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# IN THE COURT OF APPEALS OF INDIANA

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| JOSEPH R. BURNS, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 92A03-0606-CR-265 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE WHITLEY CIRCUIT COURT
The Honorable James R. Heuer, Judge
Cause No. 92C01-0502-FC-26

**December 12, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## Case Summary

Joseph R. Burns appeals his sentence under his conviction for aiding escape and a habitual offender enhancement. Finding that the trial court properly considered and weighed aggravators and mitigators in arriving at a sentence and that this sentence is not inappropriate, we affirm.

## Facts and Procedural History

In February 2005, Burns was incarcerated at the Whitley County Jail, serving a one-year sentence for residential entry and operating while intoxicated. Burns became acquainted with fellow inmate Troy Rains. Rains informed Burns that he planned to escape from the jail, but that he was concerned because he did not know the Whitley County area very well. Burns arranged for his girlfriend, Terra Blair, to meet Rains outside the jail and to assist his escape by driving him out of the county. With Blair's assistance, Rains did escape, though he was later recaptured.

Burns was charged with one count of Aiding Escape, a Class C felony,[1] and a habitual offender enhancement was also filed against him.[2] A jury trial commenced on June 28, 2005, and a jury was selected. When the trial adjourned on June 29, 2005, Burns filed a motion to withdraw his plea of not guilty and enter a guilty plea without the benefit of a written plea agreement. The trial court accepted Burns' change of plea and found him guilty of aiding escape, and it accepted his admission to being a habitual offender.

[1] Ind. Code § 35-44-3-5; Ind. Code § 35-41-2-4.

[2] Ind. Code § 35-50-2-8.

Sentencing was held on July 25, 2005. The trial court indicated that it had reviewed Burns' pre-sentence investigation report, and Burns stated that the information contained in the report was correct. The trial court found four aggravating factors: (1) Burns' two prior juvenile adjudications; (2) Burns' adult criminal history, which included four prior felony convictions and three misdemeanor convictions; (3) Burns' history of [three] probation violations; and (4) the fact that Burns was serving a sentence for another crime at the time the instant offense occurred. The trial court also found one mitigator: the fact that Burns received his GED while incarcerated. The court found the aggravators to outweigh the mitigators. Burns was sentenced to six years for aiding escape, and four years were added to that sentence based on the habitual offender enhancement, resulting in an aggregate sentence of ten years.

On April 10, 2006, Burns filed a petition for leave to file a belated notice of appeal under Indiana Post-Conviction Rule 2. The trial court granted Burns' petition, and on May 31, 2006, Burns filed this belated appeal.

**Discussion and Decision**

In challenging his sentence,[3] Burns presents one issue on appeal; however, we find his claim to encompass two separate issues. We therefore rephrase and restate Burns' claim as follows. First, he argues that the trial court abused its discretion when finding

[3] Between the date of Burns' offense—which the charging information alleged occurred between July 16, 2004, and February 7, 2005—and the date of sentencing, July 25, 2005, Indiana Code §§ 35-50-2-6 was amended to provide for "advisory" sentences rather than "presumptive" sentences. *See* P.L. 71-2005, § 9 (eff. Apr. 25, 2005). This Court has previously held that the change from presumptive to advisory sentences should not be applied retroactively. *See Walsman v. State*, 855 N.E.2d 645, 650-51 (Ind. Ct. App. 2006), *reh'g pending*; *Weaver v. State*, 845 N.E.2d 1066 (Ind. Ct. App. 2006), *trans. denied*; *but see Samaniego-Hernandez v. State*, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005). Therefore, we operate under the earlier "presumptive" sentencing scheme when addressing Burns' sentence.

and weighing aggravators and mitigators. Second, he contends that his sentence is inappropriate. We address each issue in turn.

## I. Aggravators and Mitigators

Burns first argues that the trial court abused its discretion by assigning too much weight to his criminal history as an aggravator and by failing to find the fact that he pled guilty as a mitigator. In general, sentencing lies within the discretion of the trial court. *Henderson v. State*, 769 N.E.2d 172, 179 (Ind. 2002). As such, we review sentencing decisions only for an abuse of discretion, "including a trial court's decision to increase or decrease the presumptive sentence because of aggravating or mitigating circumstances." *Id*. Furthermore, "[w]hen enhancing a sentence, a trial court must: (1) identify significant aggravating and mitigating circumstances; (2) state the specific reasons why each circumstance is aggravating or mitigating; and (3) evaluate and balance the mitigating against the aggravating circumstances to determine if the mitigating offset the aggravating circumstances." *Vazquez v. State*, 839 N.E.2d 1229, 1232 (Ind. Ct. App. 2005) (quoting *Bailey v. State*, 763 N.E.2d 998, 1004 (Ind. 2002)), *trans. denied*. A single aggravating circumstance is adequate to justify an enhanced sentence. *Moon v. State*, 823 N.E.2d 710, 717 (Ind. Ct. App. 2005), *reh'g denied*, *trans. denied*.

Burns remarks that the first three aggravators cited by the trial court—his juvenile adjudications, adult criminal record, and history of probation violations—all properly address his criminal history.[4] He takes issue, however, with the weight the trial court assigned to this criminal history in light of the fact that part of that history was used to

[4] Burns does not challenge the fourth aggravator cited by the trial court—the fact that Burns was incarcerated when he committed the current offense.

support the trial court's finding that Burns is a habitual offender. He contends that because he was found to be a habitual offender, his criminal history should be given minimal aggravating weight when balanced against any mitigating circumstances. We cannot agree.

In order to find Burns to be a habitual offender, the trial court was required to find that Burns had "accumulated two (2) prior unrelated felony offenses." Ind. Code § 35-50-2-8(a). Burns pre-sentence investigation report indicates that Burns was convicted of Class C felony burglary in 2001, Class D felony possession of paraphernalia in 2002, Class C felony robbery in 2003, and Class D felony residential entry in 2003. Any two of these convictions, taken together with his current conviction, are adequate to support Burns' habitual offender enhancement. If Burns' criminal history were comprised of no more than those two crimes, we might be inclined to find that the trial court should not have relied on that history as an aggravator. *See Darnell v. State*, 435 N.E.2d 250, 256 (Ind. 1982) (holding that a trial court may rely on criminal history as an aggravator when the trial court considers more than just those prior felonies used in the habitual offender count); *but cf. Jones v. State*, 600 N.E.2d 544, 548 (Ind. 1992) (holding that it is permissible for a trial court to consider the same prior offenses for both enhancement of the instant offense and to establish habitual offender status).[5] However, Burns' adult

[5] Another panel of this Court recently addressed the implications of *Jones* on the *Darnell* case and similar holdings:

> The facts in *Jones* do not reveal if Jones had convictions other [than] those used to establish his habitual offender status. In stating that the trial court could rely upon the same felonies for habitual offender status and to enhance the offense, the Court cited to *Criss v. State*, 512 N.E.2d 858 ([Ind.] 1987). In *Criss*, the Court stated, "It is not error for a court to use the same prior offenses for both enhancement of the instant offense and to

criminal history, in total, is composed of those two crimes, the other two felony crimes listed above, three misdemeanors, and three probation violations. As a juvenile, Burns was adjucated a delinquent on six charges. Considering this history, the trial court acted within its discretion when it found that Burns' criminal history was not only sufficient to support a habitual offender enhancement but also as an aggravator carrying significant weight.

Burns also argues, however, that the trial court abused its discretion when it failed to acknowledge his guilty plea as an mitigator. "An allegation that the trial court failed to find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." *Vazquez*, 839 N.E.2d at 1234. With regard to guilty pleas, the Indiana Supreme Court has said, "A guilty plea demonstrates a defendant's acceptance of responsibility for the crime and extends a benefit to the State and to the victim or the victim's family by avoiding a full-blown trial." *Francis v. State*, 817 N.E.2d 235, 237-38 (Ind. 2004). "[A] defendant who willingly enters a plea of guilty has extended a substantial benefit to the [S]tate and deserves to have a substantial benefit extended to him in return." *Id*. at 237 (*quoting*

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> establish a status as an habitual offender." *Id*. at 860. However, in *Criss*, the Court noted that the defendant had prior convictions of rape, armed robbery, burglary, robbery, confinement and two counts of second degree burglary. *Id*. The *Criss* Court, in turn, cited to *Darnell*, *supra*. As noted above, the holding in *Darnell* was based upon the fact that the trial court, in enhancing the sentence, relied upon the fact of more convictions than just the prior felonies used in the habitual offender count. 435 N.E.2d at 256. Whether *Criss* and *Jones* have altered the law so that a trial court may rely solely upon the felonies which support a habitual offender enhancement to also enhance a sentence because of criminal history is unclear. Nonetheless, we need not resolve that issue because of the availability of misdemeanor convictions in the case before us.

*Waldon v. State*, 829 N.E.2d 168, 182 n.13 (Ind. Ct. App. 2005), *reh'g denied*, *trans. denied*. Likewise, for the reasons stated in our main text, we need not resolve that issue today, either.

*Scheckel v. State*, 655 N.E.2d 506, 511 (Ind. 1995)). However, the *Francis* Court also recognized that where a guilty plea fails to demonstrate a defendant's acceptance of responsibility or to confer a benefit on the State, a trial court does not abuse its discretion by declining to find mitigation. *Id*. at 238, n.3; *see also Vazquez*, 839 N.E.2d at 1234. Moreover, a guilty plea may not rise to the level of significant mitigation where the evidence against the defendant is such that the decision to plead guilty is merely a pragmatic one. *Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), *trans. denied*.

Burns' guilty plea falls into the category of guilty pleas that are not deserving of mitigating weight. The State alleges, and we agree, that the evidence against Burns was strong. That evidence included statements by Rains indicating that Burns helped him plan his escape and arranged the meeting between Rains and Blair, and it included Burns' own statement that he arranged the meeting. The decision to plead guilty, then, can be characterized as a pragmatic one. Moreover, Burns' guilty plea came on the second day of trial and after a jury had already been selected. Where a defendant waits until the last minute before trial to make a pragmatic decision to plead guilty, the State has still expended its judicial resources and time on bringing the defendant to trial, and therefore no real benefit has been conferred to the State. *See Gray v. State*, 790 N.E.2d 174, 178 (Ind. Ct. App. 2003). Therefore, it cannot be said that the trial court abused its discretion when it declined to find Burns' guilty plea as a mitigator.

Considering the propriety of the trial court's findings of aggravators and mitigators, then, we hold that the trial court acted within its discretion when it weighed those findings and sentenced Burns accordingly.

## II. Inappropriate Sentence

Burns also argues that his six-year sentence for aiding escape is inappropriate in light of the nature of his offense and his character.[6] Indiana Rule of Appellate Procedure 7(B) states: "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." "Although appellate review of sentences must give due consideration to the trial court's sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." *Purvis v. State*, 829 N.E.2d 572, 587 (Ind. Ct. App. 2005) (internal citations omitted), *trans. denied*, *cert. denied*, 126 S. Ct. 1580 (2006).

Regarding first the nature of Burns' offense, Burns concedes that aiding the escape of a jail inmate is a serious offense. However, he contends that a review of his actions, in isolation, indicates that he was a minor participant in Rains' escape, therefore deserving of only the least severe sentence available. We disagree. Burns and Rains became acquainted during their time in the Whitley County Jail, and Burns assisted Rains in planning an escape from that facility. Rains was unfamiliar with the Whitley County area, so Burns provided him with maps of the jail and the surrounding geography. Rains had no contact outside the jail willing to help him in his getaway, so Burns arranged contact with his girlfriend for that purpose. Burns was instrumental, then, in arranging

[6] Burns does not challenge the four-year portion of his sentence based on his habitual offender enhancement. *See* Appellant's Br. p. 14.

Rains' escape and helping Rains to achieve his criminal objective where he otherwise was unable to do so. We cannot allow Burns to now minimize his role in this crime.

Moreover, we are not persuaded that Burns' character is of the sort to warrant a reduced sentence. As noted above, Burns has a considerable criminal history that includes convictions for four felonies and three misdemeanors, multiple juvenile adjudications, and three parole violations. His crimes include burglary, robbery, battery, resisting law enforcement, residential entry, and operating a vehicle while intoxicated. In addition, Burns committed the instant offense while incarcerated, and he enlisted the assistance of his own girlfriend to help a stranger commit a crime in the process. The State correctly points out that Burns has failed, despite numerous contacts with the legal system, to halt his criminal behavior. Taking into account the nature of Burns' offense and his character, we cannot say that his six-year sentence, which is two years less than the maximum for a Class C felony, is inappropriate.

Affirmed.

BAKER, J., and CRONE, J., concur.