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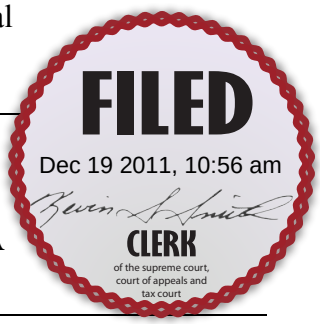

IN THE COURT OF APPEALS OF INDIANA

BRIAN E. CAIN,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 79A02-1104-CR-372
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0503-FB-5

December 19, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Brian E. Cain ("Cain") pleaded guilty in Tippecanoe Circuit Court to Class B felony criminal deviate conduct, Class D felony battery on a law enforcement officer, and Class A misdemeanor resisting law enforcement. Cain also admitted to being an habitual offender. The trial court sentenced Cain to an aggregate term of forty-five years, with forty years executed and five years suspended. On appeal, Cain presents two issues, which we reorder and restate as: (1) whether the trial court erred in imposing consecutive sentences, and (2) whether Cain's sentence is inappropriate.

We affirm.

Facts and Procedural History

On March 25, 2005, Cain was in a bar in Lafayette where he met C.D. for the first time. When C.D. stated that she was looking for a new apartment to rent, Cain informed her that he knew of a place that she might rent. Cain and C.D. then went across the street to another bar, where C.D. played pool and telephoned her boyfriend to let him know where she was. Later that night, Cain asked C.D for a ride home and offered to help pay for fuel. C.D. accepted and the two got in her car.

At some point during the trip, Cain asked C.D. to pull the car over, claiming that he had an apartment to show her. C.D. pulled the car over, and the two talked about the apartment. Thereafter, C.D. decided to leave and repeatedly told Cain to get out of her car. Cain refused. When she tried to drive away, Cain grabbed her arm to prevent her from putting her car in gear. Cain also grabbed C.D.'s hair and forced her head toward his lap. C.D. resisted by kicking and placing her feet underneath the dashboard. Her foot

then slipped off the clutch, causing the car to lurch forward and stall. Cain was then able to grab C.D.'s car keys from the ignition.

Cain then told C.D., "You're going to give me head. You're going to make me come!" Appellant's App. pp. 20-21. Cain had unzipped his pants and exposed his penis to her. C.D. became sick and vomited into the street, but Cain grabbed her and forced her back into the car, causing scratches to C.D.'s neck and torso. Cain forced C.D.'s head down and felt "flesh," presumably Cain's penis, in her mouth, which caused her to gag. Id. at 21.

During Cain's assault, C.D. was able to use her mobile phone to call 911 and leave her phone on. The 911 dispatchers heard C.D. begging Cain to stop and also heard C.D. gagging. They also heard C.D. repeatedly state, "no," and heard her tell Cain, "Let go of my hair, oh my God, Help." Id. The dispatchers also heard Cain tell C.D., "Get on this d**k," and, "I'm not giving you your keys, f**k it. You suck this c**k and you can go. You suck this c**k and you can go or else you will be here all night." Id.

As a result of C.D.'s 911 call, officers from the Lafayette Police Department were dispatched to the area. One of these officers, Officer Dombrowski, heard C.D. scream for help from her car. She opened up her door to escape, but Cain grabbed her and tried to pull her back into the car. Despite this, C.D. managed to break free and ran to Officer Dombrowski. C.D. was distraught and crying and pleaded with the police to help her. Officer Dombrowski put C.D. in the back of his patrol car and ordered Cain to put his hands up and remain in the car. Cain refused to comply and opened the passenger door

of C.D.'s car and exited the vehicle. Cain's zipper was still unzipped and his penis was exposed.

When Cain got out of the car, Officer Dombrowski recognized him and knew that he had a history of fighting with police officers. When Officer Dombrowski ordered Cain to stop, Cain responded, "f**k you," and fled. Id. at 19. Officer Dombrowski gave chase and caught up with Cain in an alley, where he tackled Cain to the ground. Cain fought with Officer Dombrowski by kicking him in the groin and punching him in the face. With the help from other officers, Cain was eventually subdued. Cain then refused to walk and had to be carried by the police to the patrol car.

On March 25, 2005, the State charged Cain as follows: Count I, Class B felony criminal deviate conduct; Count II, Class D felony criminal confinement; Count III, Class D felony sexual battery; Count IV, Class D felony battery on a law enforcement officer; and Counts V–VI alleged three counts of Class A misdemeanor resisting law enforcement. The State also alleged that Cain was an habitual offender.

On June 9, 2006, Cain agreed to plead guilty to Count I, Count IV, and Count VI and also admitted to being an habitual offender. In exchange, the State agreed to dismiss the remaining charges and an unrelated petition to revoke probation. The plea agreement provided that the executed portion of Cain's sentence would be no less than twenty years but no more than forty years.

On July 10, 2006, the trial court held a sentencing hearing. The court found as mitigating that Cain had expressed remorse, had taken responsibility for his crimes by pleading guilty, and that he had a dependent child. The court found as aggravating that

Cain had an extensive criminal history, that he used illegal drugs and alcohol, that prior attempts at rehabilitation had been unsuccessful, and that Cain had been on probation at the time of the instant crimes. The trial court then sentenced Cain to fifteen years on Count I, three years on Count IV, and one year on count VI. The trial court also imposed an habitual offender enhancement of twenty-six years. The court ordered that all sentences run consecutively, for an aggregate term of forty-five years, but also ordered five years to be suspended. Thus, Cain was sentenced to the maximum term allowed under the plea agreement. On March 17, 2011, the trial court granted Cain's petition for permission to file a belated notice of appeal, and this appeal ensued.

I. Consecutive Sentences

Cain argues that the trial court erred in ordering his sentences, apart from the habitual offender enhancement, to be served consecutively. The decision to impose consecutive sentences lies within the discretion of the trial court, but the court is required to state its reasons for imposing consecutive sentences. Owens v. State, 916 N.E.2d 913, 917 (Ind. Ct. App. 2009). The trial court must find at least one aggravating circumstance before imposing consecutive sentences. Id.

Here, Cain does not argue that the trial court erred in identifying aggravating factors that would support the imposition of consecutive sentences. He instead bases his argument wholly on the "continuing crime" doctrine.

We have previously explained that:

> The continuing crime doctrine essentially provides that actions that are sufficient in themselves to constitute separate criminal offenses may be so compressed in terms of time, place, singleness of purpose, and continuity of

> action as to constitute a single transaction. [T]he continuous crime doctrine does not seek to reconcile the double jeopardy implications of two distinct chargeable crimes; rather, the doctrine defines those instances where a defendant's conduct amounts only to a single chargeable crime. In doing so, the continuous crime doctrine prevents the State from charging a defendant twice for the same continuous offense.

Buchanan v. State 913 N.E.2d 712, 720 (Ind. Ct. App. 2009) (quoting Riehle v. State, 823 N.E.2d 287, 296 (Ind. Ct. App. 2005)), trans. denied.

Cain claims that "when [his actions are] compressed the way they are . . . and as interwoven in terms of purpose," the continuing crime doctrine "prohibits charging [Cain] thrice for the same continuous crime." Appellant's Br. p. 18. As Cain's own argument indicates, the continuing crime doctrine prevents the State from charging and convicting a defendant multiple times for the same continuous offense. See Buchanan, 913 N.E.2d at 720. And the remedy for a violation of this doctrine is vacating the multiple convictions. See id. (vacating defendant's false reporting and intimidation convictions to remedy violation of continuing crime doctrine); Nunn v. State, 695 N.E.2d 124, 125 (Ind. Ct. App. 1998) (vacating defendant's convictions on four of five counts of attempted murder which were based on the defendant's act of firing five shots at a single individual in a space of a few seconds). Therefore, by invoking the continuing crime doctrine, Cain is attacking the propriety of his convictions, not simply the consecutive sentences imposed thereon.

Here, however, Cain pleaded guilty. By doing so, he waived his right to challenge the validity of his convictions on direct appeal. It is well settled that a defendant who pleads guilty is not permitted to challenge the propriety of that conviction on direct

appeal. Collins v. State, 817 N.E.2d 230, 231 (Ind. 2004) (citing Tumulty v. State, 666 N.E.2d 394, 395 (Ind. 1996)).[1]

Cain does not directly claim that he is challenging the propriety of his convictions, but his current argument is little more than an attempt to challenge the propriety of his convictions under the rubric of the continuing crime doctrine. That is, the thrust of Cain's argument is that the trial court erred in imposing consecutive sentences because he should not have been convicted of more than one count. Because he pleaded guilty, however, Cain may not now challenge the validity of his plea, either directly or indirectly. As Cain makes no other challenge to his consecutive sentences, and since the trial court found multiple aggravating factors, we find no error in the trial court's imposition of consecutive sentences.

II. Appellate Rule 7(B)

Cain also argues that his sentence is inappropriate. Pursuant to Indiana Appellate Rule 7(B), we may revise a sentence otherwise 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." Although we have the power to review and revise sentences, "[t]he principal role of appellate review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived 'correct' result in each case." Cardwell v. State, 895

[1] A person who pleads guilty is entitled to contest on direct appeal the merits of a trial court's sentencing decision where the trial court has exercised sentencing discretion, i.e., where the sentence is not fixed by the plea agreement. Id.

N.E.2d 1219, 1225 (Ind. 2008). It is on the basis of Appellate Rule 7(B) alone that a criminal defendant may now challenge his sentence "where the trial court has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing a particular sentence that is supported by the record, and the reasons are not improper as a matter of law, but has imposed a sentence with which the defendant takes issue." Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). It is the defendant's burden on appeal to persuade the reviewing court that the sentence imposed by the trial court is inappropriate. Id. at 494.

Cain claims that he received the maximum sentence allowed under his plea agreement and that we should therefore view his sentence as the maximum allowed. We disagree. Although Cain did receive the maximum *executed* sentence allowed under his plea agreement, the plea agreement did not place any limit on the total sentence Cain could receive.[2] And we decline to apply the "worst offender, worst offenses" analysis to a case where the defendant did not receive the statutory maximum sentence. Instead, we will consider both the nature of the offense and the character of the offender in deciding whether Cain has met his burden of demonstrating that his sentence is inappropriate. See Anglemyer, 868 N .E.2d at 494.

[2] In fact, the statutory maximum sentence for the crimes Cain was convicted of, plus the maximum habitual offender enhancement, was fifty-four years, not the forty-five years with five years suspended he received. The maximum sentence for a Class B felony is twenty years. See Ind. Code § 35-50-2-5. The maximum sentence for a Class D felony is three years. See Ind. Code § 35-50-2-7. The maximum sentence for a Class A misdemeanor is one year. See Ind. Code § 35-50-3-2. And the maximum habitual offender enhancement is no more than three times the advisory sentence for the enhanced conviction, but never more than thirty years. See Ind. Code § 35-50-2-8(h).

The nature of Cain's offense is particularly disturbing. Cain met C.D. at a bar, convinced her to drive him home, had her stop the car under false pretenses of looking at an apartment, and then sexually attacked her. Cain assaulted C.D. by forcing her head onto his penis, took her car keys, and told her that she could not leave until she performed oral sex. Despite her pleas to stop, Cain then physically forced her to perform oral sex on him. When the police arrived, Cain ignored their commands, fled from the officers, and then punched Officer Dombrowski in the face and kicked him in the groin. Cain then refused to walk, requiring the police to carry him to a patrol car.

Cain's character further supports the trial court's sentencing decision. As a juvenile, Cain was found to be a delinquent after committing criminal mischief. His probation was later modified for failure to attend school classes and comply with school rules. The presentence investigation report reveals that, at the time of sentencing in the present case, Cain had accumulated thirty-two criminal convictions, consisting of twenty misdemeanor convictions and twelve felony convictions. The misdemeanor convictions include driving while suspended, check deception, possession of marijuana, battery, battery on a law enforcement officer, residential entry, resisting law enforcement, invasion of privacy, operating a vehicle while intoxicated, and public intoxication. His felony convictions include five theft convictions, three resisting law enforcement convictions, two check fraud convictions, an attempted escape conviction, and a conviction for battery on a law enforcement officer. In addition, Cain had his probation

revoked at least three times.[3] And as noted by the trial court, Cain was on probation at the time he committed the instant offenses.

In short, Cain's crimes were brutal, and his character is that of a recidivist criminal who has yet to be deterred by lesser punishments and attempts at rehabilitation. We therefore conclude that Cain has not met his burden of demonstrating that his sentence of forty-five years, with forty years executed and five years suspended, was inappropriate.

Affirmed.

BAILEY, J., and CRONE, J., concur.

[3] The presentence investigation report also reveals numerous other arrests for charges and alleged probation violations that were later dismissed for various reasons. Although "[a] record of arrest, without more, does not establish the historical fact that a defendant committed a criminal offense and may not be properly considered as evidence of criminal history," such may reveal that a defendant "has not been deterred even after having been subject to the police authority of the State." Cotto v. State, 829 N.E.2d 520, 526 (Ind. 2005). Thus, a history of arrests may be relevant to the trial court's assessment of the defendant's character. Id.