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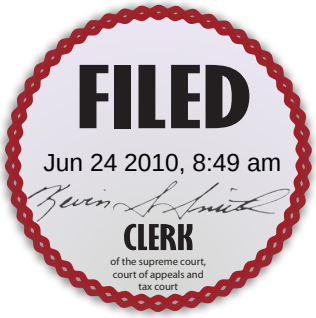


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# IN THE
# COURT OF APPEALS OF INDIANA

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|---|---|---|
| VIRGIL J. SMITH, | ) | |
| | ) | |
| Appellant- Defendant, | ) | |
| | ) | |
| vs. | ) | No. 85A02-1001-CR-176 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee- Plaintiff, | ) | |

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APPEAL FROM THE WABASH CIRCUIT COURT
The Honorable Robert R. McCallen, III, Judge
Cause No. 85C01-0908-FB-128

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**June 24, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

## Case Summary and Issue

Virgil Justin Smith pled guilty to robbery, a Class B felony, and was sentenced to sixteen years, two suspended, to be served consecutive to his term of imprisonment in an unrelated case. Smith appeals his sentence, contending it is inappropriate in light of the nature of his offense and his character. Concluding a consecutive sentence is inappropriate, we revise and remand to the trial court to order concurrent sentences.

## Facts and Procedural History

On July 16, 2009, Smith, armed with a BB gun, entered First Financial Bank in North Manchester, Indiana, approached a teller, told her to put money in the bag he handed her, and took the money. Smith was charged with robbery, a Class B felony, and on December 18, 2009, filed a pro se[1] motion to change his plea from not guilty to guilty. He did not have a formal plea agreement with the State; however, at the change of plea hearing, the State agreed to dismiss an unrelated dealing charge in exchange for Smith's open plea. The trial court accepted Smith's plea of guilty to robbery and set the case for sentencing in conjunction with the sentencing scheduled in an unrelated case for possession of a narcotic drug. Prior to announcing Smith's sentence, the trial court found the following aggravating circumstances: Smith's criminal history, that he was on probation at the time of this offense, and that he is in need of rehabilitation best provided by commitment to a correctional facility. The trial court also found the following mitigating circumstances: Smith pled guilty, he showed genuine remorse, and he assisted law enforcement in recovering evidence of his crime. The trial court ordered Smith to

[1] The trial court originally appointed counsel for Smith, but at Smith's request, counsel's appearance was withdrawn. The same counsel was later reappointed as Smith's "legal advisor" with Smith's consent, and appeared alongside him at the change of plea and sentencing hearings.

serve sixteen years, with two years suspended to probation, for the robbery conviction. Because Smith was on probation out of Howard County at the time he committed the instant offense, the trial court was required by statute to order this sentence to be consecutive to the sentence in that case. In addition, the trial court ordered the sentence to be served consecutive to the sentence imposed in the possession case on that same date.[2] Smith now appeals his sentence.

## Discussion and Decision

### I. Standard of Review

This court has authority to revise a sentence "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." Ind. Appellate Rule 7(B). In determining whether a sentence is inappropriate, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied; cf. McMahon v. State, 856 N.E.2d 743, 750 (Ind. Ct. App. 2006) ("[I]nappropriateness review should not be limited … to a simple rundown of the aggravating and mitigating circumstances found by the trial court."). The burden is on the defendant to demonstrate that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). "[W]hether we regard a sentence as appropriate at the end of the day turns on our sense of 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." Cardwell v. State, 895 N.E.2d 1219, 1224 (Ind. 2008).

[2] The pre-sentence investigation report for the unrelated Wabash County case indicates Smith had entered a plea agreement in that case pursuant to which he was to be sentenced to a term of three years.

## II. Consecutive Sentences

Smith concedes two things: 1) he stated at the sentencing hearing that he had no objection to the State's recommendation that his sentence be sixteen years with two suspended, see transcript at 61, see also Ind. Code § 35-50-2-5 ("A person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years"); and 2) the sentence was required by statute to be consecutive to the Howard County sentence, see Ind. Code § 35-50-1-2(d) ("If, after being arrested for one (1) crime, a person commits another crime . . . before the date the person is discharged from probation . . . for the first crime . . . the terms of imprisonment for the crimes shall be served consecutively . . . ."). His sole argument on appeal, therefore, is that ordering this sentence to be served consecutive to his sentence in the other Wabash County case resulted in an inappropriate sentence.

Concerning the nature of Smith's offense, he was charged with robbery as a Class B felony for knowingly or intentionally taking property from First Financial Bank by using or threatening the use of force on the teller and/or by putting the teller in fear while armed with a deadly weapon. The testimony Smith gave at his change of plea hearing indicated he entered the bank armed with a non-functioning BB gun and told the teller, "You're okay. Nobody's gonna [sic] get hurt." Tr. at 40. A BB gun is considered a deadly weapon, see Merriweather v. State, 778 N.E.2d 449, 457 (Ind. Ct. App. 2002) ("Although not firearms, pellet or BB guns can be considered deadly weapons within the statute"), and Smith conceded that the teller and other people in the bank would not have known it was a BB gun, let alone that it was unloaded. The teller testified at the

sentencing hearing that she continues to think about the robbery. However, as the presence of a deadly weapon and putting another in fear are accounted for in the charge, there is nothing particularly egregious about this robbery.

As to Smith's character, Smith has a criminal record consisting of one juvenile delinquency adjudication that ultimately resulted in his commitment to the Department of Correction, four misdemeanor convictions (operating while never licensed, conversion, public intoxication, and illegal possession of alcohol), and one felony conviction (burglary). He was on probation for the burglary conviction at the time he committed this offense, with a petition to revoke probation pending, and had a felony charge for robbery pending in another county. He was sentenced for an additional felony (possession of a narcotic drug) at the same time he was sentenced in the instant case. "The significance of a criminal history varies based on the gravity, nature and number of prior offenses as they relate to the current offense." Wooley v. State, 716 N.E.2d 919, 929 n.4 (Ind. 1999). Smith's prior offenses have primarily been offenses against property or drug- or alcohol-related. Smith testified he robbed the bank because he was "nursing an addiction." Tr. at 40. Smith's prior criminal history is clearly significant in relation to his commission of this offense against a person and the property of the bank because of his drug problem. However, as the trial court noted, Smith cooperated with police in the investigation of the robbery, pled guilty without the benefit of a written plea agreement – although the State did dismiss a pending charge – and was genuinely remorseful for his actions and the impact on his victims. The State noted that without Smith's cooperation, it "probably wouldn't have" the shoes he wore or the gun he used in the robbery, and acknowledged

that the prosecution was helped by having these items. Id. at 60. As to Smith's apology to the victims, the trial court stated, "I do believe you appear remorseful, which is not something I have found yet – I think that's probably the first time I've ever felt that way at a sentencing hearing." Id. at 63.

Smith was sentenced to sixteen years for a Class B felony, the advisory sentence for which is ten years. Although Smith's criminal history clearly supports some enhancement of his sentence, and the trial court has the discretion to impose consecutive sentences if warranted by the aggravating circumstances, see Ind. Code §§ 35-38-1-7.1(b), 35-50-1-2(c), given the nature of Smith's offense and particularly his character, we believe it is inappropriate to both enhance his sentence and order it served consecutively to another. Cf. Monroe v. State, 886 N.E.2d 578, 580 (Ind. 2008) (holding aggravating circumstances sufficient to impose enhanced, but not consecutive, sentences for five convictions of child molesting, and revising consecutive sentences totaling 100 years to concurrent sentences of fifty years for each count). Smith agreed a sixteen-year sentence was appropriate for his crime, but we remand to the trial court to order the sentence served concurrently with the sentence in his other Wabash County case.

## Conclusion

The trial court's order that Smith serve his sixteen-year sentence consecutively to another sentence is inappropriate in light of the nature of Smith's offense and his

character. We therefore revise the sentence and remand for the trial court to order the sentences to be served concurrently.

Remanded.

FRIEDLANDER, J., and KIRSCH, J., concur.