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IN THE COURT OF APPEALS OF INDIANA

ANTHONY SMITH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0602-CR-76
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49G02-0505-FC-80944

November 8, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Anthony Smith appeals the trial court's imposition of maximum sentences for three of his four convictions. We affirm.

Issue

Smith raises the issue of whether his sentence is inappropriate in light of the nature of the offenses and his character.

Facts and Procedural History

On May 14, 2005, Smith ran a red light at 30th and Meridian Streets. Indianapolis Police Department Officer Andrew Branham followed his car and signaled for Smith to pull over. Smith did not stop. He fled from Officer Branham, traveled northbound on Meridian Street, and eventually rear-ended a van at the 46th Street intersection. Nine-year-old Luke Bucine, a passenger in the van, suffered head injuries as a result of the accident.

Following the collision, Smith then exited his car and jumped over a nearby privacy fence. Officer Branham retrieved his canine partner, Marko, to assist him in searching for Smith. Marko located Smith hiding behind a tree in a nearby residential backyard. With the dog "attached to him[,]" Smith began to run. Appellant's App. at 24. He then grabbed Marko and dove into an inground pool. Marko broke free, and Officer Branham retrieved the dog from the pool. It took approximately fifteen seconds for Marko to catch his breath, during which time Smith jumped over another privacy fence and ran away, ignoring Officer Branham's orders to stop. Officer Branham and another officer later found Smith on the porch of a nearby house and took him into custody.

On May 17, 2005, the State charged Smith with ten counts: Count I, resisting law enforcement, a class C felony; Count II, residential entry, a class D felony; Count III, failure to stop after accident resulting in serious bodily injury, a class D felony; Count IV, resisting law enforcement, a class A misdemeanor; Count V, resisting law enforcement, a class A misdemeanor; Count VI, striking a law enforcement animal, a class A misdemeanor; Count VII, criminal trespass, a class A misdemeanor; Count VIII, driving while suspended, a class A misdemeanor; Count IX, failure to stop after an accident resulting in serious bodily injury, a class A misdemeanor; and Count X, failure to stop after an accident resulting in property damage, a class C misdemeanor. The State later moved to add a habitual offender charge as Count XI, and the trial court granted the motion.

On December 19, 2005, the trial court accepted the parties' plea agreement, in which Smith pled guilty to Counts I, II, III, VI, and XI with open sentencing. In exchange, the State agreed to dismiss the remaining counts. On January 11, 2006, the trial court conducted a sentencing hearing. The court found aggravating and mitigating circumstances and concluded that the aggravators outweighed the mitigators. The trial court sentenced Smith to eight years (with three years suspended) for resisting law enforcement, which was the maximum sentence authorized by statute. Smith was sentenced to the advisory sentence of one and one-half years for residential entry, to be served concurrently with the first sentence. The trial court ordered a consecutive three-year sentence, the maximum, for failure to stop after an accident resulting in serious bodily injury, and it imposed the maximum term of one year, to be served concurrently, for mistreatment of a law enforcement animal. The court

also added four years for the habitual offender count. In sum, Smith was sentenced to a total of fifteen years, with twelve executed and three suspended to probation. Smith now appeals.

Discussion and Decision

Smith claims that the trial court erred in ordering the maximum sentences for three of his four convictions. He asks us to revise his sentence pursuant to our authority under Indiana Appellate Rule 7(B), which states as follows: "The 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." Our Rule 7(B) review is extremely deferential to the trial court's decision. *Walker v. State*, 758 N.E.2d 563, 567 (Ind. Ct. App. 2001), *trans. denied* (2002).

Here, the trial court considered Smith's criminal history "very aggravating[.]" Tr. at 52. The court specifically noted Smith's 1997 conviction for resisting law enforcement; his 1998 conviction for operating while intoxicated and two related charges of resisting law enforcement that were dismissed; his 1999 battery conviction and two related charges of resisting law enforcement that were dropped; his 2001 arrest for battery, resisting law enforcement, and reckless driving; his 2001 conviction for resisting law enforcement; and his 2003 resisting law enforcement arrest, which was still pending at the time of sentencing in

the instant case.[1] The trial court also noted that Smith had violated his probation in 1998, and that he was on probation when he committed the offenses in this case. The trial court also identified a few mitigating factors: Smith's acceptance of responsibility for his actions by pleading guilty, the hardship that a prison sentence would impose upon his dependents, and his remorse. The court concluded that the aggravators outweighed the mitigators.

Smith argues that the severity of his sentence was inappropriate in light of the nature of his offenses and his character, specifically because of his "upbringing in an alcoholic environment, his alcohol use and the fact that [Luke Bucine] was fortuitously left without permanent physical damage." Appellant's Br. at 14. He also notes that Luke was not wearing a seat belt when Smith rear-ended the van. The record indicates that these arguments were considered by the trial court, along with the State's arguments that Smith's prior run-ins with the law had given him many opportunities to turn his life around. Instead, he continued to abuse alcohol, drive while intoxicated, and run away from police. Further, Smith's misleading characterization of the severity of his victim's injuries is not well taken. The record does not provide much detail regarding Luke's condition immediately following the accident and the degree of recovery he has achieved. However, the charging information

[1] We note that an arrest and/or charge, without more, "does not establish the historical fact that the defendant committed a criminal offense and may not be properly considered as evidence of criminal history." *Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005). However, a lengthy arrest record may be relevant to the trial court's assessment of the defendant's character in terms of the risk that he will commit another crime. Here, Smith's four prior convictions were sufficient to support the trial court's identification of his criminal history as an aggravator. The trial court noted that it normally does not consider prior arrests at sentencing. The court found it "telling" in this case, however, that, in addition to his prior convictions, Smith had four prior arrests for resisting law enforcement and one resisting law enforcement charge pending in another county at the time of sentencing. Tr. at 23-24. Clearly, this pattern of arrests suggests something about Smith's character, namely that he had little or no regard for the law and that he was likely to re-offend.

states that Luke suffered "serious bodily injury, that is: unconsciousness, extreme pain, a coma, and/or a skull fracture," and his father testified that he has "continued effects" from his injuries, that he missed twenty-nine days of school, and that "he's different than he was before that day." Appellant's App. at 27; Tr. at 44.

Finally, Smith claims that the maximum sentences were inappropriate because the State failed to show that he is one of the worst offenders who committed one of the worst offenses, which is the type of person for whom maximum sentences should generally be reserved. *See Payton v. State*, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), *trans. denied* (2005). First, we note that the trial court ordered sentences for two of Smith's convictions to be served concurrently with the other two, so, in fact, his aggregate sentence was not the maximum that the trial court could have ordered. As for the "worst of the worst" consideration, we have stated previously that there is danger in attempting to apply this principle to our sentencing reviews. *Brown v. State*, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), *trans. denied*. We would be forced to compare the facts surrounding the appealed sentence with the facts of prior cases as well as with hypothetical facts that might demonstrate a worse case scenario. *Id*. The maximum sentence would never be justified because the worst case scenario could always be imagined beyond any real facts. *Id*. For these reasons, "[w]e should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character." *Id*.

In sum, and as the trial court clearly contemplated, Smith's lengthy criminal history

was a "very aggravating" factor in this particular case because it shows that he has repeatedly violated the same laws, including resisting law enforcement, driving while suspended, and driving while intoxicated.[2] His criminal history reveals a lack of respect for the police and an arrogant disregard for the law. Thus, we conclude that the trial court's sentence is not inappropriate in light of the nature of Brown's offenses and his character.[3]

Affirmed.

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

[2] In the instant case, the State did not charge Smith with operating while intoxicated. He testified, however, that "every time I've been in trouble, it's been due to pretty much drinking . . . I mean, I [make] bad mistakes when I drink." Tr. at 47. The presentence investigation report includes a similar statement in the section documenting Smith's version of the incident. *See* Presentence Investigation Report at 10 ("All my arrest(s) have been from the use of alcohol.").

[3] Although he does not frame it as a separate issue, Smith alternatively argues that his sentence violates Article 1, Section 16 of the Indiana Constitution because it is disproportionate to the severity of the crimes of which he was convicted. He asks us to compare his case to two recent cases reviewed by this Court, which involve similar convictions and lesser sentences. However, a constitutional proportionality analysis does not require us to compare the sentence of a particular crime to others convicted of the same or similar crimes. *Highbaugh v. State*, 773 N.E.2d 247, 253 (Ind. 2002). For all the reasons that we conclude that Smith's sentence is not inappropriate in light of his character and the nature of his offenses, we find no constitutional error.