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IN THE COURT OF APPEALS OF INDIANA

KELVIN DEWAN BOGAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0902-CR-181
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Randy J. Williams, Judge
Cause No. 79D01-0710-FA-33

November 10, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Kelvin Dewan Bogan (Bogan), appeals his sentence for dealing in cocaine, as a Class A felony, Ind. Code § 35-48-4-1.

We affirm.

ISSUES

Bogan raises two issues for our review, which we restate as:

(1) Whether the trial court abused its discretion when it mentioned a desire to send a message to the community as a whole when sentencing him; and

(2) Whether his sentence is inappropriate when the nature of his offense and his character are considered.

FACTS AND PROCEDURAL HISTORY

On October 1, and again on October 3, 2007, Detective Curwick of the Lafayette Police Department purchased cocaine from Bogan at the Country View Estates apartment complex. On October 12, 2007, the State filed an Information charging Bogan with six counts: Count I, dealing in cocaine, as a Class A felony, I.C. § 35-48-4-1; Count II, possession of cocaine, as a Class B felony, I.C. § 35-48-4-6; Count III, trespass, as a Class A misdemeanor, I.C. § 35-43-2-2; Count IV, dealing in cocaine, as a Class A felony, I.C. § 35-48-4-1; Count V, possession of cocaine, as a Class B felony, I.C. § 35-48-4-6; and Count VI, trespass, as a Class A misdemeanor, I.C. § 35-43-2-2. On November 25, 2008, Bogan and the State entered into an agreement wherein Bogan agreed to plead guilty to Count I, dealing in cocaine, as a Class A felony, in exchange for the State's dismissal of all other charges in

this matter and the misdemeanor charges pending against him in Cause Numbers 79D05-0706-CM-1159, 79D05-0706-CM-1231, and 79D05-0706-CM-1240. The trial court took Bogan's plea under advisement and on January 21, 2009, held a sentencing hearing. During the sentencing hearing the trial court stated:

> I don't know if you thought this was an easy way to make some money down here or around here in Tippecanoe County or not but a message has to be sent that that's not going to [be] allowed. It's not going to happen in this county where, where we have children, where I have children. I'm not going to let that happen. A message has to be sent.

(Transcript p. 27). The trial court sentenced Bogan to twenty-four years in the Indiana Department of Correction, and six years on probation, one of which is to be supervised and the other five, unsupervised.

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

DISCUSSION AND DECISION

I. *Abuse of Discretion*

Bogan argues that the trial court abused its discretion when sentencing him. When sentencing a defendant, the "trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). As long as the sentence imposed by the trial court is within the statutory range, it is subject to review only for an abuse of discretion. *Id.* An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the trial court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id*. Ways in which trial courts may

abuse their discretion include: wholly failing to issue a sentencing statement; issuing a sentencing statement that bases a sentence on reasons that are not supported by the record, or that includes reasons that are improper as a matter of law. *Id*. at 490-491.

Bogan argues that the trial court abused its discretion by relying, in part, on the desire to send a message to the community when sentencing him. Specifically, Bogan contends that by stating its desire to send a message to the community the trial court applied an aggravating factor that was improper as a matter of law.

Bogan correctly points out that our supreme court's decision in *Beno v. State*, 581 N.E.2d 922 (Ind. 1991), provides valuable guidance for our analysis here. In *Beno*, our supreme court considered a claim that the defendant's sentence was manifestly unreasonable, the standard which predated our "inappropriateness" review. When sentencing the defendant, coincidentally for dealing in cocaine, the trial court explained its rationale by stating, in part: "I don't see anything at all wrong with sending a very clear message to every person in the State that somewhere along the line the buck's gotta stop and it's gotta stop right here at this bench." *Id*. at 923. Our supreme court stated plainly: "A trial judge's desire to send a message is not a proper reason to aggravate a sentence." *Id*. at 924. Acknowledging this precedent, we must agree with Bogan that the trial court abused its discretion when it considered a desire to send a message to the community when sentencing him.

That being said, we believe that we can say with confidence that the trial court would have imposed the same sentence irrespective of its consideration of a desire to send a

message to the community. Our supreme court has held that a sentence may be upheld where a single aggravating factor supports it, so long as we can say with confidence that in the absence of the invalid aggravators the trial court would have imposed the same sentence. *Bacher v. State*, 772 N.E.2d 799, 803 (Ind. 2000). Bogan was sentenced to the advisory sentence for his Class A felony, with six of those years suspended to probation. *See* I.C. § 35-50-2-4. The trial court found as aggravating that Bogan was out on bond at the time that he sold cocaine to an undercover police officer. Because of this fact, we believe that the trial court would have imposed the same sentence regardless of whether it considered the message Bogan's sentence could send to the community.

II. *Inappropriateness*

Bogan also contends that his sentence is inappropriate when the nature of his offense and character are considered. Regardless of whether the trial court has sentenced the defendant within its discretion, we have the authority to independently review the appropriateness of a sentence authorized by statute through Appellate Rule 7(B). *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008). 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. "Ultimately the length of the aggregate sentence and how it is to be served are the issues that matter." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). "The principle role of appellate review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but

not to achieve a perceived 'correct' result in each case." *Id*. at 1225. The defendant carries the burden to persuade us that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

Bogan requests that we take into consideration that he pled guilty when performing our 7(B) analysis. Pleading guilty and taking responsibility for one's acts could speak for the good character of an individual. However, where a defendant has received substantial benefit in exchange for a plea of guilty, we have held that the decision is merely a pragmatic one and need not be considered as a significant mitigating factor. *Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005). Similarly, a pragmatic decision to plead guilty does not prove any good character on the part of the defendant. Here, the State agreed to dismiss multiple charges for which concurrent sentencing would not have been required and for which convictions would not have violated double jeopardy. The trial court noted that Bogan was on bond at the time he committed his crime, and for whatever crime or crimes Bogan was on bond for, he would be required to serve consecutive sentences to his sentence here.[1] *See* I.C. § 35-50-1-2(d). The charges may have been misdemeanors, but, nevertheless, Bogan has not demonstrated that his decision to plead guilty was not a pragmatic decision.

Additionally, Bogan again directs our attention to our supreme court's decision in *Beno*. In *Beno*, the defendant committed similar crimes to that of Bogan, but was sentenced

[1] Presumably, Bogan was on bond for the charges in Cause Numbers 79D05-0706-CM-1159, 79D05-0706-CM-1231, and 79D05-0706-CM-1240.

by the trial court to an aggregate term of seventy-four years.[2] Our supreme court concluded that his sentence was manifestly unreasonable, explaining as follows:

> Beno not only received that maximum possible sentence for each offense, but the sentences were to run consecutively. [] Beno was convicted of committing virtually identical crimes separated by only four days. Most importantly, the crimes were committed as a result of a police sting operation. As a result of this operation, Beno was hooked once. The State then chose to let out a little more line and hook Beno for a second offense. There is nothing that prevented the State from conducting any number of additional buys and thereby hook Beno for additional crimes with each subsequent sale. We understand the rationale behind conducting more than one buy during a sting operation, however, we do not consider it appropriate to then impose maximum and consecutive sentences for each additional violation.

Id. at 924. Our supreme court went on to reduce Beno's sentence to the maximum for each offense, with those sentences to be served concurrently. *Id*.

On appeal, Bogan uses this discussion from *Beno* regarding consecutive sentences for repeat, nearly identical, undercover drug buys to point out that Bogan could not have received consecutive sentences if convicted of the multiple drug sales that were alleged in the Information. We agree with that contention. However, Bogan was convicted of only one drug sale.

What we find more helpful from *Beno* to our analysis is the sentence which our supreme court ordered compared to the sentence which the trial court ordered here. Our supreme court ordered the maximum sentence of fifty years for Beno, and Bogan received the advisory sentence for his Class A felony offense, thirty years, with six of those years

[2] Beno was sentenced to the maximum sentence on each conviction, that being dealing in cocaine, as a Class A felony, dealing in cocaine, as a Class B felony, and maintaining a common nuisance, a Class D felony. *Beno*, 581 N.E.2d at 923-24.

suspended to probation, a considerably lesser sentence. *See* I.C. § 35-50-2-4. Considerations such as the extent of criminal history may vary when comparing Beno to Bogan, but we cannot say that the Bogan's sentence represents one of the outliers when it is acknowledged that he received the advisory sentence and six of those years were suspended to probation. For these reasons, Bogan has failed to persuade us that his sentence is inappropriate when the nature of his offense and character are considered.

CONCLUSION

Based on the foregoing, we conclude that the trial court abused its discretion by stating its desire to send a message to the community when sentencing Bogan, but we can say with confidence that the trial court would have given him the same sentence if it had not considered this improper consideration. Furthermore, Bogan's sentence is not inappropriate when the nature of his offense and character are considered.

Affirmed.

BAKER, C.J., and FRIEDLANDER, J., concur.