

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.

ATTORNEY FOR APPELLANT:

MARK A. BATES
Crown Point, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General Of Indiana

RYAN D. JOHANNINGSMEIER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ARMANDO J. VELASQUEZ,)

Appellant-Defendant,)

vs.)

No. 45A03-0512-CR-626

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Salvador Vasquez, Judge
Cause No. 45G01-0408-MR-7

November 29, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Armando Velasquez appeals his sentence for voluntary manslaughter, a Class B felony, after entering a plea agreement with the State under which he was sentenced to twelve years. On appeal, Velasquez raises one issue, which we restate as whether his sentence was proper and appropriate.¹ Concluding that the sentencing court properly determined and imposed an appropriate sentence, we affirm.

Facts and Procedural History

On June 13, 2004, Velasquez fired a handgun toward a car of rival gang members, missing it and killing a bystander. Velasquez entered into a plea agreement under which he pled guilty to voluntary manslaughter as a Class B felony in exchange for the State dropping other charges against him. On November 29, 2005, the sentencing court accepted the plea agreement, considered aggravating and mitigating circumstances, found the aggravators to outweigh the mitigators, and imposed a sentence of twelve years. This appeal followed.

Discussion and Decision

It is well settled that sentencing decisions are within the sentencing court's discretion and will be reversed only for an abuse of discretion. White v. State, 847 N.E.2d 1043, 1045 (Ind. Ct. App. 2006). Here, Velasquez committed the crime on June 13, 2004, and was convicted on November 29, 2005. Indiana amended its sentencing statutes during this

¹ Velasquez frames the issue as “[w]hether the sentence imposed by the trial court was inappropriate in light of the character of the offender and nature of the crime,” Brief of the Appellant at 1, but then argues only that the trial court improperly considered and weighed aggravating and mitigating circumstances. For this reason, we consider both whether the sentence imposed was proper in light of the aggravators and mitigators, as well as whether it was appropriate in light of Velasquez's character and the nature of his crime.

timeframe. Therefore, before considering the propriety of the sentencing court's decision, we must address which sentencing statute is applicable in this case.

Our legislature responded to Blakely v. Washington, 542 U.S. 296 (2004), by amending our sentencing statutes to replace “presumptive” sentences with “advisory” sentences, effective April 25, 2005. Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), trans. denied. Under the new advisory sentencing scheme, “a court may impose any sentence that is authorized by statute and permissible under the Indiana Constitution ‘regardless of the presence or absence of aggravating circumstances or mitigating circumstances.’” Id. (quoting Ind. Code § 35-38-1-7.1(d)). Thus, while under the previous presumptive sentencing scheme, a sentence must be supported by Blakely-appropriate aggravators and mitigators, under the new advisory sentencing scheme, a trial court may impose any sentence within the proper statutory range regardless of the presence or absence of aggravators or mitigators.

There is a split on this court as to whether the advisory sentencing scheme should be applied retroactively. Compare Settle v. State, 709 N.E.2d 34, 35 (Ind. Ct. App. 1999) (sentencing statute in effect at the time of the offense, rather than at the time of conviction or sentencing, controls) and Weaver, 845 N.E.2d at 1070 (concluding that application of advisory sentencing statute violates the prohibition against *ex post facto* laws if defendant was convicted before effective date of the advisory sentencing statutes but was sentenced after) with Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (concluding that change from presumptive sentences to advisory sentences is procedural

rather than substantive and therefore application of advisory sentencing scheme is proper when defendant is sentenced after effective date of amendment even though offense was committed before). Our supreme court has not yet had the opportunity to resolve this issue.

In this case, the outcome is the same regardless of which sentencing scheme is applied, and therefore we need not decide the issue of retroactivity herein.

A. Presumptive Sentencing Scheme

Prior to amendment of Indiana's sentencing scheme, Velasquez was subject to imprisonment "for a fixed term of ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances." Ind. Code § 35-50-2-5. Modification of the presumptive sentence based upon aggravating or mitigating circumstances requires the sentencing court to: (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate its evaluation and balancing of the circumstances. White, 847 N.E.2d at 1045.

Here, the sentencing court identified three mitigating factors: (1) "substantial grounds to give reason for the crime, though failing to establish a defense of self defense"; (2) Velasquez's guilty plea and admitted responsibility; and (3) Velasquez's age and his potential for rehabilitation. Appendix of the Appellant at 44. The sentencing court also identified three aggravating circumstances, including: (1) Velasquez was on probation at the time of the offense; (2) Velasquez's criminal history included an offense for carrying a gun without a license, for which he was given probation; and (3) Velasquez's possession and use

of a handgun to commit the crime. The aggravators were determined to outweigh the mitigators, resulting in an enhanced sentence.

Velasquez argues only that the sentencing court's identification of his use of a handgun during commission of the crime is an improper aggravator, without which enhancement of his sentence is unjustified. We disagree because Velasquez was convicted of voluntary manslaughter, which does not include the use of a firearm as an element of the crime.² The sentencing court explained this during the sentencing hearing when it referred to "the nature and circumstances of the offense, particularly the use of a weapon." Transcript at 33. Furthermore, Velasquez stipulated the fact that he was armed with a handgun he fired at intended targets, resulting in the death of a bystander. Velasquez's criminal history and that he was on probation at the time of the offense, neither of which Velasquez disputes as aggravating factors, were the result of a gun conviction, and emphasize the relevance of his use of a handgun as a third aggravating factor. In light of the facts and circumstances, we cannot say the sentencing court abused its discretion in giving significant weight to Velasquez's possession and use of a handgun as an aggravating circumstance, therefore enhancing the presumptive ten-year sentence by two additional years.³ Even if the sentencing court should not have relied on Velasquez's possession and use of a handgun as a significant aggravating factor, the two undisputed aggravators are sufficient to support the enhancement of his sentence. See White, 847 N.E.2d at 1045 (single aggravating

² Ind. Code § 35-42-1-3.

³ We also note that had Velasquez been charged under Indiana Code section 35-50-2-11, he could have been given an additional fixed term of five years for using a firearm in the commission of his offense.

circumstance may support sentence enhancement).

B. Advisory Sentencing Scheme

Application of Indiana's sentencing statute as amended results in the imposition of a sentence "for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years." Ind. Code § 35-50-2-5. An advisory sentence is "a guideline sentence that the court may voluntarily consider as the midpoint between the maximum sentence and the minimum sentence." Ind. Code § 35-50-2-1.3(a). Moreover, "regardless of the presence or absence of aggravating circumstances or mitigating circumstances," a trial court may impose any sentence that is authorized by statute, and permissible under the Constitution of the State of Indiana. Ind. Code § 35-38-1-7.1(d). Under this sentencing scheme, regardless of aggravators or mitigators, the trial court could not abuse its discretion by imposing upon Velasquez a twelve-year term within the range authorized by statute for his offense.

C. Appropriateness of Velasquez's Sentence

Velasquez also asks us to exercise our authority to review and revise his sentence, which we may do if, after due consideration of the sentencing court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). We exercise great restraint in doing so, recognizing the special expertise of the trial bench in making sentencing decisions. Scott v. State, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006), trans. denied.

A statutorily prescribed sentence is the "starting point the Legislature has selected as

an appropriate sentence for the crime committed.” Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). The nature of Velasquez’s crime evidences an extreme disregard for the lives of others, be they rival gang members or innocent bystanders, and disrespect for the law that imposed probation upon him for a prior gun conviction. His use of a gun in the present case also establishes a tendency toward escalating gun-related offenses. His character is reflected by his criminal conduct, tempered only by his acceptance of responsibility for the consequences of his actions in this case. As such, we cannot say Velasquez’s sentence is inappropriate in light of his offense or his character.

Conclusion

The sentencing court properly determined and imposed an appropriate sentence of twelve years upon Velasquez. We therefore affirm the trial court.

Affirmed.

BARNES, J. concurs.

SULLIVAN, J. concurs in result.