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IN THE
COURT OF APPEALS OF INDIANA

BRUCE A. WALDON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A04-0906-CR-304
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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

February 17, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Bruce A. Waldon ("Waldon") appeals, challenging his sixty-three year executed sentence for his convictions of five counts of burglary,[1] each as a Class B felony; three counts of conspiracy to commit burglary,[2] each as a Class C felony; five counts of theft,[3] each as a Class D felony; one count of corrupt business influence[4] as a Class C felony; three counts of contributing to the delinquency of a minor,[5] each as a Class A misdemeanor; and a habitual offender enhancement. The issues presented for our review are:

I. Whether Waldon's sentence was inappropriate in light of the nature of the offense and the character of the offender; and

II. Whether the trial court abused its discretion by imposing consecutive sentences for certain of Waldon's convictions.

We affirm.

FACTS AND PROCEDURAL HISTORY

The facts most favorable to Waldon's conviction were set forth in our opinion in his direct appeal 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 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.

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[1] *See* Ind. Code § 35-43-2-1.

[2] *See* Ind. Code §§ 35-41-5-2, 35-43-2-1.

[3] *See* Ind. Code § 35-43-4-2.

[4] *See* Ind. Code § 35-45-6-2.

[5] *See* Ind. Code § 35-46-1-8.

> 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 v State, 829 N.E.2d 168, 172-73 (Ind. Ct. App. 2005) ("*Waldon I*").

Waldon was tried and convicted as set forth above. On December 11, 2003, the trial court sentenced Waldon to an aggregate sentence of sixty-three years executed. In *Waldon I*, we affirmed Waldon's convictions, but remanded the matter to the trial court for resentencing pursuant to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). *Waldon I*, 829 N.E.2d at 184.

Waldon's resentencing hearing was held on January 10, 2006, and the trial court reimposed the sentence of sixty-three years executed. Waldon appealed, and we affirmed his sentence. *Waldon v. State*, 79A02-0606-CR-458 (Ind. Ct. App. Nov. 9, 2006), *trans. denied* ("*Waldon II*").

On April 28, 2008, Waldon filed a petition for post-conviction relief alleging that his trial counsel was ineffective for failing to impeach a co-defendant with prior statements, and that his appellate counsel was ineffective for failing to claim in *Waldon II* that Waldon's sentence was inappropriate. The parties reached an agreement whereby the ineffective

assistance of trial counsel claim would be dismissed with prejudice, while Waldon's appellate attorney in *Waldon II* would be considered ineffective, and another sentencing hearing would be held. At the conclusion of the sentencing hearing held on May 1, 2009, the trial court imposed the same sentence, sixty-three years executed. Waldon now appeals.

DISCUSSION AND DECISION

I. Inappropriate Sentence

Waldon claims that his sentence is inappropriate in light of the nature of the offenses and his character. In general, he contends that there is nothing particularly egregious about the offenses and that his character is such that the sixty-three year executed sentence is inappropriate.

This court has the constitutional authority to revise a sentence if, after "due consideration" of the trial court's decision, this court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B); *Childress v. State*, 848 N.E.2d 1073, 1076 (Ind. 2006). The burden is on the defendant to persuade the appellate court that his sentence is inappropriate. *Childress*, 848 N.E.2d at 1080.

At the conclusion of sentencing on January 10, 2006, the trial court found Waldon's criminal history, consisting of a 1982 conviction for two counts of burglary, each as a Class B felony, and three counts of theft, each as a Class D felony; a 1992 conviction for burglary as a Class C felony and theft as a Class D felony; a 1992 conviction for burglary as a Class C felony and attempted theft as a Class D felony; a 1987 conviction for theft as a Class A

misdemeanor; a 1990 conviction for criminal mischief as a Class B misdemeanor; and two burglaries, each as a Class C felony to which Waldon had pleaded guilty, but for which he had yet to be sentenced, to be an aggravating circumstance. The trial court also found the nature and circumstances of Waldon's crime, *i.e.*, lengthy and multiple offenses, to be an aggravating circumstance. The trial court found no mitigating factors existed. The trial court then found that the aggravating factors outweighed the mitigating factors and sentenced Waldon to an aggregate sentence of sixty-three years executed.

Waldon argues that his sentence is inappropriate because he committed his crimes against businesses, not residences, at night when the businesses were not likely to be open and when no one would likely be harmed. He cites to his good behavior in prison and letters submitted by correctional officers as support of his changed character. He notes that he has remained drug-free while incarcerated.

We are without the benefit of the trial transcript as a part of the record in this appeal. However, regarding the nature of the offenses, it is evident that a lengthy sentence was probable given that Waldon was convicted of fourteen felonies and three misdemeanors in the present case. Although Waldon attempts to minimize the magnitude of his offenses by arguing that he committed his crimes against businesses at night when the businesses were not likely to be open and no one would likely be harmed, Waldon recruited minors to aid him in the commission of the offenses which did cause losses to the victims of those crimes.

Regarding the character of the offender, we note the trial court's observation at Waldon's sentencing hearing, that Waldon's "life since before he was an adult has been one

long crime spree interrupted only by periods of imprisonment." *Appellant's App.* at 179. Waldon had pleaded guilty to two additional counts of burglary as Class C felonies in Clinton County and one count of burglary as a Class C felony in Carroll County for which he was awaiting sentencing when he was first sentenced in this case. The trial court noted that Waldon engaged in gratuitous destruction of property during the commission of some of the crimes and was corrupting young people, including his son and nephew, by enlisting them to aid him in the commission of the offenses. Though Waldon argues that his good behavior in prison is evidence of the reformation of his character, the historical pattern of his behavior shows that he is unable to avoid the commission of crimes when he is not incarcerated. Waldon had been convicted of at least nine felonies prior to the time of his first sentencing hearing in the present case. Waldon has failed to convince us that his sentence is inappropriate in light of the nature of the offenses and his character.

II. Consecutive Sentences

Waldon argues that the trial court erred by imposing consecutive sentences for the burglaries which occurred on the evening of May 13, 2002, and were charged as Counts XIV through XVII. Waldon contends that the burglaries and thefts constituted a single episode of criminal conduct for which consecutive sentencing was not allowed by statute.

Generally, a trial court must sentence defendants under the statute in effect at the time the defendant committed the offense. *White v. State*, 849 N.E.2d 735, 741 (Ind. Ct. App. 2006). Sentencing decisions rested within the trial court's discretion and were reviewable only for an abuse of that discretion. *Brown v. State*, 698 N.E.2d 779, 781 (Ind. 1998).

"When imposing an enhanced sentence, the trial court must identify all significant aggravating and mitigating circumstances, give specific reasons why each factor is so identified, and balance the aggravating and mitigating circumstances to determine whether the former outweigh the latter." *Id*.

At the time of the commission of the crimes at issue, Indiana Code section 35-50-1-2(c), provided that, except for crimes of violence, when a defendant was sentenced for felony convictions arising out of an episode of criminal conduct, the total of the consecutive terms of imprisonment, excluding a habitual offender enhancement, must not exceed the presumptive sentence for a felony which was one class of felony higher than the most serious of the felonies for which the defendant had been convicted. An episode of criminal conduct was defined as "offenses or a connected series of offenses that are closely related in time, place, and circumstance." Ind. Code § 35-50-1-2(b).

The State correctly notes that the trial transcript was not made a part of the proceedings below, and as a consequence, is not a part of the record on appeal. The absence of the trial transcript precludes our review of Waldon's issue here on appeal that the convictions for the crimes charged in Counts XIV through XVII constituted a single episode of criminal conduct. As our Supreme Court noted in *Harris v. State*, 861 N.E.2d 1182, 1187 (Ind. 2007), "[t]he trial transcript contained the evidence and was the only source of evidence to support the factual predicate of the claim." We have no facts to review concerning the timing and manner of the crimes charged. It is the timing of the offenses that dictates whether the offenses were a single episode of criminal conduct. *Reed v. State*, 856 N.E.2d

1189, 1200-01 (Ind. 2006). Because Waldon has failed to show when and how the crimes were proven at trial to have been committed, he has failed to establish that the trial court abused its discretion by imposing consecutive terms for Counts XIV through XVII.

Affirmed.

DARDEN, J., and MAY, J., concur.