Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

LEANNA WEISSMANN
Lawrenceburg, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JOBY D. JERRELLS
Deputy Attorney General
Indianapolis, Indiana

FILED
Nov 21 2008, 8:24 am
CLERK
of the supreme court, court of appeals and tax court

IN THE COURT OF APPEALS OF INDIANA

LAMAR OWENS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 15A01-0806-CR-264
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DEARBORN CIRCUIT COURT
The Honorable James Humphrey, Judge
Cause Nos. 15C01-0205-FB-11 and 15C01-0605-FA-5

November 21, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

In a consolidated appeal, Lamar Owens challenges the eight-year sentence he received after pleading guilty to committing class C felony possession of cocaine. In addition, he attempts to appeal the imposition of the balance of a previously suspended sentence for dealing in cocaine. We affirm.

Facts and Procedural History

On May 10, 2002, the State charged Owens with class B felony dealing in cocaine. App. at 1 (Cause No. 15C01-0205-FB-11). In February 2003, a jury found him guilty. In March 2003, a court ordered an eleven-year sentence but suspended five years and one hundred sixteen days. *Id*. at 33. On March 18, 2005, Owens was released and placed on active probation for five years and one hundred sixteen days. *Id*.

On July 14, 2006, Owens, who was in Addyston, Ohio, agreed to meet a confidential informant ("CI") to "party" in a Lawrenceburg, Indiana, hotel room. *Id*. at 30. CI expressed interest in obtaining two "eight balls" of cocaine[1] from Owens and agreed to give him a ride to the hotel. After picking up Owens, CI made two stops, the first to pick up an undercover detective at a gas station and the second to "shop" at a liquor store. At the store, police arrested Owens. In the interest of maintaining their cover, CI and the undercover detective also were arrested at the liquor store. CI informed police that Owens had placed a baggie of cocaine in the car's center console; police recovered approximately seven grams of cocaine from that console. *Id*. at 31.

On July 17, 2006, the State charged Owens with class A felony dealing in cocaine. *Id*. at 17 (Cause No. 15C01-0607-FA-5). The next day, a habitual offender charge was added, and the State filed a request for probation violation hearing. *Id*. at 27-34. In February 2008, the court held a hearing at which it accepted a plea agreement. *Id*. at 35. Per the agreement, the State amended the cocaine charge from class A felony dealing to class C felony possession and dismissed the habitual offender charge; Owens pled guilty to the C felony possession charge. *Id*. In addition, Owens admitted to violating probation that had been granted after his 2003 conviction. *Id*. While Owens was to receive credit for time served as well as good time, sentencing was left to the court's discretion. *Id*. at 35-36.

In May 2008, the court held a sentencing hearing, revoked the balance of Owens' probation for the 2003 conviction, and sentenced Owens to eight years in prison for the 2006 cocaine conviction, to be served consecutive to his remainder of his reinstated sentence. The court explained its ruling as follows:

> The Court considers aggravating factors:
>
> 1. The Court considers [Owens'] significant criminal history to be a significant aggravating factor which includes an aggravated burglary, aggravated robbery in … Ohio in 1994. The facts of the case indicated acts of violence. The record also includes conspiracy to deliver cocaine for which he was convicted [in 2003]. Mr. Owens had only been released to probation on this case for seven (7) months prior to the commission of the current offense. The Court also notes that [Owens] has an active warrant from … Ohio for the offense of menacing issued on August 16, 2006. This offense was allegedly committed when he was released on probation in this cause of action. The Court also considers the fact that [Owens] was on probation at the time the current offense was committed.

---

[1] An "eight ball" is a slang term for an 1/8 ounce (equivalent to approximately 3.5 grams). *See Perry v. State*, 638 N.E.2d 1236, 1242 (Ind. 1994) (noting State's evidence that appellant agreed to sell an "eight-ball" or 3.5 grams of cocaine).

The Court also considers mitigating factors:

> 1. The Court has considered [Owens'] arguments regarding [his] background and family hardships as a mitigating circumstance. The Court finds whatever may have happened when [he] was a child concerning the neighborhood in which he lived while unfortunate, does not constitute a mitigating circumstance since he is now thirty-one (31). The Court also considers the testimony of Jean Owens, [his] mother, and Owen Cross, his uncle. The Court finds that [Owens] has always had available to him, a supportive and caring family and that his decisions to commit criminal offenses at this point constitute personal decisions on his part. The Court also considers [Owens'] intelligence and educational background as possible mitigating factors. The Court also finds that this is an indication of past opportunities and [his] ability to conduct himself according to the law and to take care of his responsibilities to his family and to society. The Court finds that he has chosen not to do so. The Court has also considered what has been presented as [Owens'] remorse, expressed not by himself, but through his mother. The Court finds an insufficient basis to determine significant remorse by [Owens]. The Court has considered the fact that [Owens] has entered a plea of guilty and has apparently cooperated in some fashion with the State of Indiana. The Court, however finds that significant benefit was provided [him] by reduction of the charge from a Class A Felony to a Class C Felony. The Court does not consider this a significant mitigating factor.
>
> The Court considers the balance between the aggravating and mitigating circumstances to be that the aggravating factors significantly outweigh mitigating factors and that these aggravating factors are sufficient not only to aggravate the sentence imposed but also to run sentences consecutive for probation violation request and the current offense.

App. at 42-43.

Discussion and Decision

Citing Indiana Appellate Rule 7(B), Owens asserts that his eight-year sentence for class C felony cocaine possession was inappropriate. As to the nature of the offense, he notes that there was no victim, physical injury, or pecuniary loss, and contends his offense was not egregious. As for his character, Owens attempts to explain his extensive criminal

record by noting "the poor environment" in which he was raised. Finally, Owens stresses that his decision to plead guilty saved resources.

Indiana Appellate Rule 7(B) allows a court on review to revise a sentence if the sentence is inappropriate in light of the nature of the offense and the character of the offender. Although Rule 7(B) does not require this Court to be extremely deferential to a trial court's sentencing decision, this court still gives due consideration to that decision. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). This court also recognizes the unique perspective a trial court brings to its sentencing decisions. *Id*. The defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate. *Krempetz v. State*, 872 N.E.2d 605, 616 (Ind. 2007).

Regarding the nature of the offense, the advisory sentence is the starting point our legislature has selected as an appropriate sentence for the crime committed. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). The advisory sentence for a class C felony is four years, with a fixed term of between two and eight years. Ind. Code § 35-50-2-6. Owens received eight years. His offense consisted of bringing cocaine to sell at what he thought would be a party.

Moving next to the question of character, we often look at criminal history. Our supreme court has emphasized that "the extent, if any, that a sentence should be enhanced [based upon prior convictions] turns on the weight of an individual's criminal history." *Duncan v. State*, 857 N.E.2d 955, 959 (Ind. 2006). "This weight is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a

defendant's culpability." *Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006); *Prickett v. State*, 856 N.E.2d 1203, 1209 (Ind. 2006).

Despite Owens' efforts to paint a different picture of his character, his criminal history is significant. Thirty-one-year-old Owens began committing offenses when he was fourteen and has continued to do so during the ensuing years. In addition to six juvenile adjudications, Owens' record includes aggravated burglary, aggravated robbery, and conspiracy to deliver cocaine. Moreover, his response to the privilege of being released to probation was to commit the current offense (another offense involving cocaine) within seven months. In addition, after Owens' arrest for the current charge but before being sentenced on it, a warrant alleging that Owens committed "menacing" was issued. Owens' criminal history clearly reflects poorly on his character.

Further, we are not persuaded by Owens' argument that a difficult childhood somehow justifies his criminal behavior. To the contrary, in light of his mature age, family support, and demonstrated intelligence, Owens' continued choice to violate laws reflects very poorly on his character. To the extent Owens argues that his decision to plead guilty reflects well on his character, we are not impressed. Owens' willingness to plead guilty says little about his character, level of remorse, or willingness to take responsibility. This is because in exchange for his agreement to the open plea, Owens received two substantial benefits: reduction of the cocaine charge from a class A felony to a class C felony, and dismissal of the habitual charge. In sum, Owens has not met his burden of persuading us that his sentence violates Indiana Appellate Rule 7(B). While we may have originally ordered a different sentence, we cannot say that the sentence ordered by the court was inappropriate in light of

Owens' character and offense.

We briefly address Owens' attempt to challenge the court's "imposition of the entire [remainder of the] suspended sentence" for the 2003 conviction. Appellant's Br. at 8. Specifically, Owens argues that it was "unreasonable" to reinstate the balance of his previously suspended sentence "given the nature of his probation violation and his character." *Id*. It is important to point out that Owens does not challenge the actual revocation of probation. Given his admission to committing the current crime, a clear violation of probation was presented, thus revocation was certainly justified. As for the consequence of that probation violation, Indiana Code Section 35-38-2-3(g) provides the court with three sentencing options: continue probation with or without modifying or enlarging conditions, extend the probationary period, or order execution of all or part of the sentence that was suspended.

We review "a trial court's sentencing decision in a probation revocation proceeding for an abuse of discretion." *See Abernathy v. State*, 852 N.E.2d 1016, 1020 (Ind. Ct. App. 2006). "Generally speaking, as long as the trial court follows the procedures outlined in Ind. Code § 35-38-2-3, the trial court may properly order execution of a suspended sentence." *Id*. Owens makes no allegation that the court failed to follow the procedures found in Indiana Code Section 35-38-2-3. In light of Owens' commission of a new crime, again involving cocaine, and looking at his lengthy criminal history, we cannot say the court abused its

discretion in choosing to reinstate the balance of the originally suspended sentence.[2]

Affirmed.

KIRSCH, J., and VAIDIK, J., concur.

[2] Despite Owens' use of terminology such as nature and character, a sentence ordered after a clear violation of probation is not subject to Indiana Appellate Rule 7(B) analysis. Neither is reasonableness the proper lens with which to examine the court's decision. Rather, we apply an abuse of discretion standard of review.