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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL KINCADE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A05-0812-CR-730
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON CIRCUIT COURT
The Honorable Judith S. Proffitt, Judge
Cause No. 29C01-0710-FC-95

June 4, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Michael Kincade appeals his fourteen-year executed sentence following a guilty plea to two counts of forgery, both Class C felonies, and one count of theft, a Class D felony. For our review, Kincade raises two issues, which we restate as: 1) whether the trial court issued an adequate sentencing statement; and 2) whether Kincade's sentence is inappropriate in light of the nature of his offenses and his character. Concluding that the trial court issued an adequate sentencing statement and Kincade's sentence is not inappropriate, but that the trial court incorrectly suspended Kincade's sentence for the Class D felony below the minimum sentence, we affirm, but remand with instructions to correct that error in the sentence.

Facts and Procedural History

Kincade was an employee in charge of accounting at Telliss, LLC, a family-owned telecommunications business. Between June 1, 2006 and July 31, 2007, Kincade wrote checks on Tellis's account to pay the rent on his apartment and other bills. In addition, Kincade wrote payroll checks to himself in excess of his regular payroll. In total, Kincade stole $83,445.92 from Telliss.

On October 3, 2007, the State charged Kincade with seven counts of forgery,[1] all Class C felonies, and one count of theft,[2] a Class D felony. On August 15, 2008, Kincade entered into a plea agreement, whereby he agreed to plead guilty to two counts of forgery and one count of theft. In return, the State agreed to dismiss the remaining forgery

[1] The forgery counts relate to seven instances where Kincade wrote company checks to pay the rent on his apartment and used a signature stamp to sign the checks without his supervisor's permission.

[2] The theft count was based on the total amount of money, $83,445.92, stolen from the company.

charges. The agreement allows the parties to argue sentencing to the discretion of the trial court, but caps the executed sentence at fourteen years.

The trial court held a sentencing hearing on December 2, 2008, after which it issued the following sentencing statement:

> In arriving at a sentence that is left to the discretion of the Court, the Court is required to state any aggravating and mitigating circumstances that the Court finds. With regard to mitigating circumstances, the Defendant has entered a plea of guilty and that is one factor that is a show of remorse that is recognized by Indiana law and the Court makes that finding as part of today's record. This case comes to the Court for sentencing based on the guilty plea. Also, that the Defendant has a strong family support system in place as evidenced by the letters they've sent to the Court. Aggravating circumstances exist here as well. And that, of course, is the harm, injury and damage suffered by the victim. In this case significant financial damage to this victim. Another aggravating circumstance is a history of criminal activity. Even though there's only one misdemeanor conviction and one prior felony, the excessive damage and amount that was a result of that one prior felony,[3] much less this felony, make that a very significant history of criminal activity even though the numbers of offenses is small by comparison to some other Defendants the Court sees as well. An additional aggravating circumstance is that this Defendant was in a position of trust with the victim and violated that trust. He has also, as a fourth aggravating circumstance, recently violated his probation in the Marion County case where he was on probation in that court. Given all of that, the sentence imposed is going to be very similar to the recommendation ….

Transcript at 36-37. The trial court went on to sentence Kincade to the following: eight years executed with the Department of Correction ("DOC") on count one, forgery; eight years with six years executed, four years at the DOC followed by two years at Hamilton County Community Corrections work release, and two years suspended to probation on count 2, forgery; and three years suspended to probation on count 3, theft. The trial court ordered all of the sentences to be served consecutively for a total sentence of nineteen

[3] Prior to his arrest on these charges, Kincade was convicted of four counts of forgery, all Class C felonies, and sentenced to a total sentence of four years suspended to probation. In addition, Kincade was ordered to pay $41,000.00 in restitution.

years with twelve years executed at the DOC, two years executed in Community Corrections, and five years suspended to probation. Kincade now appeals.

Discussion and Decision

I. Standard of Review

We engage in a multi-step process when evaluating a sentence. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (2007). First, the trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e. to particular aggravating or mitigating circumstances, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id. Even if a trial court abuses its discretion by not issuing a reasonably detailed sentencing statement or in its findings or non-findings of aggravators and mitigators, we may choose to review the appropriateness of a sentence under Rule 7(B) instead of remanding to the trial court. See Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007).

II. Sentencing Statement

Kincade first argues that the trial court issued an inadequate sentencing statement. Indiana Code section 35-38-1-1.3 requires a trial court to "issue a statement of the court's reasons for selecting the sentence that it imposes." A trial court may impose any sentence that is authorized by statute and permissible under the Indiana Constitution

regardless of the presence or absence of aggravating or mitigating circumstances. Ind. Code § 35-38-1-7.1(d). Indiana Code sections 35-38-1-7.1(a) and (b) provide non-exhaustive lists of aggravating and mitigating factors, respectively, that the trial court may consider in imposing sentence.

To perform our function of reviewing the trial court's sentencing discretion, we must be told of its reasons for imposing a particular sentence, including a statement of the facts, in some detail, which are peculiar to the particular defendant and the crime, as opposed to general impressions or conclusions. Eversole v. State, 873 N.E.2d 1111, 1113 (Ind. Ct. App. 2007), trans. denied. "The trial court can abuse its discretion by either failing to issue a sentencing statement or by issuing a statement that indicates the reasons for the sentence 'but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law.'" Smith v. State, 872 N.E.2d 169, 178 (Ind. Ct. App. 2007) (quoting Anglemyer, 868 N.E.2d at 490-91)).

Although the trial court's sentencing statement is far from comprehensive, it nonetheless adequately sets forth the aggravating and mitigating circumstances considered by the trial court in issuing the sentence. The trial court identified three mitigating circumstances: Kincade's guilty plea; his remorse; and his strong family support system. The trial court also identified four aggravating circumstances: the amount of harm caused to the victims; that Kincade violated a position of trust; Kincade's criminal history, especially his prior forgery conviction; and the fact that Kincade violated his terms of probation from his prior felony conviction. In addition, the trial

court highlighted the harm caused to the victim and Kincade's prior forgery conviction as significant. The trial court concluded by stating, "Given all of that, the sentence imposed is going to be very similar to the recommendation …."[4] Tr. at 37. As such, the trial court's sentencing statement includes reasonably detailed reasons or circumstances for the sentence imposed and is sufficient to allow us to review the sentence.

Kincade characterizes his argument as an attack on the sufficiency of the sentencing statement; however, in fact, the argument requests that we review the weight given by the trial court to each of the mitigating factors. See Appellant's Brief at 5 ("[T]he court should have highly considered and detailed that Kincade's remorsefulness for the crime was a significant mitigating factor that should have been considered at sentencing.") and 7 ("[T]he court should have highly considered and detailed Kincade's strong family support system."). While we may review the inclusion or omission of specific aggravating and mitigating factors, we do not review the weight assigned to such factors by the trial court. Anglemyer, 868 N.E.2d at 491. In light of the above discussion, we hold the trial court issued an adequate sentencing statement.

III. Appropriateness of the Sentence

Kincade next argues that his sentence is inappropriate in light of the nature of his offenses and his character. Kincade's eight-year sentences for his Class C felony forgery convictions and three-year sentence for his Class D theft conviction are the maximum sentences allowed by statute. See Ind. Code §§ 35-50-2-6(a) and 35-50-2-7(a). Pursuant to Indiana Appellate Rule 7(B), we may revise a sentence if, after due consideration of

[4] The Pre-Sentence Investigation report had recommended sentences of eight years, seven years executed and one year suspended, for each of the Class C felonies, and three years suspended for the Class D felony with all sentences to be served consecutively.

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." Id. When making this decision, 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 by the trial court."). However, the defendant bears the burden to "persuade the appellate court that his … sentence has met this inappropriate standard of review." Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

A. Nature of the Offenses

The offenses took place over a long period of time, during which Kincade was entrusted with accounting responsibilities for Telliss. Kincade stole $83,445.92 from Telliss. Terri Ballantini, the founder and president of Telliss testified at the sentencing hearing regarding the impact of Kincade's crimes.

> We've lost everything. We've lost – We've lost our business that I had for thirteen years. We've had to file Chapter 13 [bankruptcy]. We're about to get our house foreclosed. And I haven't had health or life insurance for the past year for my family ….
>
> * * *
>
> And the eighty-three thousand doesn't contain the damage. He didn't file payroll taxes. He didn't live up to the payroll taxes that we had – were paying in agreement with the IRS. He didn't pay sales taxes because he was stealing our money.

Tr. at 32-33, 34.

In considering the appropriateness of a maximum punishment we should focus "on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character." Roney, 872 N.E.2d at 207 (quoting Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002)). Here, Kincade's crimes inflicted serious harm to the company he worked for and to the family who owns the company and trusted him with its finances. In addition, Kincade began stealing from the company almost immediately after being hired and continued to steal on a regular basis until he was caught, while neglecting to pay the company's legitimate obligations. Therefore, Kincade's sentence is not inappropriate in light of the nature of his offenses.

B. Character of the Offender

The circumstances surrounding the commission of these crimes weigh negatively on Kincade's character. Kincade had already been convicted of stealing money from a prior employer. Yet, he sought out and obtained another job with financial responsibility and did not inform his new employer of his criminal conduct. Not only that, Kincade began stealing almost immediately after his employment began. Kincade placed his own greed above the well-being of the company and the family who employed him.

Kincade has a minimal criminal history consisting of a misdemeanor operating while intoxicated conviction and a conviction on four counts of forgery, all Class C felonies. After his prior conviction for forgery, the trial court had shown leniency and imposed only a four-year sentence entirely suspended to probation. However, Kincade did not take advantage of this second chance to lead a law-abiding life. Instead, he

disregarded the trial court's leniency by immediately returning to his criminal conduct. This also weighs negatively against his character.

Kincade did accept responsibility for his crimes by pleading guilty pursuant to a plea agreement. However, we also note that Kincade received a substantial benefit for his guilty plea; the State dismissed five additional Class C felony charges. In addition, there was substantial evidence of Kincade's guilt in Telliss's financial records. A guilty plea's significance is diminished if there was substantial admissible evidence of the defendant's guilt, Scott v. State, 840 N.E.2d 376, 383 (Ind. Ct. App. 2006), trans. denied, and is also diminished in direct proportion to the benefit realized by the defendant in accepting it, Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005). Therefore, we afford his guilty plea only minimal weight in favor of his character. Kincade also expressed remorse for his crimes in a written statement included in his pre-sentence investigation report. However, Kincade did not express his remorse in person to either the trial court or the victims at his sentencing hearing. Nonetheless, his remorse weighs in favor of his character.

Finally, we agree with the trial court that Kincade has a strong family support system in place. However, Kincade failed to take advantage of that support system after he was convicted and sentenced for the prior forgery charges. Kincade indicated in his written statement that he has reconnected with his family and friends since being incarcerated. We encourage Kincade to continue to rely on this support system, and such a support system weighs in favor of his character.

Those factors weighing in favor of Kincade's character have all arisen only after he was caught and charged with these crimes. On the other hand, Kincade has displayed a total disregard for the law, for the leniency he was given after his prior convictions, and for the trust given him by his employers. In our analysis, these latter factors outweigh the former. Therefore, Kincade's sentence is not inappropriate in light of his character.

Kincade bears the burden of establishing that his sentence is inappropriate in light of the nature of his offenses and his character. After due consideration of the trial court's decision, we are not convinced that Kincade has carried this burden. As a result, we conclude that Kincade's sentence is not inappropriate in light of the nature of his offenses and his character.

IV. Sentencing Error

Our review of Kincade's sentence has revealed a technical error, which we raise sua sponte. The trial court imposed the maximum sentences for each crime, eight years for the two Class C felonies and three years for the Class D felony. This results in a total sentence of nineteen years. However, the plea agreement entered into by Kincade and the State and accepted by the trial court caps the possible executed sentence at fourteen years. In order to comply with the plea agreement, the trial court suspended two years of the second Class C felony sentence and the entire three-year Class D felony sentence.

Indiana Code section 35-50-2-2(b)(3) provides that a trial court "may suspend only that part of the sentence that is in excess of the minimum sentence" where "[t]he crime committed was a Class D felony and less than three (3) years have elapsed between the date the person was discharged from probation, … for a prior unrelated felony

conviction and the date the person committed the Class D felony ….” On January 9, 2007, Kincade was sentenced to four years suspended to probation for his prior forgery convictions. The probable cause affidavit for Kincade’s present Class D felony theft conviction alleges that he committed the crimes between June 1, 2006 and July 31, 2007. Thus, Indiana Code section 35-50-2-2(b)(3) prevents the trial court from suspending Kincade’s sentence for the Class D felony below the minimum sentence of six months.

We recognize that the trial court imposed the maximum executed sentence allowed by the plea agreement, and, therefore, it cannot simply add an additional six months to Kincade’s executed sentence. However, the trial court has sufficient flexibility in Kincade’s two eight-year Class C felony sentences to accommodate the required minimum six-month executed sentence for the Class D felony while keeping the total executed sentence within the fourteen-year cap.

Therefore, we remand this issue to the trial court with instructions to impose at least a six-month executed sentence for Count 3, theft, a Class D felony. The trial court need not hold an additional sentencing hearing assuming this technical correction does not result in any net change to the total sentence of fourteen years executed and five years suspended to probation.

Conclusion

The trial court issued an adequate statement prior to sentencing Kincade, and Kincade’s sentence is not inappropriate in light of the nature of his offenses and his character. However, the trial court’s sentence is technically incorrect because it fails to

impose an executed sentence of at least six months for the Class D felony conviction as required by Indiana Code section 35-50-2-2(b)(3). Therefore, we affirm the sentence but remand the case to the trial court to correct the sentence to include at least a six-month executed sentence for Count VIII, theft, a Class D felony.

Affirmed and remanded.

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