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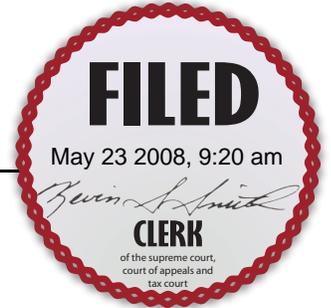
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**IN THE
COURT OF APPEALS OF INDIANA**

CARL BOARDS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0710-CR-864

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark Stoner, Judge
Cause No. 49G06-0612-FA-228815

May 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Carl Boards appeals his convictions and sentence for one class B felony, one class C felony, and four class D felonies. We affirm.

Issues

Boards presents two issues, which we restate as follows:

- I. Whether his convictions and sentences for both unlawful possession of a firearm by a serious felon and carrying a handgun without a license violate double jeopardy; and
- II. Whether his aggregate sentence is appropriate in light of the nature of the offenses and his character.

Facts and Procedural History

The evidence most favorable to the convictions reveals that on November 30, 2006, at approximately 5:00 a.m., Indianapolis Police Officer Michael Kavanaugh was checking on a business that had been burglarized recently. As Officer Kavanaugh left the business and turned onto White River Parkway, his attention was drawn to an older Chevy Suburban with dark tinted windows and an out-of-county license plate. The driver of the Suburban “slammed on his brakes causing the tires to squeal, and then made a very abrupt turn” without activating a turn signal. Tr. at 46-47. Officer Kavanaugh followed the Suburban, observed it make another turn without signaling, and decided to initiate a stop.

Officer Kavanaugh activated his patrol car’s lights, but the Suburban did not halt. The officer turned on his vehicle’s siren and reported to dispatch that a driver was refusing to stop. Officer Kevin Larussa heard the report and joined the pursuit. The Suburban, which was driven by Boards, stopped. As Officers Kavanaugh and Larussa exited their respective

vehicles, Boards pointed a .40-caliber semi-automatic handgun out of the driver's window. He fired seven bullets at the officers, who quickly took cover behind Officer Kavanaugh's patrol car. Three bullets hit the squad car, and Boards reloaded the gun before speeding away in the Suburban.

The officers called in a "Code 1"¹ and resumed the chase. Officer Kavanaugh's vehicle struck the Suburban, backed off, and continued following as Boards drove through a red light. Eventually, Lieutenant Mark McCardia, responding in his own police vehicle, executed a "precision intervention technique," which stopped the Suburban. *Id.* at 68-69. At that point, the officers apprehended Boards and found, in the Suburban, two weapons: a Taurus .40-caliber semi-automatic handgun on the front seat, and an AK-47-style assault rifle with a loaded drum magazine on the floor of the driver's side. In addition, the officers recovered from the Suburban a box of ammunition for the handgun as well as two magazines taped together for the assault rifle. Police arrested Boards and, while processing him, found eight ecstasy pills in his front pants pocket. Boards had ingested at least one ecstasy pill that evening.

On December 1, 2006, the State charged Boards with attempted murder, possession of a firearm by a serious violent felon, three counts of resisting law enforcement, possession of a schedule I controlled substance (ecstasy), and carrying a handgun without a license. The following year, the State added a habitual offender allegation and dismissed one of the resisting law enforcement charges. At the conclusion of a two-day trial in August 2007, a

¹ A Code 1 "means there's imminent danger, there's imminent threat to [a police officer's] life." Tr.

jury found Boards guilty of class D felony criminal recklessness as a lesser-included offense of attempted murder, two counts of class D resisting law enforcement, class D felony possession of ecstasy, and class A misdemeanor carrying a handgun without a license. Boards waived jury trial on the unlawful possession of a firearm by a serious violent felon, the class C felony enhancement to the carrying a handgun without a license conviction, and the habitual offender allegation. On September 6, 2007, the court found him guilty of class B felony unlawful possession of a firearm by a serious violent felon, enhanced the handgun conviction, and found him to be a habitual offender.

The court sentenced Boards as follows: seven years for class D felony criminal recklessness enhanced by the habitual, eighteen years consecutive for class B felony unlawful possession of a firearm by a serious violent felon, concurrent three-year terms for each of the class D felony resisting convictions, a three-year concurrent sentence for the ecstasy possession conviction, and a concurrent eight-year sentence for the class C felony carrying a handgun without a license conviction. Therefore, Boards' aggregate sentence is twenty-five years.

Discussion and Decision

I. Double Jeopardy

Boards asserts that his convictions and sentences for both unlawful possession of a firearm by a serious violent felon and carrying a handgun without a license violate the Double Jeopardy Clause of the Indiana Constitution. Likening his case to *Alexander v. State*, 768 N.E.2d 971 (Ind. Ct. App. 2002), *aff'd on reh'g*, 772 N.E.2d 476, *trans. denied*, Boards

at 60. A Code 1 is the highest code, and any officers that hear it may respond to it. *Id.*

contends that the information filed against him alleges the same facts and elements for both the firearm and handgun charges and that therefore the handgun charge “must fall.” Appellant’s Br. at 9.

The Double Jeopardy Clause in the Indiana Constitution is embodied in Article 1, Section 14, which provides, “No person shall be put in jeopardy twice for the same offense.” Our supreme court has concluded this provision was intended to prohibit, among other things, multiple punishments for the same actions. *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999). In *Richardson*, our supreme court established a two-part test for analyzing double jeopardy claims. According to that test, multiple offenses are the same offense in violation of Article 1, Section 14, “if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.” *Id.* at 49. If the evidentiary facts establishing one offense establish only one or several, but not all of the essential elements of the second offense, there is no double jeopardy violation. *Spivey v. State*, 761 N.E.2d 831, 833 (Ind. 2002). According to *Richardson*, the statutory elements test and the actual evidence test are separate considerations under the double jeopardy analysis. Therefore, even where multiple offenses do not violate double jeopardy under the statutory elements test, they may nonetheless violate double jeopardy if the actual evidence presented at trial demonstrates that each offense was not established by separate and distinct facts. *Montgomery v. State*, 804 N.E.2d 1217, 1224 (Ind. Ct. App. 2004), *trans. denied*.

With respect to the charge of carrying a handgun without a license, the State was

required to prove that Boards knowingly carried a handgun in any vehicle.² *See* Ind. Code § 35-47-2-1. In arguing its case, the State made it clear that it was referring to the handgun Boards used to shoot at the police. Specifically, the deputy prosecutor stated: “This man had a gun. He fired that gun seven times. It was on the bench seat next to him. You guys saw it repeatedly throughout trial. You can see it right here now. This is the gun that he had. ... Again, Carl Boards, driver’s seat, gun next to him.” Tr. at 376. The exhibits plainly showed the Taurus handgun on the front bench seat near the driver’s side. In contrast, the AK-47-style assault rifle was on the floorboard by the driver’s side. There was never any assertion, let alone evidence, that Boards fired the AK-47-style assault rifle. Rather, the evidence focused on the handgun that Boards fired and reloaded. Accordingly, we have no difficulty concluding that the jury found him guilty of carrying a handgun charge *based upon the handgun evidence* – not based upon the evidence regarding the rifle.

Although Boards’ case occurred in stages, the judge who presided over the jury trial portion was the same judge who decided the issues at the later proceeding. Thus, that judge was well aware that the jury had already found Boards guilty of carrying the handgun without a license. The judge was equally cognizant of the fact that the AK-47-style rifle was found on the driver’s side floorboard and that additional magazines were lying on the front bench seat. A court on review presumes the trial judge is aware of and knows the law, and considers only evidence properly before the judge in reaching a decision. *See Dumas v. State*, 803 N.E.2d 1113, 1121 (Ind. 2004). As such, we presume that Judge Stoner would not

² The State was not required to prove that Boards did not possess a valid license to carry the handgun because that is not an essential element of the crime. Rather, proof of a valid license is a defense. *See*

have used the handgun evidence to find Boards guilty on the firearm count when to do so would create double jeopardy problems, and particularly when evidence regarding the AK-47-style rifle was readily available. Rather, considering the evidence regarding the AK-47-style rifle along with the evidence of Boards' status as a serious violent felon, the court could easily find that Boards committed unlawful possession of a firearm by a serious violent felon. *See* Ind. Code § 35-47-4-5(c).

Because the actual evidence demonstrates that each offense (carrying handgun versus possession of firearm) was established by separate and distinct facts, no double jeopardy violation has been shown. *Cf. Jarrell v. State*, 818 N.E.2d 88, 92-93 (Ind. Ct. App. 2004) (remanding to vacate carrying a handgun conviction where State used evidence of one gun to prove both carrying a handgun without a license and unlawful possession of a firearm by a serious violent felon), *trans. denied*; *cf. also Alexander*, 768 N.E.2d at 976-78 (concluding double jeopardy problem arose from the "broad, non-specific way the case was prosecuted and argued, i.e., without specific reference to separate guns for separate crimes"; noting ambiguous terms such as: "they," "them," "weapons," "it").

II. Appellate Rule 7(B)

Citing Indiana Rule of Appellate Procedure 7(B), Boards maintains that his sentence was inappropriate. Specifically, he argues that he is not "nefarious" but instead suffers from mental illness that needs treatment. Appellant's Br. at 9. He claims that on the night in question he was patrolling Indianapolis for terrorists and that he shot toward the police officers only because he did not want them to interfere with his protective mission. He

Washington v. State, 517 N.E.2d 77, 79 (Ind. 1987).

contends that a supportive, therapeutic environment would teach him the importance of taking proper medication for his bipolar condition. He also complains that he is being punished five times for the same incident.

Our rules authorize revision of 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). “[A] defendant must persuade the appellate court that his or her sentence has met this inappropriateness standard of review.” *Krempetz v. State*, 872 N.E.2d 605, 616 (Ind. 2007).

Regarding the nature of the offense, Boards responded to a routine traffic stop by firing seven shots at police officers, reloading his handgun, and speeding away through residential areas. Having ingested ecstasy, Boards continued “patrolling” in his Suburban, in which he had also packed an AK-47 style rifle, extra magazines, and more bullets. Not until several police vehicles joined the chase and a special intervention technique was utilized did Boards finally stop. In light of the dangerous situation created by Boards, we are amazed that no serious injuries or deaths resulted to police or bystanders.

In examining the character of a defendant, we often look at criminal history. Our supreme court has emphasized that “the extent, if any, that a sentence should be enhanced [based upon prior convictions] turns on the weight of an individual’s criminal history.” *Duncan v. State*, 857 N.E.2d 955, 959 (Ind. 2006). “This weight is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant’s culpability.” *Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006); *Prickett v.*

State, 856 N.E.2d 1203, 1209 (Ind. 2006).

Mental illness may also factor into the sentencing analysis. The weight, if any, to be given to mental illness in sentencing is determined by: (1) the extent of the defendant's inability to control his behavior due to the disorder or impairment; (2) overall limitations on functioning; (3) the duration of the mental illness; and (4) the extent of any nexus between the disorder or impairment and the commission of the crime. *Weeks v. State*, 697 N.E.2d 28, 31 (Ind. 1998). Where a defendant's mental illness is less severe and the defendant appears to have more control over his thoughts and actions, or where the nexus between defendant's mental illness and the commission of the crime is less clear, the trial court may determine on the facts of a particular case that the mental illness warrants relatively little or no weight as a mitigating factor. *Archer v. State*, 689 N.E.2d 678, 685 (Ind. 1997).

Boards has a significant criminal history. He was convicted in 1998 for class A misdemeanor carrying a handgun without a license, in 1999 for class C felony battery, and in 2001 for class B felony unlawful possession of a firearm by a serious violent felon and class B felony possession of cocaine. Moreover, Boards has violated parole and bond, and has a separate pending charge of unlawful possession of a firearm by a serious violent felon. His history suggests a pattern of disregard for the laws and an increasingly dangerous inability to conform to the conditions imposed by our criminal justice system.

According to his presentence investigation report, Boards was first diagnosed with mental illness in 2000 or 2001. While Boards' precise diagnosis has changed since then from paranoid schizophrenia to bipolar disorder, his tendency to refuse prescribed medication has remained constant. Boards has introduced illegal drugs and weapons into the mix to further compound

matters. Our review of the record leaves us with no doubt that the court considered Boards' mental illness as well as his remorse as potential mitigators. However, because of Boards' failure to take prescribed medications to combat his illness, the court did not assign substantial mitigating weight to Boards' bipolar disorder. Ultimately, the court ordered an enhanced – though not maximum – sentence. Given the nature of the offenses committed and Boards' character, we cannot conclude that the aggregate sentence was inappropriate. Therefore, we will not revise the twenty-five-year total sentence for his convictions of class D felony criminal recklessness enhanced by the habitual status, class B felony unlawful possession of a firearm by a serious violent felon, class D felony resisting arrest (two counts), one class D felony possession of ecstasy, and class C felony carrying a handgun without a license.

Affirmed.

BARNES, J., and BRADFORD, J., concur.