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**IN THE
COURT OF APPEALS OF INDIANA**

DARREN HUDSON,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A02-0808-CR-731

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jane Magnus-Stinson, Judge
Cause No. 49G06-0110-PC-192822

June 4, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Darren Hudson pled guilty to Class B felony robbery and Class D criminal recklessness and admitted to being a habitual offender and was sentenced to eighteen years executed. On appeal, he argues that the trial court abused its discretion by failing to consider several mitigators and that his sentence is inappropriate in light of the nature of the offenses and his character. Concluding that the trial court did not abuse its discretion and that Hudson's sentence is not inappropriate in light of his offenses and his character, especially his serious criminal history, we affirm.

Facts and Procedural History

On September 27, 2002, Hudson pled guilty pursuant to a plea agreement to robbery as a Class B felony¹ and criminal recklessness as a Class D felony² and admitted to being a habitual offender.³ In exchange, the State dismissed charges for burglary as a Class B felony,⁴ criminal confinement as a Class B felony,⁵ three counts of criminal recklessness as a Class D felony,⁶ and attempted robbery as a Class B felony⁷ and agreed to an eighteen-year sentence cap. At Hudson's guilty plea hearing, the State laid a factual basis, establishing that shortly after midnight on September 29, 2001, Hudson, armed

¹ Ind. Code § 35-42-5-1.

² Ind. Code § 35-42-2-2.

³ Ind. Code § 35-50-2-8.

⁴ Ind. Code § 35-43-2-1.

⁵ Ind. Code § 35-42-3-3.

⁶ I.C. § 35-42-2-2.

⁷ Ind. Code §§ 35-41-5-1, -42-5-1.

with what appeared to be a handgun but later turned out to be a BB gun, approached a vehicle parked at Mike's Speedway Lounge in Marion County, Indiana, and began striking the driver's side window with the gun. He pointed the gun at the occupant, Mary Plummer, and demanded that she give him her purse. When she told him she had no money, Hudson left and approached Charles McNeive, another patron of Mike's Speedway Lounge, who was leaving the establishment and walking across the parking lot. Hudson pointed the gun in McNeive's face and demanded that McNeive give him his wallet. McNeive gave Hudson his wallet, which contained \$200 in cash. Hudson then traveled to the Beehive Bar, where he brandished the gun, pointed the gun at several people in the bar, and yelled racial slurs. Hudson then left the bar, and an Indianapolis Police Department officer apprehended him. At his guilty plea hearing, Hudson also admitted to being a habitual offender.

After the presentence investigation report (PSI) was accepted by both Hudson and the State, the trial court proceeded with sentencing. Hudson testified that the weapon he had brandished was not a genuine firearm and that he was remorseful. Hudson offered into evidence two competency evaluations. The two doctors who evaluated Hudson described his history of mental illness, which includes depression and panic disorder, his problems with substance abuse and addiction, which includes dependence on alcohol and crack cocaine, and his history of physical illness, which includes diabetes and Hepatitis C. Hudson testified that he uses substances to self-medicate to deal with his other problems, and the substance abuse leads to an impairment in judgment which "played a substantial part in it, in what happened." Tr. p. 26. Hudson also stated that he had

participated in a substance abuse therapy group while incarcerated at the Marion County Jail. Hudson told the trial court that he would seek help with his substance abuse problems and try to obtain an associate's degree while incarcerated.

The trial court sentenced Hudson as follows:

[THE COURT:] [W]hen I sentence somebody there are a variety of factors I have to consider under the law. The first is the risk that they'll commit another crime You've had a fairly constant criminal history as the prosecutor indicated. It may well be that your criminal history is tied up with your addiction, but the fact of the matter is not all addicts are constantly committing crimes.

THE DEFENDANT: I understand.

THE COURT: And I'm not trying to let you have it here. I'm just trying to explain to you my decision. . . . The next thing I have to consider is the nature and circumstances of the crimes committed. This was an evening where one thing led to another, led to another, led to another. It was a pretty long series of criminal acts. The State dismissed a lot of them at the request of someone who loves you. . . . Then I have to look at your character and condition. I'm looking at this big long criminal history and one of the things that just struck me is every time you've been on probation, it's been revoked. You've never made it and that's a problem. My guess is for example when you got that D felony DUI with two years probation, they were ordering you into treatment, right?

THE DEFENDANT: Yes, ma'am.

* * *

[THE COURT:] But these crimes keep getting committed while you're on probation, so that's a problem with respect to your criminal history. . . . And the Court's trying to give you the chance for treatment and sentencing and you weren't listening. This night when you went way, way off the deep end, you're wanting to blame the alcohol or the drugs and basically we're here to blame you. . . . Now this is what I want to explain to you, [the prosecutor] took all this into account when he capped you at eighteen years. I will tell you right now, I could give you fifty years today without this cap and you could not get your sentence reversed at the Court of Appeals. Your record would support a fifty year executed sentence. . . . [W]hen you all agree to a cap, it doesn't change the law. An eighteen year sentence in this case is a highly mitigated sentence. I don't find aggravators to get you to eighteen. That's a mitigated sentence in this case with the habitual. . . . Now I agree with the State that because it were – if it were a real handgun, you never would have gotten eighteen years and I wouldn't have even accept[ed] this plea.

Id. at 40-43. The trial court then sentenced Hudson to eight years for Class B felony robbery with ten years added for being a habitual offender to run concurrent with a three-year sentence for criminal recklessness as a Class D felony, for a total executed sentence of eighteen years.

On September 27, 2006, Hudson filed a petition for post-conviction relief. However, on August 1, 2008, Hudson filed a petition for permission to file a belated notice of appeal. Three days later, the trial court granted his petition and ordered his post-conviction relief petition to be held in abeyance. Hudson now appeals.

Discussion and Decision

On this direct appeal, Hudson challenges his sentence.⁸ Specifically, Hudson contends that the trial court abused its discretion in sentencing him and that his sentence is inappropriate.

A. Abuse of Discretion

Hudson contends that the trial court abused its discretion in sentencing him. Specifically, Hudson argues that the trial court failed to properly consider three offered mitigators—that the weapon used was not a real handgun, that Hudson is mentally ill, and that Hudson has taken rehabilitative measures while incarcerated—in arriving at his eighteen-year sentence and that the trial court abused its discretion by attaching the habitual offender enhancement to robbery rather than criminal recklessness.

⁸ Hudson committed his crimes in 2001, which is before the amendments to our sentencing statutes. As a result, the presumptive sentencing scheme applies to his case. *See Gutermyth v. State*, 868 N.E.2d 427, 431 n.4 (Ind. 2007) (noting that the sentencing statute in effect at the time a crime is committed governs the sentence for that crime).

The trial court sentenced Hudson to eight years for Class B felony robbery, enhanced by ten years for the habitual offender status, to run concurrent with the three-year sentence for Class D felony criminal recklessness. At the time of Hudson's sentencing, a Class B felony had a presumptive sentence of ten years, with the maximum sentence being twenty years and the minimum sentence being six years. Ind. Code § 35-50-2-5 (2002); *Oeth v. State*, 775 N.E.2d 696, 705 (Ind. Ct. App. 2002), *reh'g denied*, *trans. denied*. A Class D felony had a presumptive sentence of one and one-half-years, with the maximum sentence being three years and the minimum sentence being six months. Ind. Code § 35-50-2-7 (2002); *Nicholson v. State*, 768 N.E.2d 443, 448 (Ind. 2002), *reh'g denied*; *Simmons v. State*, 773 N.E.2d 823, 825 n.2 (Ind. Ct. App. 2002), *trans. denied*.

Sentencing is within the trial court's discretion, and the trial court will be reversed only upon a showing of a manifest abuse of discretion. *Cruz Angeles v. State*, 751 N.E.2d 790, 798 (Ind. Ct. App. 2001), *trans. denied*. The finding of mitigating circumstances is also within the discretion of the trial court. *Legue v. State*, 688 N.E.2d 408, 411 (Ind. 1997). An allegation that the trial court failed to identify or find a mitigating circumstance requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Carter v. State*, 711 N.E.2d 835, 838 (Ind. 1999).

The trial court has within its discretion the ability to determine whether the presumptive sentence for a crime will be increased or decreased because of aggravating or mitigating circumstances. *Cruz Angeles*, 751 N.E.2d at 798. The weighing of

aggravating and mitigating factors is also within the trial court's discretion. *Id.* "If a trial court uses aggravating or mitigating circumstances to deviate from the presumptive sentence, it must identify all significant mitigating and aggravating circumstances, state the specific reason why each circumstance is determined to be mitigating or aggravating, and articulate its evaluation and balancing of the circumstances." *Donnegan v. State*, 809 N.E.2d 966, 978 (Ind. Ct. App. 2004), *trans. denied*. The trial court's assessment of the proper weight of mitigating and aggravating circumstances and the determination of the total sentence is entitled to great deference on appeal and will be set aside only upon a showing of a manifest abuse of discretion. *Id.*

In sentencing Hudson, the trial court found both aggravating and mitigating circumstances. Appellant's App. p. 16 (CCS entry). Although the trial court did not specifically delineate the aggravators and mitigators at the sentencing hearing or in the abstract of judgment, we have reviewed the transcript of the sentencing hearing, and it is apparent that the trial court found aggravating Hudson's criminal history and the fact that Hudson committed "a long series of criminal acts" on the evening in question. Tr. p. 41. As for the mitigators offered by Hudson, the trial court did consider as mitigating the fact that the weapon Hudson used was not a real handgun and that Hudson has taken rehabilitative measures while incarcerated. Regarding the weapon, the trial court stated, "Now I agree with the State that because it were – if it were a real handgun, you never would have gotten eighteen years and I wouldn't even accept this plea." *Id.* at 43. Thus, the trial court considered the BB gun as a mitigating circumstance. However, Hudson admitted that the gun was nevertheless just as intimidating to his victims as if the gun

were a real handgun. *Id.* at 19. As for Hudson’s rehabilitative measures, the trial court acknowledged that Hudson earned his GED and several certificates from Bible correspondence courses and a substance abuse therapy group. *Id.* at 31 (Hudson’s testimony describing the certificates), 44 (“Now listen, I gave you all those certificates back because they’re your accomplishments and they’re good.”). However, the trial court also expressed concern that Hudson admitted that he had been ordered into treatment several times after his previous convictions but did not successfully complete treatment because he would commit more crimes and have his probation revoked. *Id.* at 42 (“And the Court’s trying to give you the chance for treatment and sentencing and you weren’t listening.”). We cannot say that the trial court failed to consider these mitigators offered by Hudson or that the trial court abused its discretion by not giving them more mitigating weight than it did.

Turning to the offered mental illness mitigator, Hudson presented evidence that he suffered from depression and panic disorder. *See* Mental Health Evaluation Report.⁹ Hudson testified that his history of mental illness was tied to his substance abuse in that Hudson self-medicated to alleviate the symptoms from his mental and physical ailments. *Id.* at 25. Hudson presented evidence that the impairment in judgment resulting from the substance abuse played a substantial part in his criminal activity. *Id.* at 26. It is clear that the trial court considered Hudson’s substance abuse but did not find it significantly mitigating. *Id.* at 40 (“It may well be that your criminal history is tied up with your

⁹ The Mental Health Evaluation Report is included in the record on appeal in a separate envelope but is not paginated. The Report consists of a Competency/Sanity Report prepared by Dr. George Parker of the Indiana University School of Medicine and a Competency/Sanity Report prepared by Dr. Ned Masbaum. Both doctors concluded that Hudson suffered from depression and substance dependence. Dr. Parker concluded that Hudson also suffered from panic disorder.

addiction, but the fact of the matter is not all addicts are constantly committing crimes.”). Although the trial court did not separately address Hudson’s history of depression and panic disorder, the trial court did consider its consequences; namely, Hudson’s substance abuse.

Even if we concluded that the trial court had abused its discretion by failing to recognize mental illness as a mitigator, we would affirm this sentence. Given the other mitigators found by the trial court and Hudson’s serious criminal history as an aggravator, we can say with confidence that the trial court would have imposed the same sentence even with an additional mitigating circumstance. *See McCann v. State*, 749 N.E.2d 1116, 1121 (Ind. 2001) (finding that the Court could say with confidence that the trial court would have imposed the same sentence even without the improper aggravating circumstance).

Turning now to the habitual offender enhancement, Hudson argues that the trial court abused its discretion by attaching the enhancement to the Class B felony rather than the Class D felony. A habitual offender finding does not constitute a separate crime nor result in a separate sentence but is a penalty enhancement. *Greer v. State*, 680 N.E.2d 526, 527 (Ind. 1997). If the defendant is convicted of multiple felonies, the trial court must impose the habitual offender enhancement on only one of the convictions and must specify the conviction that is so enhanced, but the habitual offender finding is not linked to any particular conviction. *Id.* As a result, “where a defendant is convicted of multiple felonies at the same time and the defendant is an habitual offender, the trial court may attach the habitual offender finding to any of the relevant felonies even if attachment

results in a harsher penalty.” *Burrus v. State*, 763 N.E.2d 469, 472 (Ind. Ct. App. 2002), *trans. denied*. The trial court’s decision here to attach the enhancement to the more serious felony was not an abuse of discretion. Nor was the length of the enhancement an abuse of discretion. *See* I.C. § 35-50-2-8 (2001) (providing that the court shall sentence a person found to be a habitual offender to an additional fixed term that is not less than the presumptive sentence for the underlying offense nor more than three times the presumptive sentence for the underlying offense but in any event not to exceed thirty years); *Merritt v. State*, 663 N.E.2d 1215, 1217 (Ind. Ct. App. 1996) (“Aside from setting the parameters concerning the length of the enhancement, the relevant statutes contain no guidelines or formulas for courts to apply or follow when determining the length of the habitual offender enhancement. Instead, the decision is left to the trial court’s discretion.”), *trans. denied*.

B. Inappropriateness

Hudson also contends that his eighteen-year sentence is inappropriate in light of the nature of his offenses and his character pursuant to Indiana Appellate Rule 7(B).¹⁰ Although a trial court may have acted within its lawful discretion in imposing a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a 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.” *Reid v. State*, 876 N.E.2d 1114,

¹⁰ In response, the State argues that Hudson waived his right to challenge the appropriateness of his sentence in a provision of his plea agreement. Because we conclude that Hudson’s sentence is not inappropriate, we need not decide this question.

1116 (Ind. 2007) (citing *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007)). The burden is on the defendant to persuade us that his or her sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

As for the nature of the offenses, Hudson acknowledges that his actions were serious. Hudson demanded money from Plummer and McNeive while pointing a gun at them. Although the gun was a BB gun rather than a genuine handgun, Hudson's victims were fearful and Hudson knew they were afraid. Tr. p. 20. Hudson then traveled to a bar, where he slung racial insults at the patrons and brandished his weapon at them.

As for Hudson's character, although we applaud that he has participated in substance abuse treatment and earned his GED, the PSI reveals that Hudson has a long and serious criminal history leading up to his crimes in 2001. Hudson has several felony convictions: a 1989 conviction for possession of cocaine, a 1991 conviction for criminal recklessness, a 1992 conviction for robbery, a 1993 conviction for operating a vehicle while intoxicated with a prior conviction, and a 1998 conviction for perjury. Hudson has numerous misdemeanor convictions, including possession of marijuana, operating a vehicle while intoxicated, criminal mischief, driving while his license was suspended, resisting law enforcement, battery, invasion of privacy, public intoxication, disorderly conduct, and domestic battery. Hudson has numerous additional arrests, and his probation has been revoked several times. Hudson's record reveals that many of his offenses appear linked to his substance abuse problem. Hopefully, Hudson will seek treatment for this problem, but we cannot say that his substance abuse excuses his

actions. In sum, Hudson has failed to persuade us that his eighteen-year sentence is inappropriate.¹¹

Affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.

¹¹ In his brief, Hudson cites two provisions of the Indiana Constitution: Article I, Section 16 and Article I, Section 18. Because Hudson provides no separate authority or argument that his sentence violates these provisions, these claims are waived. *See Fair v. State*, 627 N.E.2d 427, 430 n.1 (Ind. 1993).