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IN THE
COURT OF APPEALS OF INDIANA

JOSE MENDOZA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0505-CR-231
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry Shewmaker, Judge
Cause No. 20C01-0406-FA-83

October 24, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

Previously we issued our memorandum decision in Mendoza v. State, No. 20A03-0505-CR-231 (Ind. Ct. App. April 28, 2006), affirming the trial court's judgment of conviction and sentencing order. The Indiana Supreme Court granted transfer, and this matter now comes before us on remand, with instructions to reconsider our decision in light of Kincaid v. State, 837 N.E.2d 1008 (Ind. 2005). Upon reconsideration of the claims raised on appeal by Jose Mendoza, we adopt our prior opinion in all respects with one exception, namely, Mendoza's sentence. On that issue, we now consider whether his sentence violates Blakely v. Washington, 542 U.S. 296 (2004).

DISCUSSION AND DECISION

Mendoza contends that the trial court violated his right to have a jury determine the existence of aggravating factors beyond a reasonable doubt as required by Blakely. The State counters that Mendoza waived any claim under Blakely by failing to raise the issue at the sentencing hearing. We conclude that Mendoza has not forfeited his right to review of his Blakely claim.

In Kincaid, our supreme court held as follows:

> [F]or Blakely claims, we have relaxed the rule that a particular sentencing claim must be raised in an appellant's initial brief on direct appeal in order to receive review on the merits. Smylie v. State, 823 N.E.2d 679, 689-90 (Ind. 2005)[, 126 S. Ct. 545 (2005)]. . . . For cases in which the appellant's initial brief was filed after the date of the Smylie decision, a specific Blakely claim must be made in appellant's initial brief on direct appeal for it to be reviewed on the merits.

837 N.E.2d at 1010. Here, Mendoza's initial brief on direct appeal was filed seven months after our supreme court handed down its decision in Smylie, and Mendoza raised

a Blakely claim in his initial brief on direct appeal. Thus, we address Mendoza's Blakely claim on the merits.

The United States Supreme Court has held that the Sixth Amendment requires a jury to determine beyond a reasonable doubt the existence of aggravating factors used to increase the sentence for a crime above the presumptive sentence assigned by the legislature. Blakely, 542 U.S. at 301. Our supreme court has since held that the rule announced in Blakely applies to Indiana's presumptive sentencing scheme. Smylie, 823 N.E.2d at 690-91. In other words,

> [u]nder Blakely and Indiana's former sentencing scheme, trial courts could enhance a sentence above the presumptive based only on those facts that were established in one of several ways: (1) as a fact of prior conviction; (2) by a jury beyond a reasonable doubt; (3) when admitted by a defendant; and (4) in the course of a guilty plea where the defendant waived his or her Sixth Amendment rights and stipulated to certain facts or consented to judicial factfinding.

Sullivan v. State, 836 N.E.2d 1031, 1034 (Ind. Ct. App. 2005) (citing Trusley v. State, 829 N.E.2d 923, 925 (Ind. 2005)).

Here, the trial court sentenced Mendoza as follows:

> The Court notes aggravating circumstances to be the fact that the Defendant is not a permanent resident alien and has another case pending in federal court similar to the one of which the Defendant has been convicted in this court. The Court notes the Defendant's criminal history consists of a prior infraction case incurred while he was also not a permanent resident alien and the Court notes that fines and costs in that offense have not resulted in the rehabilitation of this Defendant. Court also notes as an aggravating circumstance the fact that he facilitated this offense by setting it up through another intermediary and paid the intermediary $500.00 to deliver the drugs for and on behalf of this Defendant. The Court notes as an aggravating circumstance the fact that he has involved another person in his criminal enterprise. The Court also notes as an aggravating circumstance the fact that the Defendant did not mention any remorse or accept any responsibility for his criminal conduct. The Court also notes that the Defendant denies

> the use of controlled substances leaving the only other conclusion that this Defendant was involved in the distribution of controlled substances and illegal drugs for financial gain. The Court further notes as an aggravating circumstance the fact that the confidential informant and cooperating source in this case indicated he had made other purchases on the same terms from this Defendant indicating a pattern of conduct on behalf of this Defendant involving the distribution of drugs. The Court also notes the disparity and diversity between the various reports with respect to this Defendant's income. The Court notes that in the original pre-sentence report he indicated he had no income or assets and the Addendum indicates that he had assets with a net value of $117,500.00. Court notes as a mitigating circumstance the fact that this Defendant does not have any prior convictions of a felony nature utilizing the same [sic] "Jose Mendoza". Court weighs the aggravating and mitigating circumstances and finds that the aggravating circumstances do outweigh the mitigating circumstances warranting the imposition of an additional sentence of ten (10) years.

Appellant's App. at 75-76.

The following aggravators do not constitute criminal history nor were they admitted by Mendoza: that fines and costs imposed in a prior infraction case have not resulted in Mendoza's rehabilitation, that Mendoza facilitated the offense by setting it up through another intermediary and paid the intermediary to deliver the drugs for Mendoza, that Mendoza involved another person in the criminal enterprise, that Mendoza did not mention any remorse or accept responsibility for his criminal conduct, that Mendoza committed the offense solely for financial gain, that the confidential informant and cooperating source made other drug purchases from Mendoza, that Mendoza lied about his assets on the original pre-sentence investigation report, and that Mendoza "is not a permanent resident alien[1] and has another case pending in federal court similar to" the

[1] We do not determine whether Mendoza's nonpermanent resident alien status is a valid aggravator. However, we note that being an illegal alien has been considered a valid aggravator. See, e.g., Samaniego-Hernandez v. State, 839 N.E.2d 798, 809 (Ind. Ct. App. 2005); Yemson v. U.S., 764 A.2d 816, 819 (D.C. Cir. 2001) (in sentencing a criminal defendant, court cannot treat defendant more

one for which Mendoza was being sentenced. Appellant's App. at 75. As such, those aggravators should have been determined by a jury. See Blakely, 542 U.S. at 310; Smylie, 823 N.E.2d at 690-91. Because they were not, we conclude that the trial court improperly considered those aggravators when it imposed an enhanced sentence.

We next consider whether Mendoza's criminal history was properly considered as an aggravator used to enhance his sentence. A defendant's sentence may be enhanced on the basis of prior convictions without violating the Sixth Amendment rights addressed in Blakely. Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006). But we have noted that:

> whether and to what extent a sentence should be enhanced turns on the weight of an individual's criminal history. 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.

Id.; see also Wooley v. State, 716 N.E.2d 919, 929 (Ind. 1999) (holding that trial court must identify all "significant" aggravators and "[s]ignificance varies based on the gravity, nature and number of prior offenses as they relate to the current offense.").

Here, Mendoza's criminal history consists of a single infraction. In that case, Mendoza was convicted of unreasonable speed and an open container infraction.[2] Those offenses are not on a par, in gravity or nature, with the current offense of dealing in more

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harshly than any other citizen solely due to his national origin or alien status, but that does not mean that court must close its eyes to defendant's illegal alien status and disregard for the law, including immigration laws).

[2] In its sentencing order, the trial court refers only to "a prior infraction case incurred [sic] while he was also not a permanent resident alien . . . ." Appellant's App. at 75. It is not clear from the record on appeal whether the court was referring only to the open container infraction or to both the open container and the unreasonable speed charges. The record also does not indicate the level of offense assigned to the unreasonable speed charge. On review we consider Mendoza's criminal history to be comprised of both offenses.

than three grams of methamphetamine, as a Class A felony. Mendoza has no felony or drug-related criminal history. Thus, his criminal history is not a significant aggravator in the context of a sentence for dealing in methamphetamine. See Wooley, 716 N.E.2d at 929. As a result, we conclude that the trial court abused its discretion when it enhanced Mendoza's sentence based on his criminal history.

Conclusion

In sum, we adopt our prior opinion in all respects except with regard to the sentencing issue. On that issue, we conclude that all of the aggravators identified by the trial court except Mendoza's criminal history should have been determined by a jury and that his criminal history was not a significant aggravator. On these facts, the trial court abused its discretion when it imposed an enhanced sentence. Thus, we remand this case to the trial court with instructions to re-sentence Mendoza and impose a presumptive sentence of thirty years.

Affirmed in part, reversed in part, and remanded with instructions.

BAKER, J., and BAILEY, J., concur.