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**IN THE
COURT OF APPEALS OF INDIANA**

JOSE HUMBERTO AREVALO,)

Appellant-Defendant,)

vs.)

STATE OF INDIANA,)

Appellee-Plaintiff.)

No. 79A02-0608-CR-706

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0510-FA-23

May 22, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Jose Humberto Arevalo (Arevalo), appeals his sentence for conspiracy to commit dealing in cocaine, a Class A felony, Ind. Code §§ 35-48-4-1 and 35-41-5-2.

We affirm.

ISSUE

Arevalo raises two issues on appeal, which we consolidate and restate as the following single issue: Whether the trial court properly sentenced Arevalo.

FACTS AND PROCEDURAL HISTORY

During 2005, Arevalo, Julie K. Anderson (Julie), and Jose Gregorio Arevalo (Jose) entered into an agreement to deliver cocaine. And, sometime during the same year, but prior to October 25, Arevalo possessed three or more grams of cocaine as an overt act in furtherance of the agreement to deliver cocaine.¹

On October 25, 2005, the State filed an Information charging Arevalo with Count I, conspiracy to commit dealing in cocaine, a Class A felony, I.C. §§ 35-48-4-1 and 35-41-5-2; Count II, conspiracy to commit dealing in methamphetamine, I.C. §§ 35-48-4-1.1 and 35-41-5-2; Count III, possession of cocaine, a Class B felony, I.C. § 35-48-4-6; and Count IV, reckless possession of paraphernalia, a Class A misdemeanor, I.C. § 35-48-4-8.3. On March 31, 2006, pursuant to a plea agreement, Arevalo plead guilty to Count I, conspiracy to commit dealing in cocaine, a Class A felony, I.C. §§ 35-48-4-1 and 35-41-

¹ No specific dates were given as to when the agreement between Arevalo, Julie K. Anderson, and Jose Gregorio Arevalo was entered into, nor were any specific dates given as to when Arevalo possessed the three or more grams of cocaine.

5-2, in exchange for the State dismissing Counts II-IV and all offenses charged under Cause Number 79D07-0506-FA-19. Additionally, Arevalo's sentence, left to the discretion of the trial court, could not exceed thirty years executed. On June 30, 2006, a sentencing hearing was held. After finding Arevalo's acceptance of responsibility as a mitigating factor and finding his criminal history, prior unsuccessful attempts at rehabilitation, and his commission of this offense while on bond as aggravating factors, the trial court sentenced Arevalo to forty-two years with thirty years executed and twelve years suspended to probation, the last four years of incarceration were ordered served through Tippecanoe Community Corrections, followed by four years of supervised probation and eight additional years of unsupervised probation.

Arevalo now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

We first note that it is unclear from the record whether Arevalo conspired with Julie and Jose to deal cocaine before or after the language amending Indiana's sentencing statutes took effect.² This is pertinent because our court is divided as to whether the presumptive sentencing scheme or the amended advisory sentencing scheme applies to crimes committed before April 25, 2005, but sentenced after that date. *See, e.g. Weaver v. State*, 845 N.E.2d 1066, 1072 (Ind. Ct. App. 2006), *trans. denied* (application of new sentencing statutes to defendants convicted before effective date of amendments, but sentenced afterward, violates prohibition against *ex post facto* laws); *but see Samaniego-*

² Public Law 71-2005 abolishing "presumptive sentences" in favor of "advisory sentences" took effect April 25, 2005.

Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (change in sentencing statute is procedural rather than substantive; therefore, we analyze this issue under amended statute that provides for advisory rather than presumptive sentences). To avoid making the proverbial sentencing waters any murkier, we will address whether the trial court abused its discretion when balancing the recognized aggravating and mitigating circumstances, and also conduct an independent review under Ind. Appellate Rule 7(B).

I. *Aggravators and Mitigators*

Arevalo first argues the trial court abused its discretion by sentencing him to forty-two years based on the aggravating and mitigating circumstances and the trial court's balancing of those factors. However, it is well established that sentencing decisions lie within the discretion of the trial court and will be reversed only for an abuse of that discretion, including the discretion to impose an enhanced sentence. *White v. State*, 846 N.E.2d 1026, 1034 (Ind. Ct. App. 2006), *trans. denied*; *Anderson v. State*, 798 N.E.2d 875, 879 (Ind. Ct. App. 2003). And, even if a trial court improperly applies aggravating circumstances, a sentence enhancement may be upheld where other valid aggravating circumstances still remain. *White*, 846 N.E.2d at 1034. In addition, Ind. App. R. 7(B) gives us authority to review and revise sentences to ensure that they are appropriate in light of the nature of the offense and character of the offender.

A. *Aggravating Circumstances*

With respect to the aggravating circumstances delineated by the trial court, Arevalo first argues it is impossible to find he committed the present offense while on bond, as the evidence does not support this aggravator. We agree. Just as we were

unable to determine from the record whether Arevalo conspired with Julie and Jose to deal cocaine before or after the language amending Indiana's sentencing statutes took effect, we cannot determine from the record whether Arevalo conspired with Julie and Jose to deal cocaine before or after he was arrested and released on bond in another matter. Thus, the trial court should not have considered Arevalo's being on bond during the commission of the instant offense as an aggravator.

Next, Arevalo claims his prior attempts at rehabilitation were successful and as such the trial court should not have considered prior *failed* attempts at rehabilitation as an aggravator. Arevalo's argument, however, is somewhat flawed. His prior attempts at rehabilitation were certainly successful for the twelve years he was not abusing drugs, but once he began abusing drugs again, the prior attempts immediately failed. Thus, we do not find the trial court improperly considered this aggravator.

Arevalo also argues his criminal history, comprised of two battery convictions in 1988 and 1993 and two vehicle operating misdemeanors in 2002, should not have been considered as an aggravator because it is too remote to the instant offense. Also, the trial court did not consider the gravity, nature, and relationship of his past convictions to the current offense. Arevalo bases this argument on our supreme court's pronouncement in *Hass v. State*, 849 N.E.2d 550, 556 (Ind. 2006), that when "assigning weight to a defendant's criminal history, a trial court must consider the chronological remoteness of the convictions as well as the gravity and nature of the prior crime." (Internal citations omitted). Except, we disagree that Arevalo's criminal history should not be recognized as an aggravating circumstance because regardless of its chronological remoteness,

gravity, nature, and/or relationship to the current offense he still has a criminal history. While the weight to be assigned to Arevalo's criminal history may vary from other defendant's with a criminal history more proximate in time and nature, Arevalo's criminal history was still properly considered as an aggravating circumstance. *See id.*

Additionally, Arevalo believes his pending felony charges should not be included in his criminal history and as such were improperly considered by the trial court. He relies on *Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005), which states that a "record of arrest, without more, does not establish the historical fact that a defendant committed a criminal offense and may not be properly considered as evidence of criminal history." However, in *Miller v. State*, 709 N.E.2d 48 (Ind. Ct. App. 1999), we held that "the trial court did not err by considering the subsequent arrests as aggravating factors. Although an arrest record is not evidence of prior criminal history, '[t]his information is relevant to the court's assessment of the defendant's character and the risk that he will commit another crime and is therefore properly considered by a court in determining sentence.'" *Id.* at 49-50 (quoting *Tunstall v. State*, 568 N.E.2d 539, 545 (Ind. 1991)). Thus, to the extent the trial court relied upon Arevalo's pending felony charges as a part of his criminal history, the trial court was incorrect, but his arrests may be considered as aggravating factors.

B. *Balancing Aggravating and Mitigating Factors*

With regard to balancing the aggravating and mitigating circumstances, Arevalo asserts that the trial court failed to accurately balance the aggravating and mitigating circumstances due to the erroneously found aggravators. It is apparent from our review

of the trial court's sentencing statement that the trial court should not have considered the possibility Arevalo committed the instant offenses while on bond or any pending felony charges as aggravating factors for sentencing. However, Arevalo's criminal history, albeit remote, and his prior failed attempts at rehabilitation are still acceptable aggravating factors. Balancing those aggravating factors with his acceptance of responsibility, we do not believe the trial abused its discretion by enhancing Arevalo's sentence.

II. *Appellate Rule 7(B) Analysis*

Lastly, Arevalo contends his forty-two year sentence is inappropriate in light of the nature of the offense and his character. Specifically, he avers (1) his character does not support an enhanced sentence because his criminal history of two burglary convictions and two vehicle operating misdemeanors is remote and not violent in nature, and (2) the nature of this offense does not support an enhanced sentence because unprecedented amounts of cocaine were not brought into the community as a result of this conspiracy, most of the activity occurred while he was in prison, and Arevalo did not make a living selling drugs.

App. R. 7(B) gives us the authority to revise a sentence authorized by statute 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.

Our review of the record indicates Arevalo has had run-ins with the law since the age of seventeen. In 1988 and 1993, Arevalo was convicted for burglary. Thereafter, he amassed two vehicle operating misdemeanors. Otherwise, Arevalo managed to live the

life of a law-abiding citizen. However, in 2005, he was arrested and charged with various offenses on *four* separate occasions – including multiple drug related charges. As previously discussed, although an arrest record is not properly considered as a part of a defendant’s criminal history, an arrest record may be considered in a trial court’s assessment of a defendant’s character. *See Miller v. State*, 709 N.E.2d 48, 49-50 (Ind. Ct. App. 1999). As such, we are not convinced the sentence imposed by the trial court was inappropriate in light of Arevalo’s character.

With respect to the nature of the crime, Arevalo mainly argues the offenses mostly concerned other people, and that most of the conspiracy activity occurred while he was incarcerated. We cannot agree that crimes committed from prison are less egregious than those committed by persons on the street. Additionally, we will not reweigh to what extent Arevalo was or was not involved in the conspiracy. *See Dickenson v. State*, 835 N.E.2d 542, 551 (Ind. Ct. App. 2005). As such, we are not persuaded the sentence imposed is inappropriate in light of the nature of the crime.

CONCLUSION

Based on the foregoing, we conclude that the trial court properly sentenced Arevalo.

Affirmed.

NAJAM, J., concurs

BARNES, J., concurs in result.