

STATEMENT OF THE CASE

Appellant-Defendant, Thomas Ainsworth (Ainsworth), appeals his sentence for three counts of burglary, as Class B felonies, Ind. Code § 35-43-2-1.

We affirm.

ISSUES

Ainsworth raises three issues on appeal, which we restate as follows:

- (1) Whether Ainsworth's guilty plea was knowing and voluntary;
- (2) Whether the trial court abused its discretion when it sentenced him; and
- (3) Whether his sentence is inappropriate when the nature of his offenses and character are considered.

FACTS AND PROCEDURAL HISTORY

On January 31, 2008, Ainsworth was charged with burglary, a Class B felony, I.C. § 35-43-2-1, and theft, a Class D felony, I.C. § 35-43-4-2. On February 8, 2008, the State filed an amended Information adding two more charges of burglary, Class B felonies, and two more counts of theft, Class D felonies. On April 18, 2008, Ainsworth filed a written plea agreement informing the trial court that he agreed to plead guilty to three counts of burglary in exchange for the dismissal of all other counts and the State's agreement not to pursue an habitual offender charge. The plea agreement left sentencing on those three burglary counts to the discretion of the trial court. That same day, Ainsworth admitted to the facts sufficient to convict him of three separate burglaries, and the trial court took his plea under advisement.

On May 12, 2008, a presentence investigation report was filed with the trial court. On June 9, 2008, the trial court held a sentencing hearing. At the beginning of the sentencing hearing, Ainsworth's attorney requested to be removed from the case because Ainsworth had expressed that he thought the attorney was in cahoots with the State with their goal being a long sentence for Ainsworth. Further, Ainsworth's attorney orally expressed Ainsworth's desire to withdraw his plea of guilty. The trial court asked Ainsworth about the reasons for his request, and Ainsworth informed the trial court that he felt he had been misled because "Officer Newlon . . . told me . . . is there any other burglaries that you've done, it don't make no difference but whatever you did is going to be put in one package, so you'll be charged with, all will be charged as one." (Transcript p. 36). His attorney stated that he had advised Ainsworth that his sentence would be "anywhere from six (6) to sixty (60)." (Tr. p. 33). The trial court questioned Ainsworth further, decided that it would not vacate Ainsworth's plea of guilty or give him a new attorney, and would proceed with the sentencing hearing.

The trial court heard evidence from each of the victims of Ainsworth's burglaries, and Ainsworth testified as well. The trial court concluded that there was a significant risk that Ainsworth would commit another crime in light of his substantial criminal history. The trial court noted Ainsworth had cooperated to a certain extent in helping the victims get back some of their stolen possessions, but there were irreplaceable items that were unable to be recovered. The trial court noted that Ainsworth had expressed some remorse, but also noted that he had not taken any action to return the stolen items until after he had been arrested and had made statements that conveyed that he did not fully appreciate the harm he had caused or

the seriousness of his crimes. Further, the trial court noted that each of the burglaries were completely separate events, and concluded that they should be treated individually with consecutive sentences. The trial court sentenced Ainsworth to eleven years with one year suspended on each count of burglary, with the sentences to run consecutively, for a total executed sentence of thirty years to be served in the Department of Correction, with an additional three years suspended to probation.

Ainsworth now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Knowing and Voluntary*

Ainsworth argues that his plea of guilty was not knowing and voluntary because the trial court did not determine that Ainsworth had been informed of the possibility of consecutive sentences prior to accepting his plea of guilty as required by Indiana Code section 35-35-1-2. The State contends that this issue is not properly before us on direct appeal, but rather should be raised at a proceeding pursuant to Ind. Post-Conviction Rule 1.

The general rule is that a defendant cannot raise a claim that his plea was not entered into knowingly or voluntarily upon direct appeal, but rather should raise that claim through a P-C.R. 1 proceeding. *Walton v. State*, 866 N.E.2d 820, 821 (Ind. Ct. App. 2007) (citing *Tumulty v. State*, 666 N.E.2d 394, 395 (Ind. 1996)). However, our supreme court has recognized that, where a defendant has properly raised a motion to withdraw a plea of guilty before sentencing, and that motion was reviewed by the trial court and rejected, the denial of the motion to withdraw the plea is reviewable on direct appeal. *Brightman v. State*, 758

N.E.2d 41, 44 (Ind. 2001). Indeed, if a motion to withdraw a guilty plea is denied, and the individual wishes to contest the trial court's decision, a direct appeal is the proper appellate procedure, and failing to raise the issue on direct appeal waives that issue. *Mills v. State*, 868 N.E.2d 446, 452 (Ind. 2007).

At the beginning of the sentencing hearing, while Ainsworth's plea was still under advisement, Ainsworth's attorney addressed the trial court and asked permission to withdraw. After explaining that Ainsworth believed that he was working in concert with the State in an attempt to give Ainsworth a lengthy sentence, Ainsworth's counsel stated that Ainsworth "also asks to have the plea agreement withdrawn based upon that and based upon representations that he claims the police made to him." (Tr. p. 33).

However, Ainsworth never filed a written motion to withdraw his guilty plea. A motion to withdraw a guilty plea must be made in writing and verified. I.C. § 35-35-1-4(b). Therefore, Ainsworth's motion to withdraw his guilty plea was not properly before the trial court, and, consequently, his claim that his plea of guilty was not entered into knowingly or voluntarily is not properly before us now on direct appeal. *See Walton*, 866 N.E.2d at 821.

II. Sentencing

A. Standard of Review

Ainsworth also challenges his sentence on appeal. As long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Anglemeyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and

circumstances before the trial court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.* One way in which a trial court may abuse its sentencing discretion is by applying aggravating factors that are improper as a matter of law. *Id.* at 490-491. Another example includes entering a sentencing statement that explains the reasons for imposing a sentence, including aggravating and mitigating factors, which are not supported by the record. *Id.*

Regardless of whether the trial court has sentenced the defendant within its discretion, we also have the authority to independently review the appropriateness of a sentence authorized by statute through Appellate Rule 7(B). *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008). That rule permits us to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Anglemyer*, 868 N.E.2d at 491. Where a defendant asks us to exercise our appropriateness review, 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). "Ultimately the length of the aggregate sentence and how it is to be served are the issues that matter." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). Whether 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 a myriad of other considerations that come to light in a given case. *Id.*

B. Abuse of Discretion

Ainsworth contends that the trial court abused its sentencing discretion by improperly applying as an aggravating factor the impact his crimes had upon the victims. For support, Ainsworth directs us to *Simmons v. State*, 746 N.E.2d 81, 91 (Ind. Ct. App. 2001), where we stated: “Generally, the impact that a victim or a family experiences as a result of a particular offense is accounted for in the presumptive sentence.” (citing *Mitchem v. State*, 685 N.E.2d 671, 678 (Ind. 1997)).¹

However, the *Simmons* court also acknowledged that, “[i]n order to validly use victim impact evidence to enhance a presumptive sentence, the trial court must explain why the impact in the case at hand exceeds that which is normally associated with the crime.” 746 N.E.2d at 91 (citing *Davenport v. State*, 689 N.E.2d 1226, 1233 (Ind. 1997), *clarified on reh’g on other grounds*). Our legislature has stated that appropriate considerations when imposing sentences include the “harm, injury, loss, or damage suffered by the victim of an offense” if it is “significant . . . and greater than the elements necessary to prove the commission of the offense.” I.C. § 35-38-1-7.1. Here, the trial court stated that Ainsworth’s burglaries left the victims living in fear and less than fully compensated, and explained: “The harm suffered by the victims was significant and greater than the elements necessary to prove the crime, including physical damage, loss of sentimental property which cannot be replaced[,] and loss of security.” (Appellant’s App. pp. 60-61). We conclude that the trial

¹ We note that Ainsworth was sentenced under the current advisory sentencing scheme and not the former presumptive sentencing scheme, but this distinction is immaterial to our consideration of Ainsworth’s claim that the impact upon the victims was not an improper aggravating factor.

court properly considered the impact of Ainsworth's crimes upon the victims as an aggravating factor.

C. Appropriateness of Ainsworth's Sentence

Finally, Ainsworth contends that his sentence is inappropriate when the nature of his offenses and his character are considered. The advisory sentence for each of Ainsworth's burglaries is ten years, but the trial court had discretion to sentence Ainsworth to a fixed term between six and twenty years on each count. I.C. § 35-50-2-5. As we explained above, the trial court sentenced Ainsworth to eleven years with one year suspended to probation on each count. The trial court ordered the sentences to run consecutively, which is within its discretion. *See* I.C. § 35-50-2-1.3. Our concern is whether the aggregate sentence of thirty years with an additional three years suspended to probation is inappropriate. *See Cardwell*, 895 N.E.2d 1224.

Addressing Ainsworth's character first, the pre-sentence investigation report shows that he has an extensive criminal history, including fifteen arrests resulting in six convictions for crimes of dishonesty (thefts and writing worthless checks), and convictions for battery, possession of cocaine, and hunting without a license. The trial court noted that Ainsworth helped return some of the items stolen during his burglaries, but he did so only after he had been arrested. Ainsworth attempted to diminish the severity of his crimes by explaining that he could have stolen more than what he actually did: "I could have took[sic] a brand new 4-wheeler. I could have took[sic] a lot of things. A big giant safe, I could have cleaned that man out but, no, I didn't." (Tr. p. 91). At the sentencing hearing, Ainsworth denied being a

thief in spite of his prior convictions and the current offenses for which we was being sentenced.

Moving on to the nature of Ainsworth's offenses, on three separate days in January 2008, Ainsworth broke into three different homes. At one house, the door was "ripped apart [by] a crowbar or something," and a paint sprayer worth \$500 was taken. (Tr. p. 60). From another house, Ainsworth stole a new set of tools, a video camera, jewelry boxes, and personal items including family video tapes. The door of that house was pried open on the day of a winter storm, and snow and ice blew inside the home exacerbating the harm suffered by the victims. And from the third house that Ainsworth burglarized, he stole guns, ammunition, saddles, saddle pads, tools, jewelry, and a camera. Each of the owners testified that the crimes destroyed their sense of security in the place where they should feel most secure: their homes. Altogether, considering Ainsworth's character and the nature of his three offenses, we conclude that his sentence is not inappropriate.

CONCLUSION

Based on the foregoing, we conclude that Ainsworth cannot raise on direct appeal his contention that his plea of guilty was not entered into knowingly and voluntarily, the trial court did not abuse its discretion when sentencing Ainsworth, and Ainsworth's sentence is not inappropriate when his character and the nature of his offenses are considered.

Affirmed.

DARDEN, J., and VAIDIK, J., concur.