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IN THE
COURT OF APPEALS OF INDIANA

ERIC EMRICH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A04-0810-CR-625
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0803-FB-6

May 7, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Eric Emrich appeals the fifteen-year sentence imposed by the trial court after Emrich pleaded guilty to Dealing in a Controlled Substance,[1] a class B felony, and admitted to being a Habitual Substance Offender.[2] Although Emrich does not contest the overall length of the sentence, he argues that the manner in which he is to serve the sentence is inappropriate in light of the nature of the offense and his character. Specifically, Emrich argues that the record establishes that he has a serious recidivist drug addiction and that he needs more time in a drug treatment program in Community Corrections and less time in the Department of Correction. Finding that it is a very close call but that we are unable to say that the sentence is inappropriate, we affirm.

FACTS

On March 5, 2008, Emrich sold ten morphine tablets to a person later revealed to be an undercover detective. On March 7, 2008, the State charged Emrich with class B felony dealing in a controlled substance, class D felony possession of a narcotic drug, and alleged him to be a habitual substance offender. On July 18, 2008, Emrich pleaded guilty to class B felony dealing in a controlled substance and admitted to being a habitual substance offender in exchange for the dismissal of the class D felony possession of a narcotic drug charge. The plea agreement provided for an executed sentence between nine and thirteen years.

[1] Ind. Code § 35-48-4-2(a).

[2] Ind. Code § 35-50-2-10.

At the time of sentencing, Emrich was twenty-six years old, and told a psychiatrist that he had "been in prison pretty much since I was 18[.]" Appellant's App. p. 68. As a juvenile, Emrich was adjudicated delinquent for being a runaway and for drug offenses. As an adult, he has amassed a number of misdemeanor convictions for drug and alcohol offenses and has also been convicted of two counts of class C felony forgery, class D felony escape, and class D felony possession of marijuana with a prior conviction. He has had probation revoked at least four times and was on probation when he committed the instant offense.

At Emrich's September 19, 2008, sentencing hearing, the trial court found Emrich's criminal history, including recent violations of probation, pretrial release, and community corrections, to be an aggravating factor. It found Emrich's mental illness to be a mitigating circumstance. Concluding that the aggravator outweighed the mitigator, the trial court imposed an eleven-year sentence for class B felony dealing in a narcotic drug and enhanced that sentence by four years for being a habitual substance offender. The trial court ordered Emrich to serve ten years at the Indiana Department of Correction (DOC) and two years with Community Corrections, recommending that Emrich be enrolled in the CLIFF Program[3] while in the DOC. It suspended the remaining three years of the sentence to supervised probation. Emrich now appeals.

DISCUSSION AND DECISION

[3] The parties and the trial court refer to the CLIFF Program, but the record does not reveal the source of th acronym or the purpose or particulars of the program.

Emrich does not contest the aggregate length of the sentence imposed by the trial court. Instead, he argues that he should be ordered to serve less time in the DOC and more time in Community Corrections, contending that the way in which the trial court has ordered him to serve the fifteen years is inappropriate in light of the nature of the offense and his character pursuant to Indiana Appellate Rule 7(B).[4] In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). 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).

As for the nature of the offense, Emrich sold ten morphine pills to an undercover detective. He did not sell them "to make a lot of money," but to "make me a few pills off of it . . . [t]o get high." Tr. p. 24.

As for Emrich's character, he has a lengthy criminal history that includes multiple probation and community corrections violations. He has "been a drug addict since I was about eleven years old," starting with marijuana with school friends and eventually "escalat[ing] to pills and other things." Id. at 20. Before sentencing, Emrich underwent a psychological and substance abuse evaluation, which revealed that

[4] The State spends most of its brief arguing that Emrich has waived his argument on appeal because, according to the State, Emrich focuses on an improper constitutional provision as the basis for his argument. The State's position is wholly disingenuous. If one reads Emrich's brief, it is readily apparent that he is making a 7(B) argument that is supported by thoughtful and articulate reasoning. Indeed, Emrich explicitly states that he is not relying on the constitutional provision emphasized by the State. Appellant's Br. p. 8 n.7. We caution the State to read the appellant's brief more carefully and summarize and respond to the argument therein more honestly in the future. Needless to say, we do not find that Emrich has waived this argument.

> . . . His clinical profile was indicative of significant depression and associated anxiety. . . . Overall, this testing instrument identifies Mr. Emrich as a man in need of intervention, primarily in the area of substance dependence, with a secondary issue with psychological distress.
>
> ***
>
> It is clear that his primary issue is his severe addiction. He appears to suffer from depression in response to the consequences of his drug use, primarily the problems his drug use causes in his relationships with his ex-wives and his access to see his children. . . .
>
> . . . It is clear that his addiction played a significant role in his motivation for engaging in the instant offense.
>
> . . . It is recommended that intensive inpatient substance treatment be mandated by the Court as part of any sentence he might receive for the current charges against him, and that regular drug and alcohol screening be a condition of any period of court supervision. . . . He expressed the need for a substance abuse/dependence treatment program, and psychological testing indicated that Mr. Emrich acknowledges major difficulties in his functioning and perceives the need for help in dealing with his problems, a finding that increases the likelihood of success in treatment programs. <u>Without intensive treatment, Mr. Emrich presents with an extremely high risk for substance-related recidivism.</u>

Appellant's App. p. 66-70 (emphasis added). The State has not challenged the content of this evaluation.

Emrich was employed by a cleaning and painting business at the time he was arrested for the offense herein. His employer, Tracy Goodman, testified that Emrich demonstrated an excellent and dedicated work ethic:

> [Emrich] did a good job, he did show up every day. We worked Saturday sometimes. He worked Saturdays. As far as being on time he did a good job there. He went out of his way sometimes to go the extra mile because I told him we had drywall repairs to do. And he

> helped do those to learn. And I would have to say at this point I would take him back at any time . . . .

Tr. p. 18-19.

Emrich has acknowledged the gravity of his offense and expressed remorse for his actions:

> What hurts me the most is that I let my addiction get out of control again and I put it before my children and family. I was only out of jail for 43 days before I caught this case. I know I need help or I[']m going to end up dead.

Appellant's App. p. 89. Emrich also told the psychiatrist who evaluated him before sentencing that "I think I'm a piece of sh*t for leaving my kids like this." Id. at 69. At the sentencing hearing, Emrich admitted that his actions warranted punishment:

> I mean, I deserve to be punished, but not . . . I know what I did was wrong, but I don't feel that thirteen years is appropriate. I mean, sending me back to prison is not—not, you know, I mean I've done been [to prison] three times, it's not the answer. I need some kind of rehabilitation. Some serious intense drug treatment or something.

Tr. p. 23-24.

We agree with Emrich that our penal system should strive to rehabilitate offenders even as it punishes them. And we concede that this case is a very close call. But because it is such a close call, we must defer to the trial court's wisdom. The trial court had the benefit of firsthand observation of the witnesses and delved into the substance and nuances of Emrich's offense and character in a way that we cannot from a paper record. Under these circumstances, we cannot find that the sentence was inappropriate in light of the nature of the offense and Emrich's character.

As an aside, we observe that if Emrich were to file a request within 365 days of the day on which he began serving his sentence, the trial court would be entitled to amend his sentence without the State's approval. Ind. Code § 35-38-1-17(a). If Emrich were to file such a motion, we would encourage the trial court to do its best to fashion a sentence that will have the best chance of giving Emrich the help that he clearly needs—and wants—and breaking the cycle of recidivism that will surely continue unless he receives this much-needed treatment.

The judgment of the trial court is affirmed.

MAY, J., concurs.

BARNES, J., concurs with opinion.

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BARNES, Judge, concurring

I concur with the majority, but write to separately to say that although I am more than sympathetic with one such as the defendant here who has an addiction, there is simply a time when all tools available to the criminal justice system have failed, and incarceration is the only thing left. Remember, we are talking about a defendant who was out of jail for only forty-three days before he sold ten morphine pills to an undercover police officer. Given the opportunities extended to Emrich in the past, and acknowledging the terrible curse of an addiction, I just do not believe this is a close call as articulated by the majority.