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# IN THE
# COURT OF APPEALS OF INDIANA

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| THOMAS SMITH, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 38A04-1008-CR-478 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE JAY CIRCUIT COURT
The Honorable Brian D. Hutchison, Judge
Cause Nos. 38C01-0809-MR-3, 38C01-1007-MI-16

**June 8, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BRADFORD, Judge**

Following a guilty plea in Cause Number 38C01-0809-MR-3 ("Cause No. 3"), Appellant-Defendant Thomas Smith was convicted of Murder,[1] a felony, for which he was sentenced to sixty years in the Department of Correction and required to pay a $10,000 fine. In addition, Smith was subsequently found in contempt of court in Cause Number 38C01-1007-MI-16 ("Cause No. 16") and sentenced to serve an additional year. Upon appeal, Smith challenges both of his sentences and his fine. We conclude that Smith has waived his challenge to his sentence for murder in Cause No. 3, but that the trial court abused its discretion in imposing the fine. We further conclude that the one-year sentence for contempt in Cause No. 16 is not inappropriate. Accordingly, we affirm in part, reverse in part, and remand.

## FACTS AND PROCEDURAL HISTORY[2]

On September 8, 2008, Thomas Smith, along with alleged co-conspirators Addison Pinjapples, Rod Berry, Tina Whiting and Michael Heffren, lured Shawn Buckner to Whiting's home after which they beat, stabbed, and ultimately killed Buckner. Smith cut Buckner's throat after Berry and Heffren allegedly stabbed Buckner at least ten times each. The State charged Smith on September 11, 2008, in Cause No. 3, with murder (Count I) and Class B felony robbery resulting in bodily injury (Count II). Smith entered into a written plea agreement on June 4, 2010. Pursuant to the agreement,

[1] Ind. Code Ann. § 35-42-1-1 (2008).

[2] The guilty plea transcript is not part of the record on appeal. These facts come from Smith's statement to police and sentencing submission to the court, upon which he relies in his statement of facts.

Smith pled guilty to Count I, and the State dismissed Count II. As an additional term of the plea agreement, Smith agreed to waive his right to appeal his sentence, either through a challenge to the trial court's finding and balancing of mitigating and aggravating factors, or through an Indiana Appellate Rule 7(B) challenge to its appropriateness. The plea agreement did not contain a term regarding the imposition of a fine. *Id.*

On July 7, 2010, the trial court sentenced Smith to a term of sixty years, fined him $10,000, and ordered him to pay restitution to the victim's family. In a subsequent proceeding, in Cause No. 16, Smith refused to testify against Whiting and Pinjapples, even after being granted use immunity, on the grounds that testifying would "bring harm to [his] person." Tr. p. 7. The trial court found Smith in direct contempt of court and sentenced him to one additional year in Jay County Security Center, with such sentence to be served following his murder sentence. Appellant's App. p. 273. This court consolidated these two cases for purposes of appeal on August 25, 2010. This appeal follows.

## DISCUSSION AND DECISION

### I. Cause No. 3

#### A. Waiver

On appeal, Smith challenges his sentence for murder by claiming mitigating factors were not taken into account by the trial court. The State responds by first asserting that Smith has waived his right to appeal this claim. In making this argument, the State refers to the plea agreement signed on June 4, 2010, which contained a

provision stating, "The Defendant waives their right to challenge the trial court's findings and balancing of mitigating and aggravating factors and further waives their right to have the Court of Appeals review their sentence under Indiana Appellate Rule #7 (B)." Appellant's App. pp. 197-98.

In *Creech v. State*, 887 N.E. 2d 73, 75 (Ind. 2008), the Indiana Supreme Court held that such waiver provisions in plea agreements are enforceable and that a defendant may waive the right to appellate review of his sentence as part of a written plea agreement, as Smith did in this case. Moreover, Smith specifically waived the right to challenge the finding and balancing of aggravating and mitigating factors in his agreement.

As the State acknowledges, at the sentencing hearing the trial court informed Smith, contrary to the terms of the plea agreement, that he had the right to appeal. Nevertheless, under *Creech*, the Supreme Court determined that actions by the trial court following a defendant's plea are presumed to have no effect on the plea transaction, even when the defendant is erroneously advised that he has a right to appeal. *Id*. at 77. Notably, the trial court's misadvisement occurred during the sentencing hearing, over a month after the plea was entered into. In addition, Smith presents no argument suggesting that he misunderstood the conditions or terms of the plea agreement as a result of the trial court's statement. Accordingly, we decline to review the merits of Smith's challenge to the sentencing factors used by the trial court. "Acceptance of the plea

agreement containing the waiver provision is sufficient to indicate that, in the trial court's view, Smith knowingly and voluntarily agreed to the waiver." *Id*.

### B. Fine

Smith also challenges the trial court's imposition of a $10,000 fine. Plea agreements are contractual in nature, binding the defendant, the State, and the trial court. *Pannarale v. State*, 638 N.E.2d 1247, 1248 (Ind. 1994). Once the trial court has accepted a plea agreement recommending a specific sentence, the terms of the agreement constrain the discretion the court would otherwise employ in sentencing. *Id.*

In *Gipperich v. State*, 658 N.E.2d 946, 949-50 (Ind. Ct. App. 1995), *trans. denied*, this court reversed a trial court's imposition of a $10,000 fine where the court had accepted a plea agreement, for which no fine provision existed. Likewise, the plea agreement here is silent with respect to fines. We must therefore conclude that imposition of a fine by the trial court was not contemplated by the parties in reaching their agreement and therefore was an abuse of discretion. Accordingly, we reverse the portion of the sentence imposing the $10,000 fine.

## II. Cause No. 16

Lastly, Smith also challenges the one-year sentence imposed for contempt of court. Smith bases his argument on Indiana Appellate Rule 7(B), which permits the court to review and revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Smith argues that the nature of his contempt offense

was not overly disruptive because he cooperated with authorities, his testimony was not essential, and he feared going to prison as "a snitch."

In *Jones v. State*, 847 N.E.2d 190, 201-02 (Ind. Ct. App. 2006), *trans. denied*, this court noted that because there is no longer a statute setting out the punishment for contempt, it is unclear whether Appellate Rule 7(B) should apply in reviewing contempt sentences. Before its repeal in 1987, Indiana Code Section 34–4–7–6 limited punishment for contempt to a fine of $500.00 and/or imprisonment of no more than three months. *See Downs v. State*, 827 N.E.2d 646, 652 (Ind. Ct. App. 2005), *trans. denied*.

This court has recognized, "[I]n the absence of the statute, the power to punish contempt is limited by reasonableness." *In re Gardner*, 713 N.E.2d 346, 347 (Ind. Ct. App. 1999) (citing *Hopping v. State*, 637 N.E.2d 1294, 1297 (Ind. 1994)). In *Hopping*, the Indiana Supreme Court noted that punishment for contempt is usually left to the sound discretion of the trial court, and at that time applied the "manifestly unreasonable" standard. 637 N.E.2d at 1297–98. Under the manifestly unreasonable standard, a reviewing court did not revise a sentence which was authorized by statute unless it determined that "no reasonable person could find the sentence appropriate given the particular offense and character of the offender." *See id.* Admittedly, both the old and the new standards for revising sentences apply to sentences "authorized by statute." *See Jones*, 847 N.E.2d at 202.

Whatever the standard, Smith's one-year sentence for contempt passes. In *In re Steeleman*, 648 N.E.2d 366, 369 (Ind. Ct. App. 1995), this court upheld a one-year

sentence for contempt based on the refusal to testify in a case involving conspiracy to commit escape, confinement, and intimidation. This case involves a brutal group murder, and Smith was a participant. Given the importance of such eyewitness testimony and the gravity of the case involved, we view the trial court's imposition of a one-year sentence as fully acceptable.

## III. Conclusion

The judgment of the trial court in Cause No. 3 is affirmed in part, reversed in part, and remanded with instructions to vacate the fine. The judgment in Cause No. 16 is affirmed.

BAKER, J., and MAY, J., concur.