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IN THE
COURT OF APPEALS OF INDIANA

JAMES E. SMITH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 47A02-0604-CR-325
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAWRENCE SUPERIOR COURT
The Honorable William G. Sleva, Judge
Cause No. 47D02-0112-CF-1150

October 26, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

James E. Smith appeals his sentence following his conviction for Burglary, as a Class C felony, pursuant to a guilty plea. He presents a single issue for our review, namely, whether his sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

FACTS AND PROCEDURAL HISTORY

On December 27, 2001, Smith broke into the C and R Quik Stop Convenience Store ("Quik Stop") in Lawrence County with the intent to commit theft. Smith pried open the doors to the Quik Stop, tripping an alarm. Someone then saw Smith exit the Quik Stop carrying bags, although he dropped two of them. Officer Roberts, the first officer on the scene, found the bags, which contained cartons of cigarettes. Shortly thereafter, another officer located Smith in a drainage ditch in possession of a trash bag and over $4,000 in cash. On December 28, the State charged Smith with burglary, as a Class C felony. The State amended the charging information on January 4, 2002, to include an additional count of Theft, as a Class D felony, and an allegation that Smith was an habitual offender.

Over four years later, on January 27, 2006, two business days before trial against Smith was scheduled to begin, Smith pleaded guilty to the charge of burglary and to being an habitual offender. In exchange for the guilty plea, the State agreed to dismiss the additional charge of theft and not to file any new criminal charges against Smith for any offenses he may have committed in Lawrence County prior to January 27, 2006, in

which he was already a suspect. In addition, to support the habitual offender plea, Smith acknowledged two prior, unrelated Class D felony convictions in 1990 and 1991.

On February 24, 2006, the trial court sentenced Smith. The trial court found as a mitigating circumstance the hardship of incarceration on Smith's mother and son, and the trial court found as aggravators his criminal history and Smith's violation of federal parole terms in December of 2002. In discussing Smith's criminal history, the trial court recited fifteen different convictions between 1974 and the instant offense, including at least five felonies between 1991 and 2000. However, the trial court made no mention, either at the sentencing hearing or in its sentencing order, of Smith's guilty plea as a possible mitigating circumstance. After finding that the aggravators "greatly outweigh[ed]" the mitigators, the trial court sentenced Smith to eight years imprisonment for burglary, as a Class C felony, the maximum sentence allowed, and enhanced that sentence by twelve years for his habitual offender status, also the maximum. Transcript at 43. This appeal ensued.

DISCUSSION AND DECISION

Smith contends that his sentence is inappropriate in light of the nature of the offense and the character of the offender. We exercise with great restraint our responsibility to review and revise sentences, recognizing the special expertise of the trial bench in making sentencing decisions. Bennett v. State, 787 N.E.2d 938, 949 (Ind. Ct. App. 2003), trans. denied. If the sentence imposed is authorized by statute, we will not revise or set aside the sentence unless it is inappropriate in light of the nature of the

offense and the character of the offender. Ind. Appellate Rule 7(B); McCann v. State, 749 N.E.2d 1116, 1121 (Ind. 2001).

As an initial matter, we emphasize that Smith, in his Reply Brief, does not challenge whether the trial court abused its discretion in sentencing him, but only whether his sentence is inappropriate under Appellate Rule 7(B). As stated by our supreme court, "[t]hese are two separate inquiries reviewed under different standards." Noojin v. State, 730 N.E.2d 672, 678 (Ind. 2000). Hence, we do not consider whether the trial court erred in its findings of aggravators and mitigators. See also Weiss v. State, 848 N.E.2d 1070 (Ind. 2006). That said, Smith argues that "[t]he maximum allowable sentence . . . is inappropriate where the defendant accepted responsibility by pleading guilty and where the convictions used to prove the habitual offender status are over ten years old." Appellant's Brief at 3. We cannot agree.

Smith pleaded guilty to burglary, as a Class C felony, and to being an habitual offender. In 2001, the year the crime was committed,[1] the presumptive sentence for a Class C felony was four years, with not more than four additional years available for aggravating circumstances. Ind. Code § 35-50-2-6(a) (2001). Also at that time, Indiana Code Section 35-50-2-8(h) (2001), the habitual offender statute, provided for "an additional fixed term that is not less than the presumptive sentence for the underlying offense nor more than three (3) times the presumptive sentence for the underlying offense. However, the additional sentence may not exceed thirty (30) years." Here, after finding that the aggravators outweighed the mitigators, the trial court imposed the

[1] The current versions of the sentencing statutes are not applicable here since the commission of the offense was before their effective dates. See Richards v. State, 681 N.E.2d 208, 213 (Ind. 1997).

maximum eight year sentence on the Class C felony conviction. The trial court then enhanced Smith's sentence by twelve years for being an habitual offender. The aggregate sentence of twenty years was authorized by statute.

Smith only challenges the appropriateness of his sentence in light of his character, namely, in light of his guilty plea and the length of time that has passed since his admitted prior unrelated felonies.[2] We first address Smith's criminal history, since a defendant's criminal history, without more, can support an enhanced sentence. Soliz v. State, 832 N.E.2d 1022, 1030 (Ind. Ct. App. 2005), trans. denied. At the sentencing hearing, the trial court referenced the following adult convictions: a minor misdemeanor in 1974; Driving While Suspended, a misdemeanor, in 1975; Dealing in a Controlled Substance, as a Class D felony, in 1976; a misdemeanor in 1980; Dealing in Marijuana, as a misdemeanor, and Dealing in a Schedule I Controlled Substance, as a Class B felony, in 1981; driving while suspended, a misdemeanor, and Attempted Theft, as a Class D felony, in 1990; two counts of Receiving Stolen Property, as Class D felonies, in 1991; two counts of theft, as Class D felonies, in 1994; Possession of a Schedule II Controlled Substance, as a Class D felony, in 1997; Conspiracy to Possess with Intent to Distribute Methcathinone, a federal felony, in 1998; burglary, as a Class C felony, in 2000; and a fourteen-month sentence in federal prison for violating the 1998 conspiracy parole terms by testing positive for drugs in December of 2002. As such, even if the age of the admitted 1990 and 1991 Class D felonies does mitigate the severity of those two

[2] Smith presents no argument that the nature of the offense favors a sentence other than that which he received. As such, we do not address that issue.

convictions, the record still reveals multiple more recent felonies, including convictions for theft and burglary. Smith's criminal history clearly reflects poorly on his character.

We also cannot agree with Smith's contention that his guilty plea reflects a responsible character. In exchange for Smith's plea, the State agreed not to prosecute any crimes before the plea date in which the State had identified Smith as a suspect.[3] Smith presents no argument that the State's willingness not to pursue prosecution for any additional crimes was not meaningful. Further, Smith does not direct us to any part of the record on appeal indicating that his guilty plea extended any particular benefit to the State other than avoiding a trial. He pleaded guilty only two business days prior to the scheduled trial date. Before his plea, the State was required to respond to Smith's discovery requests and prepare its prosecution for trial. In addition, the State was required to delay prosecution for four years after Smith filed at least eight motions for continuance, generally alleging incomplete discovery or the need for additional time to confer with the prosecutor. Such delays are not demonstrative of someone who accepts responsibility. Rather, they emphasize that the weight of the evidence was against Smith, on this and possibly other uncharged counts that were dismissed, and that, as a result, his guilty plea was a pragmatic decision.

Finally, Smith maintains that the maximum allowable sentence is inappropriate because such sentences should be reserved for the worst offenses and the worst offenders. In Rodriguez v. State, 785 N.E.2d 1169, 1180 (Ind. Ct. App. 2003), we held that the

[3] The State also dismissed the theft count against Smith. However, Smith correctly identifies the theft charge as a lesser included offense to the charge of burglary, and, therefore, he could not have been sentenced for both the burglary and the theft. Hence, we do not consider the State's dismissal of that charge as having conferred a benefit to Smith.

defendant's character did not merit the maximum allowable sentence because his lack of criminal history could not support the argument that he was "the very worst offender." Here, Smith attempts to analogize his criminal history to that of the defendant's in Rodriguez by citing the prosecutor's comment at the sentencing hearing that "most of [Smith's criminal history] is junk." Transcript at 38. However, the larger context of the prosecutor's remarks shows that the prosecutor was describing how Smith's character is reflective of "one of the saddest situations I have ever seen":

> He is 50 years old. . . . [H]e has spent some 35 years in one kind of incarceration or another. That's seventy percent of his life. I just don't know of any other situation[] like this. This, this—and most of this stuff is junk, you know. Ah, theft . . . I'm not making light of it, but dealing in a schedule I controlled substance—I can't imagine there is a lot of money in that. I don't know. Relatively minor, minor in terms of the pecuniary loss, like this one. . . . I, I, I don't—he's basically, unless something changes radically . . . thrown his life away. . . . This is Mr. Smith's tenth felony conviction. I don't have any answers.

Id. at 38-39. Hence, the larger context of the prosecutor's remarks reveals that the prosecutor, in referring to Smith's "junk" convictions, was describing Smith's repeated poor decisions in choosing criminal behavior and not being deterred by a life spent mostly in prison. As such, Smith's reliance on Rodriguez is misplaced.

As discussed above, Smith has an extensive criminal history, including numerous felony convictions. Moreover, he previously has had his probation revoked. Accordingly, prior attempts to rehabilitate Smith and deter him from future unlawful conduct have failed. We conclude that the sentence imposed by the trial court was not inappropriate in light of the nature of the offense and Smith's character.

Affirmed.

KIRSCH, C.J., and DARDEN, J., concur.