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IN THE COURT OF APPEALS OF INDIANA

JOEL WILLIAMS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A05-1002-CR-52
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Steven R. Caldemeyer
Cause No. 18C01-0107-CF-45

October 29, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Joel Williams appeals the forty-year sentence imposed after his plea of guilty to five Class B felonies. He argues the trial court improperly relied on certain aggravating factors in determining his sentence and his sentence is inappropriate. We affirm.

FACTS AND PROCEDURAL HISTORY

In the summer of 2001, Williams, armed with a handgun, broke into a residence intending to rob the two women who lived there. He held one resident and her guest at gunpoint, took money and a watch from them, and tied them up. He was charged with Class A felony possession of cocaine,[1] Class B felony burglary,[2] two counts of Class B felony robbery,[3] and two counts of Class B felony criminal confinement.[4] Williams agreed to plead guilty to the five Class B felonies and the State agreed to dismiss the Class A felony count. He was sentenced to twenty years on each count, with two of the sentences to be served consecutively and the rest concurrently for a total executed sentence of forty years.

In its sentencing order, the court noted no mitigating circumstances, but found a number of aggravating circumstances that "completely outweigh the mitigating circumstances." (App. at 19.) It found Williams had a "lengthy history of criminal and delinquent activity," (*id.*); prior charges had resulted in dismissal for reasons other than lack of evidence; the number, seriousness, and pattern of prior crimes; Williams needed

[1] Ind. Code § 35-48-4-6(b)(3).
[2] Ind. Code § 35-43-2-1.
[3] Ind. Code § 35-42-5-1.
[4] Ind. Code § 35-42-3-3(b)(2).

correctional or rehabilitative treatment best provided by commitment to a penal facility; prior attempts at rehabilitation through juvenile probation and adult parole had failed; a reduced sentence would depreciate the seriousness of the crime; the crime required Williams to confront the victims; and the victims were injured by the crime.

DISCUSSION AND DECISION

Under the presumptive sentencing scheme in effect when Williams committed the offenses,[5] if the trial court imposed a sentence in excess of the statutory presumptive sentence, it was obliged to identify and explain all significant aggravating and mitigating circumstances and explain its balancing of the circumstances. *Edrington v. State*, 909 N.E.2d 1093, 1097 (Ind. Ct. App. 2009), *trans. denied*. Sentencing determinations are within the sound discretion of the trial court, and we will reverse only for an abuse of discretion. *Id*. Therefore, we will not modify a sentence unless it is clear the decision was against the logic and effect of the facts and circumstances before the court. *Id*.

1. Aggravating Circumstances

Williams argues the court erroneously relied on certain aggravating circumstances in enhancing his sentences and ordering some served consecutively. In *Blakely v. Washington*, 542 U.S. 296, 302 (2004), *reh'g denied*, the Supreme Court held, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed

[5] When Williams committed his offenses in 2001, Ind. Code § 35-50-2-5 provided: "A person who commits a class B felony shall be imprisoned for a fixed term of ten (10) years, with no more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances."

statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[6]

Williams concedes his prior convictions of robbery and his juvenile adjudications are valid aggravating circumstances under *Blakely*. Those aggravators are sufficient[7] to support the sentence enhancement. Where the use of some aggravators violates *Blakely* and others do not, the question is whether we can say beyond a reasonable doubt that the trial court's reliance on improper aggravators was harmless because it would have imposed the same sentence based solely on the proper aggravators. *Simmons v. State*, 828 N.E.2d 449, 457 (Ind. Ct. App. 2005).

In *Simmons*, the trial court found as aggravating circumstances that one of the defendants, Davis, had a lengthy criminal history along with certain other aggravators, and it

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[6] Both parties argue at some length whether Williams's sentence is governed by the presumptive sentencing scheme in effect when *Blakely* was decided. As the sentence was not an abuse of discretion under either the current sentencing scheme or the prior scheme in light of the *Blakely* standard, we need not resolve that issue. Williams does not offer argument based on a post-*Blakely* standard, so we will address only whether there was a *Blakely* violation.

We summarized the changes arising from the *Blakely* decision in *Padgett v. State*, 875 N.E.2d 310, 315 (Ind. Ct. App. 2007), *trans. denied*:

> Our legislature responded to [*Blakely*] by amending our sentencing statutes to replace "presumptive" sentences with "advisory" sentences, effective April 25, 2005. Under the new advisory sentencing scheme, "a court may impose any sentence that is authorized by statute and permissible under the Indiana Constitution 'regardless of the presence or absence of aggravating circumstances or mitigating circumstances.'" Thus, while under the previous presumptive sentencing scheme, a sentence was required to be supported by *Blakely*-appropriate aggravators and mitigators, under the new advisory sentencing scheme, a trial court may impose any sentence within the proper statutory range regardless of the presence or absence of aggravators or mitigators.

(Citations omitted), *trans. denied.*

[7] Williams appears correct that certain other aggravators were improper because they "duplicated the elements of the offenses to which Williams pled guilty," (Br. of Defendant-Appellant at 11), were "derivative of Williams' criminal history," (*id.*), or were not admitted by him or found by a jury.

enhanced his sentence. Davis conceded the trial court properly considered his criminal history as an aggravator but contended we should remand for resentencing because of the trial courts reliance on two other aggravators; that he was on probation at the time of the offense and that he was in need of correctional or rehabilitative treatment best provided by a commitment to a penal facility.

Davis's adult criminal history included two convictions of larceny, two convictions of attempted receiving and concealing stolen property, two convictions of attempted delivery/manufacture of less than fifty grams of cocaine, and possession of less than twenty-five grams of cocaine. Davis's four drug related convictions occurred within two years prior to the offense at issue in *Simmons*. "Given that Davis has numerous convictions and several drug related convictions and the lack of any mitigators, we conclude beyond a reasonable doubt that the trial court would have imposed the same sentence based solely on his criminal history." *Id*.

Since *Simmons* was decided, our Indiana Supreme Court has instructed us that a probation violation, even if not found by a jury or admitted by a defendant, could properly be relied on to enhance a sentence. In *Robertson v. State*, 871 N.E.2d 280, 287 (Ind. 2007), the Court concluded that because the probation violation was reported in a presentence investigation report compiled by a probation officer relying upon judicial records, the trial court properly used it as an aggravating factor under *Blakely*. *Id*.

Even if only the prior convictions and Williams' recent release from probation were

proper aggravators, his sentence could be affirmed. Williams had been in Boys School for nineteen months[8] and had been convicted in 1985 of three counts of robbery. He was sentenced to forty-five years for that crime but was released to parole in January 2000. He was discharged from parole in January 2001 and committed the offenses in the case before us some six months later. We can say with confidence that the trial court would have imposed the same sentence if it had considered only the prior convictions and recent release from parole. *See Edrington*, 909 N.E.2d at 1100 (sentence enhancement proper when Edrington violated a "position of care" even though the court improperly considered the victim's age as an aggravator).

2. Appropriateness

We may revise a sentence authorized by statute if, after due consideration of the trial court's decision, we find the sentence inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). When determining whether a sentence is inappropriate, we recognize the presumptive or advisory sentence as the starting point the legislature has selected as appropriate for the crime. *Edrington*, 909 N.E.2d at 1101 (presumptive); *Gervasio v. State*, 874 N.E.2d 1003, 1005 (Ind. Ct. App. 2007) (advisory). The presumptive sentences for Williams' Class B felonies were ten years.[9]

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[8] The record does not reflect the nature of Williams's juvenile offenses.

[9] The current version of Ind. Code § 35-50-2-5 provides that a person who commits a Class B felony "shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years." The version of that section in effect when Williams committed his offenses provided: "A person who commits a class B felony shall be imprisoned for a fixed term of ten (10) years, with no more than ten (10)

In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. *Id*. The burden is on the defendant to persuade us his sentence is inappropriate. *Id*. Williams has not met that burden and we cannot find his sentence inappropriate.

Williams argues the sentence was inappropriate because he agreed to plead guilty, he expressed remorse, and although his offenses were violent, the victims were not physically injured. With intent to commit robbery, Williams broke into a residence while people were present. He took property from two people. He was armed, held the victims at gunpoint, and tied them up. While the victims were not physically harmed, one testified in detail how she had been emotionally and psychologically damaged. Williams had an adult criminal record and a record of juvenile offenses. He benefitted from his guilty plea, as the State dropped a Class A felony charge that could have added fifty years to his sentence. The sentence was not inappropriate, and we affirm it.

Affirmed.

BAILEY, J., and BARNES, J., concur.

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years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances."