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.

FILED
Jun 22 2009, 9:19 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

BRIAN J. MAY
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

KELLY A. MIKLOS
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JUAN HERNANDEZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0903-CR-88
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D01-0804-FA-12

June 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Juan Hernandez appeals his sentence for Class B felony robbery and Class B felony criminal confinement. We affirm.

Issue

Hernandez raises one issue, which we restate as whether the trial court abused its discretion by sentencing him to consecutive terms.

Facts

On February 29, 2008, Hernandez and his cousin were driving in South Bend with the victim, T.N., in the car. They originally told T.N. they would take her to the west side of South Bend. At some point, Hernandez had a dispute with T.N. about how much money he owed her. He pointed a gun at her and forced her to give him the money. Instead of taking her to the west side, Hernandez drove her forty-five minutes away to Walkerton. He let her out of the car on the side of the road. T.N. was unfamiliar with the area and went to a nearby home for help.

The State charged Hernandez with Class A felony rape, Class A felony criminal deviate conduct, Class B felony criminal confinement, Class B felony robbery, Class C felony robbery, and Class C felony battery. Hernandez pled guilty Class B felony criminal confinement and Class B felony robbery on October 28, 2008. The remaining charges were dismissed. The trial court sentenced Hernandez on November 19, 2008. It sentenced him to ten years on each count, to run consecutively. This appeal followed.

Analysis

Hernandez states in the heading of his argument that his sentence was inappropriate under Indiana Appellate Rule 7(B), but then proceeds throughout the brief to reference the trial court's abuse of discretion. However, inappropriate sentence and abuse of discretion arguments are to be analyzed separately. See King v. State, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008). Hernandez does not use any of the terms of Indiana Appellate Rule 7(B) or discuss the merits of his character or the nature of the offenses. By failing to develop or provide cogent argument specific to the appropriateness of the sentence under this rule, Hernandez has waived this claim for appeal. See Ind. Appellate Rule 46(A)(8).

Waiver notwithstanding, Hernandez has provided a sufficiently cogent argument to prompt a review of the trial court's discretion in sentencing him. Hernandez contends the trial court relied on an improper aggravator in ordering consecutive sentences. We review a trial court's identification of aggravating and mitigating circumstances for an abuse of discretion. Anglemyer v. State, 868 N.E.2d 482, 490-91 (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 drawn therefrom. Id. at 490. We cannot review the relative weight given to these aggravators and mitigators. Id. at 491.

In determining whether to impose consecutive or concurrent sentences, the court may consider aggravating and mitigating circumstances. See Ind. Code § 35-50-1-2(C). "Even a single aggravating circumstance may support the imposition of consecutive

sentences." Mathews v. State, 849 N.E.2d 578, 589 (Ind. 2006). Hernandez contends that the trial court improperly relied on the victim's physical injuries and emotional trauma as detailed in the victim impact statement in ordering consecutive sentences.[1] He argues that such reliance was improper because the battery charge had been dismissed and there was not additional evidence of physical injury. The sentencing transcript, however, demonstrates that although the trial court noted the emotional hardship suffered by the victim, it did not rely on this factor to impose consecutive sentences. Instead, the trial court relied on the length of the confinement as the aggravator. It stated:

> I understand you accepted responsibility by pleading guilty to the two counts that you did plead guilty to; however, I note that in exchange, count I rape, and count II, criminal deviate conduct, were dismissed. The more serious felonies. So I'm not giving any weight to the plea. You do show some remorse, but you do have a prior criminal history.[2] So I'm finding the aggravators and mitigators equal.
>
> I agree with what the state said. This was a confinement. Well, to begin with, it was a confinement that lasted far longer than was necessary. It was a confinement that lasted for a significant period of time. So looking at that fact, I find that an aggravating factor as well, sufficient to justify the imposition of consecutive sentences. I am sentencing you to 10 years on each of these sentences. These sentences are not suspended.
>
> You could have done very little more to harm a human being than you did. And you may be young, but you are old enough to know that what you did was a horrible thing to another

[1] The victim impact statement is not part of the record before us.

[2] The detailed criminal history is not part of this record, as it appears that the confidential volume II of the Appellant's Appendix is not included here. The trial court and both attorneys discuss Hernandez's criminal history during the guilty plea and sentencing hearings, so we were able to review that information as contained in the transcripts.

> person, who had done nothing to you. You just selected her and terrorized her.

Tr. pp. 12-13.

Prior to listing these aggravators and mitigators, the trial court referenced the victim's impact statement. The trial court did so in response to Hernandez's statement that he "didn't hurt her at all." Id. at 11. The trial court explained:

> She was injured in the course of this whole event, was in the hospital and has suffered since. If you had the opportunity to read this, what she talked about is what sounds like post-traumatic stress disorder. Which she may have forever, and which she is unable to attend treatment for, because she can't afford it.

Id. at 12. The trial court merely noted these facts, but did not rely on them in calculating Hernandez's sentence. It was because Hernandez drove the victim far from South Bend and confined her much longer than necessary that the trial court imposed the consecutive sentences. The trial court explicitly found that "it was a confinement that lasted far longer than necessary," which was an aggravating factor "sufficient to justify imposition of consecutive sentences." Id. at 13. To the extent that Hernandez implies such weight should not have been given to this aggravator, we do not engage in reweighing these factors on appeal. See Anglemyer, 868 N.E.2d at 490. It was not an abuse of discretion for the trial court to rely on this finding in ordering consecutive sentences.

Conclusion

The trial court did not abuse its discretion in sentencing Hernandez. Its selection of consecutive sentences was supported by the record and not an abuse of discretion. We affirm.

Affirmed.

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