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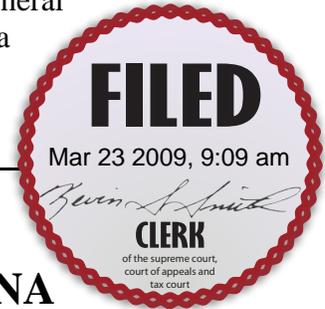
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**IN THE
COURT OF APPEALS OF INDIANA**

JOSHUA POWELL,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 24A01-0808-CR-376

APPEAL FROM THE FRANKLIN CIRCUIT COURT
The Honorable J. Steven Cox, Judge
Cause No. 24C01-0602-FB-83

March 23, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Joshua Powell appeals his eighty-year aggregate sentence for four class B felony burglary¹ convictions, arguing that his sentence is inappropriate based on the nature of the offenses and his character. We vacate and remand with instructions to impose an aggregate sentence of thirty-six years.

On February 7, 2005, at approximately 8:00 a.m., Luther Stanton departed from his home in Laurel. Later that day, Stanton's thirteen-year-old son returned home from school and found that someone had broken into the home. He was scared and called Stanton at work. Stanton returned home and found his home in complete disarray. He said that "it looked like a cyclone hit the house." Tr. at 12. Stanton's shotgun, flat screen televisions, DVD players, a camcorder, many electronics, and his military medals were missing.

The same day around 3:30 p.m., Melinda McQuinley finished work and returned to her Rushville home and discovered that it had been ransacked. The missing items included hunting guns, assorted knives, jewelry, a bottle filled with coins, and a purse that contained social security cards, children's immunization records, birth certificates, and McQuinley's checkbook.

On December 1, 2005, Leah McCool returned to her Bossert Road home after running errands with her children. She saw that the bottom of the side door of her garage was damaged and its window was broken. She went to her sister's and called the police. When McCool entered her home with the police she found that her house was a mess, "like a tornado had gone through." *Id.* at 28. Missing from McCool's home were a computer,

¹ See Ind. Code § 35-43-2-1.

camcorder, thirty-five millimeter camera, CDs, DVDs, her jewelry box and its contents, her son's basketball shoes, and his gym bag.

On December 22, 2005, John Beccario and his family left their West Harrison home to go skiing. On their return, Beccario's wife discovered that the door was broken from its hinges. When the police arrived, John walked through the house with them and found that drawers had been pulled out, closets emptied, and furniture had been moved. All the family's Christmas presents, jewelry, a computer, cash, and a Bose radio were gone.

Larry Ailes had been with Powell during the burglaries, and he informed the police that he and Powell had committed the burglaries to support a drug habit. He explained to police that he, Powell, and other members of Powell's family would go to homes that appeared empty and knock on the door. If someone answered the door, they would ask for directions. If no one answered the door, they would burglarize the home and use the stolen items to obtain drugs or money to buy drugs. Ailes also informed the police that Powell always carried a gun when committing the burglaries.

On February 7, 2006, the State charged Powell with four counts of class B felony burglary. On June 2, 2008, a jury found him guilty as charged. On June 25, 2008, the trial court sentenced Powell to twenty years on each count, to be served consecutively.²

On appeal, Powell challenges his sentence as inappropriate in light of the nature of the offenses and his character. Pursuant to Article 7, Section 6 of the Indiana Constitution, we

² The trial court also ordered that Powell's sentences be served consecutive to his fifty-year sentence in cause number 24C01-0512-FB-1106 for a class B felony burglary conviction and a habitual offender finding.

are authorized to review and revise sentences imposed by the trial court. This authority is implemented through Indiana Appellate Rule 7(B), which provides, “The 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. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

Powell was convicted of four class B felony burglaries. The advisory sentence for a class B felony is ten years, with a fixed term of between six and twenty years. Ind. Code § 35-50-2-5. The trial court ordered that his sentences be served consecutively, thereby imposing the maximum sentence.

[T]he maximum possible sentences are generally most appropriate for the worst offenders. This is not, however, an invitation to determine whether a worse offender could be imagined. Despite the nature of any particular offense and offender, it will always be possible to identify or hypothesize a significantly more despicable scenario. Although maximum sentences are ordinarily appropriate for the worst offenders, we refer generally to the class of offenses and offenders that warrant the maximum punishment. But such class encompasses a considerable variety of offenses and offenders.

Buchanan v. State, 767 N.E.2d 967, 973 (Ind. 2002) (citations and quotation marks omitted).

Thus, “with respect to deciding whether a case is among the very worst offenses and a defendant among the very worst offenders, ... we should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant’s character.” *Brown v. State*, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), *trans. denied*.

Turning first to the nature of Powell's offenses, we observe that the advisory sentence is the starting point in determining an appropriate sentence for the crime committed. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. Here, Powell took steps to insure that no one was home when he committed the burglaries, thereby reducing the potential for violence. *See Frye v. State*, 837 N.E.2d 1012, 1014 (Ind. 2005) (noting absence of violence where offender was unarmed and burglary was committed when no one was home). This consideration is somewhat counterbalanced by the fact that Powell was armed during each burglary. Further, even though the victims regained possession of some of their property, the pecuniary loss was not insignificant. In addition several of the items had unique emotional significance to the victims such as Stanton's military medals and the Beccarios' Christmas presents. The victims also suffered damage to their homes. Thus, although the nature of the offenses may not support the imposition of the maximum sentence, it certainly supports a sentence above the advisory.

As for Powell's character, his criminal history reflects poorly on it. Powell is a criminal recidivist and has been under the supervision of the court or incarcerated since he was eighteen. He was twenty-four and twenty-five years old when he committed the current offenses. The presentence investigation report ("PSI") shows that he has nine prior felony convictions, which include two theft, two receiving stolen property, and three burglary convictions. He also received two convictions for receiving stolen property and possession of a controlled substance under the misdemeanor sentencing provision. *See Ind. Code § 35-50-2-7(b)* ("Notwithstanding [the Class D felony sentencing provision], if a person has

committed a Class D felony, the court may enter judgment of conviction of a Class A misdemeanor and sentence accordingly.”). Moreover, at the time Powell committed these crimes, he was currently serving a ten-year suspended sentence for class B felony burglary.

We note, however, that Powell’s violent crimes are limited to misdemeanor battery, resisting law enforcement, and intimidation, and that his burglaries appear to have been motivated by a drug problem. With effective drug treatment in prison, he can potentially be rehabilitated. Thus, while his character warrants a sentence above the advisory, we cannot say that it justifies an eighty-year sentence. *See Frye*, 837 N.E.2d at 1015 (acknowledging offender’s extensive criminal history but finding that it did not demonstrate a character of such recalcitrance or depravity to justify forty-year sentence for burglary conviction and habitual offender finding and reducing sentence to twenty-five years.) We therefore vacate Powell’s sentence and remand with instructions to reduce each sentence to eighteen years, with Count II to be served consecutive to Count I, and Counts III and IV to be served concurrent to Count II, for an aggregate sentence of thirty-six years.

Vacated and remanded.

ROBB, J., and BROWN, J., concur.