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IN THE
COURT OF APPEALS OF INDIANA

JEFFREY RANDOLPH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-1010-CR-1104
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Rudolph R. Pyle III, Judge
Cause No. 48C01-0903-FC-135

JUNE 8, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Jeffrey Randolph appeals the sentence he received after he pleaded guilty to criminal recklessness, a Class D felony, Indiana Code section 35-42-2-2 (2006); resisting law enforcement, a Class A misdemeanor, Indiana Code section 35-44-3-3 (2006); and public intoxication, a Class B misdemeanor, Indiana Code section 7.1-5-1-3 (2001). Randolph was sentenced to an aggregate term of four years.

We affirm.

ISSUES

Randolph presents three issues, which we consolidate and restate as:

I. Whether the trial court abused its discretion by not allowing Randolph to present evidence at a post-sentencing hearing.

II. Whether the trial court abused its discretion in sentencing Randolph and whether his sentence is inappropriate.

FACTS AND PROCEDURAL HISTORY

While involved in an altercation, Randolph swung a 40 ounce beer bottle at a man. Randolph then left the scene and went to a nearby Village Pantry convenience store. The police were called, and they found Randolph at the Village Pantry. They noted Randolph's slurred speech, red and bloodshot eyes, unsteady balance, and strong odor of alcoholic beverage. The officers arrested Randolph, and, as they were attempting to put him in a squad car, he resisted and pushed against one of the officers. Based upon this incident, Randolph was charged with battery by means of a deadly weapon, a Class C felony, Indiana Code section 35-42-2-1 (2008), resisting law enforcement, and public

intoxication. The battery charge was later amended to a charge of criminal recklessness, a Class D felony.

Randolph pleaded guilty to criminal recklessness, resisting law enforcement, and public intoxication on June 23, 2010. Sentencing was scheduled for August 2, 2010, but Randolph failed to appear. The trial court granted defense counsel's request for a continuance and rescheduled the sentencing hearing for August 16, 2010. Randolph again failed to appear, and the court sentenced him, in absentia, to three years for his conviction of criminal recklessness and one year for his conviction of resisting law enforcement, to be served consecutively. The court also sentenced him to 180 days for his public intoxication conviction, which was to be served concurrently to the sentences for the other two offenses. Randolph attended a post-sentencing hearing on September 13, 2010, at which he explained why he had failed to appear for sentencing, and the court advised him at that time of his sentence. It is from this sentence that he now appeals.

DISCUSSION AND DECISION

I. EXCLUSION OF EVIDENCE

Randolph first contends that the trial court erred by not allowing him to present evidence at the post-sentencing hearing held on September 13, 2010. Randolph desired to present evidence relevant to his sentence at the post-sentencing hearing because he was sentenced in absentia.

The admissibility of evidence is within the sound discretion of the trial court, and we will not disturb the decision of the trial court absent a showing of abuse of that

discretion. *Gibson v. State*, 733 N.E.2d 945, 951 (Ind. Ct. App. 2000). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id*.

Here, after a warrant was issued for Randolph's arrest at the sentencing hearing on August 16, 2010, he appeared in court for a hearing on September 13, 2010. At that hearing, the trial judge asked Randolph if he could give the court an explanation as to why he was not present for his sentencing, and Randolph responded that he was incarcerated. Later, the trial judge advised Randolph as to his sentence and asked him if he would like to appeal. Randolph responded affirmatively and stated that he did not have the chance to present evidence showing why he deserved house arrest or probation.

As disclosed by the transcript of the September 13 hearing, there was no effort by Randolph or his counsel to object or tender any evidence beyond Randolph's explanation as to his whereabouts at the time of his sentencing hearing in response to the court's question. *See Kellett v. State*, 716 N.E.2d 975, 981 (Ind. Ct. App. 1999) (specific and timely objection and offer of proof must be made in order to preserve for appeal a claim of error in exclusion of evidence). Randolph briefly references a program for veterans but there is neither an explanation as to what that evidence would have been nor a showing as to whether it would have made a difference in the trial court's sentencing decision. Indeed, Randolph's counsel, in Randolph's absence at sentencing, had explained to the court that Randolph was admitted into a program through the Veterans' Administration to assist him with his substance abuse issues. In light of that, defense

counsel asked the court to suspend the balance of Randolph's sentence in order to allow him to finish the program. At the end of the September 13 hearing, the court asked Randolph if there was anything else he wanted the court to know about. Randolph asked questions regarding the sentence being imposed but did not ask to put on evidence or call witnesses. Thus, the court did not refuse to allow Randolph to present evidence; rather, Randolph neither requested to do so nor attempted to tender any. We find no abuse of the trial court's discretion.

To the extent that Randolph might be attempting to argue that the trial court erred in sentencing him in absentia, his argument fails. In general, a criminal defendant has a right to be present at all stages of the trial. *Brown v. State*, 839 N.E.2d 225, 227 (Ind. Ct. App. 2005), *trans. denied*. A defendant may waive this right and be tried in absentia if the trial court determines that the defendant's waiver is knowing and voluntary. *Id.* There exists a presumption that a defendant voluntarily, knowingly and intelligently waived his right to be present when there has been a showing that the defendant knew the scheduled trial date but failed to appear, and the best evidence of this knowledge is the defendant's presence in court on the day the matter is set for trial. *Id.* Finally, a defendant who has been tried in absentia must be afforded an opportunity to explain his absence and thereby rebut the initial presumption of waiver. *Id.*

In the instant case, Randolph was present at his guilty plea hearing when the court set sentencing for August 2, 2010 and advised Randolph to stay in touch with his attorney. Randolph failed to appear on that date, and the court reset sentencing for

August 16, 2010. At the August 16 hearing, Randolph again failed to appear, and the court questioned defense counsel about her contact with Randolph. Counsel told the court that she had left a telephone message and mailed a letter to Randolph advising him of the August 16 sentencing date. In addition, the court sent a summons on August 3, 2010. At the September 13 hearing, Randolph stated that he was unable to notify counsel because the public defender does not accept collect calls. He did not explain why, or if, he was unable to call a family member to notify his attorney or the court, or why he could not mail a letter to his attorney, the court, or a family member. Randolph's explanation did not rebut the presumption of a voluntary, knowing, and intelligent waiver of his right to be present for his sentencing. *See id.* at 228-29 (holding that defendant's incarceration in another county on day of trial, by itself, was insufficient to rebut presumption that he knowingly and voluntarily waived right to be present for trial where he was not precluded from contacting family member, counsel, or court regarding his inability to appear for trial).

II. SENTENCE

A. Abuse of Discretion

Next, Randolph argues that the trial court abused its discretion in sentencing him. Particularly, he claims that the trial court improperly used his absence from the sentencing hearing as an aggravating factor.

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), *clarified on rehearing*, 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*. When imposing a sentence for a felony, a trial court must enter a sentencing statement including reasonably detailed reasons for imposing a particular sentence. *Id.* at 490-91. A trial court abuses its discretion when it: 1) fails to issue any sentencing statement; 2) enters a sentencing statement that explains reasons for imposing a sentence, but the record does not support the reasons; 3) enters a sentencing statement that omits reasons clearly supported by the record and advanced for consideration; or 4) considers reasons that are improper as a matter of law. *Id*.

In its sentencing statement, the trial court found as an aggravating factor: "defendant fails to appear two times for sentencing hearing which shows a disdain for the court." Appellant's App. p. 14. However, the court also found as aggravating defendant's extensive criminal history, which it noted includes twenty-four misdemeanor and six felony convictions. Even if a trial court improperly applies an aggravator, a sentence enhancement may be upheld when there is another valid aggravating circumstance. *Edrington v. State*, 909 N.E.2d 1093, 1097 (Ind. Ct. App. 2009), *trans. denied*. Moreover, a single aggravator is sufficient to support an enhanced sentence. *Williams v. State*, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008). Thus, even if the trial court improperly considered Randolph's absence as an aggravating factor, his weighty criminal

history serves as a sufficient aggravator to enhance his sentence. The trial court did not abuse its discretion in sentencing Randolph.

B. Inappropriateness

For his third and final claim of error, Randolph asserts that his sentence is inappropriate. We may revise a sentence authorized by statute if, after due consideration of the trial court's decision, we determine that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). A defendant bears the burden of persuading the appellate court that his or her sentence has met the inappropriateness standard of review. *Anglemyer*, 868 N.E.2d at 494.

To assess the appropriateness of the sentence, we look first to the statutory range established for the class of the offense. Here the offenses are a Class D felony, for which the advisory sentence is one and one-half years, with a minimum sentence of six months and a maximum sentence of three years; a Class A misdemeanor, for which the maximum sentence is one year; and a Class B misdemeanor, for which the maximum sentence is 180 days. Ind. Code §§ 35-50-2-7 (2005), 35-50-3-2 (1977), and 35-50-3-3 (1977). Randolph was sentenced to three years for his conviction of the Class D felony, to one year for his conviction of the Class A misdemeanor, and to 180 days for his conviction of the Class B misdemeanor. The trial court ordered the sentences for the Class D felony and Class A misdemeanor to be served consecutively for an aggregate sentence of four years. The sentence for his conviction of the Class B misdemeanor was ordered to be served concurrently to the sentences for the other two offenses.

Next, we look to the nature of the offense and the character of the offender. The nature of these offenses is that during this entire incident, Randolph was intoxicated. First, he entered into an altercation with a man and swung a 40 ounce beer bottle at him. Fortunately, Randolph missed or the consequences could have been extremely serious. Next, when the police attempted to arrest him, he pushed a police officer and resisted being put into the officer's car, causing the officers to use spray to subdue him.

With regard to the character of the offender, we note that Randolph's criminal history is extensive. His first alcohol offense was operating while intoxicated in 1985. From there, Randolph's pattern of illegal activity continues to the present. In all, Randolph accumulated a total of six felonies and twenty-four misdemeanors, including numerous charges related to his substance abuse such as driving under the influence, habitual violator, public intoxication, operating a vehicle while intoxicated, failure to stop after an accident, resisting law enforcement, intimidation, criminal mischief, and several probation violations. Randolph served a number of prison terms during his twenty-five year criminal history when he did or could have obtained help for his substance abuse issues, as well as re-directed the path down which his life was heading. However, he chose not to do this but instead continued his pattern of criminal behavior and substance abuse. Moreover, when Randolph was jailed on a warrant from another county, he failed to be present for sentencing in this cause because he failed to notify anyone of his whereabouts.

Randolph has not carried his burden of persuading this Court that his sentence has met the inappropriateness standard of review. *See Anglemyer*, 868 N.E.2d at 494. We do not find his sentence to be inappropriate in light of the nature of the offense and the character of the offender.

CONCLUSION

Based upon the foregoing discussion and authorities, we conclude that the trial court did not abuse its discretion in the exclusion of evidence at the post-sentencing hearing. In addition, the trial court did not abuse its discretion in sentencing Randolph, and his sentence is not inappropriate.

Affirmed.

MAY, J., and BAILEY, J., concur.