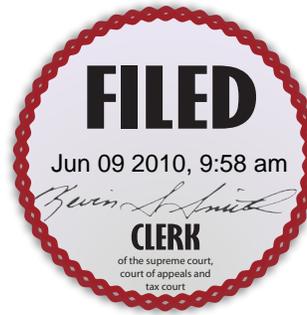


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

MATTHEW JON McGOVERN
Evansville, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

JAMES E. PORTER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ANDREW TESCH,)
)
Appellant-Defendant,)
)
vs.) No. 22A01-1001-CR-26
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE FLOYD CIRCUIT COURT
The Honorable J. Terrence Cody, Judge
Cause No. 22C01-0802-FC-45

June 9, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Andrew Tesch appeals his sentence imposed following his guilty plea to class C felony robbery. We affirm.

Issues

Tesch raises two issues, which we restate as follows:

- I. Whether his sentence exceeds the statutory maximum; and
- II. Whether his sentence is inappropriate.

Facts and Procedural History

On December 13, 2007, Tesch went to a Floyd County Motel 6, told the desk clerk that he had a gun, and threatened to shoot her if she did not give him all the money in the cash drawer. On February 7, 2008, the State charged Tesch with class C felony robbery under cause number 22C01-0802-FC-45 (“FC-45”), and later added a habitual offender allegation. Based on a different incident, the facts of which are not relevant to this appeal, the State charged Tesch for class D felony receiving stolen property under cause number 22C01-0802-FD-44 (“FD-44”).

On April 6, 2009, Tesch pled guilty in both causes pursuant to a single written plea agreement, and the State agreed to dismiss the habitual offender allegation. The plea agreement provided that the sentence in FC-45 would be left to the trial court’s discretion and the sentence in FD-44 would be a suspended term of two and one-half years, served consecutive to FC-45.

On October 29, 2009, the trial court accepted the plea agreement and proceeded to sentencing. Tesch's counsel requested the imposition of a four-year term for the robbery conviction and, pursuant to the plea agreement, a suspended two-and-one-half-year term for his receiving stolen property conviction. In closing, Tesch's counsel stated, "That would be our request Judge, yes. Along with, at [Tesch's] request, an additional term of probation that he be sent to a halfway house." Tr. at 54. The prosecutor then made his sentencing recommendation, stating in relevant part,

It is my understanding that Count II, which is the [receiving stolen property], has already been agreed to be a probated sentence and if Mr., if we want to make it a term of that probation that he go to a halfway house after doing his eight (8) years, then that may indeed be advisable, but the Class C felony Robbery which I consider to be a very major felony, un, he should serve the entire eight (8) years.

Id. at 57.

In sentencing Tesch, the trial court found no mitigating factors, but found that Tesch had an extensive criminal history that justified the maximum sentence, and therefore, imposed the maximum sentence of "eight years to serve" for his robbery conviction in FC-45.

Id. at 63. The trial court then turned to FD-44:

And then with respect to um, case ending in number 44, I'm going to sentence Mr. Tesch pursuant to the Plea Agreement to the Department of Corrections for time to serve, two and one-half (2 ½) years with zero (0) time to serve, two and one-half years suspended to probation. ... The terms and conditions of probation as outlined in the Plea Agreement are adopted by the Court and he is to report to the Adult Probation Office within seven (7) days of his release and then, um, Mr. Tesch is to reside in a halfway house which can be Townes House or House of New Beginnings.

Id. at 62-63. The trial court subsequently clarified that Tesch was to serve a minimum of six months in a halfway house. The trial court’s “Amended Judgment of Conviction” provided that Tesch “shall reside in a halfway house (Townes House, New Beginnings or other similar facility) for a minimum of six (6) months upon release from incarceration. This placement in a halfway house shall run concurrent with his supervised probation in the sentence in [FD-44].” Appellant’s App. at 101. Tesch appeals.

Discussion and Decision

I. Duration of Sentence

Tesch argues that the sentence imposed for his class C felony robbery conviction exceeds the statutory maximum. The sentence for a class C felony is between two to eight years, with an advisory sentence of four years. Ind. Code § 35-50-2-6. Tesch argues that because he received an eight-year executed sentence, and the six-month stay in a halfway house is to be served after his release from incarceration, his sentence is eight and one-half years. The State asserts that the six-month halfway house stay is not part of FC-45 but is a term of probation for FD-44. According to the State, “[w]hile the trial court did not expressly provide that Defendant’s placement in a halfway house was a term of probation for FD-44, such an inference is reached by considering both Judgments of Conviction in conjunction with the arguments of the parties.” Appellee’s Br. at 5.

From our review of the record and the judgments of conviction, it is clear that Tesch was sentenced in FC-45 to an executed term of eight years and that the six-month stay in a

halfway house is a term of probation of the suspended sentence in FD-44.¹ Tesch's eight-year executed sentence does not exceed the statutory maximum.

II. Inappropriateness

Tesch also challenges his sentence as inappropriate. Article 7, Section 6 of the Indiana Constitution authorizes this Court to independently review and revise a sentence imposed by the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. Indiana Appellate Rule 7(B) states, "The 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." "Although appellate review of sentences must give due consideration to the trial court's sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." *Purvis v. State*, 829 N.E.2d 572, 588 (Ind. Ct. App. 2005) (internal citations omitted), *trans. denied*. The defendant bears the burden of persuading us that the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

Tesch concedes that a sentence above the advisory is justified but asserts that the maximum sentence is inappropriate because he did not commit the worst of offenses and he is not the worst of offenders. Our supreme court has stated,

¹ Tesch contends that the plea agreement did not contain a stay in a halfway house as a term of probation in FD-44. However, Tesch is not appealing his sentence in FD-44. Tesch may seek relief in FD-44 under Indiana Post-Conviction Rule 1. We express no opinion as to whether his sentence in FD-44 is erroneous.

[T]he maximum possible sentences are generally most appropriate for the worst offenders. This is not, however, an invitation to determine whether a worse offender could be imagined. Despite the nature of any particular offense and offender, it will always be possible to identify or hypothesize a significantly more despicable scenario. Although maximum sentences are ordinarily appropriate for the worst offenders, we refer generally to the class of offenses and offenders that warrant the maximum punishment. But such class encompasses a considerable variety of offenses and offenders.

Buchanan v. State, 767 N.E.2d 967, 973 (Ind. 2002) (citations and quotation marks omitted).

Turning first to the nature of Tesch's offense, we observe that "the advisory sentence is the starting point our legislature has selected as an appropriate sentence for the crime committed." *Anglemyer*, 868 N.E.2d at 494. Tesch pretended he had a gun, threatened to shoot a motel clerk, and stole \$146. It is not a particularly egregious offense.

As to Tesch's character, his extensive criminal history reveals him to be a career criminal. Tesch's convictions begin in 1989. That year he was convicted for class C felony burglary and class D felony receiving stolen property. In 1990, he was found guilty of theft by unlawful taking in Kentucky and two counts of theft and two counts of burglary in Indiana.² In 2001, he was convicted of possession of marijuana in Kentucky. In 2002, he was found guilty of class D felony maintaining a common nuisance in Indiana and operating a vehicle under the influence and operating on a suspended revoked license in Kentucky. In 2003, he pled guilty to class A misdemeanor driving with a suspended license and class D felony theft in Indiana. In 2005, he was convicted of possession of a controlled substance and sentenced to five years. This is a criminal history spanning twenty years, consisting of thirteen prior convictions. We observe that Tesch had only been out of jail since October 1,

2007, when he committed the instant offense in December 2007. We conclude that Tesch has failed to carry his burden to show that his sentence is inappropriate.

Affirmed.

BAKER, C.J., and DARDEN, J., concur.

² The presentence investigation report does not consistently provide the class of offense.