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FILED
Jun 10 2011, 9:44 am
CLERK
of the supreme court, court of appeals and tax court

IN THE
COURT OF APPEALS OF INDIANA

LELAND STEPHENS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A05-1011-CR-679
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Linda Ralu Wolf, Judge
Cause No. 10C03-0810-FD-154

June 10, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Leland Stephens appeals his sentence for Class D felony theft. We affirm.

Issues

Stephens raises three issues, which we restate as:

I. whether the trial court properly determined that Stephens was entitled to no presentence credit time;

II. whether the trial court properly ordered Stephens's sentence in the present case to be served consecutive to a sentence imposed in a different case; and

III. whether Stephens's sentence is inappropriate.

Facts

The instant case concerns charges filed by the State on October 14, 2008, when it alleged Stephens had committed theft in Delaware County. Stephens was not arrested at this time. The theft occurred in August 2008 at a Wal-Mart, when Stephens used a cash register key he had obtained while previously employed by Wal-Mart to remove $828 in cash from several registers. At the time of this theft, Stephens already stood charged with three counts of theft in Allen County. That charging information had been filed in July 2008, but Stephens was not arrested at the time.

In April 2009, Stephens was convicted in Illinois of burglary for an offense committed in 2008. Stephens completed the executed portion of his sentence for his offense and was released to parole on January 15, 2010, at which time he was transferred to the Allen County jail for the charges he faced there. Stephens was sentenced for those

charges on June 4, 2010, and began serving his sentence with the Department of Correction ("DOC").

The Delaware County trial court became aware of Stephens's presence in Indiana at the Westville Correctional Facility in September 2010. On September 24, 2010, Stephens was returned to the Delaware County jail for an initial hearing on the outstanding theft charge in that county. Stephens pled guilty to that charge. On October 18, 2010, the trial court sentenced Stephens to a term of two years, to be served consecutive to his sentence for the Allen County offenses. Stephens now appeals.

Analysis

I. Credit Time

The first issue raised in Stephens's brief is whether he was properly denied credit time for time spent incarcerated before he was sentenced in the present case. Specifically, Stephens seeks credit for time he spent incarcerated for the Allen County offenses and while a "hold" was placed on him from Delaware County to face the pending charge there. At this sentencing hearing, Stephens contended that a "hold" existed from January 15 to June 28, 2010, but there is no evidence in the record to this effect.

Stephens's brief acknowledges that this is not a colorable argument. In order to earn presentence credit time, a defendant must be subject to pretrial confinement, and that confinement must be a result of the criminal charge for which sentence is being imposed. Payne v. State, 838 N.E.2d 503, 510 (Ind. Ct. App. 2005), trans. denied. If a person is

incarcerated awaiting trial on more than one charge and is later sentenced to concurrent terms for the separate crimes, he or she is entitled to receive credit time applied against each separate term. Id. "However, if the defendant receives consecutive terms, he or she is only allowed credit time against the total or aggregate of the terms." Id.

Because Stephens received consecutive sentences for the Allen County and Delaware County convictions, he was entitled to presentence credit time only for the aggregate of his sentences. Stephens does not contend that he did not receive credit time when he was sentenced in Allen County. Thus, as Stephens's attorney essentially concedes, the Delaware County trial court did not err in refusing to grant additional presentence credit time to Stephens.

II. Consecutive Sentences

Next, we address Stephens's argument that the trial court should not have ordered his sentence to be served consecutive to the sentence imposed for the Allen County convictions. Regarding consecutive sentences, Indiana Code Section 35-50-1-2 provides in part:

> (c) Except as provided in subsection (d) or (e), the court shall determine whether terms of imprisonment shall be served concurrently or consecutively. The court may consider the:
>
> > (1) aggravating circumstances in IC 35-38-1-7.1(a); and
> >
> > (2) mitigating circumstances in IC 35-38-1-7.1(b);
>
> in making a determination under this subsection. The court may order terms of imprisonment to be served consecutively

> even if the sentences are not imposed at the same time. However, except for crimes of violence, the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under IC 35-50-2-8 and IC 35-50-2-10, to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.
>
> (d) If, after being arrested for one (1) crime, a person commits another crime:
>
> > (1) before the date the person is discharged from probation, parole, or a term of imprisonment imposed for the first crime; or
> >
> > (2) while the person is released:
> >
> > > (A) upon the person's own recognizance; or
> > >
> > > (B) on bond;
>
> the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed.

Stephens contends, and the State concedes, that the "mandatory" consecutive sentencing provision under subsection (d) of the statute does not apply with respect to the Allen County and Delaware County offenses. Although Stephens committed the Delaware County offense after having been already <u>charged</u> with the Allen County offenses, he had not yet been <u>arrested</u> for them, as the statute requires.

Nonetheless, subsection (c) of the statute authorizes a trial court, within its discretion, to order a sentence to be served consecutive to a sentence imposed by a

different court in a different case. See Berry v. State, 689 N.E.2d 444, 446 (Ind. 1997). Thus, the trial court here was statutorily authorized to order Stephens's sentence in the present case to be served consecutive to the Allen County sentence. Moreover, we disagree with Stephens that the trial court mistakenly believed it was required to order consecutive sentences and that we ought to remand to the trial court for resentencing. The trial court stated, in both its oral and written sentencing statements, that it was ordering consecutive sentences "[p]ursuant to Indiana Code Section 35-50-1-2 . . . ." Tr. p. 43; App. p. 66. The trial court did not specify that it was ordering consecutive sentences pursuant to the mandatory subsection (d) of the statute, but rather cited the statute as a whole, which allows for either permissive or mandatory consecutive sentencing. We conclude that it is unnecessary to remand this case for the trial court to reconsider whether to utilize its discretion to impose consecutive sentences.[1]

III. Inappropriateness

Finally, we address Stephens's contention that his two-year sentence is inappropriate under Indiana Appellate Rule 7(B) in light of his character and the nature of the offense. Although Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id.

[1] Stephens does not argue that the consecutive sentences here violate the "single episode of criminal conduct" limitation on consecutive sentencing. Stephens also does not develop a separate argument that the trial court abused its discretion in ordering consecutive sentences, or that it was inappropriate to do so.

"Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id.

The principal role of Rule 7(B) review "should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived 'correct' result in each case." Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008). We "should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count." Id. Whether a sentence is inappropriate ultimately turns on 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. Id. at 1224.

Stephens received a sentence six months above the advisory sentence for a Class D felony, which is one and a half years. See I.C. § 35-50-2-7(a). Regarding the nature of the offense, Stephens used a key he had obtained during his previous employment by Wal-Mart to open cash registers at a Wal-Mart store and steal over $800 in cash. The State concedes that the nature of this offense is "unremarkable." Appellee's Br. p. 6. Although we generally agree that this offense was not especially heinous, neither are there extenuating circumstances that would warrant minimizing the seriousness of a planned undertaking to steal from one's previous employer.

Turning to Stephens's character, he did plead guilty shortly after being brought to court on this charge and without the benefit of a negotiated plea agreement. This does

reflect positively upon his character. See Marlett v. State, 878 N.E.2d 860, 866 (Ind. Ct. App. 2007), trans. denied. On the other hand, Stephens has an extensive criminal history consisting of seven misdemeanor and four felony convictions. The felony convictions are for the three counts of theft in Allen County and the Illinois burglary conviction, all for offenses committed in 2008. The misdemeanor convictions began in 1994 and run through 2008, are from Michigan, Iowa, and Missouri, and are for two counts of operating while intoxicated, two counts of carrying a concealed weapon, domestic violence, operating while suspended, and theft.

The weight given to a defendant's criminal history "is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability." Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006). The sheer number of Stephens's prior convictions, the proximity in time of a number of the offenses, and the similar nature of a number of them to the present offense all weigh heavily against Stephens. Stephens seems to contend that we ought not assign too much weight to the number of property offenses he committed in 2008 that he characterized as a "crime spree." Tr. p. 7. This was not a situation, however, in which Stephens committed a number of related crimes within the space of a day or two. Instead, over the course of several months, Stephens committed a number of property crimes in three different states: Indiana, Illinois, and Missouri. If anything, this extended "crime spree" arguably warrants aggravating, not mitigating, weight. We cannot say Stephens has met

his burden of persuading us that his two-year sentence is inappropriate in light of his character and the nature of the offense.

Conclusion

As Stephens's counsel has conceded, the trial court did not err in refusing to grant any presentence credit time to Stephens for this offense. There also is no indication of error in the trial court's decision to order Stephens's sentence for this offense to be served consecutive to the sentence imposed in Allen County. Finally, Stephens's sentence is not inappropriate. We affirm.

Affirmed.

RILEY, J., and DARDEN, J., concur.