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**IN THE
COURT OF APPEALS OF INDIANA**

BOBBY D. PLUMMER,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 89A01-0810-CR-498

APPEAL FROM THE WAYNE SUPERIOR COURT
The Honorable Gregory A. Horn, Judge
Cause Nos. 89D02-0710-FB-20; 89D02-0710-FB-21; and
89D02-0602-FD-23

April 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Bobby D. Plummer appeals his sentence, following a guilty plea, for two counts of class B felony robbery.

We affirm.

ISSUE

Whether Plummer's sentence is inappropriate pursuant to Indiana Appellate Rule 7(B).

FACTS

On February 6, 2005, at approximately 1:41 a.m., police were dispatched to the Richmond, Indiana apartment of Karen Smith to investigate a residential entry. Officers arrived at Smith's apartment and found Plummer inside. Smith was not at home. Plummer, nineteen years old at the time, was intoxicated and claimed to have entered with Smith's permission. The police located Smith, who denied granting Plummer permission to be in her apartment. She also informed police that she suspected Plummer of having stolen items from her before. Plummer was convicted of residential entry and placed on probation.

On October 12, 2007, at approximately 10:30 p.m., Richmond police were dispatched to Hartman's Market to investigate an armed robbery. The robber was wearing a blue puffy jacket and was armed with a knife. The cashier gave him \$550.00 from the cash register and \$70.00 from his own pocket.

On October 13, 2007, at approximately 5:45 a.m., Richmond police responded to an armed robbery at the Village Pantry. Dispatch advised that the armed suspect was

wearing camouflage and a blue hoody, and had fled south on South 13th Street. Officer Joni Moore was the first police officer to arrive at the scene. The cashier told Officer Moore that a young white male, clad in a blue puffy jacket, had entered the store, threatened her with a knife, and demanded “all the money.” (Tr. 108). The cashier gave the robber \$400.00 from the cash register. She described him as being approximately twenty-two years of age, with a buzzed haircut and a Chinese character tattooed on the left side of his neck. She recognized the robber as a customer, but did not know his name.

While en route to the scene in his marked vehicle, Officer Jeff Carrico observed a white male wearing camouflage pants and a blue hoody jacket with white sleeves running into the parking lot of Cate’s Auto. The subject slowed to a walk when he saw Officer Carrico, who then pulled behind the subject in the parking lot. Officer Carrico radioed dispatch and advised that he had followed a subject matching the description of the robbery suspect into Cate’s Auto parking lot. When Officer Carrico exited his vehicle, the subject approached him and stated that he had just been “jumped” by two black males. (Tr. 41). Officer Carrico asked the subject, later identified as Plummer, to place his hands on top of the squad car for a pat-down search. When Officer Carrico attempted to handcuff Plummer, he began to “pull[] his arms away, [and] refus[ed] to be handcuffed.” (Tr. 43).

Officer Carrico called for assistance, and Officers Randy Moles and Joni Moore responded. The officers had to force Plummer to the ground to handcuff him. Upon searching Plummer, they discovered a switchblade knife and a large amount of loose

currency jammed into his left front pocket. The officers took Plummer back to the Village Pantry, where the store clerk positively identified him as the man who had robbed her at knife-point. Plummer was placed under arrest. At the time, Plummer was still on probation for residential entry.

On October 13, 2007, the State charged Plummer under cause number 89D02-0710-FB-020 with one count of class B felony robbery. Under cause number 89D02-0710-FB-021, the State charged him with count I, class B felony robbery; and count II, class D felony theft. On October 31, 2007, the probation department filed a petition to revoke probation for residential entry. Plummer's jury trial commenced on May 12, 2008. On May 13, 2008, after one day of testimony, Plummer orally moved the trial court to accept, in open court, his plea of guilty to two counts of class B felony robbery and the probation violation. The trial court advised Plummer of his constitutional rights before accepting his guilty plea.

The trial court conducted Plummer's sentencing hearing on June 11, 2008. In imposing its sentence, it made the following statement:

The Court having examined the Pre-Sentence Report and having heard statements of the Defendant, and of counsel, considers the following aggravating circumstances and mitigating circumstances. The Court considers the mitigating circumstance to be that the Defendant is of a youthful age. The Court rejects the contention by the Defendant that [his] alcohol[ism] and his remorsefulness are mitigating circumstances. This Court does not and cannot condone the use of alcohol serving to be a mitigating circumstance. The Court finds the following to be aggravators: the Defendant's criminal history consisting of two (2) felony convictions as an adult and the Court would note that the Defendant is only twenty-one years of age. In addition, as an adult he's obtained two (2) misdemeanor convictions. Further, that while he was a juvenile he was adjudicated for two (2) burglaries. The Court finding that the Defendant

has recently violated the terms of his probation The Court would further note that the Defendant, that the crimes to which the Defendant is pleading are crimes of violence, and that the Defendant indeed did use a switchblade during the commissions of these crimes. Upon weighing and balancing the aggravating circumstances and the mitigating circumstances the Court finds that the aggravating circumstances substantially outweigh the mitigating circumstances, and in fact the Court finds that the Defendant's criminal history in and of itself outweighs any mitigating circumstance.

(Tr. 143-44). The trial court imposed sentence as follows: for class B felony robbery under cause number FB-020, fifteen years; for class B felony robbery under cause number FB-021, thirteen years; and for probation violation, 250 days. The trial court ordered that the sentences be served consecutively, "due to the aggravating circumstances" and because "both crimes [we]re crimes of violence." (Tr. 145). It also ordered Plummer placed in a facility that provides drug and alcohol treatment. Plummer now appeals.

DECISION

Plummer contends that his sentence is inappropriate in light of the nature of the offense and the character of the offender. Specifically, he contends that his "character counterbalanc[es] the nature of the offenses." Plummer's Br. at 10. We cannot agree.

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. Ind. Appellate Rule 7(B). "Although Rule 7(B) does not require us to be 'very deferential' to a trial court's sentencing decision, we still must give due consideration to that decision." *Williams v. State*, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008). "We also understand and recognize the unique perspective a trial court

brings to its sentencing decisions.” *Id.* The burden is on the defendant to persuade the reviewing court that his sentence is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007); *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

Plummer cites two cases in support of his contention that his sentence is inappropriate. In *Kemp v. State*, 887 N.E.2d 102 (Ind. Ct. App. 2008), the defendant, a church administrator who managed the church’s bank accounts and maintained its books, used the church’s credit card for personal purchases and wrote \$350,000.00 in unauthorized checks to himself and others. He pleaded guilty to four counts of class C felony forgery, four counts of class D felony theft, and one count of class C felony corrupt business influence. At sentencing, the trial court found Kemp’s breach of the congregation’s trust, the amount of money stolen, and his on-going deception and intricate cover-up to be aggravating circumstances. It also found Kemp’s lack of any criminal history and his “admit[ing] his offenses and cooperat[ing] from the outset” to be mitigating circumstances. *Id.* at 104. The trial court then imposed an aggregate sentence of twenty-six years, with twenty years to be served in the Department of Correction and the balance to be served on work release. On appeal, we noted the admittedly “despicable” nature of Kemp’s offenses and acknowledged his shameful abuse of his position of trust, but concluded that the aggravating and mitigating circumstances were in equipoise. *Id.* at 106. Thus, we concluded that trial court’s sentence was inappropriate and reduced Kemp’s sentence to a sixteen-year sentence.

Plummer’s reliance on *Kemp* is misplaced. *Kemp*, unlike the instant case, involved neither a crime of violence nor even a threat of the same. Also, Kemp lacked

any criminal history whatsoever, unlike Plummer, who has both a juvenile and an adult criminal record and was on probation when he committed the instant robberies. Nor are we moved by Plummer's attempt to distinguish his character from Kemp's – arguing that “Kemp went to great strides to conceal, lie, and abuse his position of trust with the Church while committing his offenses.” Plummer's Br. at 11. Plummer fails to acknowledge his own comparable attempt to deflect Officer Carrico's investigation and to elude capture by masquerading as a robbery victim and claiming to have been jumped by two unidentified black males.

Plummer also cites *Clay v. State*, 882 N.E.2d 773 (Ind. Ct. App. 2008). In *Clay*, the defendant broke into a residence and sexually assaulted an eight-year-old child. He pleaded guilty to class A felony burglary. In imposing its sentence, the trial court identified Clay's extensive criminal history and pattern of repeated criminal behavior as aggravating circumstances; and his guilty plea, acceptance of responsibility, and mental health history as mitigating circumstances. It then imposed a thirty-two-year sentence. On appeal, we affirmed Clay's sentence, noting his extensive criminal history, his record of probation violations, and the fact that he was on probation when he committed the underlying offenses. We concluded that Clay's “repeated criminal behavior and disregard for the law show[ed] [his] less-than-admirable character and d[id] not aid his inappropriateness argument.” *Id.* at 777.

Moreover, we are not persuaded by Plummer's claim that his “character cannot be considered ‘less-than-admirable’ like [that of] the defendant in *Clay*.” Plummer's Br. at 11. Inasmuch as he argues that his character is not as bad as that of a child rapist with an

extensive criminal history, we agree that he is not one of the worst offenders. *See Childress*, 848 N.E.2d at 1080 (“the maximum possible sentences are generally most appropriate for the worst offenders”). That said, however, his character still leaves a great deal to be desired.

Plummer’s character is reflected in his criminal history, which includes two juvenile adjudications for burglary as well as adult convictions for class A misdemeanor resisting law enforcement and residential entry and receiving stolen property, as class D felonies. Like Clay, Plummer was on probation for a prior offense when he committed the instant robberies. He is unwilling to accept full responsibility for his criminal behavior. He blames his troubles on his “horrible upbringing” and attributes “[h]is past and present crimes” to his alcoholism. Plummer’s Br. at 6. The record shows, however, that criminal courts have required Plummer to participate in substance abuse prevention programs, which have not deterred him from consuming alcohol to excess. *See Bryant v. State*, 802 N.E.2d 486, 501-02 (Ind. Ct. App. 2004) (substance addiction is more properly characterized as an aggravating factor, especially where defendant is aware of his problem and has taken no steps to remedy it). Our review of the nature of the offense reveals that Plummer threatened the employees of both stores with a knife before taking money from them.

Thus, based upon the foregoing, we are not persuaded that Plummer’s sentence is inappropriate in light of the nature of the offenses or the character of the offender.

Affirmed.

VAIDIK, J., concurs.

RILEY, J., dissents with separate opinion.

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| |) | |
| STATE OF INDIANA, |) | |
| |) | |
| Appellee-Plaintiff. |) | |

Judge, Riley, dissenting with opinion.

I respectfully dissent. Plummer’s sentence is inappropriate pursuant to Indiana Appellate Rule 7(B). Because of his young age and the fact that the two crimes were committed within an eight hour time period, I do not believe the sentences should be consecutive. Plummer is an alcoholic and was intoxicated when the crimes were committed.

I believe a sentence of two concurrent fifteen (15) year sentences to the Department of Correction consecutive to a 250 day sentence for his probation violation is appropriate in light of the nature of the offense and the character of the offender.