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IN THE
COURT OF APPEALS OF INDIANA

KEM LINN,	)	
	)	
Appellant/Defendant,	)	
	)	
vs.	)	No. 27A02-1010-CR-1293
	)	
STATE OF INDIANA,	)	
	)	
Appellee/Plaintiff.	)	

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Dana J. Kenworthy, Judge
Cause No. 27D02-0811-FC-183

June 2, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Kem Linn appeals following his guilty pleas to and convictions for one count of Class C felony Corrupt Business Influence,[1] one count of Class C felony Fraud on a Financial Institution,[2] and five counts of Class C felony Forgery.[3] On appeal, Linn contends that the trial court abused its discretion in sentencing him. Specifically, Linn argues that his convictions violate the constitutional prohibitions against double jeopardy and that his convictions were all part of a single episode of criminal conduct. We affirm.

FACTS AND PROCEDURAL HISTORY[4]

At all times relevant to this appeal, Linn was one of the principals of Cubberly's Incorporated, a candy, cigarette, and grocery distribution business located in Marion. Cubberly's maintained a business checking account with Old National Bank. Beginning in 2004, Linn developed a scheme involving Cubberly's Old National business checking account. One aspect of Linn's scheme was that when customers paid for products with cash, Linn would "pocket" the cash, forge checks allegedly from the customers in the amount of their purchase, and deposit the forged checks into the Old National business checking account. Appellant's App. pp. 36-37. Another aspect of Linn's scheme was that he forged

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[1] Ind. Code § 35-45-6-2(1) (2004) though (2008).

[2] Ind. Code § 35-43-5-8(a)(2) (2004) though (2008).

[3] Ind. Code § 35-43-5-2(b)(1) and/or (b)(4) (2004) though (2008).

[4] Linn has not provided this court with a transcript of his guilty plea hearing at which he provided the trial court with a factual basis supporting his plea. The undisputed facts stated herein are taken from the hearing on probable cause which incorporated earlier testimony from an emergency hearing to appoint a receiver for Linn's business, the pre-sentence report ("PSI"), and the transcript of Linn's sentencing hearing.

checks for fictitious payments for purchases by Cubberly's, endorsed the checks over to Cubberly's, and deposited the checks into the Old National business checking account.

Linn's scheme took advantage of a one-and-one-half-day delay required by the Federal Reserve check processing system. Each day, Linn, or his business associates,[5] would deposit newly forged checks into the Old National business checking account to conceal the overdrafts which resulted from Linn's scheme. Linn's scheme involved forging thousands of checks each month, sometimes as many as 500 checks per week. For example, in October of 2008 alone, Linn deposited close to 10,000 forged checks.

Investigators for Old National discovered Linn's scheme in October or November of 2008, by which time Linn had carried out his scheme daily for approximately four years. Investigators determined that since 2004, Linn's fraudulent deposits totaled close to one billion dollars, and resulted in a $6,263,300 loss to Old National Bank.

Linn told investigators that he carried out the scheme in desperation to keep the allegedly failing Cubberly's open, and reported that during the period in question, he only withdrew a salary of $40,000 or $50,000 per year. However, investigators discovered that Linn lived an extravagant lifestyle throughout the four-year period during which he carried out the scheme. Linn lived in luxurious homes, including a home in Carmel, and a condominium, for which he paid cash, in Indianapolis. Linn drove expensive vehicles, and used business accounts to lease a Cadillac Escalade, a Chevrolet Corvette, and a Chrysler

[5] Linn acknowledged that he alone was responsible for the scheme involving Cubberly's Old National business checking account, but admitted that at times, he directed other Cubberly's employees to assist him in carrying out the scheme.

300. Linn also traveled when possible and claimed to have assisted others financially, when necessary.

On November 28, 2008, the State charged Linn with one count of Class C felony corrupt business influence, one count of Class C felony fraud on a financial institution, and forty-seven counts of Class C felony forgery. On August 9, 2010, Linn entered into a plea agreement with the State. Pursuant to the terms of the plea agreement, Linn agreed to plead guilty to the corrupt business influence charge, the fraud on a financial institution charge, and five counts of forgery. In exchange, the State agreed to dismiss the forty-two remaining forgery charges. The parties agreed that the sentences for the forgery charges would be run concurrent to one another. The parties further agreed that the determination as to whether the sentences imposed on the corrupt business influence and fraud on a financial institution convictions would be served consecutive or concurrent to each other and the aggregate sentence imposed for the forgery convictions would be left to the discretion of the trial court.

The trial court accepted Linn's guilty plea and conducted a sentencing hearing on September 20, 2010. Throughout the sentencing hearing, Linn acknowledged that he understood that the terms of his plea agreement allowed for the imposition of consecutive sentences for the corrupt business influence conviction, the fraud on a financial institution conviction, and the aggregate sentence imposed for the forgery convictions, for a maximum possible executed twenty-four-year sentence. At the conclusion of the sentencing hearing, the trial court imposed an eight-year sentence, all executed, on the corrupt business influence conviction, an eight-year sentence, with four years executed and four years suspended to

probation, on the fraud on a financial institution conviction, and an aggregate eight-year sentence, all suspended to probation, on the forgery convictions. The trial court ordered that the sentences imposed on the corrupt business influence conviction, the sentence imposed on the fraud on a financial institution conviction, and the aggregate sentence imposed on the forgery convictions be served consecutive to one another for an aggregate twenty-four-year sentence, with twelve years executed and twelve years suspended to probation.

DISCUSSION AND DECISION

I. Standard of Review

Linn contends that the trial court abused its discretion in sentencing him following his guilty plea to and convictions for one count of Class C felony corrupt business influence, one count of Class C felony fraud on a financial institution, and five counts of Class C felony forgery. Specifically, Linn claims that the trial court abused its discretion in ordering that his sentence for corrupt business influence be run consecutive to his sentence for fraud on a financial institution, and his aggregate sentence for the forgery convictions. Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *modified on other grounds on reh'g*, 875 N.E.2d 218 (Ind. 2007). "An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable probable, and actual deductions to be drawn therefrom." *Id*. (quotation omitted).

II. Analysis

A. Double Jeopardy Concerns

In claiming that the trial court abused its discretion in sentencing him, Linn argues on appeal that his convictions for corrupt business influence, fraud on a financial institution, and forgery violate the constitutional prohibitions against double jeopardy. However, the Indiana Supreme Court has repeatedly held that a defendant waives his challenge to the propriety of his convictions, including challenges on double jeopardy grounds, when he enters a guilty plea. *Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004); *Lee v. State*, 816 N.E.2d 35, 40 (Ind. 2004); *Mapp v. State*, 770 N.E.2d 332, 334 (Ind. 2002); *Games v. State*, 743 N.E.2d 1132, 1135 (Ind. 2001); *Tumulty v. State*, 666 N.E.2d 394, 395 (Ind. 1996). Therefore, we conclude that by entering into a guilty plea, Linn has waived his right to challenge his convictions for corrupt business influence, fraud on a financial institution, and forgery on double jeopardy grounds.

Waiver notwithstanding, we observe that in *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999), the Indiana Supreme Court established a two-part test for analyzing double jeopardy claims. Specifically, it held that "two or more offenses are the 'same offense' in violation of Article I, Section 14 of the Indiana Constitution, 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." *Richardson*, 717 N.E.2d at 49. Linn challenges his convictions solely under the actual evidence test.

> In a challenge under the actual evidence test, the appellant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-

> finder to establish essential elements of one offense may have also been used to establish essential elements of a second challenged offense. In applying the actual evidence test, the reviewing court must identify the essential elements of each offense and evaluate the evidence from the jury's perspective. In our review, we consider the jury instructions where relevant, the arguments of counsel, and other factors which may have guided the jury's determination.

Waldon v. State, 829 N.E.2d 168, 179 (Ind. Ct. App. 2005) (citations omitted).

Here, Linn, who challenges his convictions for corrupt business influence, fraud on a financial institution, and forgery following a guilty plea, has failed to provide this court with the factual basis supporting his plea or any other evidence supporting his claim that his convictions violate the prohibitions against double jeopardy. As such, in addition to waiver as discussed above, Linn has failed to demonstrate a reasonable possibility that the same evidentiary facts were used to establish each of his convictions, and, as a result, has failed to prove that his convictions violate the prohibitions against double jeopardy. *See Hernandez v. State*, 761 N.E.2d 845, 852 (Ind. 2002) (providing that the appellant has the burden of establishing the record necessary to his claim on appeal).

B. Single Episode of Criminal Conduct

Linn also claims that the trial court abused its discretion in imposing consecutive sentences following his convictions for corrupt business influence, fraud on a financial institution, and five counts of forgery, because the convictions arose from a single criminal episode. Indiana Code section 35-50-1-2(c) (2004) provides that "the total of the consecutive terms of imprisonment … to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony

which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted." Indiana Code section 35-50-1-2(b) defines an "episode of criminal conduct" as "offenses or a connected series of offenses that are closely related in time, place, and circumstance." A single episode of criminal conduct can only be composed of crimes which are "simultaneous" and "contemporaneous" in nature. *See Smith v. State*, 770 N.E.2d 290, 294 (Ind. 2002).

Again, Linn challenges his convictions for corrupt business influence, fraud on a financial institution, and forgery following a guilty plea. Linn has failed to provide this court with the factual basis supporting his plea or any other evidence supporting his claim that his convictions arose from a single criminal episode. As such, Linn has failed to carry the burden of proving that his convictions arose from a single criminal episode. *See Hernandez*, 761 N.E.2d at 852 (providing that the appellant has the burden of establishing the record necessary to his claim on appeal).

The judgment of the trial court is affirmed.

BAKER, J., and MAY, J., concur.