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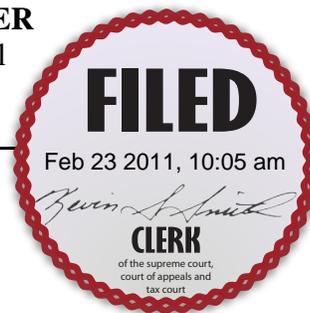
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**IN THE
COURT OF APPEALS OF INDIANA**

BILLY JAMES HUFF, JR.,
Appellant- Defendant,

vs.

STATE OF INDIANA,
Appellee- Plaintiff,

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No. 16A05-1010-CR-659

APPEAL FROM THE DECATUR SUPERIOR COURT
The Honorable Matthew D. Bailey, Judge
Cause No. 16D01-0912-FD-567

February 23, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issue

Billy James Huff, Jr., pleaded guilty to one count of possession of methamphetamine and one count of possession of paraphernalia, both Class D felonies. The trial court sentenced him to two years executed on each conviction, to run consecutively for a total of four years. Huff appeals his sentence, arguing that the trial court abused its discretion in imposing consecutive sentences and that his sentence is inappropriate in light of the nature of his offenses and his character. Concluding that the imposition of consecutive sentences is inappropriate, we revise and remand for Huff's two-year sentences to be served concurrently.

Facts and Procedural History

On December 15, 2009, Huff was driving a car that Greensburg police officers stopped for failure to signal a turn. Prior to the traffic stop, Officer Perez first observed Huff's passenger, George Yorn, purchase from a CVS store pseudoephedrine-containing cold medicine and then saw Huff and Yorn drive to a nearby Walgreens where Yorn again purchased pseudoephedrine-containing cold medicine.

During the traffic stop, Officer Perez patted down Huff's outer clothing, removed a knife, and found straws with a "residue of white powder that appeared to be drug paraphernalia." Appendix of Appellant at 7. Officer Perez then received Huff's consent to search the car. Huff's wallet, found in the car, contained his United States Military identification card and a "small bag" of white powder that field-tested positive for methamphetamine. *Id.* at 8; Appellee's Appendix at 6. Inside the car's center console was a glass tube, burnt at one end and recognizable as a smoking pipe, that contained white residue. Huff was arrested and agreed to speak with Officer Perez. He admitted he

was driving Yorn around Greensburg so that Yorn could purchase cold medicine, and stated that for the past six months he had been purchasing cold medicine for Yorn, who paid him twenty-five dollars per box.

The State initially charged Huff with possession of methamphetamine as a Class B felony, but on the day scheduled for jury trial amended that charge to a Class D felony and, without objection from Huff, added a second charge of possession of paraphernalia as a Class D felony. That same day, Huff pleaded guilty to both counts without a formal plea agreement and with sentencing left to the discretion of the trial court. At the close of the guilty plea hearing, the trial court proceeded immediately to conduct a sentencing hearing and made the following sentencing statement:

By way of mitigation, Mr. Huff has offered the factor or the circumstance, they seem to be interrelated to me, the serving his country in the National Guard and then psychological issues that he described. I don't believe that . . . these psychological issues have caused some sort of inability to control his behavior. So I don't believe that to be a significant mitigating circumstance. He has plead [sic] guilty today. Ordinarily that is a significant mitigating circumstance, however he pleads guilty today with the jury already called and sitting in the other courtroom and the State amended the charge as part of his plea of guilty. . . . So I believe his plea of guilty was a pragmatic decision and . . . is not a significant mitigating circumstance. On the aggravating circumstance side the ledger, he has two prior substance abuse convictions, specifically the Possession of a Controlled Substance in Dearborn County for an offense committed in 2009, a Possession of Paraphernalia in Ohio County, also in 2009. He was also on probation at the time that he committed this offense which is also another drug crime. As far as the nature and circumstances, this offense was committed in the presence of a minor,^[1] and Mr. Huff's previous exposure to the criminal justice system has not deterred his conduct He also hasn't followed through on any steps to address his drug problem. . . . Also the evidence we've heard today is that Mr. Huff was deeply involved in the drug business with his associates that he's told us about.

* * *

¹ Apparently a three-year-old child was present in Huff's car when it was stopped.

Count One and Count Two are to be served . . . consecutively because of the . . . statutory aggravators of the criminal history and he violated his conditions of probation. I don't believe him to be a candidate for probation.

Transcript at 34-36. Thus, the trial court sentenced Huff to two years on each count, to be served consecutively, for a total of four years executed with the Department of Correction. Huff now appeals his sentence.

Discussion and Decision

I. Standard of Review

Article 7, sections 4 and 6 of the Indiana Constitution authorize independent appellate review of the appropriateness of a sentence, an authority implemented through Indiana Appellate Rule 7(B). Childress v. State, 848 N.E.2d 1073, 1079-80 (Ind. 2006). This court may revise a sentence “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.” App. R. 7(B). The defendant bears the burden to persuade this court that his or her sentence is inappropriate. Childress, 848 N.E.2d at 1080. “[W]hether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case.” Cardwell v. State, 895 N.E.2d 1219, 1224 (Ind. 2008).

II. Inappropriate Sentence

Huff pleaded guilty to two Class D felonies, each of which carries a sentencing range of six months to three years. See Ind. Code § 35-50-2-7(a). The advisory sentence

for a Class D felony is one and one-half years. Id. The trial court imposed sentences of two years on each count, to be served consecutively for a total of four years executed.

Regarding the nature of the offenses, the advisory sentence “is the starting point the Legislature has selected as an appropriate sentence for the crime committed.” Childress, 848 N.E.2d at 1081. The nature of the offenses also bears on the appropriateness of the trial court’s decision to both enhance Huff’s sentences above the advisory for each count and order the sentences served consecutively. We find guidance in decisions of our supreme court and this court that have addressed the appropriateness of consecutive sentencing. In Serino v. State, 798 N.E.2d 852, 857 (Ind. 2003), one of the early cases applying the current version of Appellate Rule 7(B), our supreme court observed that when a defendant has committed crimes against multiple victims, “consecutive sentences seem necessary to vindicate the fact that there were separate harms and separate acts against more than one person.” Serino’s consecutive sentences were reduced in part because the counts involved a single victim. See id. at 857-58. In Horton v. State, 936 N.E.2d 1277, 1288 (Ind. Ct. App. 2010), trans. pending, we distinguished Serino and concluded that the defendant’s repeated crimes, committed daily over the course of several months, rendered consecutive sentences appropriate notwithstanding there was only one victim. In a factual context closer to the present case, we concluded in Williams v. State, 891 N.E.2d 621, 634-35 (Ind. Ct. App. 2008), that consecutive sentences were inappropriate when the multiple dealing and possession convictions arose from two nearly identical State-sponsored drug buys within a twenty-four-hour period. A common thread among these cases is that consecutive sentences are more likely to be appropriate where there were multiple victims or the crimes otherwise

amounted to multiple distinct harms. See Cardwell, 895 N.E.2d at 1225 (“Whether the counts involve one or multiple victims is highly relevant to the decision to impose consecutive sentences Similarly, additional criminal activity directed to the same victim should not be free of consequences.”).

Huff’s offenses are more akin to a single harm than to multiple distinct harms, in that he possessed methamphetamine and, at the same time and place, a smoking pipe intended for consuming methamphetamine or another illegal substance.² In other words, his contemporaneous possession of the paraphernalia fails to add more than a de minimus harm beyond his possession of the methamphetamine and thus fails to indicate, without more, that consecutive sentences are appropriate based on the nature of the offenses. See Serino, 798 N.E.2d at 857 (stating there is potential for inappropriately “cumulative” consecutive sentences when the State “elect[s] to charge multiple aspects of the same event as separate counts defined by separate criminal statutes”).

In other respects the nature of Huff’s offenses is unremarkable. His carrying a small amount of methamphetamine in his wallet likely reflects personal use, consistent with his admission of a drug addiction, rather than a dealing operation. The record does reflect that a three-year-old child was present in the car when Huff was stopped. However, there is no indication that the child was directly exposed to the drugs or smoking pipe, which were not in plain view but were inside Huff’s wallet and the car’s center console.

² The police report included in the State’s first discovery response, of which the trial court took judicial notice for purposes of the factual basis, states the smoking pipe field-tested positive for methamphetamine. However, the deputy prosecutor represented as part of the factual basis that the pipe was intended to ingest marijuana.

Turning to Huff's character, his criminal record consists of two prior misdemeanor convictions, one for possession of a controlled substance and the other for possession of paraphernalia. The deputy prosecutor noted both prior offenses were committed in February 2009 and would count as only one offense for purposes of any future habitual substance offender allegation. Huff committed the prior offenses after he returned from a seven-month tour of duty in Iraq as a member of our National Guard. At the time of conviction and sentencing he remained a National Guard member, having served for five years, and was twenty-three years old. He testified that while serving in Iraq and upon returning home, he suffered from psychological conditions that led him to attempt suicide and to be treated by a psychologist at a Veterans Administration hospital. His testimony also implied that his drug addiction stemmed from his psychological conditions, his wife's desire for a divorce, and his children's placement in foster care. While Huff was on probation when he committed the present offenses, he demonstrated his acceptance of responsibility by cooperating with law enforcement following his arrest and by pleading guilty in an open plea without the benefit of a formal plea agreement.

Given Huff's relative youth and his record of service to our country, we are concerned that years of incarceration may harden rather than rehabilitate him and disserve his potential to be once again a contributing member of society. While his recent pattern of drug and paraphernalia possession and his participation in Yorn's purchasing of methamphetamine precursors are troubling,³ we agree with Huff's

³ The trial court, and likewise the State on appeal, characterize the record as reflecting an admission by Huff that he was "deeply involved in the drug business." Tr. at 35 (trial court's sentencing statement). This characterization reads too much into what are more straightforwardly Huff's admissions, on cross examination by the deputy prosecutor, that he knew many people who were involved in the drug business and that his possession offenses were not isolated incidents. See id. at 28-30.

assessment that his behavior will be better reformed by obtaining treatment for his addiction than by lengthy incarceration. In short, Huff's character is not such as to render consecutive sentences appropriate. We also note that the State, in its argument to the trial court, requested Huff receive only two years of executed time. Tr. at 21 (deputy prosecutor recommending "four years with two years executed"). While but one factor and not determinative, the fact the trial court imposed a harsher sentence than the State requested somewhat undercuts the State's appellate argument that the trial court's sentence is appropriate. Cf. Akard v. State, 937 N.E.2d 811, 814 (Ind. 2010) (declining to increase sentence "particularly in the context of the State's request for no greater sentence at trial").

Considering all of the facts and circumstances, while the aggravating factors cited by the trial court support its modest enhancement of Huff's sentences above the advisory, we conclude after due consideration of the trial court's decision that consecutive sentences are inappropriate. We therefore remand this case to the trial court with instructions that Huff's two-year sentences be ordered to be served concurrently.

Conclusion

In light of the nature of Huff's offenses and his character, consecutive sentences are inappropriate. We revise Huff's sentence to concurrent terms of two years, and we remand this case to the trial court with instructions for it to issue an amended sentencing order and abstract of judgment consistent with this opinion.

Revised and remanded.

BROWN, J., concurs.

RILEY, J., concurs in part and dissents in part with separate opinion.

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vs.)	No. 16A05-1010-CR-659
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)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

RILEY, Judge, concurring in part and dissenting in part with separate opinion.

I concur in part and dissent in part. Huff’s military service is a strong mitigating factor; however, he has failed to respond to either probation or the threat of arrest for drug related crimes. It is troubling to me that he was on probation when he committed the present offense.

I would affirm the consecutive sentencing to an aggregate sentence of four years, but I would require only two years be executed and two years on probation. A condition of that probation would be that Huff receive the drug and psychological counseling he needs.