ATTORNEY FOR APPELLANT:

MICHAEL R. AUGER
Jones Auger & Auger
Franklin, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ZACHARY J. STOCK
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

KEVIN ECKSTEIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 41A04-0707-CR-364
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE JOHNSON SUPERIOR COURT
The Honorable Cynthia S. Emkes, Judge
Cause No. 41D02-0604-FC-10

November 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Kevin Eckstein appeals his sentences for Corrupt Business Influence,[1] Theft,[2] and two counts of Forgery,[3] all as Class C felonies. We revise and remand.

Issues

Eckstein raises four issues on appeal, which we consolidate and re-state as:

I. Whether the trial court abused its discretion in imposing consecutive sentences; and

II. Whether Eckstein's sentence is inappropriate.

Facts and Procedural History

Eckstein worked as a commercial loan officer at Lincoln Bank. A compulsive gambler, he acquired between $130,000 and $150,000 in debt by gambling on sports and at riverboats. Through twenty acts from July of 2004 through November of 2005, he "stole money from the bank" amounting to $198,887.62. Transcript at 28. He accomplished his acts through the fraudulent use of cashier's checks, a loan to a customer, and a different customer's line of credit. He went "to some lengths to cover up [his] activity." Id. at 32. After Lincoln Bank found certain discrepancies, the bank's security officer, an auditor, and a detective from the Johnson County Sheriff's Office spent collectively 800 hours investigating Eckstein's conduct. Soon after his conduct was discovered, Eckstein's parents paid Lincoln

---

[1] Ind. Code § 35-45-6-2(2).

[2] Ind. Code § 35-43-4-2(a).

[3] Ind. Code § 35-43-5-2(b)(1).

Bank almost the entire amount owed.[4]

The State charged Eckstein with Corrupt Business Influence, Theft, and two counts of Forgery. Eckstein pled guilty as charged. The trial court accepted the plea agreement and found Eckstein guilty of all four counts. For each of the convictions, the trial court sentenced him to a seven-year term of imprisonment, with two years suspended. The four sentences were ordered to be served consecutively for an aggregate sentence of twenty-eight years. Finally, the trial court ordered Eckstein to pay $4246.80 in restitution to Lincoln Bank.

Eckstein now appeals his sentences.

Discussion and Decision

I. Consecutive Sentences

Eckstein argues that the trial court abused its discretion in imposing consecutive sentences, asserting that his acts constituted an episode of criminal conduct. In particular, he argues that the four sentences should not be consecutive because a "pattern of racketeering activity" is an element of one of his convictions, Corrupt Business Influence. See Ind. Code § 35-45-6-2(2). As relief, he asks this Court to reduce his aggregate sentence to ten years, the advisory sentence for a Class B felony.

The trial court must determine whether to impose concurrent or consecutive sentences. Ind. Code § 35-50-1-2(c). If the convictions constitute an "episode of criminal conduct," the total term of imprisonment "shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been

convicted." Id. An "episode of criminal conduct" means "offenses or a connected series of offenses that are closely related in time, place, and circumstance." Ind. Code § 35-50-1-2(b) (emphasis added).

Sentencing decisions lie within the sound discretion of the trial court, including the decision to impose consecutive sentences. Echols v. State, 722 N.E.2d 805, 808 (Ind. 2000). In applying the statutory definition of "episode of criminal conduct," this Court has emphasized the words "simultaneous" and "contemporaneous" within an ABA commentary on this subject. Tedlock v. State, 656 N.E.2d 273, 276 (Ind. Ct. App. 1995) (citing ABA Standard 12-2.2(a)). The Tedlock Court held that four acts of securities fraud committed over two years did not constitute an episode of criminal conduct. Id. Recent opinions of our Supreme Court have cited favorably the Tedlock Court's emphasis of the words "simultaneous" and "contemporaneous," as well as the significance of time in concluding whether criminal acts constitute an episode of criminal conduct. Harris v. State, 861 N.E.2d 1182, 1188 (Ind. 2007) (concluding sexual misconduct with two minors on same night was one episode); and Reed v. State, 856 N.E.2d 1189, 1200-01 (Ind. 2006) (analyzing three cases and noting that "the timing of the offenses dictated whether the offenses were or were not single episodes of criminal conduct").

Within the context of these facts, "pattern of racketeering activity" means engaging in at least two incidents of committing theft or forgery. Ind. Code § 35-45-6-1. Eckstein, however, admitted to stealing money from Lincoln Bank on "twenty separate occasions." Tr.

[4] At the sentencing hearing, Lincoln Bank employee Tammy Hall testified that the balance on that day was $4246.80, not including attorney fees for a related civil lawsuit amounting to $25,347.45.

at 28. This is significantly more than the two incidents of racketeering activity necessary to establish Corrupt Business Influence. Furthermore, we note that Eckstein's twenty acts occurred over the course of seventeen months. Given the time analysis that has been favored in analyzing episodes of criminal conduct, we are not persuaded by Eckstein's argument. See also Smith v. State, 770 N.E.2d 290, 294 (Ind. 2002) (concluding that the defendant's presentation of six bad checks at six different banks over the course of less than three hours did not constitute an episode of criminal conduct). The trial court did not abuse its discretion in imposing consecutive sentences.

II. Independent Review of Sentence[5]

Eckstein contends that his sentence is inappropriate. Under Indiana Appellate Rule 7(B), this "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." A defendant "'must persuade the appellate

---

[5] Eckstein also argues that the trial court abused its discretion in finding certain aggravating circumstances. However, a criminal defendant is limited to review of his sentence under Indiana Appellate Rule 7(B) "where the trial court has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing a particular sentence that is supported by the record, and the reasons are not improper as a matter of law." Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007), clarified on other grounds, 2007 WL 3151747 (Ind. Oct. 30, 2007). For the reasons noted below, we find the trial court was within its discretion to impose the sentence, but nevertheless we review the sentence under Indiana Appellate Rule 7(B).

First, Eckstein argues that it was improper to consider the amount of money stolen and the number of incidents as they were material elements of Theft and Corrupt Business Influence. "While a trial court may not use a factor constituting a material element of an offense as an aggravating circumstance, a court may look to the particularized circumstances of the criminal act." Henderson v. State, 769 N.E.2d 172, 180 (Ind. 2002) (citations omitted). Eckstein admitted to a Theft of greater than $100,000, a statutory element, and other acts amounting collectively to more than $198,000 in stolen funds. The charges required five acts (two forgeries, a theft, and two incidents of racketeering for Corrupt Business Influence), but Eckstein admitted to twenty occasions of criminal conduct.

court that his or her sentence has met th[e] inappropriateness standard of review.'" Anglemyer v. State, 868 N.E.2d 482, 494 (Ind. 2007) (quoting Childress v. State, 848 1073, 1080 (Ind. 2006)), clarified on other grounds, 2007 WL 3151747 (Ind. Oct. 30, 2007).

The nature of the crime is quite serious. Eckstein used his position of trust as a commercial loan officer to take almost $200,000. He committed twenty criminal acts that spanned seventeen months and included attempts to conceal his wrongdoing. That said, Theft and Forgery are material elements of Corrupt Business Influence. The four charges, however, constituted essentially a sampling of an ongoing scheme to defraud Lincoln Bank and its customers.

As to Eckstein's character, he voluntarily received counseling from Gamblers Anonymous, Alcoholics Anonymous, and a clinical psychologist upon the bank's discovery of his crimes. His psychologist concluded that there was "very little chance" he would repeat this type of behavior. Tr. at 53. He had one prior conviction, Operating while Intoxicated. Meanwhile, by the time of the sentencing hearing, Eckstein had acquired a sales job serving an employer who testified at the hearing. He and his wife were working to pay off their debts. Eckstein's parents had made almost complete restitution to Lincoln Bank. Although his actions required a great numbers of hours to investigate, his plea saved the State significant resources in preparing for and conducting what could have been a very detailed and complex trial. In light of the nature of the crimes and Eckstein's character, we revise his sentence for Theft to run concurrent with his sentence for Corrupt Business Influence,

---

Second, Eckstein asserts that his conviction of Operating while Intoxicated should not have been an aggravating circumstance. However, the trial court noted that it was not placing substantial weight on that

providing for an aggregate sentence of twenty-one years with six years suspended. In all other respects, the judgment is affirmed.

Conclusion

The trial court did not abuse its discretion in imposing consecutive sentences. However, based upon our review of the case and our consideration of the trial court's decision, we revise Eckstein's sentence to an aggregate of twenty-one years with six years suspended.

Revised and remanded.

BAKER, C.J., and VAIDIK, J., concur.

---

finding.