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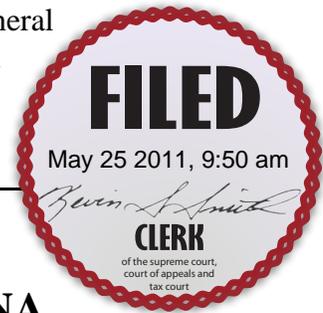
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**IN THE
COURT OF APPEALS OF INDIANA**

MARK SMITH,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 43A04-1011-CR-697

APPEAL FROM THE KOSCIUSKO SUPERIOR COURT
The Honorable Joe V. Sutton, Judge
Cause No. 43D03-1008-FD-123

May 25, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Mark Smith appeals the sentence imposed following his guilty plea to class D felony operating a vehicle while intoxicated. The trial court sentenced Smith to eighteen months' imprisonment and suspended his driving privileges for one year. On appeal, Smith invites us to revise his sentence asserting that it is inappropriate in light of the nature of the offense and his character. Finding that Smith has not met his burden to persuade us that his sentence is inappropriate, we decline his invitation and affirm the sentence imposed by the trial court.

Facts and Procedural History

On July 31, 2010, at approximately 2:00 a.m., Smith was operating a vehicle in Kosciusko County. Prior to driving, Smith consumed three cans of Colt 45, a malt liquor. Indiana State Police Officer Ryan McNamara was on patrol when he observed Smith's vehicle cross the center line. Officer McNamara stopped Smith and conducted several field sobriety tests, all of which Smith failed. A certified blood test subsequently performed at the hospital revealed that Smith's blood alcohol content was .082 gram of alcohol per 100 milliliters of blood.

The State charged Smith with two counts of operating a vehicle while intoxicated and two counts of operating a vehicle with a controlled substance in the body. Smith pled guilty to operating a vehicle while intoxicated, as a class C misdemeanor, and operating a vehicle

while intoxicated as a class D felony.¹ During sentencing, the trial court found Smith's criminal history to be an aggravating factor and his guilty plea to be a mitigating factor. Finding that the aggravating factor and the mitigating factor balanced each other, the trial court sentenced Smith to the eighteen-month advisory sentence for a class D felony. The trial court further concluded that it would consider a six-month sentence modification/reduction if Smith completed a drug and alcohol program through the Department of Correction.

Discussion and Decision

Smith's sole contention on appeal is that his eighteen-month sentence is inappropriate in light of the nature of the offense and his character. The sentencing range for a class D felony is between six months and three years, with the advisory sentence being eighteen months. Ind. Code § 35-50-2-7. Pursuant to Indiana Appellate Rule 7(B), we may 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." The defendant bears the burden to persuade this Court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). "[W]hether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the

¹ A person who operates a vehicle with an alcohol concentration equivalent to at least 0.08 gram of alcohol but less than 0.15 gram of alcohol per one hundred milliliters of the person's blood commits a class C misdemeanor. Ind. Code § 9-30-5-1. The offense is enhanced to a class D felony if the person has a previous conviction for operating while intoxicated that occurred within the five years immediately preceding the present offense. Ind. Code § 9-30-5-3. Smith was previously convicted of operating a vehicle while intoxicated on May 4, 2006, within five years of his current offense. Indiana Code Section 9-30-5-3 is known as a "progressive penalty statute" pursuant to which the seriousness of a particular charge can be elevated if the person charged has previously been convicted of a particular offense. *See Beldon v. State*, 926 N.E.2d 480, 482 (Ind. 2010).

defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case.” *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008).

Regarding the nature of the offense, Smith’s operated a vehicle after consuming three alcoholic beverages. His vehicle crossed the center line, and his blood alcohol level was determined to be over the legal limit. Smith clearly fails to recognize the serious nature of his behavior as, less than five years prior, he was convicted of the same offense. These circumstances hardly suggest that imposition of the advisory sentence is unwarranted.

Regarding Smith’s character, he has a substantial criminal history which includes two felony convictions and five misdemeanor convictions. Although trial courts have shown him leniency in the past by imposing suspended sentences, Smith’s probation has been twice revoked for violations. Indeed, Smith has been on parole since October of 2008, yet has committed four criminal offenses since that time. Although Smith points to his guilty plea as evidence of his good character, we note that the trial court gave him a benefit for his plea when it recognized such as a mitigating factor. We are not persuaded that Smith’s eighteen-month sentence is inappropriate in light of the nature of the offense or his character. Accordingly, we decline Smith’s invitation to revise his sentence.

Affirmed.

NAJAM, J., and ROBB, C.J., concur.