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IN THE
COURT OF APPEALS OF INDIANA

JEREMY KIERSTEAD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 27A02-0608-CR-639
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GRANT CIRCUIT COURT
The Honorable Thomas R. Hunt, Judge
Cause No. 27C01-0101-CF-8

November 30, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Jeremy Kierstead ("Kierstead") challenges the aggregate sentence of sixty-two years and 180 days imposed upon him following his pleas of guilty to twenty-six counts of Burglary, twenty-four as Class B felonies and two as Class C felonies,[1] and one count each of Theft, a Class D felony,[2] Robbery while Armed with a Deadly Weapon, a Class B felony,[3] Attempted Burglary, a Class B felony,[4] Robbery, a Class C felony,[5] Resisting Law Enforcement, a Class D felony,[6] False Registration, a Class C infraction,[7] Reckless Driving, a Class B misdemeanor,[8] and Driving While Suspended, a Class A infraction.[9] We affirm.

Issues

Kierstead presents two issues for review:

I. Whether the sentence was imposed in violation of Blakely v. Washington, 542 U.S. 296 (2004), reh'g denied; and

II. Whether the sentence is inappropriate.

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[1] Ind. Code § 35-43-2-1.

[2] Ind. Code § 35-43-4-2.

[3] Ind. Code § 35-42-5-1.

[4] Ind. Code § 35-43-2-1; § 35-41-5-1.

[5] Ind. Code § 35-42-5-1.

[6] Ind. Code § 35-44-3-3.

[7] Ind. Code § 9-18-2-27.

[8] Ind. Code § 9-21-8-52.

[9] Ind. Code § 9-24-19-1.

Facts and Procedural History

On January 15, 2001, seventy-two-year-old Doseena Pearcy ("Pearcy") discovered Kirstead in the living room of her Jonesboro residence and demanded to know, "what are you doing in this house?" (Tr. 60). Kirstead responded that he was robbing Pearcy, and she declared, "no you ain't you son of a b----." (Tr. 60) Pearcy and her friend Donald Hall ("Hall") tackled Kirstead and all three fell together onto the sofa, breaking it. Hall got an arm around Kirstead's neck and Pearcy "straddled him" and "got him in the privates." (Tr. 61.) Pearcy and Hall restrained Kierstead in this manner while Pearcy called the police. Kierstead broke free and ran outside the house, leaving his shirt behind. He fled in a gray Camaro.

Meanwhile, Jonesboro police officers were across the street investigating a series of burglaries. When they received a dispatch regarding the break-in at Pearcy's home, they gave chase to a gray Camaro with a shirtless driver. The driver, later identified as Kierstead, ignored the emergency lights and sirens but he eventually lost control of the vehicle. It turned sideways and was forced to come to a stop. Kierstead then fled on foot, but was soon apprehended. After his apprehension, Kierstead confessed to numerous other recent burglaries in the area.

On January 15, 2001, the State charged Kierstead with Reckless Driving, False or Fictitious Registration, and Driving While Suspended. On January 18, 2001, the State charged Kierstead with four counts of Burglary, Burglary Resulting in Bodily Injury, a Class A felony, and Resisting Law Enforcement. On February 21, 2001, the State charged

Kierstead with twenty-one additional counts of Burglary, and one count each of Attempted Burglary, Robbery while Armed with a Deadly Weapon, Robbery and Theft.

On April 5, 2002, Kierstead pleaded guilty to all counts against him, except for the Class A felony Burglary. On May 10, 2002, Kierstead pleaded guilty to a reduced charge of Class B felony Burglary on that count. Sentencing was left to the discretion of the trial court.

On June 7, 2002, the trial court sentenced Kierstead to twenty years imprisonment for each of the Class B felony Burglary convictions and for the Class B felony Attempted Burglary conviction, all to be served concurrently. Kierstead was also sentenced to serve three years for the Resisting Law Enforcement conviction, 180 days for the Reckless Driving conviction, eight years for each of the Class C felony Burglary convictions (to be served concurrently), three years for the Theft conviction, twenty years for the Robbery while Armed with a Deadly Weapon conviction, and eight years for the Robbery conviction. The trial court then ordered that all sentences not specifically designated as concurrent would be served consecutively, for a total aggregate sentence of sixty-two years and 180 days.

On March 17, 2006, Kierstead filed his Motion for Leave of Court to File a Belated Notice of Appeal. On April 7, 2006, the trial court granted the motion. Kierstead filed his Notice of Appeal on April 12, 2006.

Discussion and Decision

I. Right to Jury Determination of Aggravating Circumstance

At the time Kierstead was sentenced, Indiana Code Section 35-50-2-5 provided that a person who committed a Class B felony should be imprisoned for a fixed term of ten years,

with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances. Indiana Code Section 35-50-2-6 provided that a person who committed a Class C felony should be imprisoned for a fixed term of four (4) years, with not more than four (4) years added for aggravating circumstances and not more than two (2) years subtracted for mitigating circumstances. Indiana Code Section 35-50-2-7 provided that a person who committed a Class D felony should be imprisoned for a fixed term of one and one-half years, with not more than one and one-half years added for aggravating circumstances and not more than one (1) year subtracted for mitigating circumstances.

In sentencing Kierstead, the trial court found as aggravators: (1) Kierstead's history of delinquent activity, (2) his need for long-term correctional treatment in light of the failure of juvenile reformative measures, (3) many of his victims were aged sixty-five or older, (4) Kierstead admitted to extensive drug and alcohol abuse, but failed to seek treatment and (5) Kierstead lacked desire for gainful employment. The trial court found Kierstead's young age and cooperation with authorities to be mitigating circumstances.

Kierstead now contends that the trial court's finding of each of the aggravators, with the exception of the history of delinquent activity, is in violation of his Sixth Amendment right to have a jury determine whether or not there existed aggravating circumstances to support his sentence enhancement, according to Blakely.[10] The Blakely court applied the rule

[10] The State argues that Kierstead cannot invoke Blakely because his sentencing hearing was conducted in 2002. We disagree. The Indiana Supreme Court's rule that precludes retroactive application of new criminal rules to collateral proceedings does not apply to direct appeals brought pursuant to Post-Conviction Rule 2.

set forth in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." The Blakely court defined the relevant statutory maximum for Apprendi purposes as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."

In Smylie, our Supreme Court applied Blakely to invalidate portions of Indiana's sentencing scheme that allowed a trial court, without the aid of a jury or a waiver by the defendant, to enhance a sentence where certain factors were present. Our Indiana Supreme Court has determined that a sentence may be enhanced upon facts that "are 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 has

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Sullivan v. State, 836 N.E.2d 1031, 1035 (Ind. Ct. App. 2005) (citing Fosha v. State, 747 N.E.2d 549, 552 (Ind.2001) (holding that defendant's claim based on Richardson v. State, 717 N.E.2d 32 (Ind. 1999), would be considered on the merits, where defendant was convicted in 1993 and did not originally timely file a direct appeal but in 1999 was granted permission to file a belated appeal)). "New rules for the conduct of criminal prosecutions are to be applied retroactively to cases pending on direct review or not yet final when the new rules are announced." Powell v. State, 574 N.E.2d 331, 333 (Ind. Ct. App.1991), trans. denied. Post-Conviction Rule 2(1) provides in pertinent part: "If the trial court finds grounds, it shall permit the defendant to file the belated notice of appeal, which notice of appeal shall be treated for all purposes as if filed within the prescribed period." (emphasis added.) Because Kierstead was given permission to file this belated direct appeal, he may rely on Blakely even though he was sentenced before it was decided because his case was "not yet final" when Blakely was decided. See Smylie v. State, 823 N.E.2d 679, 690-91 (Ind. 2005), cert. denied, 126 S. Ct. 545 (2005) (holding that defendants sentenced before Blakely was handed down, but whose appeals were "on direct review" on that date, may raise a Sixth Amendment challenge to his or her sentence for the first time on appeal). See also Gutermuth v. State, 848 N.E.2d 716 (Ind. Ct. App. 2006) (concluding that the appellant bringing a belated direct appeal was entitled to the retroactive application of Blakely because his case was not yet final when Blakely was decided), trans. granted. But see Hull v. State, 839 N.E.2d 1250, 1256 (Ind. Ct. App. 2005) and Robbins v. State, 839 N.E.2d 1196, 1199 (Ind. Ct. App. 2005).

waived Apprendi rights and stipulated to certain facts or consented to judicial factfinding." Trusley v. State, 829 N.E.2d 923, 925 (Ind. 2005).

Kierstead does not contest his history of juvenile delinquency, including four offenses that would be felonies if committed by an adult, and four probation violations. In Ryle v. State, 842 N.E.2d 320 (Ind. 2005), the Indiana Supreme Court concluded that juvenile adjudications, like prior convictions, do not implicate Blakely. Nonetheless, the trial court may not impose an enhanced sentence because the defendant is both in need of rehabilitation and has a criminal history. See, e.g., Morgan v. State, 829 N.E.2d 12, 17-18 (Ind. 2005). Thus, the second aggravator is not permissible under Blakely for additional sentence enhancement.

The findings with regard to substance abuse, age of the victims, and rejection of employment are apparently derived from the presentence investigator's interview with Kierstead. The State urges that we consider these to be Kierstead's admissions because he did not contest the accuracy of the presentence report when provided the opportunity to do so at the sentencing hearing. Separate panels of this Court have held that, if a defendant confirms the accuracy of a presentence report when given an opportunity to contest it, such confirmation amounts to an admission for Blakely purposes. See Sullivan v. State, 836 N.E.2d 1031, 1036 (Ind. Ct. App. 2005); Carmona v. State, 827 N.E.2d 588, 596-97 (Ind. Ct. App. 2005); but see Vela v. State, 832 N.E.2d 610, 613-14 (Ind. Ct. App. 2005) (holding defendant's acknowledgment that presentence report was correct did not constitute admission sufficient to support an aggravator based on the nature and circumstances of the crime). Our

review of the presentence report and the argument of Kierstead's counsel at the sentencing hearing lead us to conclude that Kierstead clearly admitted to extensive substance abuse and targeting elderly victims. The repudiation of employment is not equally as apparent. Kierstead described himself to the presentence investigator as "being too lazy to get a job" but he also reported several past jobs. (Tr. 118.)

When one or more aggravating circumstances cited by the trial court are invalid, the court on appeal must decide whether the remaining circumstance or circumstances are sufficient to support the sentence imposed. Merlington v. State, 814 N.E.2d 269, 273 (Ind. 2004). We may affirm if sentencing error is harmless. Id. Our Indiana Supreme Court has observed that one valid aggravating circumstance adequately supports ordering consecutive sentences, and Blakely is not implicated by the trial court's decision to impose consecutive sentences. See Williams v. State, 827 N.E.2d 1127, 1128 (Ind. 2005). Accordingly, if the trial court's consideration of some facts permissible under Blakely, together with non-permissible facts, leads to the imposition of an aggregate term that could have been imposed as consecutive sentences, the sentencing error is harmless. Here, Kierstead could have received consecutive sentences amounting to hundreds of years. In light of Kierstead's history of delinquency, and the multitude of current offenses, we can say with confidence that the trial court would have imposed the same sentence absent consideration of Kierstead's "need for correctional treatment" as a separate aggravator. A remand for the consideration of only Blakely-permissible facts is not required.

II. Appropriateness of Sentence

Kierstead also argues that his sentence is inappropriate in light of his character and the nature of the offenses. In particular, he points out that he cooperated with authorities and confessed to more than twenty unsolved burglaries in Grant County.

Indiana Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender."

Concerning the nature of the instant offenses, we observe that Kierstead invaded dozens of homes, and targeted elderly victims in particular. He used violence on one victim, beating her in the head with a B-B gun, and threatened others. He used the proceeds of his burglaries and thefts to fund his abuse of crack cocaine and other substances. The character of the offender is such that prior rehabilitative efforts failed. He was adjudicated a delinquent on four occasions for committing acts that would be burglary and theft if committed by an adult. On four occasions, he violated the terms of his juvenile probation. It is true that Kierstead confessed to unsolved crimes. It is also clear, however, that Kierstead had already been implicated in at least some of the burglaries. Moreover, he received concurrent sentences for the majority of the additional burglaries. We are not persuaded that he is entitled to an additional sentencing benefit.

In light of the failure of prior rehabilitative efforts, and the number of similar offenses, we do not find Kierstead's sentence inappropriate.

Conclusion

Kierstead has not demonstrated that the trial court erred in imposing sentence upon him or that his sentence is inappropriate.

Affirmed.

RILEY, J., concurs.

MAY, J., concurs in result.