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IN THE
COURT OF APPEALS OF INDIANA

JOHNNY A. NEWSOME,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 35A02-0605-CR-402
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HUNTINGTON CIRCUIT COURT
The Honorable Mark A. McIntosh, Judge
Cause No. 35C01-0510-FB-62
Cause No. 35C01-0510-FB-70

December 12, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Johnny A. Newsome appeals from the sentence imposed by the trial court following his guilty plea to seven counts of Burglary,[1] a class B felony, Escape,[2] a class B felony, Robbery,[3] a class B felony, and two counts of Battery,[4] a class D felony. Specifically, he argues that the sentences imposed for his burglary, escape, and robbery convictions are inappropriate in light of the nature of the offenses and his character. Finding no error, we affirm the judgment of the trial court.

FACTS

On July 31, 2005, Newsome broke a window in Andrew Norman's home in Huntington County and stole DVDs, a VCR, tools, some loose change, and personal religious items considered to be irreplaceable by Norman. Norman valued his losses at $2875. That same day, Newsome kicked in the back door of Gary Will's home and stole money, a DVD player, and some guns. Will valued his losses at $2275.62.

On August 3, 2005, Newsome kicked in a garage door at Jeffrey Scher's residence and took a cash box containing cash and miscellaneous silver coins. Scher valued the losses not covered by insurance at $1061.25. That same day, Newsome forced open a window in Philip Graves's garage and stole a VCR, video camera containing a video of sentimental value, digital camera, laptop computer containing irreplaceable family photos, shotgun, and

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[1] Ind. Code § 35-43-2-1.

[2] Ind. Code § 35-44-3-5.

[3] Ind. Code § 35-42-5-1.

[4] I.C. § 35-42-2-1.

DVD/VCR player. Graves asked for restitution of $632 to cover his insurance deductible and his wife's lost wages.

On August 5, 2005, Newsome kicked in the door of Pam Wolfe's home, ransacked the dwelling, and stole tools, jewelry, police scanners, and other personal items.

On August 10, 2005, Newsome kicked in the door of Tony Little's home, ransacked the garage, and stole several guns, a DVD/VCR player, and a large safe. Little asked for $1000 as a reimbursement for his insurance deductible and stated that his insurance claim was $3334.06.

On August 14, 2005, Newsome kicked in the door of Louis Walker's residence. He ransacked the home, upset a fish tank, and stole a rifle, tools, assorted change, and other property. The Walkers valued the damage to their property at $15,195.48.

On October 4, 2005, the State charged Newsome with seven counts of class B felony burglary. On October 8, 2005, Newsome was in the Huntington County Jail on an unrelated theft charge. He and another inmate, Jance Twigg-Jackson, planned an escape from the jail. The two men each had shanks and called James Bickel, a jailer, to their cell. After Bickel approached their cell, Twigg-Jackson held a shank to Bickel's throat and directed him to follow their orders. Twigg-Jackson and Newsome then forced Bickel to the floor, handcuffed him, tied his legs, and stole his billfold, the cash inside the billfold, and Bickel's keychain. The two inmates used Bickel's keys to escape the cell block. Another jailer, Donetta Stanley, tried to keep them from escaping, but Twigg-Jackson and Newsome

struggled with and overpowered her, ultimately escaping the jail. They were eventually apprehended in a neighboring house.

On October 17, 2005, the State charged Newsome with class B felony escape, class B felony robbery, class D felony residential entry, and two counts of class D felony battery. On December 19, 2005, Newsome pleaded guilty to seven counts of class B felony burglary, class B felony escape, class B felony robbery, and two counts of class D felony battery.[5] Although the plea agreement did not specify a sentence, it provided that Newsome would serve the sentences for the seven counts of burglary concurrently and the sentences for the escape, robbery, and two counts of battery concurrently. The concurrent sentence for the burglaries would be served consecutively to the concurrent sentence for the remaining crimes.

At a sentencing hearing held on January 23, 2006, the trial court found the following aggravating factors: (1) Newsome's criminal history, which is "as lengthy as any the Court has ever seen," appellant's app. p. 11; (2) the seriousness of the crime of burglary of residential homes; and (3) the mental anguish and fear suffered by the victims. The trial court found the following mitigating circumstances: (1) Newsome's remorse; (2) his guilty plea; and (3) the fact that he had a minor child to support. Finding that the aggravators outweighed the mitigators, the trial court sentenced Newsome to twenty years on each count of burglary, twenty years each for escape and robbery, and eighteen months for each count of

[5] Newsome's plea agreement accounted for the charges stemming from his burglary spree and from his jail escape, although the two sets of incidents were assigned different cause numbers below. On appeal, the two cause numbers have been consolidated.

battery. In accordance with the plea agreement, the sentences for burglary were to be served concurrent to each other and consecutively to the concurrent sentences for escape, robbery, and battery, resulting in an aggregate forty-year sentence. Newsome now appeals.

DISCUSSION AND DECISION

I. New Sentencing Statutes

Newsome argues that the sentences imposed by the trial court for his burglary, escape, and robbery convictions are inappropriate in light of the nature of the offenses and his character. Before addressing the merits of Newsome's claims, we observe that on April 25, 2005, the General Assembly amended Indiana's felony sentencing statutes, which now provide that the person convicted is to be sentenced to a term within a range of years, with an "advisory sentence" somewhere between the minimum and maximum terms. See Ind. Code §§ 35-50-2-3 to -7. As it calculates the sentence to impose on a defendant, the trial court "may consider" certain enumerated aggravating and mitigating circumstances in addition to other matters not listed in the statute. Id. §§ 35-38-1-7.1(a) to -7.1(c). Furthermore, the legislature provided that a trial court "may impose any sentence that is . . . authorized by statute . . . regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Id. at -7.1(d) (emphasis added).

In examining the new sentencing statutes, we conclude that if a trial court chooses to impose a sentence greater than the advisory term, it is not required to make findings as to the existence of mitigating or aggravating factors. If it does identify aggravators and/or

mitigators, however, the trial court must simply state its reasons on the record for choosing the particular sentence that departs from the advisory term. I.C. § 35-38-1-3(3).

Moreover, under the new sentencing scheme, a defendant may no longer claim that a trial court abused its discretion under statutory guidelines in imposing the sentence. Because we can no longer reverse a sentence because a trial court improperly found and/or weighed aggravating and mitigating circumstances, our review is now confined to an analysis under Indiana Appellate Rule 7(B): "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." We also observe, however, that we are entitled to consider, among other things, aggravating and mitigating factors found—or not found—by the trial court as we conduct a Rule 7(B) review. See, e.g., Prowell v. State, 787 N.E.2d 997, 1005 (Ind. Ct. App. 2003) (considering statutory aggravators and mitigators as part of an analysis of the character of the offender); Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003) (same).

II. Newsome's Sentences

Newsome argues that the sentences imposed by the trial court for his convictions for seven counts of burglary, escape, and robbery,[6] all class B felonies,[7] are inappropriate in light of the nature of the offenses and his character. In particular, he contends that the trial court

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[6] Newsome does not challenge the eighteen-month sentences imposed by the trial court for each of his two battery convictions.

[7] Indiana Code section 35-50-2-5 provides, in pertinent part, that "[a] person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence

considered improper aggravators and erred in weighing the aggravators and mitigators. But as noted above, under the new statutory scheme, a trial court may not abuse its discretion in considering and weighing aggravators and mitigators because it is free to impose any sentence authorized by statute. We may consider any aggravators and mitigators found by the trial court, however, along with any other evidence apparent from the record, in determining whether Newsome's sentences comported with Rule 7(B).

Turning first to the nature of the offenses, we observe that Newsome went on a fifteen-day crime spree, breaking into seven homes and stealing possessions from their owners. Some of the possessions that Newsome stole are personal and irreplaceable items of great sentimental value to the victims. Moreover, he did extensive and unwarranted damage to their homes. The Walkers, in particular, suffered over $15,000 of property damage.

Additionally, the victims have been traumatized by the burglaries. Louis Walker is legally blind and has lost many nights of sleep jumping at every sound, wondering if someone was breaking into his home. The Graves live in constant fear that someone else will break into their home. Jeff Scher lost sleep for several months, watching every car that drove by his house and double-checking his locks every night. Andrew Norman does not feel safe in his own home. Moreover, Newsome agreed with a fellow inmate to accost a jailer with a dangerous weapon, bind the jailer, steal his possessions, and escape from the jail. It is

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being ten (10) years." The trial court imposed twenty-year sentences on Newsome for each of his convictions for seven counts of burglary, robbery, and escape.

apparent that the cumulative nature of these offenses alone is sufficient to justify the sentences imposed by the trial court.

As to Newsome's character, we first note that his criminal history contains juvenile adjudications and convictions for intimidation, confinement, and two misdemeanors. Appellee's Br. p. 11. Indeed, the trial court specifically noted that Newsome's criminal history "is as lengthy as any the Court has ever seen." Tr. p. 81.

Newsome argues that we should assign significance to the fact that he voluntarily pleaded guilty to the instant offenses. But he received a substantial benefit for his guilty plea. Had Newsome been convicted on all seven counts of class B felony burglary charges without the benefit of the provision of the plea agreement requiring that those sentences be served concurrently, he would have faced up to 140 years in prison. Additionally, he would have faced up to 50 years in prison for the charges stemming from his escape from jail. Rather than being sentenced to an aggregate term of 190 years, however, Newsome pleaded guilty and is instead facing an aggregate 40-year sentence. Under these circumstances, we decline to consider his guilty plea to weigh significantly in his favor as we examine his character.

Together with the nature of the offenses committed herein, Newsome's criminal history reveals a person with a marked disrespect for the criminal justice system, for his fellow human beings, and for his minor child, whose care and upbringing have taken a distant second place to Newsome's criminal activity. Under these circumstances, we conclude that

Newsome's sentence was not inappropriate in light of the nature of the offenses and his character.

The judgment of the trial court is affirmed.

CRONE, J., concurs.

VAIDIK, J., concurs in result with opinion.

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STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	
	)	

VAIDIK, Judge, concurring in result

In this appeal, Newsome contends that his sentence is inappropriate. One of his arguments is that the trial court abused its discretion in finding as an aggravating circumstance the fact that Newsome burglarized residential homes. The majority does not address this argument in its opinion, finding that appellate review of sentences is now limited to Indiana Appellate Rule 7(B) and that under our new sentencing statutes, "a trial court may not abuse its discretion in considering and weighing aggravators and mitigators because it is free to impose any sentence authorized by statute." Slip op. at 7. While I agree that the language of the new sentencing statutes serves to restrict our review of sentences to Appellate Rule 7(B), I would hold that such a review allows for claims that the trial court

abused its discretion in finding, weighing, and balancing aggravating and mitigating circumstances. However, for reasons discussed below, I agree with the majority that Newsome's sentence is not inappropriate. Therefore, I concur in result.

Another panel of this Court recently held, in an opinion written by this author, that "Indiana's appellate courts can no longer *reverse* a sentence because the trial court abused its discretion by improperly finding and weighing aggravating and mitigating circumstances[.]" *McMahon v. State*, No. 79A02-0603-CR-170, --- N.E.2d ---, slip op. at 9 (Ind. Ct. App. Nov. 13, 2006) (emphasis added). We added, however, that "our established 'inappropriateness' standard is sufficiently flexible to allow for consideration of those circumstances on appeal." *Id*. At the end of the day, our task under Appellate Rule 7(B) is not to determine the *appropriate* sentence, but to determine whether the *trial court* has imposed an *inappropriate* sentence. In doing so, our main focus must be on the factors the trial court considered in determining that sentence.

Even as amended, Indiana Code § 35-38-1-7.1 provides that a trial court "may consider" several enumerated aggravating and mitigating circumstances, along with factors not enumerated in the statute, in determining a defendant's sentence. In finding aggravating circumstances, refusing to find mitigating circumstances, and weighing and balancing those circumstances, a trial court necessarily exercises discretion. Therefore, while the ultimate question for us on appeal is whether a sentence is "inappropriate," that determination will often require us to review the trial court's exercise of its sentencing discretion. In such cases, the familiar abuse of discretion standard should apply. Another panel of this Court has

already held as much in discussing the new sentencing statutes. *Samaniego-Hernandez v. State*, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) ("[W]here the trial court at sentencing hears evidence of aggravators and mitigators, we will review these findings for an abuse of discretion.").

Turning to the facts of this case, I would hold that the trial court abused its discretion in finding as an aggravating circumstance the fact that the buildings that Newsome burglarized were homes. Indiana Code § 35-43-2-1 already recognizes the seriousness of home burglaries, making the burglary of a "dwelling" a Class B felony while making the burglary of most other structures (except those used for religious worship) a Class C felony. Therefore, Newsome is correct that the trial court relied upon an element of the crime as an aggravating circumstance. This was an abuse of discretion. *See Scott v. State*, 840 N.E.2d 376, 382 (Ind. Ct. App. 2006) ("[A] court may not use a factor constituting a material element of an offense as an aggravating circumstance[.]"), *trans. denied*.

Nonetheless, I agree with the majority that Newsome's sentence is not inappropriate. Newsome does not challenge the other two aggravating circumstances found by the trial court—his lengthy criminal history and the mental anguish and fear suffered by his victims—and I cannot say that Newsome's cumulative forty-year sentence is otherwise inappropriate.