

Case Summary and Issues

Timothy J. Gilbert appeals following a jury trial in which he was convicted of child molesting, a Class A felony, and child molesting, a Class C felony; Gilbert also pled guilty to escape, a Class C felony. Gilbert raises the sole issue of whether the trial court properly ordered him to serve his sentence for escape consecutively to his sentences for child molesting. Finding that the trial court ordered the sentence to be served consecutively based on an erroneous assumption that a consecutive sentence was mandated, we reverse and remand.

Facts and Procedural History

S.J.C. was approximately six years old when her mother married Gilbert. Several times when S.J.C. was between the ages of nine and eleven, Gilbert engaged in sexual touching and sexual deviate contact with her. S.J.C. did not tell anyone about these incidents when they occurred. In May 2005, when S.J.C. was approximately sixteen years old, police contacted her concerning allegations that Gilbert possessed nude pictures of her. At this time, S.J.C. told her mother and police that Gilbert had previously molested and engaged in sexual deviate conduct with her. Police investigated the allegations, arrested Gilbert on June 1, 2005, and subsequently executed a search warrant, leading to the discovery of evidence. Following his arrest, police left Gilbert unattended in the jail's booking area, and Gilbert escaped through a side door. Police apprehended Gilbert later the same night after finding him hiding underneath a trailer. On June 6, 2005, the State charged Gilbert with the two

counts of child molesting and escape.¹ On August 26, 2005, Gilbert moved to sever the child molesting counts from the escape count, and the trial court severed the counts and ordered separate trials. A jury found Gilbert guilty of both child molesting counts, and Gilbert then pled guilty to escape. On November 15, 2005, the trial court held a sentencing hearing. The trial court found Gilbert's lack of criminal history to be a mitigating circumstance. With regard to aggravating circumstances, the trial court made the following statement:

Even though the State has elected not to proceed with aggravating circumstances, which this Court could consider and if it did find to add to or impose a sentence above the presumptive or fixed term sentence, this Court cannot consider those circumstances and here they have certainly an undercharging of Count II and at least three uncharged acts of misconduct, which would be Class A felonies. I won't speculate what a jury would have done with those incidences. I can consider those for two purposes, and I limit my consideration to two matters. That is, is whether or not the sentence should be reduced under the presumptive sentence and also whether or not the sentences should run concurrently or consecutively. . . . I have considered those circumstances and do find that those circumstances of Count II being undercharged and three uncharged acts of misconduct as they reflect on Defendant's character are reasons for this Court not to impose a sentence under the presumptive or fixed term of imprisonment on either Counts I or II. And I have considered Defendant's lack of any prior criminal convictions as, in weighing those factors. Also, those factors weigh in favor of this Court imposing consecutive sentences.

Count III is the crime of Escape, which did occur on . . . June 1, 2005. The reason I mention this is that this Court's sentencing decision on Count III is controlled by a new set of statutes adopted by the Indiana legislature Even though this Court is no longer required to find aggravating circumstances to impose a sentence above four years for a Class C felony, this Court is required to find reasons and articulate or enumerate reasons. . . . [T]he State is asserting I should consider these [aggravating factors] on Count III. I am going to decline that opportunity to do so as I do feel to do so would be in contravention of the spirit and intent of the United States Supreme Court

¹ The State also charged Gilbert with possession of methamphetamine, two counts of theft, possession of marijuana, and possession of paraphernalia. The State dismissed all these counts on October 27, 2005.

decisions and the Indiana Supreme Court decisions of Defendant's right to trial by jury. I will, on Count III, though observe under Indiana Code 35-50-1-2(d), I believe they do have to be consecutive. . . . I believe the advisory sentence on Count III is the correct sentence.

Appellant's Brief at 3-4.² The trial court sentenced Gilbert to thirty years for the A felony child molesting, four years for the C felony child molesting, and four years for escape, and ordered that all sentences be served consecutively for an aggregate sentence of thirty-eight years. Gilbert now appeals his sentence.

Discussion and Decision

A trial court must act pursuant to express authority in order to impose consecutive sentences. Williams v. State, 787 N.E.2d 461, 463 (Ind. Ct. App. 2003). Authority to issue consecutive sentences is found in Indiana Code section 35-50-1-2. This statute provides in relevant part:

(c) Except as provided in subsection (d) or (e), the court shall determine whether terms of imprisonment shall be served concurrently or consecutively. The court may consider the aggravating and mitigating circumstances in IC 35-38-1-7.1(b) and IC 35-38-1-7.1(c) in making a determination under this subsection. The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. . . .

(d) If, after being arrested for one (1) crime, a person commits another crime:
 (1) before the date the person is discharged from probation, parole, or a term of imprisonment imposed for the first crime; or
 (2) while the person is released:
 (A) upon the person's own recognizance; or
 (B) on bond;
the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed.

² The trial court did not identify aggravators or mitigators in its sentencing order, but indicated that its sentencing decisions were "due to the aggravating circumstances enumerated by the Court in the record at the Sentencing hearing." Appellant's Appendix at 143.

Thus, under subsection (c), the trial court retains discretion to determine whether terms of imprisonment shall be served concurrently or consecutively. Under subsection (d), however, in certain circumstances the trial court has no discretion and must order that sentences be served consecutively. Williams, 787 N.E.2d at 463. In this case, the trial court's statements at the sentencing hearing indicate that it regarded consecutive sentences as mandatory under the statute. However, "[a] defendant who has not been sentenced for offense one at the time he commits offense two does not fall under the mandatory sentences provision of the Code." Dragon v. State, 774 N.E.2d 103, 106 (Ind. Ct. App. 2002), trans. denied (quoting Sides v. State, 490 N.E.2d 318, 320 (Ind. 1986), rev'd on other grounds on reh'g, 507 N.E.2d 560 (Ind.1986)). Because Gilbert had not been sentenced for his other crimes at the time he committed the offense of escape, the trial court erred in believing that it was required to order that Gilbert's sentence for escape run consecutively.

When irregularities exist in the trial court's sentencing decision, "we have the option to remand to the trial court for a clarification or new sentencing determination, to affirm the sentence if the error is harmless, or to reweigh the proper aggravating and mitigating circumstances independently at the appellate level." Francis v. State, 817 N.E.2d 235, 238 (Ind. 2004). Although the trial court was not required to order consecutive sentences under subsection (d), it had the discretion to order consecutive sentences under subsection (c) after reviewing the valid aggravating and mitigating circumstances, and we could remand with instructions that the trial court exercise its discretion to determine whether consecutive sentences are appropriate. Williams, 787 N.E.2d at 465. However, the trial court's

sentencing decision makes clear that it already exercised its discretion to not find any aggravating circumstances, and that it ordered the sentence for escape to run consecutively solely on its assumption that it was required to by statute.³ Therefore, pursuant to our appellate power to reweigh the aggravators and mitigators, we adopt the trial court's findings as to aggravators and mitigators and order that Gilbert's sentence for escape run concurrently with his sentences for child molesting.

Conclusion

We hold the trial court erroneously concluded that it was required to order Gilbert's sentence for escape to run consecutively to his other sentences. We remand with instructions that the trial court amend its sentencing order to direct that Gilbert's sentence for escape be served concurrently with his sentences for child molesting, for an aggregate sentence of thirty-four years.

Reversed, and remanded with instructions.

SULLIVAN, J., and BARNES, J., concur.

³ The State correctly argues that a single aggravator may support the imposition of consecutive sentences. Davies v. State, 730 N.E.2d 726, 742 (Ind. Ct. App. 2000), trans. denied, cert. denied, 532 U.S. 945 (2001). The State also correctly states that the trial court found aggravating circumstances to support its imposition of consecutive sentences as to counts I and II. However, the trial court specifically declined to consider these aggravators as to count III. Instead, the trial court stated that although it found no aggravators, it "will, on Count III, though observe under Indiana Code 35-50-1-2(d), I believe they do have to be consecutive." Tr. at 450-51.