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IN THE
COURT OF APPEALS OF INDIANA

BRUCE A. WALDON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0606-CR-458
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0206-FC-46

November 9, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Bruce Waldon was convicted of: five counts of Burglary,[1] three counts of Conspiracy to Commit Burglary,[2] and one count of Corrupt Business Influence,[3] all class C felonies; five counts of Theft,[4] all class D felonies; and three counts of Contributing to the Delinquency of a Minor,[5] all class A misdemeanors. Waldon was also determined to be an Habitual Offender.[6] The trial court sentenced Waldon to sixty-three years of imprisonment. Waldon appealed, and we remanded for a new sentencing determination because the trial court relied upon several improper aggravating factors.[7] Upon remand, the trial court again sentenced Waldon to sixty-three years of imprisonment. Waldon appeals the trial court's second sentencing determination, and presents the following restated issue: Did the trial court abuse its discretion by imposing a sixty-three-year sentence?

We affirm.

The brief underlying facts were set out in *Waldon I* as follows:

> During the summer of 2002, Waldon recruited the assistance of three juveniles: D.A., S.K., and his son, J.W. Waldon, S.K., and

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[1] Ind. Code Ann. § 35-43-2-1 (West 2004)

[2] Ind. Code Ann. § 35-41-5-2 (West 2004)

[3] Ind. Code Ann. § 35-45-6-2 (West 2004)

[4] I.C. § 35-43-4-2 (West 2004)

[5] Ind. Code Ann. § 35-46-1-8 (West 2004)

[6] Ind. Code Ann. § 35-50-2-8 (West 2004)

[7] *See Waldon v. State*, 829 N.E.2d 168, 184 (Ind. Ct. App. 2005) (*Waldon I*) ("[b]ecause three potentially valid aggravators remain but we are unsure how the trial court weighed them at sentencing, and given that many of the reasons supporting those aggravators are invalid, we remand to the trial court for resentencing"), *trans. denied*.

> occasionally J.W. would break and gain entry into businesses in the Lafayette area by prying around the locks on their doors with a screwdriver. Once inside, they would search for cash but would take other property, such as hair care products, when it was available. While they were inside, D.A., who served as the driver, would act as a lookout and communicate with the others via walkie-talkie. After leaving the businesses, Waldon would divide the proceeds, and D.A. would take him home.
>
> After some investigation, Waldon and his associates became suspects in the crimes. The police approached D.A. and asked him to allow them to put a GPS tracking device on his car and for him to wear a wire when the group went out. D.A. agreed. On May 29, 2002, D.A. informed the police that he, Waldon, and S.K. would be going out that night. Officers followed D.A.'s car that night as the three made their way to Carroll County where they attempted to commit burglaries of two businesses. Upon returning to Tippecanoe County, officers stopped the vehicle and the occupants were taken into custody. Waldon was then tried for multiple crimes alleged to have been committed by him and his cohorts.

Waldon I, 829 N.E.2d at 172-73.

The following is a synopsis of the procedural events that preceded our decision in *Waldon I*. On November 4, 2004, a jury convicted Waldon as set forth above. Further, Waldon was determined to be an habitual offender. The trial court found no mitigating factors and found the following aggravating factors: (1) Waldon's criminal history, consisting of numerous felony convictions,[8] two misdemeanor convictions, and eight dismissed charges; (2) the risk Waldon would commit another crime; (3) the nature and

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[8] In *Waldon I*, Waldon failed to include a copy of the presentence investigation report (the PSI) in the appellate record. In discussing Waldon's criminal history, we stated, "[a]t the sentencing hearing, Waldon's counsel, in discussing Waldon's criminal history, informed the court that the criminal history consisted of two misdemeanors, the felonies which served as the bases for the habitual offender finding, and eight cases that were dismissed.[12]" *Waldon I*, 829 N.E.2d at 181 (one footnote omitted). Footnote 12 stated, "[t]he pre-sentence investigation report was not included in the appendix so the information before us on this issue comes solely from [Waldon's] counsel's statement." *Id.* at 181 n.12.

circumstances of Waldon's crimes, including the length of time over which Waldon committed the crimes and the number of crimes committed, that Waldon took no care to minimize the harm done and there was some gratuitous destruction, that Waldon corrupted young people, and the numerosity of the charges; (4) Waldon's character; and (5) that Waldon continued to commit crimes despite knowing he was under surveillance. Based upon these factors, the trial court sentenced Waldon to sixty-three years of imprisonment.

In *Waldon I*, Waldon asserted his sentence violated *Blakely v. Washington*, 542 U.S. 296 (2004) in that his Sixth Amendment right to a jury trial was violated because the trial court relied upon aggravating factors to enhance his sentence that were neither found by a jury beyond a reasonable doubt nor admitted by him. After reviewing the aggravating factors, we concluded the trial court erred in relying upon the following: (1) Waldon's criminal history to the extent the trial court relied upon the eight dismissed charges; (2) the risk Waldon would commit another crime; (3) the nature and circumstances of the crimes to the extent the trial court relied upon the facts that Waldon took no care to minimize the harm done, he corrupted young people, and the number of charges; (4) Waldon's character; and (5) that Waldon continued to commit crimes after he knew he was being surveilled. We were left, therefore, with the following valid aggravating factors: (1) Waldon's criminal history to the extent that he had several felony convictions and two misdemeanor convictions; and (2) the nature and circumstances of the crimes, but only to the extent of the number and duration of his criminal acts. We forewent a review of Waldon's sentence under Ind. Appellate Rule 7(B) because the trial

court erred by relying upon improper aggravating factors, and remanded for resentencing consistent with our decision.

On January 10, 2006, the trial court held a resentencing hearing. Upon remand, the trial court identified no mitigating factors and the following aggravating factors: (1) Waldon's criminal history, excluding dismissed charges and including two burglaries to which Waldon pleaded guilty but for which he had not yet been sentenced; and (2) the number and duration of the crimes for which Waldon was being sentenced. The trial court concluded the two aggravating factors warranted the same sentence it previously imposed. That is, the trial court resentenced Waldon to sixty-three years of imprisonment. Waldon now appeals.

Waldon contends the trial court erred in resentencing him. The nature of Waldon's claim, however, is not entirely clear. Waldon states neither that the trial court abused its discretion, nor that his sentence is inappropriate under App. R. 7(B). Rather, Waldon asserts, "[f]or the trial court to use less aggravators in [re]sentencing [him] to the same amount of time is illogical and inappropriate[,]" concluding, "[i]t is akin to a golfer filling out his scorecard in advance of his round." *Appellant's Brief* at 15. In support of his argument, Waldon cites portions of six cases that address whether a trial court abused its discretion. We take Waldon's argument, therefore, to be the trial court abused its discretion when it resentenced him to sixty-three years of imprisonment.

We review a trial court's sentencing determination for an abuse of discretion. *White v. State*, 847 N.E.2d 1043 (Ind. Ct. App. 2006). When a trial court uses aggravating or mitigating circumstances to modify the presumptive sentence, it must: (1)

identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate its evaluation and balancing of the circumstances. *Id.* The trial court's assessment of the proper weight assignable to mitigating and aggravating circumstances is entitled to great deference and will be set aside only upon a showing of an abuse of discretion. *Id.* Even a single aggravating circumstance may support the imposition of enhanced or consecutive sentences. *Id.* Further, unless we specifically order otherwise, upon remand a trial court may: (1) issue a new sentencing order without taking any further action; (2) order additional briefing on the sentencing issue and issue a new order without holding a new sentencing hearing; or (3) order a new sentencing hearing at which additional factual submissions are either allowed or disallowed and issue a new order based on the presentations of the parties. *Chism v. State*, 807 N.E.2d 798 (Ind. Ct. App. 2004).

As we noted above, Waldon was convicted of nine class C felonies, five class D felonies, and three class A misdemeanors, and was determined to be an habitual offender. When Waldon committed these crimes, the presumptive sentence for a class C felony was four years, and the trial court was permitted to add up to four years for aggravating circumstances or subtract up to two years for mitigating circumstances. I.C. § 35-50-2-6 (West 2004). The presumptive sentence for a class D felony was one and one-half years, and the trial court was permitted to add up to one and one-half years for aggravating circumstances or subtract up to one year for mitigating circumstances. I.C. § 35-50-2-7 (West 2004). A class A misdemeanor carried a fixed term of up to one year. I.C. § 35-

50-3-2 (West 2004). Finally, upon a determination that one was an habitual offender, a trial court could enhance a defendant's sentence by "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." I.C. § 35-50-2-8 (West 2004). In this case, therefore, the maximum sentence allowed by statute was 102 years, and the minimum allowable sentence was 6 years.[9]

Upon remand, the trial court resentenced Waldon to sixty-three years of imprisonment. At the resentencing hearing, the trial court explicitly stated that it did not rely upon the improper aggravating factors. That is, the trial court did not rely upon: (1) Waldon's eight dismissed charges; (2) the risk that Waldon would commit another crime; (3) that Waldon took no care to minimize the harm done; (4) that Waldon corrupted young people; (5) the number of charges; (6) Waldon's character; or (7) that Waldon continued committing crimes after he knew he was under surveillance. The trial court, therefore, did not rely upon improper aggravating circumstances.

We note there was some confusion during the resentencing hearing regarding whether the trial court could rely upon the felony convictions that constituted the basis for the jury's habitual offender determination. This confusion resulted from our

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[9] 102 years constitutes the sum of: 9, fully-enhanced 8-year sentences for class C felonies; 5, fully-enhanced 3-year sentences for class D felonies; 3, 1-year sentences for class A misdemeanors; and 1, 12-year enhancement of a class C felony upon the habitual offender determination; with all sentences running consecutively. Conversely, 6 years constitutes the sum of: the minimum allowable sentences for all 17 convictions with all sentences running concurrently; plus the minimum, 4-year habitual offender enhancement.

discussion in *Waldon I* in which we stated "[t]he felonies which supported the habitual offender finding could not *standing alone* be relied upon as the aggravating factor of a prior criminal record to enhance the sentence." *Waldon I*, 829 N.E.2d at 182 (emphasis supplied). We reiterate that Waldon omitted the PSI from the appellate record in *Waldon I*. Waldon included the PSI in this appeal. Had he done so in *Waldon I*, it would have been clear that his criminal history included numerous felonies in addition to the felonies that served as the basis for the habitual offender determination.[10] Whether the felonies that supported the habitual offender finding could be relied upon, standing alone, as the aggravating factor of a prior criminal record to enhance a sentence is wholly irrelevant in this case: the felony convictions that served as the basis for the habitual offender finding do not stand alone. The trial court, therefore, was permitted to consider those convictions as aggravating factors. *See Jones v. State*, 600 N.E.2d 544, 548 (Ind. 1992) ("it is permissible for the trial court to consider the same prior offenses for both enhancement of the instant offense and to establish habitual offender status"). We also note that Waldon did not contend upon resentencing, nor does he now claim, that the trial court erred in not identifying any mitigating circumstances.

The trial court relied upon the following two aggravating factors: (1) Waldon's criminal history; and (2) the number and duration of the crimes. As noted above, Waldon's criminal history includes twelve felony convictions, eleven of which are for burglary and theft, the same crimes upon which he was sentenced in this case. Moreover,

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[10] Specifically, the PSI indicates Waldon has previously been convicted of the following felonies: five times for burglary; five times for theft; burglary of a dwelling; and forgery.

Waldon admitted to committing two separate burglaries for which he was awaiting sentencing. Thus, Waldon's criminal history is recent, substantial, and largely related to the instant offenses. Under these circumstances, the trial court properly gave substantial weight to this aggravating factor. *See Field v. State*, 843 N.E.2d 1008 (Ind. Ct. App. 2006) (trial court properly assigned criminal history substantial aggravating weight where defendant accumulated two prior felony convictions, two prior misdemeanor convictions, and one juvenile adjudication), *trans. denied*.

The trial court balanced the two aggravating factors against no mitigating factors and sentenced Waldon to sixty-three years. In light of the substantial aggravating weight of Waldon's criminal history, the trial court did not abuse its discretion when it imposed the same sentence upon remand as it did in its original sentencing order even though, upon remand, it considered fewer aggravating factors. That is, contrary to Waldon's assertion, it was not *per se* illogical or impermissible for the trial court to impose the same sentence in the absence of several aggravating factors. *Cf. Leffingwell v. State*, 793 N.E.2d 307, 311 (Ind. Ct. App. 2003) ("given that we have determined that two of the aggravators relied upon by the trial court were improper, we cannot conclude with any degree of certainty that the trial court would have imposed the same sentence had it not considered these factors").

Affirmed.

NAJAM, J., and DARDEN, J., concur.