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IN THE
COURT OF APPEALS OF INDIANA

RAEMOND A. ELLIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 10A04-0705-CR-285
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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

December 12, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Defendant-Appellant, Raemond A. Ellis (Ellis), appeals his conviction for robbery, as a Class A felony, Ind. Code § 35-42-5-1; and receiving stolen property, as a Class D felony, I.C. § 35-43-4-2(b).

We reverse and remand with instructions.

ISSUE

Ellis raises one issue for our review, which we restate as: Whether the trial court properly sentenced him.

FACTS AND PROCEDURAL HISTORY

We previously considered Ellis's appeal challenging his sentence for robbery and receiving stolen property in our unpublished memorandum decision, *Ellis v. State*, Cause No. 10A01-0603-CR-127, slip. op. (Oct. 26, 2006), 856 N.E.2d 789 (table). In that opinion, we explained the facts and procedural history by stating:

> 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 [m]urder, [f]elony [m]urder, robbery, and receiving stolen property. The jury convicted Ellis of robbery and receiving stolen property, 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.

Id. at 1.

On appeal, we determined that the trial court had inappropriately found the likelihood that Ellis would commit a new offense was an aggravator when making its sentencing determination. However, we determined certain other factors considered as aggravating by the trial court were properly relied upon. We concluded that we could not say with confidence that the sentence enhancement for the robbery conviction should be affirmed. Accordingly, we remanded, instructing the trial court 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.

Id. at 4.

Upon remand, the trial court held another sentencing hearing. Ellis presented argument asking the trial court to reconsider all of the potentially mitigating circumstances that he had previously offered. Additionally, Ellis presented evidence of his efforts to advance his education while in custody, and asked the trial court to consider those actions as

mitigating factors. The trial court declined, and chose to limit its balancing to the specific mitigating and aggravating factors our court instructed it to reweigh.

The trial court determined the aggravating facts 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 significantly outweighed his lack of prior criminal history. Thereafter, the trial court imposed a fifty-year sentence for the robbery, as a Class A felony, conviction.

Ellis now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Law of the Case*

Ellis argues that the trial court's imposition of an enhanced sentence violates *Blakely v. Washington*, 542 U.S. 296 (2004), *reh'g denied*. Specifically, Ellis argues that the aggravating factors considered by the trial court were neither admitted by him nor found beyond a reasonable doubt by a jury. However, we previously determined that the aggravating factors which the trial court relied upon in its second sentencing determination did not violate *Blakely*. *See Ellis*, Cause No. 10A01-0603-CR-127, slip op. at 4. "The law of the case doctrine mandates that an appellate court's determination of a legal issue binds the trial court and ordinarily restricts the court on appeal in any subsequent appeal involving the same case and relevantly similar facts." *Hopkins v. State*, 782 N.E.2d 988, 990 (Ind. 2003). Therefore, our prior determination constitutes the law of the case, and Ellis presents no extraordinary reason as to why we should reconsider this issue.

II. *Abuse of Discretion*

Next, Ellis argues that the trial court abused its discretion when sentencing him. Specifically, Ellis contends that the trial court considered improper aggravators and failed to give adequate weight to certain mitigating factors.

First, we have already concluded that the aggravators relied upon by the trial court were proper. *See Ellis*, Cause No. 10A01-0603-CR-127, slip op. at 4. Thus, the law of the case doctrine precludes us from considering whether the aggravating factors relied upon by the trial court are improper. *Hopkins*, 782 N.E.2d 990.

As for Ellis' second contention, that the trial court abused its discretion by failing to give adequate weight to certain mitigating factors, "[t]he relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse." *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007) *reh'g granted*, *decision clarified on other grounds*, 875 N.E.2d 218 (Ind. 2007). Therefore, we conclude that we cannot consider whether the trial court abused its discretion in failing to assign mitigating factors appropriate weight.

III. *Appropriateness of Ellis' Sentence*

Ellis also contends that his sentence is inappropriate when his character and the nature of the offense are considered. We have the authority to review the appropriateness of a sentence authorized by statute through Ind. Appellate Rule 7(B). That rule permits us to revise a sentence 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. *Anglemyer*, 868 N.E.2d at 491. Our supreme court has encouraged us to critically investigate sentencing decisions. *See, e.g. Walker v. State*, 747 N.E.2d 536, 538 (Ind. 2001). The purpose of the express authority to review and revise sentences is to ensure that justice is done in Indiana courts and to provide unity and coherence in judicial application of the laws. *Pruitt v. State*, 834 N.E.2d 90, 121 (Ind. 2005). It is the burden of the defendant appealing his sentence to persuade this court that his sentence has met the inappropriateness standard of review. *Anglemyer*, 868 N.E.2d at 494.

Ellis contends that his remorse for his crime supports a finding that his fifty-year sentence is inappropriate. However, the trial court was able to observe Ellis first-hand at the sentencing hearings, and on that basis alone, was a better judge of the sincerity of Ellis' expression of remorse than we are. *See Corralez v. State*, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004). Therefore, we cannot conclude that the sentence imposed by the trial court was inappropriate because of Ellis' remorse.

Additionally, Ellis argues that his young age at the time of the offense detracts from his culpability. We first note that Ellis was seventeen at the time of his offense. While chronological age can be shorthand for measuring culpability, age is not a per se mitigating factor. *Monegan v. State*, 756 N.E.2d 499, 504 (Ind. 2001). However, "Indiana decisional law recognizes 'that a defendant's youth, although not identified as a statutory mitigating circumstance, is a significant mitigating circumstance in some circumstances' including the commission of a heinous crime by a juvenile." *Trowbridge v. State*, 717 N.E.2d 138, 150 (Ind. 1999). Further, Ellis contends that his lack of any prior juvenile or adult convictions

speaks for his good character. Indeed, lack of criminal history is generally recognized as a substantial mitigating factor. *See Cloum v. State*, 779 N.E.2d 84, 91 (Ind. Ct. App. 2002).

Altogether, we find this circumstance to be similar to the facts in *Hill v. State*, 499 N.E.2d 1103 (Ind. 1986). In *Hill*, the defendant and an accomplice broke into the home of a couple that returned while the co-perpetrators were still in their home. While the burglars were attempting to flee, they beat the couple and both victims required medical treatment for their injuries. *Id*. at 1105. Our supreme court found a sentence of fifty years manifestly unreasonable for Hill who was convicted of burglary, as a Class A felony, because he was eighteen years old at the time of the offense, and had no prior adult convictions. *Id*. at 1109.

We find that Ellis' sentence is inappropriate due to his lack of criminal history and young age at the time of his offense. We conclude that Ellis' sentence should be revised, remand to the trial court and instruct that it enter an order sentencing Ellis to thirty years imprisonment for his conviction for robbery, a Class A felony, with a one and one-half year sentence for receipt of stolen property to be served concurrently.

CONCLUSION

Based on the foregoing reasons, we conclude that the trial court did not consider improper aggravating factors and did not abuse its discretion when sentencing Ellis.

However, we find that the sentence imposed by the trial court is inappropriate considering the nature of the offense and Ellis' character.

Reversed and remanded with instructions.

FRIEDLANDER, J., concurs.

SHARPNACK, J., concurs in part and dissents in part with separate opinion.

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	)	
Appellee-Plaintiff.	)	
	)	

SHARPNACK, Judge, concurring in part and dissenting in part

I respectfully concur in result in part and dissent in part. I concur in result as to the majority's determination that law of the case applies and that the trial court did not abuse its discretion in sentencing Ellis. I dissent as to the majority's reduction of Ellis's sentence to thirty years. I believe that this case is distinguishable from Hill v. State, 499 N.E.2d 1103 (Ind. 1986). Ellis had no criminal record, but unlike the defendant in Hill, Ellis's offense involved a death. Based upon the latter factor, I would reduce Ellis's sentence to no less than forty years.