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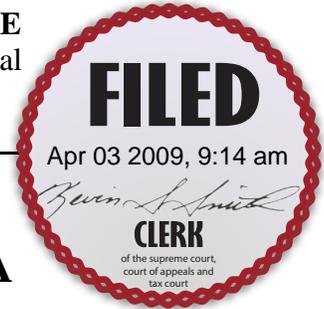
ATTORNEY FOR APPELLANT:

**JAY RODIA**  
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

**GREGORY F. ZOELLER**  
Attorney General of Indiana

**TIFFANY N. ROMINE**  
Deputy Attorney General  
Indianapolis, Indiana



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**IN THE  
COURT OF APPEALS OF INDIANA**

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DANIEL SMITH, )  
 )  
Appellant-Defendant, )  
 )  
vs. )  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

No. 49A05-0807-CR-433

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Patricia Gifford, Judge  
The Honorable Steven Rubick, Commissioner  
Cause Nos. 49G04-0803-FB-54373  
49G04-0803-FB-54375

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**April 3, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

## Case Summary and Issue

Following a guilty plea, Daniel Smith was convicted of two counts of robbery, both Class B felonies. The plea agreement provided for open sentencing with a cap of eight years on the initial executed portion of the sentence and any additional time to be suspended to probation. The trial court sentenced Smith to ten years for each robbery conviction, with two years of each sentence suspended to probation and the sentences to be served concurrently. Smith raises one issue on appeal: whether his sentence is inappropriate in light of the nature of the offenses and his character. Concluding that the sentence is not inappropriate, we affirm.

## Facts and Procedural History

On March 1, 2008, Smith and his co-defendant went to the home of Kem Moore, asked to use his cell phone, and then demanded money while brandishing a knife. They then stole Moore's laptop. Two days later, Smith asked to use Evan Straitor's cell phone. Straitor produced the phone, but when Smith did not make a call, he asked for the phone back. Smith then brandished a handgun and took the cell phone.

The State charged Smith with two counts of robbery, both Class B felonies.<sup>1</sup> Smith pled guilty to both counts pursuant to a plea agreement. The agreement provided as follows: "Open sentencing, with a cap of 8 years on the initial executed portion of the sentence. The Court may impose additional time beyond those 8 years, suspend that time, and place the Defendant on probation." Appellant's Appendix at 32.

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<sup>1</sup> The charges were filed under two separate cause numbers but were disposed of in a single proceeding.

At the sentencing hearing, the trial court found as mitigating factors that Smith had accepted responsibility for his acts, was nineteen years old, self-reported his previous substance abuse, and there could be a hardship on a child to be born to Smith's girlfriend. The court also found as an aggravating factor that Smith has a "terrible" juvenile record consisting of two felony and one misdemeanor true findings. Transcript at 20. Smith was adjudicated delinquent for offenses that would be burglary, a Class B felony; auto theft, a Class D felony; and criminal mischief, a Class B misdemeanor if committed by an adult.<sup>2</sup> The trial court sentenced Smith to two concurrent ten-year terms with eight years executed and two years suspended to probation. Smith now appeals.

### Decision and Discussion

#### I. Standard of Review

An appellate 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." Ind. Appellate Rule 7(B). When determining whether a sentence is inappropriate, we recognize that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). "[A] defendant must persuade the appellate court that his or her sentence has met this inappropriateness standard of review." Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

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<sup>2</sup> The State incorrectly asserts in its brief that the true finding of criminal mischief was a Class B felony conviction. In fact, it was a Class B misdemeanor.

## II. Appropriateness of the Sentence

In the Indiana sentencing scheme, the legislature has set a minimum and maximum sentence for each class of crime, and it has determined an advisory sentence to be used as a starting point. Anglemyer v. State, 868 N.E.2d 482, 488 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). For a Class B felony conviction, at issue here, the statute authorizes a sentence between six and twenty years, with an advisory sentence of ten years. Ind. Code § 35-50-2-5. Smith was sentenced pursuant to the plea agreement to the advisory sentence of ten years for each of his Class B felony convictions, with eight years executed and two years suspended to probation. See Weaver v. State, 845 N.E.2d 1066, 1072 n.4 (Ind. Ct. App. 2006) (explaining that a defendant's total sentence includes both the executed and suspended portion of the sentence).

With regard to nature of the offenses, Smith committed robbery with a deadly weapon on two separate occasions. There is nothing in the record to show, and the State does not contend, that the facts surrounding these robberies are any more or less egregious than a typical Class B felony robbery. Although Smith used a knife and a handgun in committing the robberies, the use of a deadly weapon is accounted for by the Class B felony charges.<sup>3</sup>

Looking to Smith's character, it is clear that Smith has a long criminal history. The trial court found that Smith, at nineteen, had a significant juvenile record consisting of two felonies and a misdemeanor. The trial court also noted that the juvenile courts

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<sup>3</sup> Robbery is a class C felony; however, if it is committed while armed with a deadly weapon, it is a Class B felony. Ind. Code § 35-42-5-1.

before which Smith appeared attempted diversion programs, formal and informal probation, informal home detention, electronic monitoring, and other sanctions to rehabilitate Smith, but he failed to complete most of these programs and showed no inclination to reform his behavior. In addition, Smith has an adult conviction for possession of a handgun without a license. Smith's criminal record and failure to take advantage of opportunities for rehabilitation opportunities reflect poorly on his character.

Smith argues that his young age, nineteen, makes his sentence inappropriate. We disagree. As the Indiana Supreme Court has stated, "focusing on chronological age . . . is frequently not the end of the inquiry for people in their teens and early twenties. There are both relatively old offenders who seem clueless and relatively young ones who appear hardened and purposeful." Monegan v. State, 756 N.E.2d 499, 504 (Ind. 2001) (citation omitted). Considering Smith's significant criminal record, along with his current crimes involving a deadly weapon, we are not persuaded that his age is a significant mitigating circumstance.

Viewing the record as a whole and giving due consideration to Smith's character and the nature of his offenses, we cannot say the advisory sentence is inappropriate. Therefore, Smith has failed to carry his burden of convincing this court that his sentence is inappropriate.

### Conclusion

We conclude that, in light of Smith's character and the nature of his offenses, the

sentence imposed by the trial court is not inappropriate.

Affirmed.

CRONE, J. and BROWN, J., concur.