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IN THE COURT OF APPEALS OF INDIANA

RAEMOND A. ELLIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 10A01-0603-CR-127
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CLARK CIRCUIT COURT
The Honorable Daniel F. Donahue, Judge
Cause No. 10C01-0406-MR-76

October 26, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Raemond Ellis appeals his conviction for Robbery, as a Class A felony, and Receiving Stolen Property, as a Class D felony, following a jury trial. We address a single issue[1] on review, namely, whether the trial court abused its discretion when it enhanced his sentence.

We reverse and remand with instructions.

FACTS AND PROCEDURAL HISTORY

On June 19, 2004, Pierre Nash died as the result of two gunshot wounds. The Jeffersonville Police Department identified Ellis and Brian McGhee as suspects in the case. When officers attempted to arrest Ellis, he led them on a chase but ultimately was apprehended. When officers questioned Ellis, he admitted witnessing McGhee shoot Nash twice. Ellis also admitted that he was armed and that he had fired his gun, but not at Nash and only "because it was new" and Ellis "wanted to see if it worked." State's Exh. 10. Ellis also told police that he took Nash's cell phone off of Nash's body after the shooting, and stole Nash's car at McGhee's request. Ellis subsequently sold Nash's cell phone to McGhee's uncle. Finally, Ellis told police that he had witnessed McGhee shoot into the empty apartment of another man only days before Nash's murder. Ellis denied either shooting Nash or knowing that McGhee intended to shoot and rob Nash, but Ellis did state that he was scared at the time of Nash's murder.

The State charged Ellis with Murder, Felony Murder, robbery, and receiving stolen property. The jury convicted Ellis of robbery and receiving stolen property,

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[1] We need not reach the issue of the appropriateness of Ellis's sentence in light of the nature of the offenses and his character. We also do not address Ellis's arguments that the trial court improperly considered mitigating circumstances. <u>See</u> <u>Blanche v. State</u>, 690 N.E.2d 709, 715 (Ind. 1998).

acquitted him of murder, and hung on the felony murder count. At the sentencing hearing, Ellis read an apology to the trial court and Nash's family. The trial court found as the only mitigating circumstance Ellis's lack of a prior criminal history. As aggravators, the trial court found the likelihood of Ellis committing a new offense and the facts and circumstances of the crime. The trial court then imposed a fifty-year sentence for the robbery conviction and a concurrent one and one-half year sentence for the receipt of stolen property conviction. This appeal ensued.

DISCUSSION AND DECISION

Sentencing decisions are generally within the discretion of the trial court and will only be reversed upon a showing of an abuse of discretion. Marshall v. State, 832 N.E.2d 615, 623 (Ind. Ct. App. 2005), trans. denied. An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or if the trial court has misinterpreted the law. Id. The court may increase a sentence or impose consecutive sentences if the court finds aggravating factors. Sherwood v. State, 749 N.E.2d 36, 38 (Ind. 2001); Ind. Code § 35-38-1-7.1(b).

Indiana law requires that the trial court take the following steps during sentencing: (1) identify all significant mitigating and aggravating circumstances; (2) specify facts and reasons which lead the court to find the existence of each such circumstance; and (3) demonstrate that the mitigating and aggravating circumstances have been evaluated and balanced in determination of the sentence. Id. A single aggravating circumstance is enough to justify an enhancement or the imposition of consecutive sentences. McCann v. State, 749 N.E.2d 1116, 1121 (Ind. 2001). Even when the trial court improperly applies

an aggravator but other valid aggravating circumstances exist, a sentence enhancement may still be upheld. Smith v. State, 770 N.E.2d 818, 822 (Ind. 2002). We examine both the written sentencing order and the trial court's comments at the sentencing hearing to determine whether the trial court adequately explained its reasons for the sentence. Vazquez v. State, 839 N.E.2d 1229, 1232 (Ind. Ct. App. 2005), trans. denied.

At the sentencing hearing, the trial court stated in pertinent part:

> I've looked at Indiana Code Section 35-38-1-7.1(a) [2004[2]] and find that of the seven mandatory factors that this Court should consider, of those seven factors three apply in this case. One is the mitigating factor, that the Defendant has no prior criminal history. The others are aggravating factors. The aggravating factors stated as the risk that the Defendant will commit another crime, in my opinion[,] applies directly against the [mitigating] factor alone . . . . It applies against that because of the ease of the Defendant's association with another intending to commit an offense. . . . The absolute ease with what you did . . . that's the thing that really bothered me the most. And then the aggravating factor stated as the nature and circumstances of the crimes committed is also applicable in this case. He was armed. We know he was armed. He fired his weapon. He took property from the body of the victim. He disposed of stolen property knowing where it came from. He associated with someone he knew had bad intentions. All of those are the aggravating factors. So having considered all of those I find that the aggravating factors in this particular case outweigh the mitigating circumstances or the mitigating factors, and therefore I find that I should under those circumstances impose the sentence of thirty years plus twenty additional years [on the robbery count] . . . .

Transcript at 526-28.

Hence, the trial court enhanced Ellis's robbery conviction based on two aggravators.[3] The trial court first identified as an aggravator the risk that Ellis will

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[2] Both Ellis and the State agree that the sentencing statute applies as it was written before the 2005 amendments.

[3] Because Ellis received the presumptive sentence for his receiving stolen property conviction, there is no Blakely issue regarding the concurrent one and one-half year sentence. See Ind. Code § 35-50-2-7(a); Davidson v. State, 849 N.E.2d 591, 595 (Ind. 2006).

commit another crime ("the first aggravator"). The trial court explained that finding simply by specifying "[t]he absolute ease" with which Ellis acted. Id. at 527-28. Second, the trial court identified the "nature and circumstances of the crimes" as aggravating ("the second aggravator"). Id. The trial court specified five facts in support of that conclusion: (1) Ellis was armed; (2) Ellis fired his gun; (3) Ellis took property from Nash's body; (4) Ellis subsequently disposed of that property knowing its origins; and (5) Ellis associated with another whom Ellis knew to have bad intentions.

Ellis argues that the trial court failed to specify adequately the facts it used to support its finding of the first aggravator and that any facts found by the trial court regarding both aggravators were neither admitted by him nor found by the jury. As such, Ellis argues that the trial court's use of those aggravators violated his Sixth Amendment rights as announced in Blakely v. Washington, 542 U.S. 296 (2004). In addition, Ellis maintains that the aggravators identified by the trial court "are merely elements of the robbery," and are, therefore, contrary to Indiana law. Appellant's Brief at 9. See Stewart v. State, 531 N.E.2d 1146, 1150 (Ind. 1988). We discuss each argument in turn.

In Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), the United States Supreme Court held that "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." In Blakely, the Court clarified that "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely, 542 U.S. at 303. In Trusley v. State, 829 N.E.2d 923, 925 (Ind. 2005), our supreme court specified that "Blakely is not

concerned, primarily, with what facts a judge uses to enhance a sentence, but with how those facts are found." Further, in Mask v. State, 829 N.E.2d 932, 936-37 (Ind. 2005), our supreme court stated:

> an aggravating circumstance is proper for Blakely purposes when it is: (1) a fact of prior conviction; (2) found by a jury beyond a reasonable doubt; (3) admitted to by a defendant; or (4) stipulated to by the defendant, or found by a judge after the defendant consents to judicial fact-finding, during the course of a guilty plea in which the defendant has waived his Apprendi rights.

The trial court's inference from either the jury's findings or Ellis's admissions to the conclusion of recidivism in the first aggravator involved a factual analysis contrary to Blakely. The trial court did not elaborate on the first aggravator other than specifying "the absolute ease" with which Ellis acted, although the State proffers several of Ellis's admissions in support of the trial court's assessment. Namely, the State argues that the first aggravator is supported by Ellis's admissions regarding his voluntary association with someone whom Ellis knew to be prone to violence, his readiness to rob a stranger's body, and his failure to seek aid for Nash or report the crime. The State then asserts that "[t]hese facts provide[] the necessary support [for the first aggravator] because [they] demonstrate[] that [Ellis] is likely to commit crimes in the future unless he is taught the consequences . . . for such an attitude by a lengthy incarceration." Appellee's Brief at 8.

However, even assuming that those admitted facts support an assessment of the ease with which Ellis acted, such a conclusion is not necessarily supportive of a finding of recidivism. Ellis made no admission regarding his likelihood to commit a future crime, nor did the jury make any such finding. There were no admissions or findings that Ellis had a prior criminal history, that he intended to commit more crimes, that he was

psychologically disposed to commit more crimes, or regarding another relevant fact to reach the conclusion of recidivism. See Waldon v. State, 829 N.E.2d 168, 183 (Ind. Ct. App. 2005), trans. denied. As such, the trial court's findings that Ellis was likely to commit future crimes involved a factual analysis unsupported either by Ellis's admissions or by the jury's findings. Therefore, the trial court improperly found that Ellis was likely to commit future crimes. As such, that aggravator violates Blakely.[4]

The same cannot be said for the second aggravator. In support of that aggravator, the trial court specified five facts that were each admitted by Ellis in connection to the crimes with which he was charged. Specifically, Ellis admitted that he was armed, he fired his gun, he took property from Nash's body, he subsequently disposed of that property knowing its origins, and he associated with another whom he knew to have bad intentions. Each of those admitted facts goes to the nature and circumstances of the robbery. Hence, the second aggravator does not violate Blakely.

Ellis further contends, however, that the second aggravator "merely [repeated] elements of the robbery" felony,[5] and, therefore, is contrary to Indiana law. Appellant's Brief at 9. See Stewart, 531 N.E.2d at 1150. "Robbery" occurs when "[a] person knowingly or intentionally takes property from another person . . . by using or threatening

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[4] The State's additional argument that "[t]his aggravator . . . was used simply to describe [the] underlying facts," in which the State cites Morgan v. State, 829 N.E.2d 12, 17-18 (Ind. 2005), is contradictory. Moral-penal descriptions of facts may not stand as separate aggravators when the factual basis that supports them also serve as an aggravator. See Haas v. State, 849 N.E.2d 550, 553 (Ind. 2006). However, the State now argues that the trial court's finding of recidivism is supported by the same aggravating facts the trial court referenced in the second aggravator. As such, if the trial court's description of recidivism was merely a moral-penal observation, it is used as a separate aggravator contrary to law. See id.

[5] As noted above, because Ellis received the presumptive sentence on the receiving stolen property conviction, we do not address his arguments that his sentence on that count was enhanced improperly.

the use of force on any person." Ind. Code § 35-42-5-1. Robbery is a Class A felony when, as here, its occurrence "results in serious bodily injury to any person other than a defendant." Id. Of the five facts the trial court specified in describing the second aggravator, four are not elements of the crime of robbery as a Class A felony, namely, that Ellis was armed, that he fired his gun, that he knowingly sold stolen property, and that he associated with another whom Ellis knew to have bad intentions. However, the State concedes that the trial court's consideration that Ellis took property from Nash's body is an element of robbery and was therefore improper for the trial court to reference. But the State then asserts that its concession is immaterial. We cannot agree. The trial court assigned no particular weight to any of the five listed facts, nor is a relative scale readily apparent.

When a court has relied on valid and invalid aggravators, the standard of review is whether we can say with confidence that, after balancing the valid aggravators and mitigators, the sentence enhancement should be affirmed. See Trusley v. State, 829 N.E.2d 923, 927 (Ind. 2005) (where the court balanced the valid aggravators and mitigators and stated "with confidence" that Trusley's sentence enhancement should be affirmed). Here, when we exclude from consideration the invalid aggravator of Ellis's likelihood to commit future crimes and the improper fact that Ellis took property from Nash's body, we cannot say with confidence that the trial court would have imposed the same sentence. As such, we reverse and remand for a new sentencing hearing. On remand, the trial court is instructed to reweigh the mitigating fact that Ellis has no prior criminal history with the permissible facts of the second aggravator, namely, that Ellis

was armed, that he fired his gun, that he disposed of stolen property knowing its origins, and that he associated with another whom he knew to have bad intentions.

Reversed and remanded with instructions.

FRIEDLANDER, J., and DARDEN, J., concur.