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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL JON SEARLE,)
Appellant-Defendant,)
vs.) No. 45A03-0602-CR-47
STATE OF INDIANA,)
Appellee.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-0502-FD-00016

December 6, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Appellant, Michael Jon Searle, appeals his sentence following his guilty plea to and convictions for Assisting a Criminal as a Class D felony[1] and False Informing as a Class A misdemeanor.[2] Upon appeal, Searle claims the trial court abused its discretion upon weighing the aggravators and mitigators in imposing an aggravated sentence on his conviction for assisting a criminal and in ordering that the sentences be served consecutively.

We affirm.

According to Searle's testimony during the guilty plea hearing, on the evening of February 10, 2005, he and others were gathered in Hobart at a friend's home with Daniel Wright, who was wearing a vest resembling a flak jacket, and the group was discussing Wright's alleged wish to "try [the vest] out" because Wright apparently intended to join the military. Sentencing Tr. at 57. At some point Searle, who testified he was on Xanax and drinking alcohol at the time, noticed that someone in the group was holding a shotgun, and he subsequently discovered that the group was not just playing around but "really going to do it," i.e., test the effectiveness of the vest by shooting Wright, who was wearing it, with a shotgun. Sentencing Tr. at 58. According to Searle, five people, including Wright and himself, then went in Wright's car to a field off of Liverpool Road, where Wright got out of the car. Wright was wearing the vest along with a sweatshirt, and he was readying himself when one member of the group asked him if he was sure he

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[1] Ind. Code § 35-44-3-2 (Burns Code Ed. Repl. 2004).

[2] Ind. Code § 35-44-2-2(d)(1) (Burns Code Ed. Repl. 2004). Although Searle was charged and convicted under Ind. Code § 35-44-2-2(c)(1), this code section had been amended in 2003, and is currently I.C. § 35-44-2-2(d)(1). This is not an issue upon appeal.

wanted to go through with the plan. Another person then fired the shotgun into the ground to show what it would do. Subsequently, a member of the group then fired the shotgun at Wright, whereupon Wright fell to the ground, and Searle observed Wright's chest was covered with blood.

In the aftermath of the shooting, the group began concocting a story to explain what had happened. This story involved another individual shooting Wright while the group was in Gary buying alcohol and drugs and allegedly shooting out Wright's car window in the process. In order to corroborate this story, Searle shot out the window of Wright's car. According to Searle, while concocting their story, the group removed Wright's vest and sweatshirt and took him to the hospital after getting the car unstuck from the mud and switching drivers mid-route due to the first driver's "crazy" driving. Sentencing Tr. at 71. Upon arriving at the hospital, Searle told the made-up story to police there as well as at the Gary Police Department, but he later admitted it was made-up after another member of the group told police what had really happened.

Searle was charged on February 11, 2005 with assisting a criminal as a Class D felony and false informing as a Class A misdemeanor. He pleaded guilty to the charges during a December 2, 2005 plea hearing. Following a December 29, 2005 sentencing hearing, the trial court accepted Searle's plea and sentenced him to two and one-half years for assisting a criminal and to one year for false informing, with the sentences to be served consecutively for a total of three and one-half years, with three of those years to be served at the Department of Correction. In reaching its sentence the trial court found the following as aggravating circumstances: (1) Searle had a history of criminal or

delinquent behavior; (2) Searle had recently violated the conditions of probation; and (3) Searle resorted to a subterfuge shortly after the crime in an effort to conceal the circumstances of the crime. The court found this third factor to be a "major" aggravating factor. Appendix at 27. The court also found as mitigating circumstances that (1) the victim of the crime had induced or facilitated the offense; and (2) Searle had pleaded guilty as charged without the benefit of a plea agreement. The court determined that the aggravators outweighed the mitigators. Searle filed his notice of appeal on January 30, 2006.

Upon appeal, Searle claims that the trial court abused its discretion in weighing the aggravators against the mitigators, concluding that the aggravators carried more weight, and in imposing aggravated and consecutive sentences. We are mindful that sentencing determinations, including whether to adjust the presumptive[3] sentence, are within the discretion of the trial court. Ruiz v. State, 818 N.E.2d 927, 928 (Ind. 2004). If a trial court relies upon aggravating or mitigating circumstances to modify the presumptive sentence, it must do the following: (1) identify all significant aggravating and mitigating circumstances; (2) explain why each circumstance is aggravating or mitigating; and (3) articulate the evaluation and balancing of the circumstances. Id.

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[3] The amended version of Ind. Code § 35-50-2-7 (Burns Code Ed. Supp. 2006) references the "advisory sentence," reflecting the April 25, 2005 changes made to the Indiana sentencing statutes in response to Blakely v. Washington, 542 U.S. 296 (2004). Since Searle committed the crime in question on February 10, 2005, before the effective date of the amendments, we apply the version of the statute then in effect and refer instead to the presumptive sentence. See I.C. § 35-50-2-7 (Burns Code Ed. Repl. 2004) ("A person who commits a Class D felony shall be imprisoned for a fixed term of one and one-half (1 ½) years, with not more than one and one-half (1 ½) years added for aggravating circumstances or not more than (1) year subtracted for mitigating circumstances.").

When a defendant offers evidence of mitigators, the trial court has the discretion to determine whether the factors are mitigating, and the trial court is not required to explain why it does not find the proffered factors to be mitigating. Stout v. State, 834 N.E.2d 707, 710 (Ind. Ct. App. 2005), trans. denied. The trial court is not required to give the same weight as the defendant does to mitigating evidence. Fugate v. State, 608 N.E.2d 1370, 1374 (Ind. 1993). A single aggravating circumstance may be sufficient to justify an enhanced sentence. McNew v. State, 822 N.E.2d 1078, 1082 (Ind. Ct. App. 2005). It is well settled that the trial court must identify at least one aggravator to support consecutive sentences. Shepard v. State, 839 N.E.2d 1268, 1270 (Ind. Ct. App. 2005).

In pronouncing Searle's sentence, the trial court stated the following:

> "Doing the right thing, Mr. Searle, seems to be something that escapes you both in the past and in this case. And I couldn't agree more with the State's argument in terms of it being time for you to accept responsibility for what you've done here. I've presided over criminal cases for over ten years and I have never seen anything like this. When I read the probable cause affidavit when this case was filed, I absolutely could not believe it. I just couldn't believe it. It was the most outrageous thing I've ever seen, it still is, that something this senseless and needless could occur. It boggles the mind, it just absolutely boggles the mind that this kind of thing could occur. Your conduct, both at the time of the commission of the offense and afterwards is absolutely shameful and totally reprehensible that you would make an effort to conceal what had occurred while this young man arguably lay dying in your midst. How could you do such a thing? Is life so meaningless to you that saving your own hide fogged your thinking? I believe that—I don't believe that you would have ever stepped up, Mr. Searle, if this had not come to the police's attention by someone else, I don't think you ever would have said a word. I really don't. I think you're very sorry today, you're very sorry that it happened, you're sorry that you got caught, but I don't think you get it. But the great tragedy here is that a life was lost as a result of your stupidity and the other fellas. You have a history of juvenile adjudications and there is the issue of the probation in the other state that you were on. What is equally aggravating, just as aggravating as your criminal, your history of brushes with the law to be

> such a young man is that this great subterfuge that you resorted to, that's what is more sinister than anything else in this case. I am taking into account that you pled guilty as charged. Although, I would note that the evidence in this case, from what I could see, is very strong and would have been very strong in favor of a conviction. I do attach some mitigating weight to that, but not great mitigating weight. The Court finds that the aggravating factors outweigh the mitigating factors. I'm going to impose, on Count I, two and a half years in the Department of Correction and one year on Count II. Now, I'm going to run these sentences consecutive to each other. The State makes a very cogent argument in that regard. These are two separate and distinct offenses and on that basis I'm exercising my discretion and imposing consecutive sentences. Total sentence [is] three and a half years. Sentence suspended after serving three years. Six months probation." Sentencing Transcript at 89-91.

Searle's challenge to the court's imposition of an aggravated sentence is based in large part upon his claim that the court's consideration of his use of a subterfuge as a "major" aggravator was improper because such was the "gravamen" of both of his crimes. App. at 27; Appellant's Brief at 6. Searle is correct that the trial court may not use an element of the crime as an aggravating circumstance. Lemos v. State, 746 N.E.2d 972, 975 (Ind. 2001). However, the particular manner in which a crime is committed may constitute an aggravating factor. Henderson v. State, 769 N.E.2d 172, 180 (Ind. 2002). A trial court should specify why a defendant deserves an enhanced sentence under the particular circumstances. Id. We examine both the written sentencing order and the trial court's comments at the sentencing hearing to determine whether the trial court adequately explained its reasons for the sentence. Matshazi v. State, 804 N.E.2d 1232, 1238 (Ind. Ct. App. 2004), trans. denied.

Here, the trial court specified at the sentencing hearing that the circumstances of this crime constituted "the most outrageous thing [the court had] ever seen." Sentencing

Tr. at 89. Indeed, the evidence at the sentencing hearing demonstrated that the circumstances of this crime involved Searle and his friends delaying their efforts to assist Wright, who had just sustained a gunshot wound to the chest, in order to create and corroborate a false story to deflect the blame for the incident from themselves. While there was conflicting evidence as to the length of the delay involved in seeking emergency aid for Wright, Searle admitted there was such a delay. As Searle admitted, the group spent time removing Wright's sweatshirt and vest, presumably at least partly to cover up the real cause of the accident, and further to shoot out the windshield of the car in order to support their story. The court described Searle's conduct to be, both at the time of the commission of the offense and afterward, "absolutely shameful and totally reprehensible that [he] would make an effort to conceal what had occurred while [Wright] arguably lay dying in [his] midst." Sentencing Tr. at 89. The court clearly attributed great significance to these circumstances, asking Searle, "Is life so meaningless to you that saving your own hide fogged your thinking?" Sentencing Tr. at 89. It is these circumstances of delay in an emergency, with the delay partially attributable to Searle's concoction and corroboration of the false story which served as the basis of the instant convictions, which the court was justified in finding particularly egregious. Such circumstances are not an element of either assisting a criminal or false informing, and as such, were properly considered aggravating circumstances sufficient to support an aggravated sentence.

As we have found the trial court properly considered the nature and circumstances of the "subterfuge" as a proper aggravator, we find it unnecessary to address Searle's

derivative argument that the court's allegedly improper consideration of such aggravator similarly invalidates its imposition of consecutive sentences.[4]

Searle's final claim upon appeal is that the trial court did not give adequate weight to the mitigating factors. Searle argues that the fact that Wright asked to be shot as well as the fact of Searle's guilty plea merit more weight than the trial court gave them. First, the trial court acknowledged both of the above factors as mitigators. Furthermore, while Wright may have facilitated his own shooting, he did not facilitate Searle's false story to explain it,[5] so we question the weight he claims the trial court should have placed on this mitigator. Further still, contrary to Searle's argument, a trial court is not required to give significant mitigating weight to a guilty plea, particularly when such plea is as much a strategic decision as an effort at taking responsibility. See Scott v. State, 840 N.E.2d 376, 383 (Ind. Ct. App. 2006), trans. denied. Here, the court specifically found that the evidence against Searle was "very strong in favor of a conviction." Sentencing Tr. at 90. We decline to interfere with the mitigating weight the trial court placed upon the mitigators.

Having found no abuse of discretion in the trial court's weighing of aggravators and mitigators and its imposition of an aggravated sentence on Searle's conviction for

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[4] The court stated its reasoning for imposing consecutive sentences was that, "These are two separate and distinct offenses and on that basis I'm exercising my discretion and imposing consecutive sentences." Sentencing Tr. at 91. A trial court has the discretion to impose consecutive sentences. See I.C. § 35-50-1-2 (Burns Code Ed. Repl. 2004). Further, "[t]he basis for the gross impact that consecutive sentences may have is the moral principle that each separate and distinct criminal act deserves a separately experienced punishment." Hart v. State, 829 N.E.2d 541, 545 (Ind. Ct. App. 2005). Searle does not challenge the imposition of consecutive sentences under this reasoning.

[5] Searle was not convicted in connection with the actual shootings, just the subsequent cover-up of the incident.

assisting a criminal, to be served consecutively with his conviction for false informing, we affirm the trial court's sentence of two and one-half years for Searle's conviction for assisting a criminal and one year for his conviction for false informing.

The judgment of the trial court is affirmed.

ROBB, J., and BARNES, J., concur.