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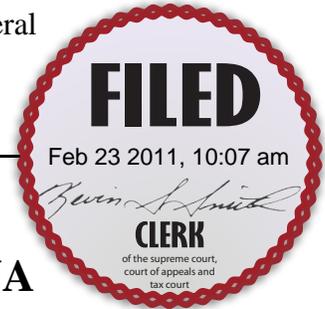
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**IN THE
COURT OF APPEALS OF INDIANA**

DANIEL W. MYERS,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 52A05-1007-CR-540

APPEAL FROM THE MIAMI SUPERIOR COURT
The Honorable Daniel C. Banina, Judge
Cause Nos. 52D02-0911-FD-229 and 52D01-0909-FC-71

February 23, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Here, a defendant accumulated numerous driving offenses and was deemed a habitual traffic offender. His license was forfeited for life, yet he continued to drive. He also accumulated a record of contacting former girlfriends despite being under court orders not to do so. While he was out on bond for his latest driving offense, he called his former girlfriend repeatedly at work in violation of a no-contact order. He eventually pled guilty to two felony counts: one related to driving as a habitual traffic offender and one related to invading the privacy of his former girlfriend.

On appeal, Daniel W. Myers challenges the appropriateness of his aggregate six-year sentence, which consists of four years executed and two years suspended to probation. We find that he has failed to meet his burden of establishing inappropriateness. As such, we affirm his sentence.

Facts and Procedural History

On September 11, 2009, thirty-nine-year-old Myers was stopped by police while driving to a football game. At the time, he knew that his driving privileges were permanently forfeited based on his accumulation of traffic-related convictions. On September 14, 2009, the State charged him with class C felony operating a motor vehicle after forfeiture of license for life (“OFLL”),¹ and he was released on bond.

On October 30, 2009, Myers contacted his ex-girlfriend, Michelle Burrow, at least fifteen times at her workplace in violation of a no-contact order. On November 3, 2009, his

¹ Ind. Code § 9-30-10-17.

bond was revoked, and he was re-arrested. On November 10, 2009, the State charged him with class D felony invasion of privacy.²

On July 12, 2010, Myers pled guilty to class D felony operating a motor vehicle as a habitual traffic violator (“OHTV”)³ in exchange for dismissal of the OFLL charge and three other charges.⁴ He also pled guilty to one count of class D felony invasion of privacy. In both cause numbers, sentencing was left to the trial court’s discretion. The trial court sentenced him to two consecutive three-year terms, with the OHTV sentence to be fully executed and with two years of the invasion of privacy sentence suspended to probation. Myers now appeals. Additional facts will be provided as necessary.

Discussion and Decision

Myers challenges the appropriateness of his sentence pursuant to Indiana Appellate Rule 7(B), which provides that we “may revise a sentence authorized by statute 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.” Our review focuses on the aggregate sentence rather than on the number of counts, the length of sentence on any individual count, or whether the sentence runs concurrently or consecutively. *Cardwell v.*

² Ind. Code § 35-46-1-15.1.

³ Ind. Code § 9-30-10-4.

⁴ The dismissed charges included one count of class D felony stalking and two counts of class D felony invasion of privacy.

State, 895 N.E.2d 1219, 1225 (Ind. 2008). We do not look to see whether the defendant's sentence is appropriate or if another sentence might be *more* appropriate; rather, the test is whether the sentence is "inappropriate." *Fonner v. State*, 876 N.E.2d 340, 344 (Ind. Ct. App. 2007). A defendant bears the burden of persuading this Court that his sentence meets the inappropriateness standard. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218; *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

In considering the nature of a defendant's offense, "the advisory sentence is the starting point the Legislature has selected as an appropriate sentence." *Anglemyer*, 868 N.E.2d at 494. Myers was convicted of two class D felonies, each of which carries a sentencing range of six months to three years, with an advisory one-and-one-half-year term. Ind. Code § 35-50-2-7(a). He received an aggregate six-year sentence, with two years suspended to probation. He argues that this amounts to the maximum sentence even though a portion of it was suspended. We disagree.

In *Davidson v. State*, 926 N.E.2d 1023, 1024 (Ind. 2010), our supreme court held that in conducting our Rule 7(B) review for appropriateness of a sentence, we may consider all aspects of the penal consequences imposed by the trial court. Thus, we look not only at aggregate length of the sentence, but also at whether a portion of the sentence is suspended or otherwise crafted using any of the variety of sentencing tools available, i.e., probation, home detention, or community corrections. *Id.* at 1025. "Common sense dictates that less executed time means less punishment. That is why almost any defendant, given the choice, would gladly accept a partially suspended sentence over a fully executed one of equal length."

Jenkins v. State, 909 N.E.2d 1080, 1084 (Ind. Ct. App. 2009), *trans. denied*. Therefore, “for purposes of Rule 7(B) review, a maximum sentence is not just a sentence of maximum length, but a fully executed sentence of maximum length.” *Id.* at 1085-86. Thus, because two years were suspended to probation, Myers is incorrect in his assertion that he received consecutive maximum sentences.

With respect to consecutive sentencing, we note that Myers committed felony invasion of privacy while he was released on bond for his felony OFLL charge. As such, he was subject to consecutive terms pursuant to Indiana’s sentencing laws. *See* Ind. Code § 35-50-1-2(d)(2)(B) (stating that where a defendant arrested for one crime commits another crime while released on bond, his terms *shall* be served consecutively).

To the extent he cites the “benign” nature of the offenses in support of his inappropriateness argument, Appellant’s Br. at 5, we first note that his repeated calls to Burrow at her workplace were disruptive and in direct violation of the no-contact order against him. When considered in conjunction with his history of threats or battery committed against the women in his life, these calls, though themselves nonviolent, took on an increasingly threatening nature. With respect to the instant traffic conviction, we note that Myers pled guilty to class D felony OHTV in exchange for dismissal of the original class C felony OFLL and three other charges. His HTV status is based on the accumulation of various traffic-related convictions, some of which include reckless driving and operating while intoxicated. While it is laudable that he was neither intoxicated nor driving recklessly this time, he should not have been driving at all.

Myers's criminal history and probation failures do not reflect well on his character. His lengthy criminal record includes nineteen arrests and twelve convictions. Three of his convictions were for acts committed against the woman in his life, i.e., a 1993 criminal trespass conviction resulting in a no-contact order regarding his girlfriend at that time; a 2001 intimidation conviction involving his then-wife; and a 2004 invasion of privacy conviction resulting in a no-contact order regarding Burrow. Nevertheless, Myers chose to commit the instant invasion of privacy offense by violating the order of no contact with Burrow. Moreover, five of Myers's convictions were traffic-related, thus subjecting him to lifetime forfeiture of his driver's license. Nevertheless, he chose to continue driving.

Myers cites his "character as father, former [reformed] substance abuser, and productive member of society" as rendering him worthy of leniency in sentencing. Appellant's Br. at 3.⁵ With respect to his fatherhood, he has four children by three different mothers and owes a child support obligation that is "not current." Confidential App. at 9. While his consistent employment record and completion of substance abuse treatment are laudable, prior attempts at sentencing leniency have proven unavailing. He has been placed on probation nine times. While on probation, he has committed seven violations and has had his probation revoked three times. Thus, not only has he demonstrated a pattern of disregard for the law, but he has also shown his unwillingness to abide by the conditions attendant to probation. Violations notwithstanding, the trial court suspended two years of his six-year

⁵ Myers does not cite his guilty plea as a positive reflection on his character. Nevertheless, we note that his plea, offered in exchange for dismissal of four other charges, was merely a pragmatic response to a favorable deal.

sentence to probation. In sum, Myers has failed to establish that such a sentence is inappropriate. Accordingly, we affirm.

Affirmed.

KIRSCH, J., and BRADFORD, J., concur.