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IN THE
COURT OF APPEALS OF INDIANA

ANTHONY MALENCHIK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0902-CR-133
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Les A. Meade, Judge
Cause No. 79D05-0711-FD-628

June 5, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Anthony Malenchik ("Malenchik") appeals his sentence for Receiving Stolen Property, as a Class D felony,[1] enhanced because of his adjudication as a Habitual Offender.[2] We affirm.

Issues

Malenchik raises two issues, which we reorder and restate as:

I. Whether the trial court abused its discretion in sentencing him; and

II. Whether Malenchik's sentence is inappropriate.

Facts and Procedural History

Malenchik and his mother, Marilyn Hopkins ("Hopkins"), lived with Connie Griesey ("Griesey") at some point prior to the events of the instant case. In September of 2005, Malenchik was convicted of Theft for taking property belonging to Griesey, and he was ordered not to enter her property.

A year and a half later, several items were stolen from Griesey's home, including a flat-screen television, DVDs, a camera and its accessories, as well as two guns – one each from her maternal and paternal grandfathers. On November 17, 2008, Malenchik pled guilty to Receiving Stolen Property, as a Class D felony. The trial court then found that he was a Habitual Offender.[3]

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[1] Ind. Code § 35-43-4-2.
[2] Ind. Code § 35-50-2-8.
[3] The parties did not include a transcript of the plea hearing in the appellate record.

At the sentencing hearing, the trial court questioned Malenchik as follows:

Q: You know I don't think I've seen a 20 year old here with the kind of criminal history you've developed. Uhm, you've been through the system, it doesn't seem to make any changes. You – your LSIR [Level of Service Inventory-Revised] score is high. Your SASSI [Substance Abuse Subtle Screening Inventory] score is high with a high probability of substance dependence disorder. Your criminal history shows a complete disregard of other people – and uh, and unwillingness or inability to change your behavior.

A: Your Honor, I was thinking about myself at that time. I was not – I was not thinking about . . .

Q: Well, this is – this is what I'm getting at and I want – I want to lay this out and then I'll ask that question. You tell me that you have changed since that. When did this change occur?

A: When I bonded out in March 15th. I know I failed a drug screen . . .

Q: Yeah. Well, you see that's what I'm getting at even then things didn't change.

A: I try to medicate – I try to medicate myself through what I used to know how to medicate myself by instead of actually being – I got put back on my adderal and everybody that has ever seen me on my adderal, I did well. Even [my employer] admitted to me that I did excellent work through him – when I was back on my medications. The reasons why I spoke [sic] marijuana was [sic] because of the simple fact I was stressed out over this case and I didn't even smoke it all that time.

Q: Now, here's the deal stressing out doesn't justify criminal behavior. It doesn't – I was under stress so I was self-medicating and using illegal drugs. It doesn't track. What that represents is blaming something else for what you were doing. This is – this is the fundamental problem we've got here. It's not somebody else's fault. It's not the circumstances that are so overwhelming that you have no choice; you have no control over what you do. Each time you decided to do those drugs, you made the decision to do it and you did.

A: Yes, Your Honor I understand I made – no one – no one made me smoke marijuana, no one put it to my mouth, no one told me, I . . .

. . .

Q: [W]hat happens when for you know one circumstance or another [your family members] aren't there and then you start stressing out again?

A: There won't be that.

Q: Well . . .

A: I'll have my moped then Your Honor.

Q: Anthony this is what you told me before. And this is the fundamental problem we're facing today and I want to make sure you understand what it is that I'm looking at and trying to consider and trying to understand, but the fundamental problem that I've seen before is what still concerns me now, and even today you are blaming circumstances for your behavior rather than really accepting responsibility for yourself. Now that's . . .

A: I understand . . .

Q: . . . that's my fundamental concern.

. . .

Q: Because the juvenile justice system had provided over and over again services and finally Judge Rush said that's it, I give up. It's just not working.

Appendix at 40-43 (emphasis added). Later in the hearing, the trial court continued its questions to Malenchik:

Q: So tell me Anthony if all of this stuff was found not just the TV, but all of these other items that were taken from Ms. Griesey were found in in your room or on the property, did you buy all of this stuff from this mysterious Mexican that you described that you bought the TV from out of a trunk of a car over at Subway?

A: All I bought is the TV Your Honor.

Q: All you bought was a TV and it just happens to be the exact same TV that was stolen from Ms. Griesey. Is that what we're talking about?

A: Yes, Your Honor. I feel that – I feel that I was set up Your Honor.

Q: Do you really – do you really think that I should believe that? That the coincidence of – of you buying the particular TV out of a trunk of a car at Subway when all of the other items taken from Ms. Griesey's home were found at or around your home?

A: It was on the back of five acres of land in a shed, out behind a shed that nobody went in . . .

Q: Do you think the Mexican – this mysterious Mexican just put 'em back there?

A: No, I feel that [Griesey] has it out for me because of my mother.

Q: Connie had it out for you because of your mother. Okay. Well, here – here's the problem I don't think you're telling me the truth now. I don't think you're telling yourself the truth now. I don't think you have really turned – I think you are quite capable of – of doing work. I think you are quite capable of providing for your children, but you know what you're not demonstrating that you can even tell yourself the truth much less tell your parents, tell your fiancée, or tell me the truth.

App. at 59-61.

In announcing its decision, the trial court remarked,

[I]t's going to be a three year executed sentence on the D felony and I'll tell you why because regardless of what you're telling me that you've changed, you haven't. Even now you're not telling me the truth. . . . You have – and this is the fundamental lack of honesty that we've seen from you since you're first showed up in this court. You have violated every rule. You have made promises and not kept them.

App. at 64-65. The trial court then imposed the maximum, three-year term for the Class D felony, enhanced by three years for the Habitual-Offender finding, for an aggregate term of six years, with four years executed and two years suspended to probation. Also, the trial court ordered the execution of six months that had been previously suspended in a separate conviction – consecutive to the instant sentence.

In speaking directly to Malenchik, the trial court then continued,

> [Y]ou kept deciding that doing drugs was more important to you than taking advantage of [the Fast Track Program]. You had the job and you continued to do the drugs. App. at 66.
>
> [Y]ou're going to have to start telling the truth to yourself and others. App. at 67.
>
> All of this is based upon the character, the risk of recidivism, which is quite high according to the LSI-R and the SASSI. We've got a number of things that we need to do and frankly when you come out you'll get some treatment in the Department of Correction and then I want you on supervised probation so that we can move you into providers here in the community. App. at 67 (emphasis added).

Malenchik now appeals his sentence.

Discussion and Decision

I. LSI-R and SASSI

Malenchik argues that the trial court abused its discretion in referring to his LSI-R and SASSI scores during his sentencing hearing. "So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on other grounds, 875 N.E.2d 218 (Ind. 2007). Trial courts must enter a sentencing statement whenever imposing sentence for a felony. Id. The

sentencing statement,

> must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances.

Id. Its reasons must be supported by the record and must not be improper as a matter of law. Id. at 491. "[I]t is an abuse of discretion to rely on scoring models to determine a sentence." Rhodes v. State, 896 N.E.2d 1193, 1195 (Ind. Ct. App. 2008).

Here, the trial court made no findings of aggravating or mitigating circumstances. Nor did it include any findings in its written sentencing order. Nonetheless, Malenchik acknowledges that the court had "an extended discussion with the defendant and counsel at the sentencing hearing and obviously made a thoughtful decision as to the sentence." Appellant's Brief at 12-13.

The trial court made two references to Malenchik's LSI-R and SASSI scores. However, it is clear from the transcript, reproduced in detail above, that the trial court based its determination upon a series of proper considerations, including Malenchik's lack of credibility, his repeated failure to take advantage of court-ordered services, and his continued use of drugs in the face of court-ordered testing. The trial court stated that "the fundamental problem that I've seen before is what still concerns me now, and even today you are blaming circumstances for your behavior rather than really accepting responsibility for yourself." App. at 42-43. Based upon this record, we conclude that, while the sentencing court referred in passing to Malenchik's LSI-R and SASSI scores, it did not rely upon them in crafting his

sentence. Accordingly, the trial court did not abuse its discretion in sentencing Malenchik.

II. Appropriateness of Sentence

Under Indiana Appellate Rule 7(B), this "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); see IND. CONST. art. VII, § 6. In performing our review, we assess "the culpability of the 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). This "introduces into appellate review an exercise of judgment that is unlike the usual appellate process, and is very similar to the trial court's function." Id. at 1223. A defendant "'must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.'" Anglemyer, 868 N.E.2d at 494 (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)).

As to the nature of the offense, the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Childress, 848 N.E.2d at 1081. For a Class D felony, the minimum, advisory, and maximum sentences are respectively six months, eighteen months, and three years. Ind. Code § 35-50-2-7. The additional term for a Habitual-Offender finding on a Class D felony must be between eighteen months and four-and-a-half years. Ind. Code § 35-50-2-8(h). Malenchik's three-year term was the maximum for Receiving Stolen Property, as a Class D felony, while his additional term of three years was the midpoint for a Class-D-felony, Habitual-Offender

finding. Thus, within a statutory range of two to seven-and-a-half years, Malenchik received an aggregate term of six years, two of which were suspended to probation.

Malenchik and his mother had resided with Griesey. A year and a half before the instant offense, Malenchik was sentenced for taking items from Griesey. Here, he received stolen property belonging to the same person. On appeal, he suggests merely that "[n]one of the items were indispensable to the victim" and that the offense posed no danger to Griesey. Appellant's Br. at 11.

As to Malenchik's character, he was adjudicated a juvenile delinquent for seven acts. In 2005, he committed two acts of Theft, as Class D felonies, including the one referenced in our analysis, above. In Florida, he committed Grand Theft, a felony, and Criminal Mischief, a misdemeanor, resulting in the revocation of his probation in Indiana. On May 8, 2008, the trial court ordered Malenchik to submit to a drug screen, but he fled. Thus, by age twenty, Malenchik had established a lengthy criminal record and had repeatedly refused to obey court orders. Furthermore, although the trial court did not enter explicit findings, the transcript documented the trial court's determination that Malenchik was not truthful.

Based upon our review of the record, we conclude that Malenchik's sentence is not inappropriate.

Conclusion

The trial court did not abuse its discretion in sentencing Malenchik. His sentence is not inappropriate.

Affirmed.

DARDEN, J., and ROBB, J., concur.