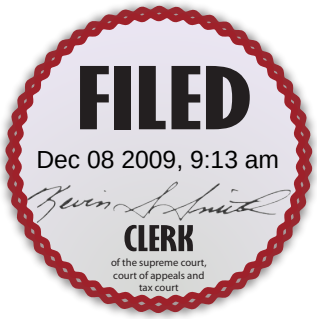

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IN THE
COURT OF APPEALS OF INDIANA

DOUGLAS A. MARSHALL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 07A04-0906-CR-309
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BROWN CIRCUIT COURT
The Honorable Judith A. Stewart, Judge
Cause No. 07C01-0801-FB-00003

DECEMBER 8, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Senior Judge

Pursuant to a guilty plea, Douglas A. Marshall was convicted of three counts of Dealing in a Controlled Substance, each as a Class B felony.[1] His appeal is from the sentences imposed upon those convictions. Upon an "open" plea, Marshall was sentenced to eleven years imprisonment upon each conviction and pursuant to the agreement, all sentences were to be served concurrently.[2]

The appellate challenge asserts that the aggregate eleven-year sentence is inappropriate given the nature of the offenses and the character of the defendant. He further claims that requiring the entire sentence to be served in the Department of Correction is overly severe and that he more appropriately should be ordered to serve at least a portion of the aggregate sentence upon probation or in community corrections.

Marshall emphasizes that he is sixty-four years of age and is disabled. He adds that although he has two prior felony convictions, the time elapsed between those convictions was fourteen years. In addition, he suggests that the current offenses are not particularly egregious in comparison to other "drug" offenses such as dealing in methamphetamine or dealing in a greater quantity. He also notes that no one consumed the controlled substance which he sold.[3]

At the outset, we decline Marshall's request to diminish the seriousness of the crimes. The fact remains that he pleaded guilty to the offenses as Class B felonies which

[1] On three separate occasions Marshall sold a total of twelve eighty-milligram Oxycodone pills.
[2] The advisory sentence for a Class B felony is ten years. Therefore, the sentence imposed upon each conviction was for one year more than the advisory sentence.
[3] Apparently, the offenses were committed by "sales" of the substance to persons serving in an undercover police operation.

call for an advisory sentence of ten years but authorize an increase of up to ten more years. We are unwilling to hold that the crimes are less serious than the crimes committed here, and for which the sentences were imposed.

Marshall concedes that he has a prior criminal record[4] and that he was on probation at the time he committed the instant crimes. He argues, however, that the aggravated sentence of eleven years is inappropriate.

It is the burden of the defendant to persuade this court that the sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). In conducting our review of a sentence, Rule 7 of the Rules of Appellate Procedure requires that we afford due "consideration of the trial court's decision." Rule 7 (B).

The current state of the law dictates that in imposing a sentence, the court is obligated to issue a statement of the reasons for selecting the particular sentence imposed. Anglemyer v. State, 868 N.E.2d 482 (Ind. 2007). In the case before us, the court did not mention the 1994 convictions but noted that Marshall had a "criminal history, that includes C felony (sic), as well as a prior Possession of Marijuana, and I believe Maintaining a Common Nuisance that was entered as a D felony on that charge." (Tr. at 16).

The court then stated:

> Given that you have a prior criminal history, and that you were on bond for that offense [the 2008 conviction] when this one was committed, I think those are aggravating factors. I

[4] In 1994, Marshall was convicted of three counts of a B felony. In 2008, he was convicted of Maintaining a Common Nuisance, as well as a misdemeanor possession of marijuana.

> think the only mitigating factor I can see is that, it's not a statutory mitigating factor, but the fact that you have the health problems that you do, I know it will make serving time in the Department of Corrections even more difficult than it might be without those health problems. But taking all of that into consideration . . and, frankly, having had the opportunity of probation before, and a substance abuse evaluation, having had that opportunity, I don't know that I see the benefit of probation here. I'm looking at a fully executed sentence in the matter.

(Tr. at 16).

Although a different sentencing authority might have settled upon the advisory sentence of ten years, we are unable to state that the eleven-year aggregate executed sentence is inappropriate.[5]

The judgment is affirmed.

FRIEDLANDER, J., and BARNES, J., concur.

[5] For the same reason, we are unable to conclude that the eleven-year sentence, or a portion thereof, should have been ordered served on probation or community service.