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IN THE
COURT OF APPEALS OF INDIANA

FLOYD MARSH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A05-0905-CR-299
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0210-FB-344

February 17, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Floyd Marsh pleaded guilty to battery[1] as a Class A misdemeanor, criminal confinement[2] as a Class D felony, and criminal deviate conduct[3] as a Class B felony and received a ten-year aggregate sentence. He appeals raising the following restated issues:

I. Whether the trial court abused its discretion when it denied Marsh's motion to withdraw his guilty plea; and

II. Whether his sentence was inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

FACTS AND PROCEDURAL HISTORY

On September 4, 2002, Marsh was in his camper with Vera Hook, a former girlfriend. At some point, an argument began between them when Marsh insisted that Hook have sex with him, and she refused. She attempted to leave the camper, and Marsh dragged her back inside by pulling her hair. During this fight, Marsh pulled down Hook's pants and underwear and spanked her buttocks. He also inserted his fingers inside her vagina and placed his mouth on her vagina. Hook was treated at the hospital for her injuries resulting from the incident.

The State charged Marsh with battery as a Class A misdemeanor, criminal confinement as a Class D felony, and criminal deviate conduct as a Class B felony. On February 10, 2003, Marsh pleaded guilty as charged. Before pleading guilty, Marsh

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[1] *See* Ind. Code § 35-42-2-1.

[2] *See* Ind. Code § 35-42-3-3.

[3] *See* Ind. Code § 35-42-4-2.

acknowledged that he had never been treated for mental illness and did not presently suffer from any mental or emotional disability. *Tr*. at 4. He also denied that he was under the influence of any alcohol or drugs. The trial court then advised Marsh of his constitutional rights, inquiring as to whether Marsh understood and waived such rights. *Id*. Marsh was also informed of the nature of the alleged offenses and the potential punishments for each. *Id*. at 5. The trial court confirmed that Marsh had not been offered any special treatment or leniency in exchange for his plea, that he had not been forced to plead guilty, and that his plea was voluntary. *Id*. at 5-6. Marsh also stated that he was pleased with his trial representation.

The State then established a factual basis for the offenses, and Marsh agreed that he had committed the acts described. *Id*. at 7-9. He also specifically pleaded guilty to each offense. *Id*. at 9. The trial court found that Marsh knowingly and voluntarily pleaded guilty, stated that a factual basis existed, and accepted his plea. *Id*. at 10. Marsh was told his sentencing date would be March 10, 2003, and he acknowledged this, stating he would be present. *Id*.

Marsh failed to appear for his sentencing hearing on March 10 and again on March 31, 2003, and a warrant was issued for his arrest. In March 2009, Marsh was arrested in Arizona and brought back to Indiana. At the April 20, 2009 sentencing hearing, Marsh made an oral motion to withdraw his guilty plea. *Id*. at 13. Marsh claimed that he did not remember pleading guilty, that his counsel had coerced him into the plea, that he did not commit the crimes, and that he was not the man who had pleaded guilty to the offenses. *Id*. at 13, 16, 19.

After listening to a recording of the guilty plea hearing in open court, the trial court found that Marsh had understood the nature of the charges against him and that a factual basis existed for his guilty plea. It then denied Marsh's motion to withdraw his guilty plea. Marsh was then sentenced to one year for battery as a Class A misdemeanor, three years for criminal confinement as a Class D felony, and ten years for criminal deviate conduct as a Class B felony, with the sentences to be served concurrently. Marsh now appeals. Additional facts will be added as necessary.

DISCUSSION AND DECISION

I. Withdrawal of Marsh's Guilty Plea

After a guilty plea is entered, but before a sentence is imposed, a defendant may move to withdraw his guilty plea for any fair and just reason unless the State has been substantially prejudiced by its reliance upon the plea. Ind. Code § 35-35-1-4(b); *Brightman v. State*, 758 N.E.2d 41, 44 (Ind. 2001). The defendant must prove by a preponderance of the evidence that the withdrawal is necessary to correct a manifest injustice. I.C. § 35-35-1-4(b). Absent such a showing, the decision to grant or deny the motion is solely within the trial court's discretion. *Id*.

Therefore, we review the trial court's denial of a motion to withdraw guilty plea for an abuse of discretion. *Id*. On appeal, the trial court's ruling is cloaked with a presumption of validity. *Brightman*, 758 N.E.2d at 44. "A trial court abuses its discretion only 'when the failure of the trial court to grant the motion would result in . . . a manifest injustice.'" *Davis v. State*, 770 N.E.2d 319, 326 (Ind. 2002).

Marsh argues that the trial court abused its discretion when it denied his motion to withdraw his guilty plea. He contends that, because he continued to maintain his innocence at the sentencing hearing and did not remember pleading guilty, the trial court was required to allow the withdrawal of his plea in order to correct a manifest injustice. Marsh also claims that the State failed to show that it would be substantially prejudiced if his plea was withdrawn and the case reset for trial.

Initially, we note that a motion to withdraw a guilty plea must be in writing and verified and must state facts in support of the relief demanded. I.C. § 35-35-1-4(b). When the defendant fails to submit a written, verified motion to withdraw a guilty plea, the issue has been waived. *Carter v. State*, 739 N.E.2d 126, 128 n.3 (Ind. 2000); *Smith v. State*, 593 N.E.2d 1208, 1209 (Ind. Ct. App. 1992), *trans. denied*. Here, Marsh failed to submit a written, verified motion to withdraw. Instead, his attorney made an oral motion to withdraw the guilty plea during the sentencing hearing. Consequently, Marsh has waived this issue.

Waiver notwithstanding, Marsh has failed to demonstrate that the withdrawal of his guilty plea was required to correct a manifest injustice. Generally, a trial court cannot accept a guilty plea from a defendant who pleads guilty and maintains his innocence at the same time. *Johnson v. State*, 734 N.E.2d 242, 245 (Ind. 2000). "A trial court may, however, accept a guilty plea from a defendant who pleads guilty in open court, but later protests his innocence." *Id.*

Here, Marsh did not maintain his innocence simultaneously while pleading guilty at his plea hearing. Instead, after he received all of the required advisements concerning the

consequences of pleading guilty, he unequivocally admitted the factual basis for the offenses and advised the trial court he would be present for sentencing. Six years later, after absconding from the jurisdiction, Marsh asserted that he was innocent of the offenses. We conclude that the trial court was not required to allow the withdrawal of his plea. Likewise, Marsh has failed to show that the withdrawal of his plea should have been allowed because he did not remember pleading guilty. At the sentencing hearing, Marsh claimed that he did not remember pleading guilty to the offenses, but did remember the allegations against him and speaking to the police during the investigation. The trial court then played the recording of the guilty plea hearing in open court and, after listening to it, found that Marsh had understood the nature of the charges against him and that a factual basis had been established. *Tr*. at 21. Marsh has not shown that the withdrawal of his plea was necessary to correct a manifest injustice. The trial court did not abuse its discretion when it denied his request to withdraw his guilty plea.

II. Inappropriate Sentence

Appellate courts may revise a sentence after careful review of the trial court's decision if they conclude that the sentence is inappropriate based on the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). Even if the trial court followed the appropriate procedure in arriving at its sentence, the appellate court still maintains a constitutional power to revise a sentence it finds inappropriate. *Hope v. State*, 834 N.E.2d 713, 718 (Ind. Ct. App. 2005). The burden is on the defendant to persuade this court that his sentence is inappropriate. *Patterson v. State*, 909 N.E.2d 1058, 1063 (Ind. Ct. App. 2009).

Marsh argues that his ten-year aggregate sentence was inappropriate in light of the nature of the offenses and his character. He specifically contends that his criminal history only consisted of non-violent offenses and one possible felony conviction, which was over thirty years old. This, coupled with his work history and raising of a family, makes his sentence inappropriate, and he, therefore, asserts we should revise his sentence.[4]

Here, Marsh pleaded guilty to battery as a Class A misdemeanor, criminal confinement as a Class D felony, and criminal deviate conduct as a Class B felony. The trial court sentenced him to one year for the battery, three years for the criminal confinement, and ten years for the criminal deviate conduct, which were advisory sentences. The trial court ordered the sentences to be served concurrently, for an aggregate term of ten years.

As to the nature of the offenses, these offenses occurred after Hook refused to voluntarily engage in sexual relations with Marsh. After she refused and attempted to leave, Marsh grabbed her and dragged her back inside by her hair, not allowing her to leave his camper. He then pulled down her pants and underwear and spanked her buttocks. Marsh also inserted his finger into Hook's vagina and placed his mouth on her vagina. These actions constituted two separate acts of criminal deviate conduct—one more than was necessary to prove the offense. Hook was treated at the hospital for her injuries, and she indicated that she attended counseling as a result of this incident.

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[4] Although Marsh cites to law pertaining to the finding of aggravating and mitigating circumstances and our review of such, he fails to develop any argument regarding how the trial court abused its discretion in doing so. "Generally, a party waives any issue raised on appeal where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record." *Smith v. State*, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005), *trans. denied*; see also Ind. Appellate Rule 46(A)(8)(a). Therefore, we conclude that Marsh has waived any challenge to the finding of aggravating and mitigating circumstances.

As to Marsh's character, the evidence showed that after his guilty plea hearing, Marsh failed to appear for two sentencing hearings and absconded from the trial court's jurisdiction for six years. Marsh did not voluntarily surrender himself; instead, he was arrested on the outstanding warrant in this case when he registered at a hotel in Phoenix, Arizona. This failure to appear and flight from the jurisdiction showed a disrespect for the criminal justice system. Marsh also demonstrated poor character by blaming the victim for her injuries when he contended that Hook smashed her own face into a fan, causing herself injury, in order to hurt him. Marsh also had a previous criminal history which included serving time in a federal correctional facility for his involvement in an auto theft and being AWOL, while serving in the military. He also had prior arrests for rape, driving while intoxicated, and possession of drug paraphernalia, but dispositions were not available as the arrests were from different states. Additionally, although Marsh had been consistently employed in the past, there was no evidence presented that he had been employed during the previous six years; likewise no evidence was presented that Marsh either paid any child support or had any contact with his son for nearly thirty years. We conclude that Marsh's aggregate ten-year sentence, which consisted of the advisory sentences for each offense ordered to run concurrently, was not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

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