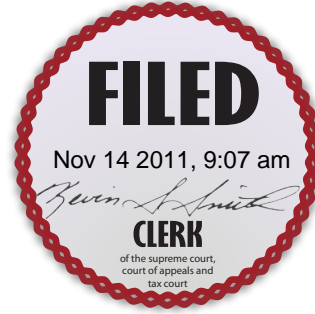


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JAMES A. SMITH,

Appellant- Defendant,

vs.

STATE OF INDIANA,

Appellee- Plaintiff,

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No. 40A01-1103-CR-122

APPEAL FROM THE JENNINGS CIRCUIT COURT
The Honorable Jon W. Webster, Judge
Cause No. 40C01-1001-MR-009

November 14, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issue

James Smith and two other inmates unsuccessfully attempted to escape from jail, attacking and handcuffing three jailers in the process. Smith pleaded guilty to attempted murder and kidnapping, both Class A felonies, and two counts of battery, Class C felonies. The trial court sentenced him to thirty-five years for both attempted murder and kidnapping, with five years suspended for each, and six years for each count of battery, with two years suspended for each. It ordered Smith to serve his sentences for attempted murder, kidnapping, and one count of battery consecutively, with the second count of battery concurrently, for an aggregate sentence of seventy-six years executed and twelve years suspended. Smith raises two issues for our review, which we restate as whether the trial court abused its discretion by using improper aggravating circumstances, and whether his sentence is inappropriate in light of the nature of his offenses and his character. Concluding the trial court did not abuse its discretion and Smith's sentence is not inappropriate, we affirm.

Facts and Procedural History

While incarcerated in the Jennings County Jail, Smith shared a cell with Roger Bushhorn. Ryan Renfro was in the cell next to theirs. In October 2009, the three men attempted to escape. They had been planning the escape for several days, and the weekend before, while Bushhorn was distracting guards, Smith stole a laundry bag and stored it in his cell. Smith and Bushhorn then removed a metal rod from the bag, broke it into pieces, and sharpened the ends. Although they originally planned to use the "shanks" to dig through their cell walls, after that plan failed they decided to use the shanks as weapons against jail guards.

On the evening of the escape attempt, Jailer Vickie Day was alone in the book-in area just outside their cells when Bushhorn called Day over to his cell and asked her to empty his trash. Smith attacked her before she could finish and lock their cell. He forced her to the ground, held a shank to her throat, and threatened to kill her. Bushhorn stole Day's keys, released Renfro from his cell, and retrieved handcuffs and chemical spray from the guard's book-in area. Bushhorn sprayed chemical spray in Day's face and handcuffed her. Then they dragged Day by her hair to a hallway that leads to an exit from the jail. Using a walkie-talkie, Bushhorn and Renfro attempted to persuade other guards to open the doors and allow them to exit, threatening to kill Day if the other guards did not cooperate. Despite the threats, the guards would not open the doors. Around this time, Smith stabbed Day "in her lower torso area." Transcript at 50. Jailers Peace and McDaniels then entered the hallway, and Smith punched McDaniels in the face and stabbed Peace in the head, causing a hemorrhage in Peace's brain. A struggle ensued, and eventually the three inmates handcuffed all three officers. Soon thereafter, several officers poured in, and the inmates unsuccessfully attempted to use the three handcuffed guards as shields. They were thereafter apprehended.

Day suffered several stab wounds to her legs and other minor injuries to her back and wrists. Peace endured a severe eye injury and brain hemorrhage. McDaniel suffered a stab wound to an arm and minor injuries to his chest, face, and wrists. After the State charged Smith with twelve offenses, Smith pleaded guilty to the attempted murder of Peace and the kidnapping of Day, both Class A felonies, and to two counts of battery, Class C felonies. The trial court sentenced Smith to the Department of Correction for thirty-five years with five years suspended for both attempted murder and kidnapping,

and six years with two years suspended for each battery offense. It ordered the sentences for attempted murder, kidnapping and one count of battery to be served consecutively, and the second count of battery to be served concurrently, for an aggregate sentence of seventy-six years executed and twelve years suspended. Smith now appeals his sentence.

Discussion and Decision

I. Abuse of Discretion

Generally, sentencing determinations are within the trial court's discretion. McElroy v. State, 865 N.E.2d 584, 588 (Ind. 2007). We review the trial court's sentencing decision for an abuse of that discretion. Id. An abuse of discretion has occurred when the sentencing decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. Id. A trial court may abuse its discretion in sentencing by failing to enter a sentencing statement, entering a sentencing statement that explains reasons for imposing a sentence which the record does not support, omitting reasons that are clearly supported by the record and advanced for consideration, or giving reasons that are improper as a matter of law. Anglemyer v. State, 868 N.E.2d 482, 490-91 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007).

Smith argues the trial court abused its discretion by using improper aggravating circumstances. In its sentencing order, the trial court found the following aggravating circumstances:

[T]he Defendant has no high school diploma or GED certificate; the Defendant has one (1) formal juvenile delinquency adjudication for escape; the Defendant was incarcerated at the time of these crimes; there is evidence the escape attempt was well planned and devised including the preparation of deadly weapons; there were multiple opportunities to retreat

and terminate the attack and the Defendant did not do so; one victim was a physically weaker, more vulnerable female; and the attack literally was less than one (1) inch from a murder on one of the victims.

Appendix of Appellant at 62-63. First, Smith contends the trial court should not have used his juvenile delinquency adjudication for escaping from a group home. He argues his escape from a group home was too dissimilar from the escape attempt now at issue, making it an abuse of discretion for the trial court to consider the juvenile adjudication in determining his sentence.

In Wooley v. State, 716 N.E.2d 919, 929 (Ind. 1999), our supreme court concluded that a single conviction for driving while intoxicated was not a significant aggravator in the context of a sentence for murder. It also noted that the significance of potentially aggravating prior adjudications “varies based on the gravity, nature and number of prior offenses as they relate to the current offense.” Id. at 929 n.4. Although Smith’s escape from a group home may not have been an escape from a secured facility, unlike the vast difference between driving while intoxicated and murder in Wooley, Smith’s prior adjudication relates to the nature of his actions here at issue. Given the similar nature of escaping from a group home and attempting to escape from jail, the trial court was within its discretion to consider his prior escape an aggravating factor.

Second, Smith argues the trial court should not have considered the well-planned nature of the escape attempt as an aggravating factor in his sentencing because the evidence shows Bushhorn planned the entire escape attempt. As the State points out, the trial court considered as a mitigating factor that “there was some evidence the Defendant was following the lead of another older inmate.” App. of Appellant at 63. Further, Smith was not completely left out of planning the escape attempt. He was the one who stole a

laundry bag in order to retrieve the metal rod that ultimately became weapons. The trial court did not abuse its discretion in considering this an aggravating circumstance.

Third, Smith contends the trial court abused its discretion by considering that Day was a smaller and weaker female as an aggravating circumstance. He argues there was no evidence to support this factor. This is incorrect. As the State contends, security video from the jail was shown at Smith's sentencing hearing, revealing Day and everyone else involved in the incident. This is sufficient evidence for the trial court to determine Day was smaller and weaker than the attackers based on her stature in the video, and the trial court did not abuse its discretion in considering this an aggravating circumstance.

II. Inappropriateness

We “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.” Ind. Appellate Rule 7(B). In performing our review, we examine “the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case.” Cardwell v. State, 895 N.E.2d 1219, 1224 (Ind. 2008). A defendant bears the burden of persuading us that his or her sentence is inappropriate. Anglemyer, 868 N.E.2d at 494.

Pursuant to statute, the sentencing range for a Class A felony is twenty to fifty years, with an advisory sentence of thirty years,¹ and the range for a Class C felony is two to eight years, with an advisory sentence of four years.² In regard to the nature of

¹ Ind. Code § 35-50-2-4.

² Ind. Code § 35-50-2-6.

Smith's offenses, he attempts to argue the attempted murder offense was "not as catastrophic as in other attempted murder cases" because jailers Peace and McDaniel returned to work within a short time after the attacks. Appellant's Brief at 17. As the trial court found, however, the escape attempt was well planned and Smith was an active participant in its planning and execution, Smith had multiple opportunities to terminate the escape attempt and attacks but did not, one victim was smaller and weaker in stature, and Smith was within inches of killing Peace when he stabbed him in the head with a shank. Smith may be correct that the result of his attempted murder was not as catastrophic as in other attempted murder cases, but Smith only received a thirty-five year sentence. While that may be slightly enhanced from the advisory sentence of thirty years, it is considerably less than the maximum fifty-year sentence allowed under statute.

As to the character of the offender, Smith argues he experienced a lack of upbringing as a child, has mental health issues and drug addictions, has "never participated in an escape attempt like this despite having been placed in a secure detention facility," was merely used as a pawn in the escape attempt by an older and more experienced inmate, and he apologized to the victims and took responsibility for his actions. *Id.* at 15-16.

While we sympathize with Smith for his lack of a childhood and do not refute the claims he makes, we do not find any of these factors particularly persuasive regarding the appropriateness of his sentence. A disadvantaged childhood is a travesty that occurs all too often in our society, but it does not significantly ameliorate the negative aspects of Smith's character or actions. His mental health problems are relevant to his sentence, but a sentence slightly elevated above the advisory sentence is not incongruent with his

mental health issues when considering the circumstances of his offenses. While a prior escape attempt from a secured facility would certainly be an aggravating circumstance, it is of very little import that he has not previously attempted to escape from a secured facility. Prior criminal history is relevant as a whole, but not having committed a specific offense in the past does not automatically become a mitigating circumstance.

Further, Smith's criminal history does not benefit his argument concerning his character. He previously escaped from a home where he was ordered to stay. He had informal adjudications for theft and battery. At the time of Smith's escape attempt, he was incarcerated for robbing his grandmother. While it may be true that Bushhorn was more involved in planning the escape than Smith, Smith was the one who was the most involved in the execution of the plan. Smith initially attacked Day and threatened to kill her, then he stabbed Day in her leg repeatedly. Smith punched McDaniels in the face and stabbed Peace in the head, causing a hemorrhage in his brain. Smith took part in handcuffing the guards and using them as defensive shields. Even if Smith was less involved in planning the escape, as he argues, he took a lead role in the plan's execution and his actions reveal he was much more than a "pawn" in the plan.

While Smith did take responsibility for his actions by pleading guilty and apologizing to the victims, he did so in exchange for the State dropping several charges. This negates the significance of his accepting responsibility because he benefitted from doing so. In summary, examining the nature of the offenses and character of the offender, we conclude any factors that support Smith's claim that his sentence was inappropriate are already accounted for by his only slightly-elevated sentence. His sentence was not inappropriate.

Conclusion

The aggravating circumstances used by the trial court were not improper and thus are not an abuse of discretion, and Smith's sentence was not inappropriate in light of the nature of his offenses and character. We therefore affirm the trial court's sentence.

Affirmed.

BARNES, J., and BRADFORD, J., concur.