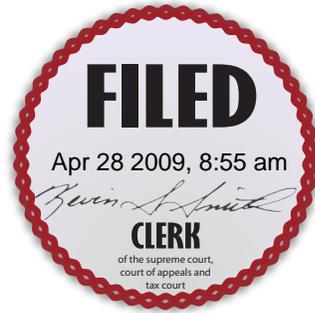


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JIMETHA GOREE,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 33A05-0807-CR-428

APPEAL FROM THE HENRY SUPERIOR COURT
The Honorable Mary Willis, Judge
Cause No. 33C01-0707-FB-13

April 28, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, Jimetha Goree was convicted of possession of a device by an incarcerated person, a Class B felony, and rioting, a Class D felony. Goree appeals his twelve-year executed sentence raising a single issue, which we expand and restate as: 1) whether the trial court properly sentenced him; and 2) whether his sentence is inappropriate in light of the nature of his offenses and his character. Concluding the trial court properly sentenced Goree and his sentence is not inappropriate, we affirm.

Facts and Procedural History

Goree was convicted of armed robbery and sentenced to twelve years in prison by the State of Arizona. At some point during that sentence, Goree was transferred to Indiana to serve his Arizona sentence at the New Castle Correctional Facility. On April 24, 2007, Goree participated in a prison riot. Corrections officers observed Goree holding a metal pole and throwing rocks large enough to cause injury toward several other officers.

On July 16, 2007, the State charged Goree with possession of a device by an incarcerated person, a Class B felony, and rioting, a Class D felony. After a jury trial, Goree was found guilty and convicted of both crimes. The trial court proceeded to hold a sentencing hearing on June 17, 2008. At the conclusion of the hearing, the trial court found Goree's extensive criminal history to be an aggravating circumstance. The trial court also found as a mitigating circumstance that imprisonment would result in an undue hardship to Goree's daughter, but assigned little weight to the mitigator because Goree "has no duty to support or court order to support that child anyway." Transcript at 176.

Concluding that the aggravating circumstance far outweighed the mitigating circumstance, the trial court sentenced Goree to twelve years executed on the Class B felony and three years executed on the Class D felony, the two sentences to run concurrently to each other, but consecutively to Goree's Arizona sentence. Goree now appeals.

Discussion and Decision

I. Propriety of Sentence

We review a trial court's sentencing decision for an abuse of discretion, which occurs only when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218.

Goree argues first that the trial court issued an inadequate sentencing statement because it failed to consider all of the mitigating circumstances. Initially, we point out a trial court may impose "any sentence that is: (1) authorized by statute ... regardless of the presence or absence of aggravating or mitigating circumstances." Ind. Code § 35-38-1-7.1(d). However, when imposing a sentence for a felony, a trial court must enter a sentencing statement including reasonably detailed reasons or circumstances for imposing a particular sentence. Anglemyer, 868 N.E.2d at 490. Further, a trial court abuses its discretion when it: 1) fails to issue any sentencing statement; 2) enters a sentencing statement that explains reasons for imposing a sentence, but the record does not support the reasons; 3) enters a sentencing statement that omits reasons clearly

supported by the record and advanced for consideration; or 4) considers reasons that are improper as a matter of law. Id. at 490-91.

A. Aggravating Circumstance

Goree argues that the trial court improperly considered an element of his crime as an aggravating circumstance. Goree is correct that a trial court may not consider a material element of a crime as an aggravating circumstance when sentencing a defendant. See Lemos v. State, 746 N.E.2d 972, 975 (Ind. 2001). However, such is not the case here. In order to convict Goree of possession of a device by an incarcerated person, the State had to allege and prove beyond a reasonable doubt that Goree: was incarcerated in a penal facility; knowingly or intentionally possessed a deadly weapon; that he used or intended to use in a manner readily capable of causing bodily injury. Ind. Code § 35-44-3-9.5.

The trial court found Goree's extensive criminal record to be an aggravating circumstance. The trial court did not mention in its sentencing statement that Goree committed his crimes while incarcerated or that it considered this fact to be an aggravating circumstance. Goree argues without authority that if the trial court cannot consider his incarceration, it also cannot consider the conviction leading to that incarceration. We need not address this issue, however, because even excluding the single offense leading to Goree's incarceration, he still has an extensive criminal history including three felonies – possession of a forgery device, theft, and possession of marijuana – and numerous other non-felony crimes. Therefore, the trial court did not

abuse its discretion in finding Goree's criminal history to be an aggravating circumstance.

B. Mitigating Circumstance

Goree also argues that the trial court failed to consider his desire to reunite with his daughter as a mitigating circumstance. On the contrary, however, the trial court made specific reference to Goree's relationship with his daughter, stating:

imprisonment of the person would result in an undue hardship to a dependent. He does have a daughter, however, I would point out in the P.S.I. that there is no support order that's currently owed, so even if that is mitigating factors [sic], it's quite low because he has no duty to support or court order to support that child anyway.

Tr. at 176. Goree presented no evidence contrary to the trial court's depiction of his daughter's dependency upon him. Therefore, the trial court did not fail to consider the mitigating circumstance and also did not abuse its discretion in assigning it little weight.

III. Appropriateness of the Sentence

Goree's twelve-year sentence for his Class B felony conviction is two years above the advisory sentence, see Ind. Code § 35-50-2-5 (advisory sentence is ten years), and his three-year sentence is the statutory maximum sentence for his Class D felony conviction, see Ind. Code § 35-50-2-7.

Pursuant to Indiana Appellate Rule 7(B), we may 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." Id. When making this decision, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 196 (Ind. Ct. App. 2007), trans. denied; cf. McMahon v. State, 856 N.E.2d 743, 750 (Ind. Ct. App. 2006) ("[I]nappropriateness review should not be limited ... to a

simple rundown of the aggravating and mitigating circumstances found by the trial court.”). However, the defendant bears the burden to “persuade the appellate court that his ... sentence has met this inappropriate standard of review.” Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

A. Nature of the Offenses

With respect to the nature of Goree’s crimes, we note that nothing about his crimes makes them out of the ordinary. There is no evidence that Goree, personally, successfully caused bodily harm to a correctional officer, or that he was an instigator or leader of the rioting. On this note, the trial court remarked, “I’m aware of the circumstances at the riot, the mob mentality which was prevailing on that day. Quite frankly, many more people could have been charged probably than were.” Tr. at 178. On the other hand, Goree had the option of not participating in the riot at all or, at least, not picking up and throwing objects. Therefore, the nature of Goree’s offenses alone do not weigh in favor of either a reduction or addition to the advisory sentence.

B. Character of the Offender

Goree’s character, on the other hand, weighs heavily in favor of a sentence above the advisory sentence. As discussed above, Goree has an extensive criminal history, including: failing to appear for traffic, license, and vehicle violations thirteen times; driving while suspended eight times; driving without a license three times; felony possession of a forgery device; theft; misdemeanor assault; felony possession of marijuana; and felony armed robbery. Goree has been incarcerated on six different occasions, committed at least three of the above offenses while on probation for other

crimes, and had his probation revoked four times. In addition, Goree committed the crimes for which he is being sentenced here while incarcerated. In short, Goree has demonstrated no willingness or ability to cease his criminal activity.

In favor of Goree's character, he appears to have attempted to establish and maintain a good relationship with his mother and daughter. While incarcerated in Arizona, Goree participated in and completed many programs. Goree also expressed his desire to be reunited with his daughter and to serve as a good role model for her. However, this will be difficult to accomplish if he cannot turn away from criminal behavior.

Goree bears the burden of persuading us that his sentence is inappropriate in light of the nature of his offenses and his character, and he has failed to do so. Although the nature of his offenses may not merit a sentence above the advisory, his consistent unwillingness to abide by the laws of society, as evidenced by his extensive criminal history and his continuing criminal behavior while incarcerated, indicates his twelve-year sentence is not inappropriate.

Conclusion

The trial court properly sentenced Goree and his sentence is not inappropriate in light of the nature of his offenses and his character.

Affirmed.

CRONE, J., concurs.

BROWN, J., dissents with opinion.

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No. 33A05-0807-CR-428

BROWN, Judge dissenting

I respectfully dissent, finding Goree’s twelve-year sentence for the class B felony conviction to be inappropriate and would remand for imposition of the advisory ten-year sentence.