

Case Summary

Dale Harris appeals his sentence for two counts of Class C felony nonsupport of a dependent. We affirm.

Issue

Harris raises one issue, which we restate as whether the trial court abused its discretion by ordering his sentences to be served consecutively.

Facts

On July 23, 2003, the State charged Harris with two counts of Class C felony nonsupport of a dependent and one count of Class D felony nonsupport of a dependent. Harris pled guilty to two counts of Class C felony nonsupport of a dependent on February 12, 2004, and the State moved to dismiss the third Class D felony count. Count one stemmed from Harris' failure to pay over \$17,000 in support for T.M. from July 21, 1998, to July 21, 2003. Count two stemmed from Harris' failure to pay over \$24,000 in support during the same time period for A.P. and J.P., children born to another woman. A third child, A.H., has yet another mother and was the subject of the dismissed Class D felony charge. The plea agreement provided that the parties were to argue sentencing.

Harris failed to appear for his sentencing hearing on March 10, 2004. The trial court sentenced Harris to eight years on each count, to run consecutively for a total of sixteen years. This belated appeal followed.

Analysis

Harris argues that the trial court abused its discretion in ordering his sentences to be served consecutively. The trial court shall determine whether terms are served

consecutively or concurrently and such determination is within its discretion. See Ind. Code 35-50-1-2(c); Smith v. State, 881 N.E.2d 1040, 1049 (Ind. Ct. App. 2008). Except for crimes of violence, consecutive sentences for a single episode of criminal conduct “shall not exceed the presumptive sentence for a felony which is one class of felony higher than the most serious of the felonies for which the person has been convicted.” I.C. § 35-50-1-2(c) (2004).¹ An “episode of criminal conduct” is “a connected series of events that are closely related in time, place, and circumstance.” I.C. § 35-50-1-1(b). Harris maintains both of his charges were merely one episode of criminal conduct, and therefore, his sentence should not have exceeded ten years.

Harris relies on Smith v. State, 717 N.E.2d 239 (Ind. Ct. App. 1999), for the proposition that his own failure to pay child support for three different children, born to two different mothers, is a single episode of criminal conduct. In that case, our court determined that Smith’s five year sentence for four counts of Class D felony nonsupport exceeded statutory authority, because the four counts represented one episode of criminal conduct. Smith, 717 N.E.2d at 242. Harris’ reliance on Smith is misplaced because the Smith case is easily distinguishable. In Smith, both parties conceded that “Smith’s failure to pay an undivided amount of child support during the same time period for the benefit of four children born of the same marriage constituted one episode of criminal behavior for the purposes of sentencing.” Id. at 241.

¹ At the time Harris committed these crimes, our legislature had not yet changed the sentencing statutes to recommend “advisory” rather than “presumptive” sentences. The earlier statute is otherwise substantially similar to the wording of the current version.

In the present matter, Harris failed to pay distinct amounts of child support to two different mothers, for the benefit of three children. Clearly, the trial court was presented with an entirely different factual scenario than the Smith case. In Smith, not only did the State concede that Smith's charges constituted one episode of criminal conduct, Smith's charges involved four children born of the same marriage. The State makes no such concession here, and Harris' children were born to two different mothers. Two households suffered separately due to Harris' failure to provide support.

Following the completed briefing of this matter, our court decided Gilliam v. State, No. 71A03-0808-CR-420 (Ind. Ct. App. Feb. 24, 2009). In Gilliam, we held that Gilliam's failure to pay court ordered child support to "three separate and distinct households" did not constitute a single episode of criminal conduct. Gilliam, slip op. at 6. In that case, the State charged Gilliam with three counts of nonsupport of a dependent, and each count represented dependents born to different mothers. Our court determined that three households with different sets of victims were deprived of child support and such offenses did not constitute a single episode of criminal conduct. Id. Harris failed to pay support to three of his children, living in two different households. Such deprivation of child support cannot be considered a single episode of criminal conduct. See id.

We also note that our supreme court has explained that "when the perpetrator commits the same offense against two victims, enhanced and consecutive sentences seems necessary to vindicate the fact that there were separate harms and separate acts against more than one person." Serino v. State, 798 N.E.2d 852, 857 (Ind. 2003). Harris failed to support two families. The trial court explained that it ordered consecutive

sentences because the failure to pay support to different women made each crime a separate event. We agree. The trial court did not abuse its discretion in making this conclusion.

Conclusion

Harris' failure to pay child support to two different mothers of three of his children is not a single episode of criminal conduct. The trial court did not abuse its discretion in ordering Harris' terms to be served consecutively. We affirm.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.