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IN THE
COURT OF APPEALS OF INDIANA

GREGORY L. PAYNE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0805-CR-227
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D08-0204-FA-16

April 15, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Gregory L. Payne appeals the trial court's order re-sentencing him on his convictions of criminal deviate conduct, as a class A felony; sexual battery, as a class C felony; sexual battery, as a class C felony; and criminal confinement, as a class B felony.

We affirm.

ISSUES

1. Whether Payne's counsel provided effective assistance of counsel at re-sentencing.

2. Whether Payne's sentence is inappropriate.

FACTS

We chronicled the facts of Payne's offenses, guilty plea, and initial sentencing in our earlier opinion as follows:

> On March 8, 2001, Payne was driving in South Bend when he saw seventeen-year old R.W. and offered to give him a ride. R.W. accepted. Payne drove to a liquor store and purchased some alcohol, which he and R.W. drank. Payne then pulled onto a side street and he and R.W. began "fooling around . . . ." Tr. p. 41. R.W. told Payne that he wanted to stop, but Payne threatened to choke R.W. and forced him to submit to anal intercourse.
>
> The State did not file charges against Payne until April 1, 2002, when it charged him with criminal deviate conduct as a Class A felony, criminal confinement as a Class B felony, and two counts of sexual battery as Class C felonies. Payne was charged simultaneously with two counts of child molesting as Class A felonies and one count of Class C felony criminal confinement for a separate incident involving a thirteen-year-old boy. Meanwhile, on August 24, 2001, Payne was sentenced to three years incarceration for unrelated battery and resisting law enforcement convictions. He finished serving his sentence for his convictions on or near February 2, 2003, but he remained incarcerated awaiting trial in this case.
>
> On July 21, 2003, Payne's jury trial was scheduled to begin. After voir dire, however, Payne agreed to plead guilty to the charges related to R.W.: Class A felony criminal conduct, Class B felony criminal

> confinement, and two counts of Class C felony sexual battery. The State agreed to dismiss the child molesting and confinement charges related to the other child. The plea left sentencing entirely within the trial court's discretion. On October 9, 2003, the trial court sentenced Payne to fifty years for the criminal deviate conduct conviction and eight years for each of the sexual battery convictions, all to run concurrently; no sentence was entered on the criminal confinement count.

Payne v. State, 838 N.E.2d 503, 505-506 (Ind. Ct. App. 2005), *trans. denied*. On direct appeal, Payne challenged whether the trial court had abused its discretion at sentencing and whether his sentence was inappropriate. We affirmed his sentence.

Payne petitioned the trial court for post-conviction relief.[1] At a hearing on February 29, 2008, the trial court stated that it had found that the "[S]tate's participation in the sentencing" of Payne in 2003 was a "violation" of the plea agreement.[2] (Feb. 29, 2008 Tr. at 2).[3] The trial court scheduled a hearing to re-sentence Payne, and indicated that it would consider the previously filed pre-sentence investigation report ("PSI").[4]

On March 11, 2008, the trial court held the re-sentencing hearing. The trial court noted its receipt of a letter from the victim's mother. Counsel for Payne stated that he did not "have a lot to add," but that Payne

> wanted [him] to point out that there was no weapon involved in these offenses, and there was no physical harm to the victims. Although,

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[1] Payne's brief states that the petition was filed March 13, 2006.

[2] Our opinion noted that there "appear[ed] to be no written plea agreement in this case." 838 N.E.2d at 506 n.1.

[3] The trial court's comments during the hearing indicate that this ruling was on a petition for post-conviction relief, but Payne's Appendix does not include the trial court's order thereon. Payne's statement at the hearing suggests that the trial court's "ruling" in this regard was on February 6, 2008. (February 29, 2008 Tr. at 19).

[4] The trial court also gave Payne a copy of "the presentence report from before" to review before the re-sentencing hearing. *Id.* at 16.

> obviously, from the letter, there was some emotional and mental harm to the victim, but no physical harm or no weapon used.

(March 11, 2008 Tr. at 3). The State remained silent and made "no rec[ommendation]" at the re-sentencing. Payne then spoke on his own behalf, asserting that he was attempting to "change" himself and that if given a chance, he "might change." *Id.* at 12.

The trial court stated that Payne had inflicted such damage on R.W. that the "boy will never be who he would have been," and the damage would "follow him the rest of his life," as would the damage to "the other boy whose charges were dismissed." *Id.* The trial court noted Payne's "criminal history of having committed the same kind of offense back in '86," a "burglary in '87, which was a felony," – "two felonies which occurred before" these offenses, and a felony conviction for "battery which may be based on an act that occurred after these acts for which you are being sentenced." *Id.* In addition, the trial court noted that Payne had been convicted of "two misdemeanors, a possession of drug paraphernalia and a public intoxication," and that there was "more in [his] history that ma[de] [him] a potential danger than . . . ma[de] [him] a potential successfully rehabilitated person." *Id.* The trial court also found that Payne's guilty plea was "not a mitigating circumstance" because he had received "a benefit" for the plea agreement because the State agreed to dismiss the child molesting and confinement charges related to the other child. *Id.* at 14.

The trial court then ordered Payne to serve a sentence of fifty years on the class A felony criminal deviate conduct; eight years on each of the two class C felony sexual batteries – to run concurrently with the sentence on the class A felony offense. As to the

class B criminal confinement count, the trial court found it merged with the criminal deviate conduct conviction.

DECISION

1. Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, Payne must show that (1) counsel's performance fell below an objective standard of reasonableness based upon prevailing professional norms, and (2) the deficient performance resulted in prejudice, *i.e.*, there is a reasonable probability that the result of the proceeding would have been different but for counsel's unprofessional errors. *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (citing *Strickland* at 466 U.S. 687-88, 694 (1984)). A claim of ineffective assistance must overcome the strongest presumption of adequate assistance of counsel. *Thomas v. State*, 797 N.E.2d 752, 754 (Ind. 2003) (citing *Bieghler v. State*, 690 N.E.2d 188, 194 (Ind. 1997), *cert. denied*).

Payne argues that counsel should have presented "a discussion of mitigating versus aggravating circumstances," or "argued for the presumed [sic] sentence for an A felony," with "the balance over that to be suspended as a way of protecting society and rehabilitating the defendant at the same time." Payne's Br. at 7. If counsel had suggested "sentencing alternatives" to the trial court, he concludes, "it is likely that [the trial court] would have at least explored a sentence other than the maximum" for the class A felony offense. *Id.* at 9 (emphasis added). We are not persuaded.

At the re-sentencing hearing, Payne's counsel indicated that he was arguing what Payne asked him to argue – the lack of a weapon and of physical harm to the victim. Further, Payne was allowed to make his own argument with respect to sentencing.[5]

However, in assessing counsel's performance, we must take into account the following. The history of the case includes our opinion in the initial appeal, which found that Payne's criminal history warranted significant weight as an aggravating circumstance and that no "substantial weight" was warranted for his guilty plea when "the set of charges related to the other child had been dismissed in exchange for the plea." 838 N.E.2d at 506. In addition, our opinion noted that Payne "threatened to choke [the victim] to death if he did not submit to anal intercourse, which caused the victim extreme pain" – facts which supported an enhanced sentence. 838 N.E.2d at 508. Our opinion also contained an extensive discussion of Payne's criminal history, presumably reflected in the PSI, and Payne does not argue that any of the facts therein are inaccurate.

Payne directs us to no specific fact that should have been brought to the attention of the trial court to effect a different result. Essentially, Payne simply posits that if <u>something</u> had been done differently, a different result <u>might</u> have obtained. However, he must demonstrate to us the "reasonable probability that the result of the proceeding would have been different." *Grinstead*, 845 N.E.2d at 1031. Payne has failed to

[5] At the previous hearing, on February 29, 2008, Payne repeatedly pleaded with the trial court to proceed with the re-sentencing at that time and to allow him to act pro se for the re-sentencing. ("can you just sentence me right now?"; "could you please just sentence me, Your Honor?"; "I want to go on and get sentenced"; and "I'm pro se, and I'd like to be sentenced." Tr. at 10, 12, 13, 14. He complained that he didn't understand why he was having "such a hard time in trying to get sentenced today." *Id.* at 18.).

demonstrate that there is a reasonable probability that the trial court would have sentenced him to a term less than that ordered.

2. Inappropriate Sentence

The Indiana Constitution authorizes independent appellate review and revision of a sentence, authority implemented through Appellate Rule 7(B). *Anglemyer v. State*, 868 N.E.2d, 482, 491, *clarified on reh'g on other grounds*, 875 N.E.2d 218 (Ind. 2007). The Rule provides that a 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." *Id.* (quoting Ind. Appellate Rule 7(B)). "The burden is on the defendant to persuade" the appellate court that his or her sentence is inappropriate. *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006)).

Although Payne frames his issue as "whether the sentence was appropriate under Appellate Rule 7(B)," he argues that he cannot meet his burden of persuasion that the sentence imposed is inappropriate until he is "allowed to appear again for sentencing with an attorney who could give the trial court some reasons to go lower than the fifty (50) years previously imposed as set forth" in his first argument. Payne's Br. at 10. Thus, in effect, Payne is again arguing that he received ineffective assistance of counsel – an argument we have already addressed and rejected. Moreover, it is Payne's burden to persuade us that his sentence is inappropriate. *Reid*, 876 N.E.2d at 1116. Payne has failed to do so.

Affirmed.

BAILEY, J., and ROBB, J., concur.