Id. at 123. Graves drove Grimes and Bedford's son in the Jeep to the house of Graves's mother in Mecca, Indiana. At some point during the drive, Grimes asked Graves "if he would take $460 and a $5 lottery ticket" in exchange for the Jeep, and Graves accepted Grimes's offer. Id. at 125. After making a stop at the house of Graves's mother, the three men drove to Graves's trailer. At Graves's trailer, Graves gave the title to the Jeep to Grimes, and Grimes gave Graves $460 and the lottery ticket. Graves, Grimes, and Bedford's son then returned to Bedford's home, where Graves took his personal possessions out of the Jeep. Grimes got into the Jeep and drove back to his house.

Later that evening, at approximately 8:00pm to 10:00pm, Grimes cleaned the Jeep and noticed that the stereo was missing. Grimes drove to Bedford's home to look for Graves, and Bedford said that Graves was at a bar playing pool. About thirty minutes later, Graves returned to Bedford's house, and Grimes asked him what happened to the stereo. Graves told Grimes that he had taken the stereo when he was cleaning the Jeep earlier in the day. Grimes "didn't want no big hoop-to-do over a stereo," so he "let it drop." Id. at 128. As Grimes was preparing to leave Bedford's home, Graves asked him for a ride to "Georgia's." Id. at 129. Grimes agreed to give Graves a ride.

Grimes and Graves got into the Jeep and departed from Bedford's house. After a short time, because Graves said that he needed to go "farther north" and "[a] little bit farther," Grimes assumed that Graves wanted a ride back to his trailer and told Graves that he did not mind driving him there. Id. at 129-130. During the drive, Graves asked Grimes if he had a pair of tweezers or a pocketknife because Graves had a hangnail, and Grimes gave Graves "a little pocket lock blade fishing knife." Id. at 131.

Once the two men arrived in Mecca, Indiana, Grimes told Graves that he would "have to tell [Grimes] where to go because [he] don't remember." Id. at 131. Graves directed Grimes to stop the Jeep near a trailer of a person that Graves wanted to visit. Grimes stated to Graves: "Well, whatever you gotta do do it . . . cause, you know, I told you I'd give you a ride home, but I don't like being out here." Id. Graves replied to Grimes, "man, you gotta come in with me." Id. Grimes stated that he did not "want to go in" and that he was "gonna sit . . . in the car," and Graves replied: "You ain't gonna

like it." Id. Graves exited the Jeep, opened the driver's side door of the Jeep where Grimes was seated, and again insisted that Grimes "gotta go" because "this guy will come down shooting." Id. at 134. Grimes stepped out of the Jeep.

As Grimes turned to shut the Jeep's door, Graves "jumped" Grimes and wrestled him to the ground. Id. Graves pushed Grimes to the ground, and Grimes asked "what are you doing this for?" Id. at 135. Graves did not reply, but "just kept pushing [Grimes's] head down." Id. After approximately thirty to forty seconds, Grimes felt a sharp object at his throat. Graves continued to push down on Grimes's head. Grimes felt Graves fall forward, and Grimes "raised up [his] hind end and [Graves] went over the top of [Grimes]." Id. at 136. Grimes then jumped up and grabbed his "multi-tool pliers." Id. Grimes pushed the button on the side of the multi-tool, and the pliers slid open, making "a real big snap" which sounded like "a big blade or something but it's just pliers." Id. at 137. Grimes then said, "[n]ow, punk, I've got one," even though he "really didn't have a knife." Id. Grimes began to chase Graves, and Graves jumped into the Jeep, started the engine, and started to drive the Jeep. Graves then attempted to hit Grimes with the Jeep two times. Each time Graves attempted to hit Grimes with the Jeep, Grimes hit the Jeep's window with the pliers. Grimes held his throat and jumped into the weeds "thinking [Graves] might come back," but when Graves turned the Jeep off of the little lane and on to the main road, Grimes got out of the weeds and walked to the main roadway to find help. Id. at 139. Grimes found a house with lights on and called out for help, and a man in the house called for the Sheriff. Grimes sustained a laceration to his throat, his "legs

were all cut up," and he had abrasions on his stomach, on one of his hands, and on one of his shins. Id. at 142. Grimes had also lost a shoe during the scuffle with Graves. Deputy Sheriff Edward McHargue with the Parke County Sheriff's Office arrived at the scene and interviewed Grimes.

Deputy McHargue and other law enforcement officers went to Mecca to locate Graves, and the officers ultimately arrested Graves as he was walking up the street to his house. Deputy McHargue performed a search incident to arrest of Graves and discovered in Graves's pocket a syringe and a wooden box containing marijuana and a marijuana pipe. Graves indicated that marijuana was in the wooden box. Later at the jail, Deputy McHargue was taking photographs of Graves and noticed what appeared to be needle marks on Graves's arms. Graves indicated to Deputy McHargue that the needle marks were from using the syringe. Deputy McHargue also observed that Graves had some scratches and scrapes on his left arm.

Deputy McHargue interviewed Graves, and Graves initially denied being with Grimes and told Deputy McHargue that he was with a person named "Steven Van Ness" at the time of the attack. Id. at 192. When Deputy McHargue asked if Graves could get a hold of Van Ness so that he could confirm Graves's statement, Graves stated that Van Ness would not speak to police because he had outstanding warrants. When asked about the Jeep that was discovered in his backyard, Graves stated that he had sold it to Grimes, but that Grimes "never came and picked up the Jeep." Id. at 192. At the end of the interview, Deputy McHargue asked Graves if he would submit to a polygraph. On April

7, 2008, Graves was administered a polygraph examination, and the opinion of the examiner was that Graves failed the examination. After the polygraph examination, Graves acknowledged his involvement in the April 5, 2008 fight with Grimes. Also on April 7, 2008, pursuant to a search warrant, law enforcement discovered Grimes's lock blade knife near the house of Graves's mother.

On April 10, 2008, the State charged Graves under cause number 61C01-0804-FB-61 ("Cause No. 61") with: Count I, criminal confinement as a class B felony; Count II, attempted aggravated battery as a class B felony; Count III, theft as a class D felony; Count IV, possession of paraphernalia as a class A misdemeanor; and Count V, possession of marijuana as a class A misdemeanor.

In February 2009, after a three-day trial, a jury found Graves guilty of criminal recklessness as a class D felony and as a lesser included offense of Count II, attempted aggravated battery as a class B felony; Count III, theft as a class D felony; Count IV, possession of paraphernalia as a class A misdemeanor; and Count V, possession of marijuana as a class A misdemeanor. The jury found Graves not guilty of Count I, criminal confinement as a class B felony; and Count II, attempted aggravated battery as a class B felony.

In March 2009, the trial court held a joint proceeding in Cause No. 91 and Cause No. 61. At the joint proceeding, Graves admitted to the probation violation alleged by the State under Cause No. 91, and the trial court revoked Graves's probation and ordered that he serve the remainder of the previously-suspended sentence of two years.

With respect to Graves's convictions under Cause No. 61, the trial court found that "the harm, injury, loss, or damage suffered by the victim of this offense on the Criminal Recklessness charge was significant and greater than the elements necessary to prove the commission of the offense." March 3, 2009 Transcript at 17. Also, the trial court found that Graves "does have a significant history of criminal behavior." Id. Specifically, the court observed that Graves "very recently violated his probation and has a significant history of violating probation in the past." Id. The trial court found Graves's remorse and apology to be mitigating circumstances but declined to give those factors "great weight." Id. The trial court found that the aggravating circumstances outweighed the mitigating circumstances. Based upon Graves's "significant criminal history in such a short amount of time, the ongoing probation violations, and the violence that's been exhibited throughout the criminal history of [Graves]," the trial court imposed three years for each of Graves's two class D felonies under Cause No. 61 and ordered those sentences to be served consecutively. However, the trial court modified Graves's total sentence for the two class D felonies from six years to four years pursuant to Ind. Code § 35-50-1-2(c), which requires that the total of the consecutive terms of imprisonment to which a defendant is sentenced for felony convictions arising out of an episode of criminal conduct not exceed the advisory sentence for a felony which is one class of felony higher than the most serious of the felonies for which the person was convicted. The trial court sentenced Graves to one year for each of his Class A misdemeanor convictions and ordered those sentences to be served concurrently to each other and to

Graves's sentences for his felony convictions. The trial court also ordered that the previously suspended two-year sentence ordered executed under Cause No. 61 be served consecutively to the four-year sentence imposed under Cause No. 91.

The sole issue is whether Graves's sentence is inappropriate in light of the nature of the offense and the character of the offender. Indiana Appellate Rule 7(B) provides that this court "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." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Our review of the nature of the offense reveals that Graves agreed to sell his Jeep to Grimes or Grimes's nephew for "$460 and a $5 lottery ticket." Transcript at 125. On the evening of April 5, 2008, Graves asked Grimes for a ride. During the drive, Graves asked Grimes for a pair of tweezers or a pocketknife because Graves had a hangnail, and Grimes gave Graves a pocket lock blade fishing knife. After Grimes parked, Graves exited the Jeep and insisted that Grimes exit the Jeep as well. **(**As Grimes exited the Jeep, Graves "jumped" Grimes and wrestled him to the ground. Id. at 134. After struggling with Graves for approximately half a minute, Grimes felt a sharp object at his throat. Graves pushed Grimes to the ground and "kept pushing [Grimes] head down." Id. at 135. A short time after Grimes broke free from Graves, Graves got into the Jeep and attempted to drive the Jeep as to hit Grimes two times before eventually leaving the

area and Grimes behind. As a result of Graves's "jumping" Grimes, Grimes sustained a laceration to his throat and other various abrasions to his legs, stomach, hand, and shin.[5]

Our review of the character of the offender reveals that the presentence investigation report ("PSI") shows that Graves was convicted in May 2001 of criminal mischief as a class B misdemeanor and in August 2001 of operating a motor vehicle with a blood alcohol content of .15 or more. In April 2003, Graves was convicted of battery resulting in bodily injury as a class A misdemeanor, and Graves was placed on probation and ordered to take anger management counseling. In March 2006, Graves was convicted of criminal mischief as a class A misdemeanor, and Graves was placed on probation, which was closed out unsatisfactorily in March 2007. In March 2007, Graves pled guilty to battery as a class B misdemeanor and criminal mischief as a class A misdemeanor, and a portion of Graves's sentence was suspended to probation, which was closed out unsatisfactorily in July 2007. In July 2007, Graves pled guilty to intimidation as a class D felony, and Graves was sentenced to one year executed and two years suspended to probation. In February 2008, Graves pled guilty to operating a vehicle while intoxicated and reckless driving, and Graves's sentences were suspended to probation.

[5] Graves argues that "[t]he evidence and the jury's verdict establish that the State overcharged in this case, as Graves consistently maintained." Appellant's Brief at 16. However, we observe that the jury was instructed on, and ultimately found Graves guilty of, criminal recklessness as a class D felony as a lesser included offense of the State's original charge of attempted aggravated battery as a class B felony. At sentencing, the trial court was aware of Graves's convictions and argument that he was overcharged.

Graves further argues that his sentence should be reduced because the presentence investigation report recommended an aggregate sentence of three years. However, the trial court was not bound by any sentencing recommendation contained in the presentence report. See Wright v. State, 456 N.E.2d 733, 735 (Ind. Ct. App. 1983).

The PSI also reveals that Graves has received treatment for anger management. In addition, the PSI provides that "[Graves] stated that he may drink Budweiser and his drug of preference is 'weed.'" Appellant's Appendix at 347. The PSI states that Graves "denied ever receiving education or treatment for substance abuse." Id. The PSI reveals that Graves had a "write-up" while incarcerated related to "making 'hooch' and possession of contraband." Id. at 345. Also, while Graves expressed remorse and apologized, the trial court declined to give those factors great weight. March 3, 2009 Transcript at 17.

Graves argues that "[a]ll of [his] offenses appear to be the product of substance abuse," that he "never received education or treatment for substance abuse," and that "[a]t the least, these circumstances explain, if not ameliorate, [his] criminal history to some extent." Appellant's Brief at 15. However, Graves fails to explain how his substance abuse reflects favorably on his character. The PSI reveals that Graves denied receiving education or treatment for substance abuse. We cannot say that Graves's substance abuse reflects favorably on his character. Therefore, we decline to find Graves's sentence inappropriate upon that basis. See Reyes v. State, 848 N.E.2d 1081, 1083 (Ind. 2006) (considering a defendant's drug use in declining to revise the defendant's sentence under Rule 7(B)); Iddings v. State, 772 N.E.2d 1006, 1018 (Ind. Ct App. 2002) (observing that substance abuse is sometimes found by trial courts to be an aggravator rather than a mitigator), trans. denied.

Graves also argues that he had been steadily employed, that he was the custodial parent of one of his three children, and that "[h]is imprisonment means that he neither can care for nor support his children." Appellant's Brief at 16. However, in our view, the fact that Graves committed repeated criminal offenses and failed to curtail or seek help regarding his admitted substance abuse when he was responsible for the care of one of his children and for the support of his other children reflects unfavorably on his character. We decline to find Graves's sentence inappropriate upon the basis that he was employed or that his imprisonment will hamper his ability to care for or support his children.

After due consideration, we cannot say that the sentence imposed by the trial court was inappropriate in light of the nature of the offense and the character of the offender. See, e.g., McMahon v. State, 856 N.E.2d 743, 751-752 (Ind. Ct. App. 2006) (concluding that the defendant's aggregate seven-and-one-half-year sentence with one and one-half years suspended to probation for his convictions for criminal recklessness as a class D felony, intimidation as a class C felony, and resisting law enforcement as a class D felony was not inappropriate); see also Rawson v. State, 865 N.E.2d 1049, 1054-1059 (Ind. Ct. App. 2007) (holding that the defendant's aggregate sentence of twenty-two years, including three years for criminal recklessness, was not inappropriate), trans. denied.

For the foregoing reasons, we affirm Graves's sentence for theft as a class D felony, criminal recklessness as a class D felony, possession of paraphernalia as a class A misdemeanor, and possession of marijuana as a class A misdemeanor.

Affirmed.

CRONE, J., and MAY, J., concur.