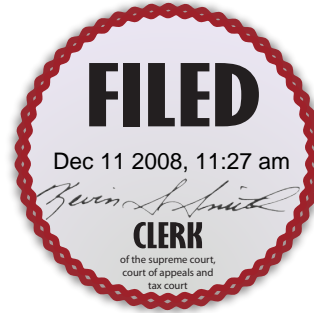


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ALFRED LORENZO FOWLER, II,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 02A03-0806-CR-323

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0801-FB-10

December 11, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Alfred L. Fowler, II (“Fowler”) pleaded guilty in Allen Superior Court to Class B felony robbery and was sentenced to twenty years incarceration. Fowler appeals and claims that his sentence is inappropriate. Concluding that Fowler’s plea agreement contained a valid waiver of his right to challenge the appropriateness of his sentence, we affirm.

Facts and Procedural History

On January 10, 2008, Fowler was in the parking lot of a shopping center in Allen County. While there, Fowler grabbed a purse being carried by a woman and pulled it off her shoulder, knocking the woman down and causing her pain and injury. On January 16, 2008, the State charged Fowler with Class B felony robbery. Fowler later agreed to plead guilty pursuant to a plea agreement with the State. Paragraph twelve of the plea agreement reads as follows:

The Defendant knowingly, intelligently and voluntarily waives his/her right to challenge the reasonableness of the sentence received in this case under Appellate Rule 7(B). Defendant also knowingly, intelligently and voluntarily waives his/her right to challenge the sentence on the basis that it is erroneous.

Appellant’s App. p. 15.

At the plea hearing held on April 7, 2008, the trial court explained to Fowler the rights he was giving up by pleading guilty. Among these rights was the right to appeal his sentence:

[Court]: Do you understand sir that by pleading guilty pursuant to a plea agreement which gives the Court discretion as to the amount of years

that the sentence would be imposed on, you do have the right to [appeal¹] that sentence, however I note in paragraph 12 you've waived that right. Is that correct?

[Fowler]: Yes ma'am.

Plea Hearing Tr. p. 7. Later on in the plea hearing, the trial court read the plea agreement to Fowler, including the waiver of his right to appeal his sentence contained in paragraph twelve of the agreement. The trial court then asked Fowler, "Is that what you understand the agreement to be?," to which Fowler replied, "Yes." Id. at 12.

At the sentencing hearing held on May 5, 2008, the trial court heard from the victim, the victim's husband, and Fowler. The trial court then accepted Fowler's guilty plea and proceeded to sentencing. The trial court found as aggravating Fowler's extensive criminal history, which consists of fourteen misdemeanor convictions and six prior felony convictions, including two for robbery. Fowler had been shown lenience previously, in the form of community service, community corrections, probation, and parole, all to no effect. In fact, Fowler was on parole at the time he committed the instant offense. The trial court found as mitigating Fowler's guilty plea and acceptance of responsibility, but gave this little weight. The trial court also mentioned that Fowler had a substance abuse problem, but also gave this little weight, explaining that Fowler's problem was "not really a drug and alcohol problem, it's just criminal behavior."

¹ The word "appeal" does not appear at this point in the transcript. Although we are unable to tell whether this is a scrivener's error or an omission by the trial court, it is apparent from the context that the trial court was discussing Fowler's waiver of his right to appeal his sentence.

Sentencing Tr. p. 18. Concluding that the aggravating circumstances outweighed the mitigating circumstances, the trial court sentenced Fowler to twenty years incarceration.²

Immediately after pronouncing sentence, the trial court began to state, “Pursuant to Criminal Rule 11 I’d inform you, you are entitled to challenge the sentence. In order to do that” Id. At this point, the prosecuting attorney interrupted the trial court, to which the court replied:

I know that you’ve got that [waiver] in your plea agreement but there’s been recent case law . . . that’s indicated that the Court of Appeals maintains its right to review . . . the trial court’s imposition of sentence. So I know that Mr. Fowler has waived his right to . . . have an appeal in paragraph 12. I just know that the case law has been a little bit unsettled in that, so out of an abundance of caution I’ll advise Mr. Fowler of that right to have the higher court review your sentence Mr. Fowler.

Id. at 19. Fowler now appeals.

Discussion and Decision

Fowler acknowledges that his guilty plea contains a waiver of his right to appeal his sentence, but nevertheless challenges the appropriateness of his sentence. The State responds only by claiming that Fowler’s twenty-year sentence is appropriate given his extensive criminal history and the nature of the instant crime. We conclude that the waiver provision in Fowler’s plea agreement is valid and precludes our review of the appropriateness of the sentence imposed by the trial court.

² At the same time, the trial court sentenced Fowler to a concurrent term of three years in another case in wherein Fowler had pleaded guilty to Class D felony theft. Fowler’s current challenge to his sentence is directed only at the twenty-year sentence imposed on his conviction for Class B felony robbery. See Br. of Appellant at 3.

Our conclusion is mandated by our supreme court's recent decision in Creech v. State, 887 N.E.2d 73 (Ind. 2008). The defendant in Creech, like Fowler, entered into a plea agreement containing a waiver of his right to appeal his sentence. On appeal, our supreme court held that a defendant may waive the right to appellate review of his sentence as part of a written plea agreement.³ Id. at 75. This is so even where the trial court does not specifically advise the defendant that he is waiving the right to appeal his sentence. See id. (noting that neither the Indiana Rules of Criminal Procedure nor the Indiana Code requires trial courts to make specific findings regarding the defendant's waiver of his appellate rights). Instead, the "acceptance of the plea agreement containing the waiver provision is sufficient to indicate that, in the trial court's view, the defendant knowingly and voluntarily agreed to the waiver." Id.

Here, the trial court *did* explain to Fowler at the plea hearing that he was waiving his right to appeal, and Fowler still agreed to plead guilty. However, at the conclusion of the sentencing hearing, the trial court misadvised Fowler of his right to appeal and appointed appellate counsel, notwithstanding the waiver provision of the plea agreement. Although the trial court may have muddied the water by later telling Fowler that he still had the right to appeal, this does not allow Fowler to ignore the terms of his plea agreement.

³ This holding in Creech does not alter the "very long-standing policy that a defendant who can establish in a post-conviction proceeding that his plea was coerced or unintelligent is entitled to have his conviction set aside." Id. at 75. Nor does the Creech holding alter "case law invalidating provisions that waive post-conviction rights." Id.

A similar mistake occurred in Creech, where the trial court, after accepting the guilty plea and pronouncing sentence, told the defendant that he did have the right to appeal his sentence. The Creech court stated that although it was important for trial courts to avoid such confusing remarks, the trial court's statements were not grounds for allowing the defendant to circumvent the terms of his plea agreement. Id. at 76. The court explained, "By the time the trial court erroneously advised Creech of the possibility of appeal, Creech had already pled guilty and received the benefit of his bargain. Being told at the close of the hearing that he could appeal presumably had no effect on that transaction." Id. at 77.

The same is true here. The trial court indicated that Fowler would still be able to appeal his sentence only after the court had accepted the plea agreement and pronounced sentence. Therefore, the trial court's statements could not have affected Fowler's decision to plead guilty because they were made after Fowler had agreed to the terms of the plea agreement and after the trial court accepted the plea agreement and pronounced sentence. See id.; Brattain v. State, 891 N.E.2d 1055, 1057 (Ind. Ct. App. 2008) (holding that plea agreement containing waiver of defendant's right to appeal his sentence was valid and enforceable); cf. Ricci v. State, 894 N.E.2d 1089, 1093 (Ind. Ct. App. 2008) (holding that defendant was entitled to appeal his sentence where trial court stated at the plea hearing, not after sentencing, that according to its reading of the plea agreement, defendant did not waive his right to appeal sentence), trans. pending. Moreover, Fowler makes no argument that his plea was otherwise not knowingly or voluntarily made. We

therefore conclude that Fowler waived his right to seek appellate review of the sentence imposed by the trial court.⁴

Affirmed.

BAKER, C.J., and BROWN, J., concur.

⁴ Even if we were to conclude otherwise, Fowler would not prevail. Given Fowler's extensive criminal history, the prior, unsuccessful rehabilitation through several prior and more lenient sentences, and the fact that he was on parole at the time of the instant offense, we would conclude that the sentence imposed by the trial court was appropriate.