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IN THE COURT OF APPEALS OF INDIANA

BRENT G. ROSENBAUM,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A04-0804-CR-240
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0705-FC-25

December 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Brent G. Rosenbaum appeals his aggregate six-year sentence imposed following his guilty plea to class D felony battery on law enforcement,[1] class D felony resisting law enforcement,[2] and class D felony operating a vehicle while intoxicated ("OWI") with a prior conviction.[3] We reverse and remand.

Issues

Rosenbaum raises three issues, but we need only address the following two restated and reordered issues:

I. Whether his six-year sentence violates Indiana Code Section 35-50-1-2; and

II. Whether his sentence is inappropriate in light of the nature of the offense and his character.[4]

Facts and Procedural History

On March 31, 2007, Rosenbaum was arrested for operating a moped while intoxicated with a prior OWI within the past five years.[5]

On May 1, 2007, Lafayette Police Officer Michael Barthelemy responded to a report of an intoxicated male and found Rosenbaum sitting on a curb crying. His shirt was "ripped

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[1] *See* Ind. Code § 35-42-2-1(a)(2)(A).

[2] *See* Ind. Code § 35-44-3-3(b)(1)(B).

[3] *See* Ind. Code § 9-30-5-3(1).

[4] Given our resolution of these issues, we need not address Rosenbaum's argument that the trial court abused its discretion in identifying an improper aggravator and failing to identify significant mitigators.

[5] This charge was subsequently added to the current cause as Count V.

up and shredded," and he said his friends had thrown him out of the car. Tr. at 27. Rosenbaum pleaded with Officer Barthelemy not to arrest him for public intoxication because he had recently received an OWI. Officer Barthelemy "felt sorry for him" and decided to drive Rosenbaum home. *Id.* When they arrived at Rosenbaum's residence, Officer Barthelemy noticed a crowded bar nearby. He decided to walk Rosenbaum "to the front door to make sure he got in safely and didn't get into a fight out on the sidewalk." *Id*. However, Rosenbaum did not want Officer Barthelemy to walk him to the door and became belligerent: he cussed at Officer Barthelemy, pointed his finger at him, and said, "[C]ops just ruin people's lives." *Id*.

When they reached the door to Rosenbaum's residence, which was at the top of some stairs, Rosenbaum refused to go inside. Officer Barthelemy told him that "he could still go to jail for public intoxication." *Id*. Rosenbaum replied that "it was too late for that" and to go "F" himself. *Id*. Officer Barthelemy decided to arrest Rosenbaum, who was then just inside the residence with the door open. Officer Barthelemy tried to keep the door open with his foot while attempting to handcuff Rosenbaum. A struggle ensued. Officer Barthelemy "tried to get [Rosenbaum] out of the building[,] and [they] fell down the steps." *Id*. at 28. The fall fractured Officer Barthelemy's wrist and elbow.

On May 7, 2007, the State charged Rosenbaum with Count I, class C felony battery resulting in serious bodily injury; Count II, class D felony battery on law enforcement; Count III, class D felony resisting law enforcement; Count IV, class B misdemeanor public intoxication; and Count V, class D felony OWI with a prior conviction.

On December 21, 2007, Rosenbaum and the State entered into a plea agreement in which Rosenbaum pled guilty to Counts II, III, and V, and the State dismissed the remaining counts. On February 11, 2008, the State filed the presentence investigation report ("PSI").

On March 28, 2008, the trial court held a sentencing hearing. Initially, the trial court reviewed Rosenbaum's criminal history, consisting of two misdemeanor convictions. Next, Officer Barthelemy testified. The trial court asked him whether he recommended an aggravated or mitigated sentence. Officer Barthelemy replied, "I would like to see him serve some time." *Id*. at 29. Officer Barthelemy also testified that he missed five weeks of work due to his injuries. The trial court then questioned Rosenbaum about his thoughts regarding Officer's Barthelemy's testimony. Rosenbaum replied, "I feel hurt. … I feel ashamed. I feel sorry. I'm sorry that he had to miss work for five weeks. I have no idea if he had any children he missed out on playing with[.]" *Id*. at 31.

The trial court then stated that there had been prior attempts at rehabilitation and asked, "It hasn't done any good has it?" *Id*. Rosenbaum answered that he had been sober for nine months after voluntarily admitting himself to inpatient treatment at Hazelden, an alcohol and drug addiction treatment center in Plymouth, Minnesota. Rosenbaum added that he was currently attending Alcoholics Anonymous meetings twice a week and had reached step four of the twelve-step program.

At the conclusion of the hearing, the trial court made the following determination:

> [I]t seems to me that based on your criminal history, the prior attempts at [] rehabilitation, you've had a lot of opportunities and as I look at the recommendation that the officer makes, he recommends an aggravated sentence and I look at the circumstances surrounding this, the aggravators outweigh the mitigators. I'm going to sentence you to six years, five executed

> at the DOC followed by one year at Tippecanoe County [Community] Corrections, after you're released from the DOC.

Id. at 49-50.

The sentencing order clarifies that Rosenbaum received a sentence of three years on Count II, three years on Count III, and three years on Count V, and that "[t]he three years on Count III shall run consecutively with three years on Count II; the three years on Count V shall run concurrently with Count III, all for a total of six (6) years." Appellant's App. at 101. Rosenbaum appeals.

Discussion and Decision

I. Statutory Violation

We first address Rosenbaum's argument that his six-year sentence violates Indiana Code Section 35-50-1-2(c), which provides in relevant part that "except for crimes of violence, the total of the consecutive terms of imprisonment … to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted." Rosenbaum asserts, and the State concedes, that at the time he committed the instant offenses, neither battery on law enforcement nor resisting law enforcement was listed as one of the enumerated crimes of violence.[6] Ind. Code § 35-50-1-2(a). Rosenbaum argues that Counts II and III comprise an episode of criminal conduct, and therefore his sentence cannot exceed four years – the

[6] "[T]he sentencing statute in effect at the time a crime is committed governs the sentence for that crime." *Gutermuth v. State*, 868 N.E.2d 427, 431 n.4 (Ind. 2007).

advisory sentence for a class C felony, which is one class higher than the most serious of the felonies for which he was convicted. *See* Ind. Code § 35-50-2-6.

An episode of criminal conduct is defined as "offenses or a connected series of offenses that are closely related in time, place, and circumstance." Ind. Code § 35-50-1-2(b). In determining whether multiple offenses constitute an episode of criminal conduct, the focus is on the timing of the offenses and the simultaneous and contemporaneous nature, if any, of the crimes. *Reed v. State*, 856 N.E.2d 1189, 1200 (Ind. 2006). Further, "the ability to recount each charge without referring to the other can provide additional guidance on the question of whether a defendant's conduct constitutes an episode of criminal conduct," but "it is not a critical ingredient in resolving the question." *Id.*

Here, Rosenbaum's conviction for resisting law enforcement arose from his actions in refusing to be handcuffed. The resulting struggle caused him and Officer Barthelemy to fall down the steps, injuring Officer Barthelemy and giving rise to Rosenbaum's conviction for battery on law enforcement. These offenses were closely connected in time, place, and circumstance. Both took place one right after another, in the same place, and were the result of Rosenbaum's extreme intoxication and belligerence. Therefore, we conclude that they constitute a single episode of criminal conduct within the meaning of the statute. *See id.*at 1201 (holding that two counts of attempted murder constituted a single episode of criminal conduct where, during a police pursuit, defendant stopped his car and fired shots at officers, then drove away and a few seconds later slowed and fired two additional shots at officers). As such, Rosenbaum's six-year sentence exceeds the statutory maximum permissible pursuant to Indiana Code Section 35-50-1-2, here four years.

II. Inappropriateness

Having determined that Rosenbaum's sentence cannot exceed four years, we now turn to his inappropriateness argument.

> Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a sentence imposed by the trial court. We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). We give deference to the trial court's decision, recognizing the special expertise of the trial court in making sentencing decisions. The defendant bears the burden of persuading us the sentence is inappropriate.

Taylor v. State, 891 N.E.2d 155, 162 (Ind. Ct. App. 2008) (quotation marks, brackets, and some citations omitted), *trans. denied*. "When determining whether a sentence is inappropriate, we recognize that the advisory sentence 'is the starting point the Legislature has selected as an appropriate sentence for the crime committed.'" *Filice v. State*, 886 N.E.2d 24, 39 (Ind. Ct. App. 2008) (quoting *Weiss v. State*, 848 N.E.2d 1070, 1072 (Ind. 2006)), *trans. denied*. The advisory sentence for a class D felony is one and one-half years, with a fixed term of between six months and three years. Ind. Code § 35-50-2-7.

Turning first to the nature of Rosenbaum's offenses, we observe that Officer Barthelemy was performing an act of kindness to Rosenbaum by ensuring that he made it home safely. Rather than appreciation and thanks, Officer Barthelemy was treated to invective and hostility and ultimately suffered such serious injuries that he was unable to work for five weeks. Thus, the nature of the crimes does support a sentence above the advisory.

As to Rosenbaum's character, there is much to consider. At the time he committed the current offenses, he had just turned twenty-two years old and was a Purdue University student. He had a serious alcohol abuse problem. His criminal history consists of two alcohol-related misdemeanors: class C misdemeanor minor consumption of alcohol and class A misdemeanor operating a vehicle while intoxicated. In addition, two previous attempts at rehabilitation have failed: a 2005 court-ordered outpatient substance abuse program in Porter County, and a 2007 court-ordered alcohol abuse class. Significantly, however, at the time of sentencing, his most recent effort to rehabilitate himself exhibited not only a sincere willingness to address his problem but success in conquering it as well.

We note that Rosenbaum *voluntarily* checked himself into an inpatient program at Hazelden and successfully completed its thirty-day program. He was released to his parents and at the time of sentencing had been sober for nine months. Nine months is not an inconsequential period of time particularly, in light of other lifestyle alterations he has made. He attends AA meetings twice a week and is progressing through the twelve-step program. He transferred to Valparaiso University and is living with his parents. He hopes to graduate in one and one-half years. Also, at the time of sentencing, he was working as a server at a Valparaiso restaurant and had been so employed for six months. These efforts indicate that Rosenbaum is now firmly committed to and is effectively transforming his life.

Given the nature of the offenses and Rosenbaum's character, we cannot say that a four-year sentence is inappropriate, but we do think a four-year executed sentence is inappropriate. Rather, we think the appropriate sentence is one-year executed at the Department of Correction, followed by three years at Tippecanoe County Community

Corrections at a level to be determined by that institution. Therefore, we reverse and remand with instructions to order sentences for Count II and Count III of two years each, to be served consecutively, with one year executed at the Department of Correction and three years at Tippecanoe County Community Corrections. To keep the aggregate sentence at four years, we also order that the sentence for Count V be reduced to two years, to be served concurrent to Count III.

Reversed and remanded.

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