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IN THE
COURT OF APPEALS OF INDIANA

CARLETON HOLT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0601-PC-44
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Heather Welch, Judge
Cause No. 49G01-9103-PC-036673

DECEMBER 8, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

GARRARD, Senior Judge

Holt appeals from the denial of his petition for post-conviction relief. He presents five contentions: (1) the trial court relied on an improper aggravating circumstance in imposing sentence, (2) ineffective assistance of trial counsel for not objecting to the aggravator, (3) ineffective assistance of appellate counsel for not challenging the aggravator on appeal, and (4) error in finding the issue of the aggravator was barred by res judicata, and (5) fundamental error.[1] The core issue in all these contentions is the aggravating circumstance found by the court in enhancing Holt's sentence for murder. That is to say, if the aggravator was proper then all of Holt's contentions necessarily fail.

The facts as reported in the direct appeal disclose that on the evening of March 2, 1991, Korey Brockmeyer and Joseph Patrick were part of a group from Illinois attending the Pacers/Bulls basketball game at Market Square Arena. As the two were leaving the arena after the game, Brockmeyer bumped into Holt, who was walking the opposite direction with his friend, Troy Page. Holt yelled at Brockmeyer regarding whether he "had a problem", and Brockmeyer responded that he did not. Brockmeyer and Patrick continued on their way, but Holt and Page turned around and followed them and continued to yell at them. Holt and Page confronted Brockmeyer and Patrick. Page engaged Patrick in a fight, while Holt brandished a knife and continued to yell at Brockmeyer. Holt swung the knife at Brockmeyer, who backed away. Holt then went to

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[1] On appeal counsel acknowledges that the issue of the aggravator may not be raised as a free-standing claim of fundamental error, but is reached through the ineffective assistance claims. See, Woodson v. State, 778 N.E.2d 475, 478 (Ind. Ct. App. 2002).

the aid of Page. He ran up behind Patrick and stabbed him in the back and neck numerous times. Then Page and Holt ran away, and Holt threw away his knife. Patrick collapsed and later died at the hospital.

Holt argues that the court used an invalid aggravator to increase his sentence from forty to fifty years. He contends that our courts have consistently held that the "depreciate the seriousness of the offense" aggravator cannot be used to enhance a sentence but will only support the refusal to reduce the presumptive sentence.

It is certainly true that our cases have held that the statutory aggravating factor, "Imposition of a reduced sentence or suspension of the sentence and imposition of probation would depreciate the seriousness of the crime[2]" cannot be used to increase a sentence above the presumptive sentence.

Our courts have consistently held, however, that it is not error to enhance a sentence beyond the presumptive sentence based upon the non-statutory aggravating circumstance that a sentence less than the enhanced term would depreciate the seriousness of the crime committed. *Mathews v. State*, 849 N.E.2d 578, 590 (Ind. 2006); *Walter v. State*, 727 N.E.2d 443, 447 (Ind. 2000); *Huffman v. State*, 717 N.E.2d 571, 577 (Ind. 1999); *Ector v. State*, 639 N.E.2d 1014,1016 (Ind. 1994).

At the sentencing hearing in Holt's case, the trial judge reviewed at length the facts and circumstances surrounding the crime which she felt required the imposition of an enhanced sentence. The abstract of judgment signed by the judge stated that

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[2] IC 35-38-1-7.1(b)(4).

"anything less would depreciate the seriousness of the crime". She did not at any time, as Holt points out, expressly use the phrase that anything less than *an enhanced sentence* would depreciate the seriousness of the offense.

Accordingly, the issue becomes whether in the absence of that phrase she must necessarily have been employing the statutory factor and, therefore, an improper aggravator.

Citing *Pinkston v. State,* 836 N.E.2d 453 (Ind.Ct.App. 2005) *transfer den.*, Holt argues that this is so. We find *Pinkston* should be distinguished. It was decided pursuant to the mandate in *Blakely v. Washington*, 542 U.S. 296 (2004) so that the jury determined the existence of the aggravators. In *Pinkston* the state filed a notice of aggravating factors to be determined by the jury. The second one listed (and submitted to the jury) was "imposition of a reduced sentence or suspension of the sentence and imposition of probation would depreciate the seriousness of the crime." Thus, it was clearly the statutory factor that the state submitted to the jury and that they found to exist.

That is not the case here. In Holt's case it was the responsibility of the judge to determine in her discretion the existence of aggravating and mitigating circumstances. The judge extensively reviewed at the sentencing hearing the facts and circumstances she found to be in aggravation. Moreover, this was the only aggravating circumstance she found, and she clearly was using it to verbalize the reason why she felt an enhanced sentence was called for. For an appellate court to say that reversible error occurred simply because she failed to use the term "enhanced sentence" in her finding would truly

elevate form over substance. That we need not do. The non-statutory aggravator was clearly found and no prejudicial error was committed.

It follows that Holt's arguments fail. The decision of the post-conviction court is affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.