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IN THE
COURT OF APPEALS OF INDIANA

FILIBERTO REYES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0811-CR-666
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven Eichholtz, Judge
The Honorable Peggy Hart, Commissioner
Cause No. 49G23-0708-FA-176202

June 3, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a guilty plea, Filiberto Reyes[1] was convicted of dealing in cocaine, a Class A felony; driving while suspended, a Class A misdemeanor; and refusal to identify self, a Class C misdemeanor. He was sentenced to twenty years with eight years suspended for the dealing in cocaine conviction, one year suspended for the driving while suspended conviction, and sixty days suspended for the refusal to identify conviction.[2] All sentences were ordered to be served concurrently. Reyes raises one issue for our review on appeal: whether his sentence is inappropriate in light of the nature of his offense and his character. Concluding that his sentence is not inappropriate, we affirm.

Facts[3] and Procedural History

Officer Henry Gregory of the Indianapolis Metropolitan Police Department initiated a traffic stop when he observed a White Ford Probe fail to use a turn signal and then exceed the speed limit. As Officer Gregory approached the vehicle, he observed the driver bend down in the front seat several times. According to Officer Gregory's records, the vehicle was registered to "Filiberto Chavez Reyes." The driver, however, produced a registration in the name of Jaime Munoz. When asked for identification, the driver indicated that he had a Mexican driver's license but did not have it with him.

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[1] Reyes notes in his brief that his last name is spelled "Riyes," although it is spelled "Reyes" in the pleadings filed with the trial court and this court. Brief of Appellant at 2 n.1. For the sake of consistency, we will use "Reyes."

[2] Reyes was also charged with and pled guilty to possession of cocaine, a Class C felony. However, no sentence was entered on this count as it is a lesser-included offense of dealing in cocaine.

[3] The following facts are taken from the probable cause affidavit. At the guilty plea hearing, the trial court read each of the charges to Reyes and asked if the allegations were true. Reyes admitted for each count that the allegations were true and no further factual basis was taken.

Officer Gregory asked the driver to write down his name and birthdate. The driver wrote his name as Jaime Lopes. When a records check failed to return information for either Jaime Munoz or Jaime Lopes, Officer Gregory placed the driver under arrest for operating a vehicle while never having received a valid license. On searching the vehicle incident to the arrest, Officer Gregory found two plastic sandwich bags containing what appeared to be cocaine within arm's reach of the driver's seat and a wallet containing picture identification for Filiberto Chavez Reyes. The picture on the identification matched the driver of the vehicle. When confronted with the identification, the driver admitted that he was Reyes. A records check for Reyes indicated that he had a suspended license. Laboratory testing of the substance found in the sandwich bags indicated it was 497.36 grams of cocaine.

The State charged Reyes with dealing in cocaine in an amount greater than three grams, a Class A felony; possession of cocaine in an amount greater than three grams, a Class C felony; driving while suspended with a prior conviction within ten years for driving while suspended, a Class A misdemeanor; and refusal to identify self, a Class C misdemeanor. The parties appeared in court on August 4, 2008, for a pre-trial conference in advance of a scheduled jury trial. Reyes withdrew his plea of not guilty and, despite having received a plea offer from the State, pled guilty without an agreement to all four counts. The trial court subsequently sentenced Reyes to twenty years with eight years suspended for dealing in cocaine, one year suspended for driving while suspended, and sixty days suspended for refusal to identify, all to be served concurrently. Reyes now appeals his sentence.

Discussion and Decision

I. Standard of Review

An appellate court "may revise a sentence authorized by statute 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). When determining whether a sentence is inappropriate, we recognize that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). In determining whether a sentence is inappropriate, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 196 (Ind. Ct. App. 2007), trans. denied; cf. McMahon v. State, 856 N.E.2d 743, 750 (Ind. Ct. App. 2006) ("[I]nappropriateness review should not be limited … to a simple rundown of the aggravating and mitigating circumstances found the by the trial court."). "[A] defendant must persuade the appellate court that his or her sentence has met this inappropriateness standard of review." Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

II. Inappropriate Sentence

A Class A felony conviction is punishable by a sentence between twenty and fifty years, with an advisory sentence of thirty years. Ind. Code § 35-50-2-4. The trial court noted Reyes's criminal history as an aggravating factor and his guilty plea and corresponding acceptance of responsibility as a mitigating factor. The trial court found that the mitigating circumstance "may" outweigh the aggravating circumstance, transcript at 39, and sentenced Reyes to the minimum sentence for his Class A felony conviction –

twenty years instead of the advisory sentence of thirty years – and suspended eight years of the sentence. Reyes contends that the twenty-year sentence with twelve years executed is inappropriate in light of the nature of his offenses and his character and argues that his entire sentence should have been suspended.

With regard to the nature of his offense,[4] Reyes had almost 500 grams of cocaine that he admitted he had the intent to distribute. Reyes characterizes his offense as "simply falling prey to the temptation to make some easy money by transporting drugs," brief of appellant at 7, citing his lack of sophistication, the nervous and naïve manner in which he dealt with Officer Gregory, his artlessness in concealing the cocaine, and his poor attempts at deception. As the State notes, however, the fact that Reyes is not a good drug dealer does not make him any less a drug dealer. He had a quantity of cocaine greatly in excess of the minimum required to be charged with a Class A felony. See Ind. Code § 35-48-4-1(b)(1) ("The offense is a Class A felony if . . . the amount of the drug involved weighs three (3) grams or more . . . ."). Although we agree that aside from the gross quantity of cocaine he possessed, there is nothing particularly egregious about Reyes's crimes, the minimum sentence and suspended time imposed by the trial court certainly account for that.

As to Reyes's character, the trial court noted his criminal history as an aggravating circumstance. Reyes has previously been convicted of two counts of battery and one count of invasion of privacy, all Class A misdemeanors. The significance of criminal history depends on the number of offenses and the nature and gravity of the prior

[4] Although Reyes was convicted and sentenced for three crimes, his argument focuses on the sentence he received for dealing in cocaine, and we will limit our discussion accordingly.

offenses as they relate to the instant offense. Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). Reyes's criminal history is not overly extensive, nor does it relate in nature or gravity to the instant offense. What is relevant about his criminal history, however, is the fact that he violated probation in both of his battery cases; in one by committing the second battery offense, and in the other by submitting several urine screens testing positive for cocaine. Reyes requested that if the trial court gave him an executed sentence, he be allowed to serve his sentence in Community Corrections and stated that he would abide by any terms and conditions of work release. Reyes's criminal history casts doubt on his suitability for alternative placement.

As Reyes points out, he has a stable work history and he was supporting his wife and two children. We note, as the trial court did, that Reyes pled guilty in an open plea; that is, he had no agreement with the State and left himself to the mercy of the trial court. He stated that he had never before distributed cocaine. However, he also reports using cocaine for the past ten years, and his conditional residency in the United States has been terminated, making his continued presence here illegal. Neither of these reflect well upon his character.

In short, Reyes has failed to meet his burden of persuading us that the nature of his offense and his character render a minimum twenty-year sentence with eight years suspended for Class A felony dealing in cocaine inappropriate.

Conclusion

Reyes's twenty-year sentence with eight years suspended is not inappropriate

in light of the nature of his offense and his character. The judgment of the trial court is affirmed.

Affirmed.

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