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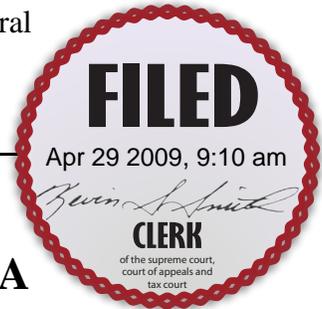
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**IN THE
COURT OF APPEALS OF INDIANA**

SYLVESTER BUCKINGHAM,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 71A04-0902-CR-80

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John M. Marnocha, Judge
Cause No. 71D02-0806-FD-625

April 29, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Sylvester Buckingham appeals his conviction and sentence for class D felony theft.

We affirm.

Issues

Buckingham raises the following issues for review:

- I. Is the evidence sufficient to sustain his conviction for class D felony theft?
- II. Is his sentence inappropriate in light of the nature of the offense and his character?

Facts and Procedural History

On June 23, 2008, loss prevention officer Michael Ruelas observed Buckingham as he entered a Kroger store, took a plastic bag from a U-Scan machine, and walked over to the deli department. Ruelas then saw Buckingham take a box of fried chicken, place it in the plastic bag, and leave the store without paying for it. Ruelas ran outside and identified himself to Buckingham. When Buckingham saw Ruelas's badge, he turned and ran. Ruelas called the police, and South Bend Police Officer Mark Walsh pursued and apprehended Buckingham. At that time, Buckingham had in his possession the Kroger bag containing the fried chicken. Officer Walsh placed Buckingham in his squad car and took him to the Kroger store, where Ruelas positively identified him as the person who stole the chicken.

On June 24, 2008, the State charged Buckingham with class D felony theft. On September 25, 2008, a jury found him guilty as charged. On October 22, 2008, the trial court

sentenced him to the eighteen-month advisory term. This appeal ensued. Additional facts will be provided as necessary.

Discussion and Decision

I. Sufficiency of Evidence

Buckingham contends that the State failed to present sufficient evidence to sustain his class D felony theft conviction. When reviewing a claim of insufficiency of evidence, we neither reweigh evidence nor judge witness credibility. *Klaff v. State*, 884 N.E.2d 272, 274 (Ind. Ct. App. 2008). Rather, we consider only the evidence and reasonable inferences most favorable to the verdict. *Id.* We will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *Id.*

Theft occurs when a person “knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use.” Ind. Code § 35-43-4-2(a). Buckingham does not deny that he took the chicken; he denies that he intended to deprive Kroger of the chicken’s value. He asserts that, for a brief time when he was not in Ruelas’s view, he spoke to an employee at the service desk. He argues that it is “plausible” that he was discussing with the employee his inability to pay and was making some other arrangement for payment. Appellant’s Br. at 6. We are prohibited from reweighing evidence and must therefore decline Buckingham’s invitation to do so. *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005). Accordingly, we affirm Buckingham’s conviction.

II. Sentencing

Buckingham challenges the appropriateness of his eighteen-month sentence. On appeal, “we may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, [this] 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). A defendant bears the burden of persuading the reviewing court that his sentence meets the inappropriateness standard. *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218.

In addressing the nature of the crime, “the advisory sentence is the starting point the Legislature has selected as an appropriate sentence.” *Anglemyer*, 868 N.E.2d at 494 (emphasis added). Buckingham received the eighteen-month advisory sentence for class D felony theft. *See* Ind. Code § 35-50-2-7 (person committing class D felony shall be imprisoned for six months to three years, with advisory term being one and one-half years). Essentially, Buckingham argues that the nature of the offense—the theft of food worth only \$6.99—is relatively minor and therefore merits a sentence shorter than the advisory term. The trial court considered this at sentencing:

Not necessarily in the matter of mitigation, but I do consider the nature and circumstances of this offense, that you stole a six or seven dollar box of chicken from Kroger’s.

Ordinarily, if this was your first offense, your second offense or your third offense, maybe even your fourth offense, I wouldn’t put anybody in jail for stealing food. I have some real problems with that.

But it’s your criminal history that indicates you just commit crimes. I mean, it’s not out of anything else other than you simply cannot follow the law.

....

I agree with the prosecutor, that probably given the criminal history that

a three year sentence is an absolutely appropriate sentence.

....

On the other hand, it's a seven dollar box of chicken.

So with the Court having considered all of that, I think the appropriate sentence is 18 months[.]

Tr. at 145-47. Like the trial court, we may not simply shrug off Buckingham's crime as stealing to eat. Instead we must address his offense in conjunction with his character.

Buckingham's poor character is reflected in his extensive criminal history. He has a "continuing criminal history from 1980 through this case." *Id.* at 145.¹ His three prior felony convictions and twelve prior misdemeanor convictions include five for theft or conversion. *Id.* at 147. Moreover, his two failed attempts at probation and the fact that he committed the instant offense just eleven days after being released on parole indicate that prior attempts at leniency have failed. In sum, Buckingham has demonstrated a persistent unwillingness to obey the law and to keep his hands off other people's property. He has failed to carry his burden of demonstrating that his sentence is inappropriate in light of the nature of the offense and his character. Accordingly, we affirm his eighteen-month advisory sentence.

Affirmed.

BRADFORD, J., and BROWN, J., concur.

¹ We note that Buckingham has failed to include in the record the presentence investigation report, which would have greatly facilitated our review.