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IN THE
COURT OF APPEALS OF INDIANA

TIM E. LEITCH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 57A03-0807-CR-381
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE NOBLE SUPERIOR COURT
DIVISION I
The Honorable Robert E. Kirsch, Judge
Cause No. 57D01-0705-FD-123

November 20, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Tim E. Leitch (Leitch), appeals the sentence imposed following his plea of guilty to operating while intoxicated (OWI), as a Class D felony, Ind. Code § 9-30-5-3, and his admission to being a habitual substance offender (HSO), I.C. § 35-50-2-10.

We affirm.

ISSUE

Leitch presents one issue for our review: Whether the portion of his sentence arising from his conviction for OWI as a Class D felony is inappropriate.

FACTS AND PROCEDURAL HISTORY

On May 13, 2007, Carey Coney of the Noble County (Indiana) Sheriff's Department arrested Leitch for OWI after observing him speed and cross the center line. The State charged Leitch with OWI as a Class D felony, I.C. § 9-30-5-2, and with being an HSO, I.C. § 35-50-2-10. The OWI charge, normally a Class C misdemeanor, was elevated to a Class D felony because of Leitch's 2003 OWI conviction in Whitley County, Indiana. The HSO allegation was based on the instant OWI charge, the 2003 OWI conviction, and a 1997 OWI conviction from Noble County.

On January 29, 2008, Leitch pled guilty to OWI as a Class D felony. On March 14, 2008, Leitch admitted to being an HSO. On June 3, 2008, the trial court sentenced Leitch to two-and-a-half years on the Class D felony, enhanced by three years based on the HSO admission, for a total sentence of five-and-a-half years. The trial court suspended two of the

two-and-a-half years for the Class D felony OWI to probation, leaving a total executed sentence of three-and-a-half years. (Appellant's App. p. 38).

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

DISCUSSION AND DECISION

On appeal, Leitch argues that his sentence is inappropriate. Indiana Appellate Rule 7(B) 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. *See* Ind. Appellate Rule 7(B); *see also Childress v. State*, 848 N.E.2d 1073, 1079 (Ind. 2006). The burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress*, 848 N.E.2d at 1080. Leitch has not carried this burden.[1]

Leitch does not challenge his entire sentence or the length of the HSO enhancement. Rather, he only challenges the two-and-a-half-year portion of the sentence for OWI as a Class D felony. He focuses on the fact that a two-and-a-half-year sentence is close to the three-year maximum sentence for OWI as a Class D felony. *See* I.C. § 35-50-2-7 (setting the

[1] Though the State prevails in this appeal, two aspects of its brief merit scrutiny. First, though Leitch presents his argument strictly in terms of inappropriateness under Indiana Appellate Rule 7(B), the State begins the argument section of its brief with a discussion of the abuse of discretion standard of review. As we recently reiterated, "inappropriate sentence and abuse of discretion claims are to be analyzed separately." *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008). Then, once the State does reach the inappropriateness standard of review, it cites "*Gibson v. State*, 864 N.E.2d 452, 457 (Ind. Ct. App. 2007)." We first note that it is *Luhrsen v. State*, not *Gibson v. State*, that appears at 864 N.E.2d 452. *Luhrsen* cites *Gibson*, which appears at 856 N.E.2d 142 (Ind. Ct. App. 2006). More importantly, the State cites *Gibson*/*Luhrsen* for the proposition that "an appellate court should not conduct a *purely de novo* review of sentences but must begin its analysis with an examination of the sentencing statement issued by the trial court." (Appellee's Br. p. 4). That proposition is certainly supported by *Gibson* and *Luhrsen*, but it was essentially superseded by our supreme court's opinion in *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007), which definitively outlined the parameters of appellate review of sentences in Indiana under the current advisory scheme.

maximum sentence for a Class D felony at three years). But what Leitch does not acknowledge is that the trial court suspended two of those two-and-a-half years to probation, leaving an executed portion of only six months. There is a substantial difference between two-and-a-half years in prison, on the one hand, and six months in prison followed by two years of probation, on the other.

We recognize that Leitch has documented mental illness issues (bi-polar II disorder and social phobia) and a history of alcohol abuse, and we commend him for his ongoing efforts to get those problems under control. Furthermore, Leitch's offense was not particularly egregious or heinous. However, this was Leitch's third OWI conviction in just over ten years, and he has yet to serve any significant jail time. Furthermore, while Leitch does not specifically challenge the HSO portion of his sentence, we note that he faced a possible maximum sentence of eleven years in this case: the maximum sentence of three years for the Class D felony, enhanced by the maximum term of eight years for being an HSO. *See* I.C. § 35-50-2-10(f) ("The court shall sentence a person found to be a habitual substance offender to an additional fixed term of at least three (3) years but not more than eight (8) years imprisonment, to be added to the term of imprisonment imposed under IC 35-50-2 or IC 35-50-3."). Instead, he received a total sentence of five-and-a-half years, with two

years suspended to probation. We cannot say that Leitch's sentence—either the whole thing or just the portion attributable to the Class D felony OWI—is inappropriate.

CONCLUSION

Based on the foregoing, we conclude that Leitch's sentence is not inappropriate.

Affirmed.

BAILEY, J., and BRADFORD, J., concur.