

Case Summary

Appellant-Defendant Timothy A. Parker appeals his convictions and sentences for Burglary, as a Class A felony,¹ Theft, as a Class D felony,² and Aiding, Inducing or Causing the Offense of Battery by Means of a Deadly Weapon, a Class C felony.³ We affirm.

Issues

Parker raises two issues on appeal:

- I. Whether the trial court erred by denying his motion for change of judge; and
- II. Whether his sentence is inappropriate.

Facts and Procedural History

On October 25, 2007, Parker, along with his brother Chris Parker (“Chris”), and Caleb Crisman, was a passenger in J.S.’s car. Parker gave J.S. directions to Lapel. On the way, the group stopped at a gas station, and Parker and Chris purchased gloves. When they arrived in Lapel, Parker directed J.S. to park on the side of a particular street. Parker and Chris exited the car.

Donning ski masks and gloves, Parker and Chris entered sixty-year-old Brenda Whetsel’s home. At the time, Whetsel was at home in her bathroom and heard Parker and Chris searching through drawers. Parker eventually forced his way into the bathroom. Whetsel grabbed Parker and told him that she was dying of cancer and that she did not have

¹ Ind. Code § 35-43-2-1(2).

² Ind. Code § 35-43-4-2(a).

³ Ind. Code § 35-42-2-1(a)(3); Ind. Code § 35-41-2-4.

any drugs. Parker persisted by hitting Whetsel. Chris then came into the bathroom and began to hit Whetsel with a golf club while yelling, “Don’t hurt my brother.” Trial transcript at 310. Parker held Whetsel down as Chris delivered numerous blows with the club. Chris then ripped the medicine cabinet off the wall and threw it on the ground. Seeing that it was devoid of medicine, Parker and Chris left the home and returned to J.S.’s car.

The State charged Parker with Burglary, as a Class A felony, Theft, as a Class D felony, and Aiding, Inducing or Causing the Offense of Battery by Means of a Deadly Weapon, a Class C felony. A jury found him guilty as charged. The trial court sentenced Parker to concurrent sentences of forty years for Burglary, eighteen months for Theft and four years for Aiding or Inducing Battery.

Parker now appeals.

Discussion and Decision

I. Motion for Recusal

First, Parker claims that the trial court erred in denying his motion for change of judge because the comments made by the trial court in the Madison Circuit Court office two weeks prior to trial demonstrated the judge’s personal bias. Citing Canon 2A of the Indiana Judicial Code of Conduct, Parker argues that there was a reasonable basis for questioning the trial court’s impartiality. The law presumes that a judge is unbiased and unprejudiced. O’Connor v. State, 789 N.E.2d 504, 511 (Ind. Ct. App. 2003), trans. denied. Canon 2A provides, “[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Pursuant to

Judicial Conduct Canon 3(E)1, “[a] judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned[.]”

The test for determining whether a judge should recuse himself is “whether an objective person, knowledgeable of all the circumstances, would have a reasonable basis for doubting the judge’s impartiality.” James v. State, 716 N.E.2d 935, 940 (Ind. 1999). On appeal of a ruling on a motion for recusal, we consider whether the decision was clearly erroneous – “one that which leaves us with a definite and firm conviction that a mistake has been made.” Noble v. State, 725 N.E.2d 842, 848 (Ind. 2000).

Parker’s affidavit alleged that while his defense counsel was in the circuit court office with seven other people in the room, including the prosecutor, the trial court judge looked up from his reading and stated, “Why does [Defense Counsel] have such an attitude about this case, hasn’t he read the probable cause affidavit of Crisman, the co-defendant?” Appendix at 10. This was an off-hand comment made outside the presence of a jury and court proceedings. See Matheney v. State, 688 N.E.2d 883 (Ind. 1997) (judge’s remark on pending motion to a deputy public defender and county prosecutor while in chambers did not constitute bias or prejudice); Flynn v. State, 494 N.E.2d 312 (Ind. 1986) (judge’s reference to the defendant by use of a vulgar expletive while in chambers conversing with his court commissioner was not grounds for disqualification of the judge). Furthermore, the comment was critical of the defense counsel as opposed to the defendant. This one comment made by a judge after apprising himself of the facts of a case in the court office would not give an objective person a reasonable basis to doubt the judge’s impartiality.

Parker also takes issue with two interactions during the trial between the prosecutor and the trial court, alleging that these interactions demonstrate partiality of the trial court. “Judges require broad latitude to run their courtrooms and to maintain discipline and control.” Brown v. State, 746 N.E.2d 63, 70-71 (Ind. 2001). To succeed on a claim of judicial bias, a defendant must demonstrate that the actions and demeanor of the trial judge showed partiality and prejudiced his case. Id. at 71.

Both interactions noted by Parker involve the trial judge clarifying how the prosecutor was going to proceed with either a question on redirect or the introduction of certain physical evidence. These can only be characterized as the trial court running its courtroom. Furthermore, Parker does not explain how either of these instances prejudiced his case. We therefore conclude that the trial court’s denial of Parker’s motion for change of judge was not clearly erroneous.

II. Sentence

Second, Parker challenges his sentence. We first note that Parker only has one section in his brief addressing his sentence yet uses terminology of abuse of discretion and the nature of the offense and the character of the offender. In Anglemyer v. State, our Supreme Court clearly expressed that there are two separate claims by which a defendant can challenge his sentence: abuse of discretion and the independent review under 7(B) as to whether the sentence is inappropriate. See Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). These are separate, distinct arguments and the respective terminology should not be intermingled. As the thrust of the argument is that

Parker seeks the advisory rather than an enhanced sentence for the Burglary conviction, we address his contentions under Indiana Appellate Rule 7(B).

Our Supreme Court recently reviewed the standard by which appellate courts independently review criminal sentences:

Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a sentence through Indiana Appellate Rule 7(B), which provides that a 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. The burden is on the defendant to persuade us that his sentence is inappropriate.

Reid v. State, 876 N.E.2d 1114, 1116 (Ind. 2007) (internal quotation and citations omitted).

Parker received the advisory sentence for his Theft and Aiding, Inducing or Causing the Offense of Battery by Means of a Deadly Weapon. As his sentences are concurrent and the longest sentence dictates the length of the executed sentence, Parker challenges the imposition of forty years for Burglary. The range of possible sentences for a Class A felony is between a minimum of twenty years and a maximum of fifty years with an advisory sentence of thirty years. Ind. Code § 35-50-2-4. Thus, Parker's sentence is ten years above the advisory sentence.

As to the nature of the offense, Parker, wearing a ski mask and gloves, entered sixty-year-old Whetsel's home to steal money and prescription pills. Although Whetsel hid from the intruders in the bathroom, Parker forced his way into Whetsel's hiding place and punched her in an effort to access the empty medicine cabinet. In response to Whetsel telling Parker

and his brother that she had terminal cancer, Parker responded that he did not care if she was dying and that “they wanted the ***** drugs anyway.” Trial Transcript at 323. Parker then held Whetsel down in order for his brother to hit her repeatedly with a golf club. This attack resulted in Whetsel suffering broken fingers, a deep laceration to her hand, and bruises to her shoulder, head, breast, and stomach.

As to the character of the offender, Parker was eighteen when he committed the offense and was on juvenile probation for what would have been Theft, as a Class D felony, if committed by an adult. Committing a similar, yet more egregious crime only months after his first and only juvenile offense reveals that the rehabilitation efforts of the juvenile system were not successful.

In light of the nature of the offense and the character of the offender, Parker has not convinced this Court that his Burglary sentence of forty years is inappropriate.

Affirmed.

MATHIAS, J., and BARNES, J., concur.