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FILED
May 19 2009, 9:03 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

RYAN A. DURBIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 88A04-0809-CR-553
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WASHINGTON CIRCUIT COURT
The Honorable Robert L. Bennett, Judge
Cause No. 88C01-0405-FB-198

May 19, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a guilty plea, Ryan Durbin was convicted of burglary, a Class B felony, and sentenced to ten years with two years suspended. Durbin appeals his sentence, raising for our review the following restated issues: 1) whether the trial court had jurisdiction to sentence him; 2) whether the trial court abused its discretion in sentencing him; and 3) whether his ten-year sentence is inappropriate in light of the nature of his offense and his character. Concluding that the trial court had jurisdiction to sentence Durbin, did not abuse its discretion in imposing a ten-year sentence, and that the ten-year sentence is not inappropriate, we affirm.

Facts and Procedural History

On May 26, 2004, the State charged Durbin with burglary, a Class B felony; theft, a Class D felony; and two counts of contributing to the delinquency of a minor, both Class A misdemeanors, for events surrounding the theft of several guns and knives from the home of Hack Albertson on March 22, 2004. On November 14, 2006, Durbin pled guilty to burglary, a Class B felony, in exchange for the State dismissing the remaining counts. His sentence was left to the discretion of the trial court. On December 12, 2006, Durbin appeared for a sentencing hearing. After hearing testimony and the arguments of the parties, the trial court made the following statement:

> [H]ere's the deal laying on the line. I'm either going to put you in prison or you are going to go to some residual [sic] treatment program and I'll tell you why because I think your drug dependency is the whole problem in your life. I think that's the whole deal. If I thought you had a streak of criminality in you, I'd just go ahead and send you any way and not worry about it but I don't think that's the case. I think basically you are probably a pretty good guy but you've got a problem.
> * * *

> I think we are going to continue this till we get a chance to see if you want to enroll in a residential facility and [sic] number one and number two . . . whether they will take you. So if you don't want to go, just let me know and you can tell me right now and I'll just go ahead and send you to prison or do you want me to continue this to see if you can find a place that would be a good place for you to get some residential treatment maybe some vocational training. In other words do you want plan A, prison, or do you want Plan B.

Transcript at 52-55. Durbin indicated that he wanted "Plan B," to find a residential treatment facility. Id. at 55. The trial court continued the hearing and reconvened on December 20, 2006, at which time Durbin's counsel advised the court that a residential treatment program with an immediate opening had been arranged. Durbin's counsel and the court then had the following discussion:

> [Counsel]: Now what I am proposing to the Court, I think it is okay with Probation and Deputy Prosecutor and I just discussed about it would be waiving C[riminal] R[ule] 4, asking the Court not to enter a judgment or a sentence at this time, [Durbin] go and participate in the program. Uh, now I think this means that if he would get out, take off, run some place we'd be talking about an escape, uh, which we don't want to happen but I think that would be an appropriate way to move the case forward if he successfully completes and then that would impact I think the sentence the Court might impose and any after occurring conditions.
>
> [Court]: And if he doesn't complete it, it might have a negative impact on whatever sentence the Court may impose.
>
> * * *
>
> [Counsel]: I would be asking the Court for permission or to grant permission for him to participate in the program there and to, uh, withhold sentence.
>
> * * *
>
> [Court]: The parties appear for resumption of sentencing hearing. The Court is advised that [Durbin] has been accepted at . . . New Directions, for treatment in Lafayette. [Durbin] waives CR4 and sentencing within thirty (30) days in order to complete the program. The Court orders that [Durbin] be released on this date to be transported by his family to New Directions on December 21st in order to participate in the program. Violation of any terms and conditions of the program, will result in the dismissal from New Directions, will result in this matter being set for sentencing. It is further

> order[ed] that [Durbin] not receive credit time during his participation in the program but that [Durbin] has earned credit time for his incarceration of four hundred and eighty-six days. . . . The Court schedules review hearing for sixty days . . . at which time [Durbin] does not need to be present providing that he is making satisfactory progress in participation in the program.

Id. at 60-61, 63-64.

On January 31, 2007, the residential treatment program sent a notice to the Washington County probation department indicating that Durbin was discharged "without malice" on January 26, 2007, for a rule violation, but would be allowed to apply for re-admission after thirty days. On April 13, 2007, the State filed a motion to set sentencing hearing, referencing Durbin's discharge from the program. After two continuances at Durbin's request, the sentencing hearing was held on October 10, 2007. Durbin's probation officer testified that since Durbin had last been in court on this matter, he had attempted to deliver a fraudulent urine sample during a random drug test and ultimately tested positive for cocaine and opiates. Criminal charges were filed and Durbin's bond was revoked due to the possession of a device to interfere with a drug screening test. The trial court sentenced Durbin to the presumptive sentence[1] of ten years, with two years suspended to probation. Durbin filed a motion to correct error that was denied. The trial court subsequently granted Durbin's request to file a belated notice of appeal and this appeal ensued. Additional facts will be provided as necessary.

[1] Although the trial court referenced the "advisory sentence" in sentencing Durbin, Durbin's crime was committed in May of 2004, and he was therefore subject to the presumptive sentencing scheme in effect at that time. Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007) ("sentencing statute in effect at the time a crime is committed governs the sentence for that crime").

Discussion and Decision

I. Trial Court's Jurisdiction

Durbin first contends that the trial court was without jurisdiction to impose a sentence on October 10, 2007, because "the trial court granted a continuance that lacked a legally recognized purpose and did not act upon the sentencing matter on a date certain . . . ." Appellant's Brief at 6. Durbin posits that in releasing him to a residential facility on December 20, 2006, the trial court imposed a sentence and divested itself of jurisdiction and that he should therefore be discharged from any further obligation.

A person convicted of a crime has an interest in the speedy imposition of sentence. Matter of Tina T., 579 N.E.2d 48, 60 (Ind. 1991). To that end, Indiana Code section 35-38-1-2 provides that "[u]pon entering a conviction, the court shall set a date for sentencing within thirty (30) days, unless for good cause shown an extension is granted." Ind. Code § 35-38-1-2(b); see also Ind. Criminal Rule 11. The trial court is excused from strict compliance with the thirty-day requirement where good cause is shown for the delay. Vandergriff v. State, 653 N.E.2d 1053, 1053 (Ind. Ct. App. 1995). The right to be sentenced within thirty days can also be waived; where the defendant himself is responsible for the delay, he cannot complain. Moore v. State, 154 Ind. App. 482, 496, 290 N.E.2d 472, 480 (1972). A trial court is not automatically divested of jurisdiction where sentencing is beyond thirty days. Murphy v. State, 447 N.E.2d 1148, 1149 (Ind. Ct. App. 1983). Delay for cause shown is not an indefinite postponement and will not render a subsequent sentence void. Arnold v. State, 157 Ind. App. 359, 361, 300 N.E.2d 135, 137 (1973).

Here, Durbin requested and the trial court agreed that the sentencing hearing be postponed beyond the thirty day deadline in order to allow Durbin to seek residential treatment for his drug addiction. Contrary to Durbin's assertion, the trial court did not impose a sentence on December 20, 2006. Rather, it was made clear to Durbin that he would be brought back before the court for a sentencing hearing and that his success or failure in the treatment program would bear on his ultimate sentence. The delay in sentencing was at Durbin's request and for Durbin's benefit. The delay was for a recognized legal purpose, see Vandergriff, 653 N.E.2d at 1053-54 (delay of six months in sentencing defendant for battery of his then-wife was acceptable when trial court stated it was taking sentence under advisement until defendant's divorce was final), and was not indefinite because it was linked to Durbin's participation in the treatment program, see McLaughlin v. State, 207 Ind. 484, 192 N.E. 753, 754 (1934) (requirement that delay in pronouncing judgment be for a time certain does not "mean that the time must be fixed for a certain day, month, or year. When time is given to prepare and file a brief in the case, we think the time is sufficiently certain."). Thus, the trial court retained jurisdiction to sentence Durbin because good cause was shown for the delay and because Durbin waived any objection to the trial court imposing sentence after more than thirty days.

Moreover, we note that even if the trial court had erred in delaying the sentence, Durbin would not be entitled to discharge as he has requested. The availability of discharge for a person found guilty of a criminal offense but not promptly sentenced is limited to circumstances where the record discloses a deliberate attempt upon the part of

the court to withhold sentence or where the facts disclose a delay in the imposition of sentence without excuse or justification for such period of time as to offend basic notions of fundamental fairness if the court were to then impose sentence. Taylor v. State, 171 Ind. App. 476, 484, 358 N.E.2d 167, 172 (1976). Durbin's case does not fall into either category. Thus, the remedy for any error would have been to secure imposition of sentence. Id.

II. Trial Court's Discretion

Durbin next contends that the trial court abused its discretion in sentencing him by "failing to articulate reasoned findings of the sentence imposed." Appellant's Brief at 6. As noted above, Durbin was subject to our former presumptive sentencing scheme because his crime was committed prior to the enactment of the advisory sentencing scheme. The trial court imposed the presumptive sentence of ten years for Durbin's Class B felony burglary conviction. Sentencing determinations rest within the sound discretion of the trial court. Cotto v. State, 829 N.E.2d 520, 523 (Ind. 2005). Generally, the imposition of a presumptive sentence does not obligate the trial court to provide a detailed sentencing statement. Jackson v. State, 728 N.E.2d 147, 154-55 (Ind. 2000). When a standard sentence has been imposed, we presume that the trial court considered "the risk that the person will commit another crime, the nature and circumstances of the crime committed, and the prior criminal record, character, and condition of the person." Jones v. State, 698 N.E.2d 289, 290 (Ind. 1998).

The trial court, in imposing the presumptive sentence, was not required to state a basis for imposing that sentence, and we decline Durbin's request that we remand for a

"greater articulation of the reason for imposing the sentence." Appellant's Brief at 13. Moreover, the trial court did state at the sentencing hearing that Durbin's age was a mitigating factor, offset by his conviction in Floyd County for possession of paraphernalia. The trial court discounted Durbin's informal adjustments as a juvenile and noted his failed drug screens. Despite no requirement that it do so, the trial court did articulate its reasons for imposing the presumptive sentence, and we find no abuse of discretion.

III. Inappropriate Sentence

Finally, Durbin contends that his ten-year sentence is inappropriate in light of the nature of his offense and his character. This court has authority to revise a sentence "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." Ind. Appellate Rule 7(B). We may "revise sentences when certain broad conditions are satisfied," Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005), and recognize the presumptive sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed," Childress v. State, 848 N.E.2d 1073, 1081 (Ind. 2006). In determining whether a sentence is inappropriate, we examine both the nature of the offense and the character of the offender. Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When making this examination, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. When the trial court imposes the presumptive sentence, the

defendant bears a heavy burden to persuade us that his sentence is inappropriate. McKinney v. State, 873 N.E.2d 630, 647 (Ind. Ct. App. 2007), trans. denied.

Regarding the nature of the offense, Durbin participated in a burglary of a home and stole guns and knives. There is nothing particularly egregious about the nature of the offense, other than perhaps the nature of the items stolen, in that weapons pose a potential threat to the public. As for Durbin's character, he is young – almost twenty-three at the time of sentencing – but he has a clearly demonstrated substance abuse problem and has consistently been in trouble with the law since he was a juvenile. In addition, he failed to take advantage of the opportunity to rehabilitate himself prior to sentencing, committed another crime while out on bond for the instant offense, and failed at least one drug screen. None of this suggests that the presumptive sentence is inappropriate. Moreover, despite Durbin's claim that the appropriate sentence should have been a suspended sentence with drug treatment as a condition of probation, "the question under Appellate Rule 7(B) is not whether another sentence is more appropriate; rather, the question is whether the sentence imposed is inappropriate." Fonner v. State, 876 N.E.2d 340, 344 (Ind. Ct. App. 2007) (emphasis in original). Given the trial court's grace in delaying sentencing for Durbin to get drug treatment, his failure to successfully do so, and his continued use of drugs prior to sentencing, an executed sentence is not inappropriate. Durbin has failed to meet his burden of persuading us that the presumptive sentence of ten years, with eight years to be served in the Indiana Department of Correction and two years suspended to probation, is inappropriate in light of the nature of his offense and his character.

Conclusion

The trial court did not err in sentencing Durbin more than thirty days after accepting his guilty plea and did not abuse its discretion in imposing the presumptive sentence. Further, the ten-year sentence is not inappropriate.

Affirmed.

DARDEN, J., and BAILEY, J., concur.