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IN THE
COURT OF APPEALS OF INDIANA

DAVID MICHAEL HARRIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A04-0809-CR-546
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0705-FC-28

JULY 9, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Senior Judge

Following a bench trial, David M. Harris (Harris) was convicted of two counts of forgery, Class C felonies (Counts I and V); Application Fraud, a Class D felony (Count II); Identity Deception, a Class C felony (Count III); two counts of Identity Deception, Class D felonies (Counts IV and VI)); Failure to Register as a Sex Offender, a Class D felony (Count VII); Failure to Possess a Valid Driver's License or Indiana Identity Card, a Class A Misdemeanor (Count VIII). He was also found to be a Habitual Offender (Count IX).

Under a corrected sentencing order, the aggregate sentence upon all counts, including those ordered to be served consecutively to sentences on other counts, was twenty-nine and one-half years.

Harris presents several arguments upon appeal. They are as follows:

I. Whether the sentencing order miscalculates the aggregate executed sentence to be twenty-nine and one-half years instead of twenty-seven and one-half years;

II. Whether the State presented sufficient evidence that Harris knowingly or intentionally failed to possess a valid driver's license or Indiana Identification card;

III. Whether the State presented sufficient evidence to prove that the alleged Application Fraud was committed in Tippecanoe County;

IV. Whether the trial court abused its discretion in sentencing in that (a) the aggregate eleven-year sentence upon the two forgery conviction exceeded the maximum permissible for a single episode of criminal conduct and (b) the LSI-R (Level of Service Inventory) score was erroneously used as an aggravating factor.

V. Whether the sentence is inappropriate given the nature of the offenses and the character of the offender.

I. MISCALCULATION OF AGGREGATE SENTENCE

Harris asserts that the aggregate sentence imposed is actually twenty-seven and one-half years rather than twenty-nine and one-half years as stated by the court in its corrected sentencing order. (Appellant's App. at 31).[1] Harris claims that "the two year terms on Counts II, III and VI are concurrent with the terms on the remaining counts." (Appellant's Brief at 12).[2]

Despite the State's concession, Harris fails to note that the two-year sentence upon Count IV, to which the two-year sentence upon Count VI was to run concurrently, was consecutive to the five-year sentence upon Count I.[3] The two-year sentence upon Count IV was not ordered concurrent with any other sentence. Thus, while the sentence on Count VI was concurrent with the sentence on Count IV, those two sentences were not concurrent with the sentences upon Counts II and III. They were consecutive to the sentences on Counts I, II and III.

We do not perceive that the court erred in calculating the aggregate executed sentence at twenty-nine and one-half years. Nevertheless, because we reverse Harris's convictions and sentences under Count VIII and Count II, as discussed under Parts II and III, because we remand for resentencing upon all other convictions, and because in resentencing the court must review its corrected sentencing order as set forth in the record

[1] The State concedes that this is a "typographical error" and "does not oppose correction of this scrivener's error." (Appellee's Brief at 6).

[2] The corrected sentencing order set forth that the two-year sentence upon Count II was to be consecutive to the five-year sentence upon Count I. The two-year sentence upon Count III was concurrent with the sentence upon Count II. The two-year sentence upon Count VI was concurrent with the two-year sentence upon Count IV.

[3] The five-year sentence upon Count I was enhanced by eleven years as a result of the Habitual Offender determination.

before us, it is necessary that the court reexamine the aggregate sentence in the light of appellant's contentions, the State's concessions, and our holdings in this case.

II. INSUFFICIENT EVIDENCE OF KNOWING OR INTENTIONAL FAILURE TO POSSESS A VALID DRIVER'S LICENSE OR INDIANA IDENTIFICATION CARD.

Harris alludes to I.C. 11-8-8-15, effective March 24, 2006, requiring a sex offender to keep in his or her possession a valid Indiana driver's license or a valid Indiana identification card.[4] Harris does not, however, note that the statute applies only to crimes committed after June 30, 2006.[5] Harris's several convictions of Child Molesting took place in 1991 and 1995. Those crimes, therefore, could not have been committed after June 30, 2006.

Harris's argument treats the statute as applicable but asserts insufficient evidence that he had the requisite culpability for the offense. The State likewise fails to make an argument as to applicability of the statute as a threshold question. These failures, however, do not relieve this court from correctly deciding the case under the applicable law. Green v. State, 232 Ind. 596, 115 N.E.2d 211 (Ind. 1953); Gardner v. State, 591 N.E.2d 592 (Ind. Ct. App. 1992). Perhaps more to the point is the premise that because there are no common law crimes in Indiana, a person may be convicted and sentenced for a crime only as that crime is defined and limited by the Indiana General Assembly. See Green, 115 N.E.2d at 213.

I.C. 11-8-8-15, which defines and limits the crime therein set forth, was not

[4] The statute was amended in 2007 but such amendment is not germane to this case.
[5] P.L. 140-2006 §42

applicable to the facts of this case. Accordingly we hold, *sua sponte*, that the conviction and sentence for Failure to Possess a Valid Driver's License or an Indiana Identification card must be vacated and set aside.

III. INSUFFICIENT EVIDENCE OF ALLEGED APPLICATION FRAUD IN TIPPECANOE COUNTY

Harris correctly claims that venue, although not an element of the crime, is a necessary fact to be proved by the State, albeit by only a preponderance of the evidence. See Campbell v. State, 500 N.E.2d 174 (Ind. 1986). Here, the State alleged that the crime took place in Tippecanoe County. Harris asserts that documents from the Bureau of Motor Vehicles reflect that it had a driver's record for Richard Blair in Lafayette and that a chauffeur's license was issued for Blair.[6] He notes, however, that there was no indication where Harris applied for the license or the ID card. During an investigation of Harris for a parole violation warrant, several documents were found at the residence where Harris was living. These documents bore the name of Richard Blair. However, with respect to the driver's license and identity card, Detective Haltom who was the lead investigator testified that he did not know whether application for those was made in Tippecanoe County. (Appellant's App. at 127).

The State concedes that the evidence, circumstantial or otherwise, failed to show that Harris committed the alleged Application Fraud in Tippecanoe County. This concession is well taken for we hold that there was a lack of evidence that the application or applications were made in Tippecanoe County. Accordingly, the conviction and

[6] The State's case reflected that Harris had used the name of Richard D. Blair in obtaining a false driver's license and Indiana identity card.

sentence upon Count II must be vacated and set aside.

IV. THE COURT ERRED IN SENTENCING HARRIS BECAUSE THE TWO FORGERY CONVICTIONS WERE FOR A SINGLE CRIMINAL EPISODE AND LSI-R SCORE WAS WRONGLY CONSIDERED AS AN AGGRAVATOR

A.

Harris was sentenced for five years upon Count I, the forgery charge involving the driver's license[7]. He was sentenced to a term of six years upon Count V, the forgery charge involving the identification card. This sentence was to run consecutively to the sentence upon Count I. The aggregate unenhanced sentences upon these two offenses was, therefore, eleven years.

Harris points to I.C. 35-50-1-2(c) which provides, insofar as applicable, the total of the consecutive terms of imprisonment for felony convictions arising out of a criminal episode may not exceed the advisory sentence for a felony which is one class higher than the most serious of the felonies for which the defendant has been convicted. Here, both crimes were Class C felonies. The advisory sentence for the next highest class, Class B, is ten years. I.C. 35-50-2-5. Therefore, if as contended the two crimes were part of the same criminal episode, the aggregate of the consecutive sentences could not exceed ten years. The sentences imposed were excessive by one year.

By statute, "episode of criminal conduct" is defined as "offenses or a connected series of offenses that are closely related in time, place, and circumstance." I.C. 35-50-1-2 (b). Here, the two crimes were alleged to have been committed on the same day, March

[7] This sentence was enhanced by an additional eleven years for the habitual offender determination.

1, 2007. It was on this date that the police went to the residence where Harris was living in order to serve a parole violation warrant. During this occurrence, the chauffeur's license and the Indiana Identification card were found in Harris's possession.

The chauffeur's license, State's Exhibit 2, contained the photograph of Harris but was issued in the name of Richard Blair. It had been issued on January 17, 2007. (Appellant's App. at 47). The identification card also was issued in the name of Richard Blair and bore the photo of Harris. It, however, had been issued on September 29, 2006. It is therefore apparent that the two forgery charges were not premised upon causing the two documents to be issued, made or uttered on March 1, 2007, but rather upon being in possession of those two documents on that date.

The two offenses of possession occurred at the same time and place and under the same circumstance. The offenses were simultaneous and contemporaneous as discussed in Tedlock v. State, 656 N.E.2d 273, 276 (Ind. Ct. App. 1995) and as cited with approval by our Supreme Court in Smith v. State, 770 N.E.2d 290, 294 (Ind. 2002).

We hold that the two forgery convictions were part of the same criminal episode and that the aggregate eleven-year sentence is excessive by one year. The case is remanded for resentencing upon Counts I and V.

B.

At the time of sentencing the court stated, "A second aggravating circumstance is the defendant's LSIR Score of twenty-five." (Appellant's App. at 234). Citing Rhodes v. State, 896 N.E.2d 1191 (Ind. Ct. App. 2008), Harris correctly observes that such constitutes an abuse of discretion.

A LSI-R is a standardized actuarial instrument containing some fifty-four items producing a summary risk score to reflect the propensity to commit future criminal acts. Id. at 1195 . The Rhodes court held, "While this actuarial instrument may be a helpful consideration for a probation department in determining rehabilitative services for an offender, its use by a trial court to assess a defendant's propensities is contrary to the essential function of the trial court in sentencing." Id.

In view of this impropriety, Harris notes that only two aggravators as set forth by the court remain: criminal history and that "prior attempts at rehabilitation have been unsuccessful." (Appellant's App. at 234). Again, Harris correctly notes that the latter factor is derivative of criminal history and cannot be used as a separate aggravating circumstance. Morgan v. State, 829 N.E.2d 12, 17 (Ind. 2005).

In this light, we conclude that the trial court's sentencing statement is an inadequate basis upon which to premise the various sentences imposed by the corrected sentencing order. The case must be remanded for resentencing upon all counts.[8]

CONCLUSION

The conviction and sentence under Count VIII, Failure to Possess a Valid Indiana Driver's License or an Indiana Identification Card, is reversed and ordered to be vacated and set aside.

The conviction and sentence under Count II, Application Fraud, is reversed and ordered to be vacated and set aside.

[8] Our determination and our remand renders it unnecessary to consider Harris's argument that the sentences are inappropriate given the nature of the offenses and the character of the offender under Indiana Appellate Rule 7 (B)

The case is remanded for resentencing upon all counts in conformity with this decision.

DARDEN, J., and MATHIAS, J., concur.