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IN THE COURT OF APPEALS OF INDIANA

WARREN N. DUGAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 52A04-0703-CR-137
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MIAMI CIRCUIT COURT
The Honorable Bruce C. Embrey, Judge
Cause No. 52C01-9906-CF-78

November 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Warren N. Dugan brings a belated appeal challenging the twenty-year aggregate sentence and restitution order imposed following his guilty plea to two counts of class B felony burglary and one count of class D felony theft. We affirm in part, vacate in part, reverse in part, and remand with instructions.

Issues

Dugan raises four issues, but we need only address the following three issues:

I. Whether the trial court improperly entered judgment of conviction and sentenced him on a second count of theft;

II. Whether the sentence is inappropriate in light of the nature of the offenses and his character; and

III. Whether he waived his claim that the restitution order is invalid.[1]

Facts and Procedural History

On May 25, 1999, Dugan and Richard Mitchell went to Craig McDougle's residence in Miami County. McDougle was not at home. Mitchell broke into McDougle's residence, took a black cordless phone, and returned to the car. Mitchell gave the phone to Dugan in payment of a debt.

The following day, Dugan and Mitchell returned to McDougle's residence. Mitchell entered the residence and took a car stereo. McDougle's brother, Curt, drove into the

driveway. Mitchell fled the residence, and he and Dugan drove away, followed by Curt. Mitchell threw the car stereo out of the car. Curt obtained the license plate number and a description of the vehicle. The vehicle belonged to Mitchell's girlfriend. Eventually, the police located Mitchell, who admitted that he and Dugan had committed the aforementioned burglaries and thefts.

On June 9, 1999, the State charged Dugan with Counts I and II, class B felony burglary,[2] and Counts III and IV, class D felony theft.[3] Appellant's App. at 33-36. On October 7, 1999, Dugan pled guilty to Counts I, II, and III as charged without a plea agreement. The State moved to dismiss Count IV. Tr. at 3. The trial court responded: "[W]e'll show Count IV dismissed on Motion of the State. Mr. Dugan you will be pleading guilty to two counts of Burglary and one count of Theft[.]" *Id.*

On November 4, 1999, the trial court held a sentencing hearing. The written sentencing order provides,

> Court finds that a factual basis has been established and enters a finding of guilty to two counts of Burglary and two counts of Theft. Sentencing hearing held.
>
> The Court now finds the following aggravating circumstances:

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[1] Dugan also contends that the trial court abused its discretion in failing to consider significant mitigating circumstances supported by the record. Although this claim is reviewable because he committed these offenses before *Blakely v. Washington*, 542 U.S. 296 (2004), and Indiana's April 25, 2005 sentencing amendments, under the current sentencing system, "[t]he relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse." *Anglemyer v. State*, 868 N.E.2d 482, 493 (Ind. 2007). Because we exercise our right to review and revise his sentence under Indiana Appellate Rule 7(B), our review of this issue is unnecessary.

[2] Ind. Code § 35-43-2-1.

[3] Ind. Code § 35-43-4-2(a).

1. [Dugan] was convicted of Attempted Robbery and Burglary in 1983 and sentenced to 10 years in prison.
2. Since the prior felony offense [Dugan] has had 9 misdemeanor offenses.
3. Prior attempts at rehabilitation have failed and [Dugan] has failed to follow the substance abuse rules.
4. [Dugan] was on probation at the time of the offense.

The Court now finds the following mitigating circumstance:

1. [Dugan] is receiving mental health counseling and medication during his current incarceration.

The Court finds aggravation outweighs mitigation.

Court now sentences [Dugan] on Count 1, Burglary, a Class B felony and Count 2, Burglary, a Class B Felony, to the Department of Corrections for 20 years with five years suspended; on Count 3, Theft, a Class D Felony and Count 4, Theft, a Class D Felony, to three years to the Department of Corrections. Sentences shall run concurrently. … [Dugan] is also ordered to make restitution in the amount of $3,900.00. Payments shall be determined by probation upon [Dugan's] release from custody.

Appellant's App. at 11. This belated appeal ensued. Additional facts will be provided as necessary.

Discussion and Decision

I. Conviction and Sentence for Count IV, Theft

Dugan asserts, and the State concedes, that the trial court had no authority to impose a sentence for Count IV, class D felony theft, when it had been dismissed at the plea hearing. We further note that the trial court lacked authority to enter judgment of conviction for Count IV. *See* Appellant's App. at 46. We therefore vacate Dugan's conviction and sentence as to Count IV, class D felony theft.

II. Inappropriate Sentence

The trial court sentenced Dugan to a maximum term of twenty years for each of his class B felony burglary[4] convictions, with five years suspended, and a maximum term of three years on his class D felony theft[5] conviction, all concurrent. Dugan contends that his sentence is inappropriate.

Article VII, Section 6 of the Indiana Constitution authorizes this Court to independently review and revise a sentence imposed by the trial court. *Childress v. State*, 848 N.E.2d 1073, 1079 (Ind. 2006). This appellate authority is implemented through Indiana Appellate Rule 7(B), which currently provides, "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."[6] We are required to "exercise deference to a trial court's sentencing decision, both because Rule 7(B) requires us to give 'due consideration' to that decision and because we understand and recognize the unique perspective a trial court brings to its sentencing

[4] "[T]he sentencing statute in effect at the time a crime is committed governs the sentence for that crime." *Gutermuth v. State*, 868 N.E.2d 427, 431 n.4 (Ind. 2007) (citing *Smith v. State*, 675 N.E.2d 693, 695 (Ind. 1996)). At the time Dugan committed the burglaries, the presumptive term for a class B felony was ten years, with up to ten years added for aggravating circumstances and not more than four years subtracted for mitigating circumstances. Ind. Code § 35-50-2-5.

[5] At the time Dugan committed theft, the presumptive term for a class D felony was one and one-half years, with up to one and one-half years added for aggravating circumstances and not more than one year subtracted for mitigating circumstances. Ind. Code § 35-50-2-7.

[6] While the "manifestly unreasonable" standard was in effect in 1999, our supreme court amended Appellate Rule 7(B) effective January 1, 2003. Accordingly, although Dugan's sentence was imposed prior to January 1, 2003, we review his sentence pursuant to an "inappropriate" sentence analysis. *Kien v. State*, 782 N.E.2d 398, 416 n.12 (Ind. Ct. App. 2003), *trans. denied*.

decisions." *Stewart v. State*, 866 N.E.2d 858, 865 (Ind. Ct. App. 2007).[7] A defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate. *Childress*, 848 N.E.2d at 1080.

Our analysis as to the nature of the offense begins with reference to the statutory presumptive sentence for the class of crimes to which the offense belongs. *Williams v. State*, 782 N.E.2d 1039, 1051 (Ind. Ct. App. 2003), *trans. denied*. Thus, "[t]he presumptive sentence is intended to be the starting point for the court's consideration of the appropriate sentence for the particular crime committed." *Id*. Our evaluation of the offender's character focuses on the general sentencing considerations and the relevant aggravating and mitigating circumstances. *Id*.

As to the nature of the offenses, our review of the record reveals that Dugan performed a minor role in their commission. He did not enter McDougle's residence. He took possession of only one item stolen from McDougle, the cell phone that Mitchell gave him in payment of a debt. We further note that there was no violence. *See Frye v. State*, 837 N.E.2d 1012, 1014 (Ind. 2005) (considering lack of violence in defendant's commission of class B felony burglary in revising sentence to presumptive term of ten years). Thus, when

[7] We note that the State characterizes our standard of review as "very deferential" and contends that we should exercise "great restraint" in reviewing sentences, citing *Martin v. State*, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003), and *Foster v. State*, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003), *trans. denied*. We have recently commented that these cases "suggest excessive deference to the trial court under Rule 7(B), which clearly conflicts with the current, more vigorous approach to revising sentences that a majority of our supreme court has adopted." *Stewart*, 866 N.E.2d at 866; *see also Neale v. State*, 826 N.E.2d 635, 639 (Ind. 2005) (emphasizing that rewording of Rule 7(B) to allow revision of "inappropriate" as opposed to "manifestly unreasonable" sentences "changed its thrust from a prohibition on revising sentences unless certain narrow conditions were met to an authorization to revise sentences when certain broad conditions are satisfied"). Therefore, cases such as *Martin* and *Foster* should no longer be cited for our standard of review under Appellate Rule 7(B). *See Stewart*, 866 N.E.2d at 865.

considering only the nature of the offenses, we find no justification for any enhancement of Dugan's sentence beyond the presumptive.

The consideration of Dugan's character is more complex. His criminal history shows disrespect for the law and the rights of others. He was convicted of attempted robbery and burglary in 1983, for which he received concurrent ten-year sentences. Appellant's App. at 156. He violated probation and was ordered to serve the entire sentence for these crimes. Since his release, he has committed nine misdemeanors, violated probation several times, and failed to comply with alcohol and drug programs.[8] *Id*. at 154-56. He was also on probation at the time he committed the current offenses.

The State asserts that "[t]hese facts alone compel imposition of the maximum sentence." Appellee's Br. at 11. However, these facts cannot be considered alone. There are other relevant considerations that soften the harsh portrait painted by Dugan's frequent contacts with the judicial system.

The record shows that Dugan experienced a difficult childhood. Dugan's father was seventy-four years old when Dugan was born and died from alcohol abuse. Appellant's App. at 158. His mother was institutionalized for mental problems. *Id*. He first used alcohol when he was five years old. *Id*. At the age of seven, Dugan was adopted. *Id*. His adoptive parents divorced when he was ten, and he has not seen his adoptive father in twenty-five years. *Id*. In his youth, Dugan experienced conflict with his adoptive mother, and he was not always welcome in her home. *Id*. Dugan dropped out of high school in the eleventh grade.

[8] Dugan's misdemeanor convictions include check deception, battery, possession of marijuana, dealing marijuana, and public intoxication. Appellant's App. at 154-56.

Id. He took special education classes and is unable to read or write. *Id*.

Dugan suffers from depression. *Id*. at 141. He has attempted suicide twice. *Id*. at 160. The most recent attempt occurred after his arrest and incarceration for the current offenses when he tried to hang himself in his cell. *Id*. After this second suicide attempt, Dugan received counseling on a regular basis for the first time and was prescribed Prozac. *Id*. Apparently, he responded well to the treatment. *Id*.; Tr. at 18.

Finally, we note that Dugan pled guilty without a plea agreement and agreed to pay restitution, illustrating that he is willing to take responsibility for his actions. When considering all factors relevant to his character and the nature of the offenses, we conclude that sentences greater than the presumptive sentence are appropriate. However, with due consideration to the trial court's sentencing decision, we cannot say that maximum twenty-year sentences for his burglary convictions are appropriate. We observe that the presentence investigation report recommended fifteen years with five years suspended on the first count of burglary and ten years on the second count. Appellant's App. at 162. In light of the foregoing, we revise Dugan's sentence for each burglary conviction to fifteen years, with three years suspended, to run concurrently. Dugan's remaining sentence for theft remains unchanged and is to run concurrently. We therefore reverse and remand with instructions to issue an amended sentencing order and to issue or make any other document or docket entries consistent with this opinion, without necessity of a hearing.

III. Restitution

At Dugan's sentencing hearing, the prosecutor stated that "the victim in this case is here and he thinks it would be appropriate that some term of probation be imposed so that he can receive restitution of the roughly thirty-nine hundred dollars that … of items that he is no longer in possession of." Tr. at 17-18. Dugan's counsel responded, "Judge, he brought an itemization and a total on paper which I gave to the prosecutor and I gave the other copy to [the probation officer] and *we have no objection to that amount* being ordered." *Id*. at 18 (emphasis added). The trial court ordered Dugan to pay $3900 in restitution. Dugan argues that the restitution order is invalid because there is no evidence in the record to support it.

Courts use restitution to impress upon the defendant the extent of the loss he has caused and that he is responsible for remedying the loss as fully as possible. *Kotsopoulos v. State*, 654 N.E.2d 44, 46 (Ind. Ct. App. 1995), *trans. denied* (1996). An "order of restitution is within the trial court's discretion and we will only review the order for an abuse of that discretion." *Roach v. State*, 695 N.E.2d 934, 943 (Ind. 1998). "An abuse of discretion occurs when the trial court's determination is clearly against the logic and effect of the facts and circumstances before the court or the reasonable, probable, and actual deductions to be drawn therefrom." *J.P.B. v. State*, 705 N.E.2d 1075, 1077 (Ind. Ct. App. 1999) (citing *Matter of L.J.M.*, 473 N.E.2d 637, 640 (Ind. Ct. App. 1985)). An abuse of discretion also occurs "when the trial court misinterprets or misapplies the law." *Green v. State*, 811 N.E.2d 874, 877 (Ind. Ct. App. 2004) (citing *Tapia v. State*, 753 N.E.2d 581, 585 (Ind. 2001)).

Restitution is governed by Indiana Code Section 35-50-5-3, which provides in relevant part,

> [I]n addition to any sentence imposed under this article for a felony or misdemeanor, the court may, as a condition of probation or without placing the person on probation, order the person to make restitution to the victim of the crime. … The court shall base the restitution order upon a consideration of: (1) the property damages incurred as a result of the crime, based on the actual cost of repair[.]

An order of restitution is as much a part of a criminal sentence as a fine or other penalty. *Kotsopoulos*, 654 N.E.2d at 46. It is well established that the restitution order must reflect the actual loss sustained by the victim. *Smith v. State*, 471 N.E.2d 1245, 1248 (Ind. Ct. App. 1984), *trans. denied*. The amount of actual loss is a factual matter, which can be determined only upon presentation of evidence. *Id*.

Specifically, Dugan asserts that the only evidence of the victim's loss in the record is an Indiana State Police Supplemental Case Report (" the Supplemental Report") contained in the presentence investigation report. Appellant's App. at 189-90. According to the Supplemental Report, the victim suffered an actual net loss of $615. *Id*. The State asserts that Dugan has waived review of this issue by failing to object to the restitution order at the sentencing hearing. As we have often noted, "'When a defendant does not properly bring an objection to the trial court's attention so that the trial court may rule upon it at the appropriate time, he is deemed to have waived that possible error.'" *Davis v. State*, 772 N.E.2d 535, 541 (Ind. Ct. App. 2002) (quoting *Mitchell v. State*, 730 N.E.2d 197, 201 (Ind. Ct. App. 2000), *trans. denied*).

In response to the State's waiver argument, Dugan avers that he "only agreed to pay restitution in accordance with an itemization which defense counsel gave to the prosecutor and the probation officer. Tr. 19. Such a statement implicitly was an objection to any larger

amount of restitution." Appellant's Reply Br. at 6. Dugan would have us believe that the itemization agreed to at the sentencing hearing was the same as or identical to the Supplemental Report. However, Dugan completely ignores that at the sentencing hearing, the prosecutor specifically stated that the itemization provided by the victim showed " the roughly thirty-nine hundred dollars that … of items that he is no longer in possession of." Tr. at 17-18. Dugan's counsel agreed, "we have no objection to that amount being ordered." *Id*. at 18. Dugan did not object to the restitution order, nor did he object to the specific amount of the victim's actual loss quoted by the prosecutor. In fact, he effectively stipulated to a restitution order of $3900. Accordingly, we conclude that Dugan waived his claim that the restitution order is invalid.[9] *See Davis*, 772 N.E.2d at 541 (holding that where defendant did not object to restitution order and discussed its scope at sentencing hearing, defendant waived claim that record was devoid of evidence that victim suffered an actual loss of earnings); *Kellett v. State*, 716 N.E.2d 975, 980 (Ind. Ct. App. 1999) (holding that where defendant failed to object at sentencing hearing to admission of ledger presented by State to support

[9] We recognize that "a reviewing court may remedy an unpreserved error when it determines that the trial court committed fundamental error. … An improper sentence constitutes fundamental error and cannot be ignored on review." *Ware v. State*, 816 N.E.2d 1167, 1179 (Ind. Ct. App. 2004). In *Ware*, we held that the trial court's order requiring the defendant to pay for any counseling that the victim received as a result of sexual misconduct constituted fundamental error because the order violated the restitution statute and imposed an undue financial burden on defendant, and there was no evidence in the record to determine the proper amount of restitution. We find no fundamental error here. *Cf. Bennett v. State*, 862 N.E.2d 1281, 1288 (Ind. Ct. App. 2007) (concluding that even where defendant agreed that some kind of restitution order was proper, the actual restitution order constituted fundamental error in that it specifically required unknown future expenses, had no end date and was not based upon any evidence); *Johnson v. State*, 845 N.E.2d 147, (Ind. Ct. App. 2006) (finding that even though defendant failed to challenge restitution order at his sentencing hearing, remand for clarification of the order requiring defendant to pay victim's counseling if requested was proper to determine whether order was in compliance with restitution statute); *Green*, 811 N.E.2d at 877 ("because the trial court ordered restitution as part of Green's sentence, we treat this question like any other claim that a trial court has violated its statutory authority in imposing sentence, which amounts to fundamental error, and which may be raised for the first time on appeal.").

restitution order, defendant waived claim that ledger contained mathematical errors and duplicate charges resulting in an amount of restitution greater than the actual expenses incurred). Therefore, we affirm the trial court's restitution order.

Affirmed in part, vacated in part, and remanded with instructions.

DARDEN, J., and MAY, J., concur.