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IN THE
COURT OF APPEALS OF INDIANA

ADRON ROBINSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 09A04-0902-CR-98
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CASS SUPERIOR COURT
The Honorable Richard Maughmer, Judge
Cause No. 09D02-0802-FC-005

July 15, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Adron Robinson appeals the sentence imposed by the trial court after his plea of guilty to battery with a deadly weapon, a class C felony.

We affirm.

ISSUES

1. Whether the trial court abused its discretion when it ordered Robinson to serve a six-year executed sentence.

2. Whether Robinson's sentence is inappropriate.

FACTS

On the evening of February 5, 2008, Robinson was drinking with friends when he first met Terry Smith. The group went to a bar, the drinking continued, and Smith used the racial epithet "n*****" directed at Robinson. Robinson warned him not to use it again. After Smith "said it to [him] again," an argument ensued, and Robinson "threatened to beat him up if he ever said it again." (Tr. 23[1]). A friend of Robinson's argued with Smith about his language, and the bartender asked Smith to leave. Smith "left the bar." (Tr. 24). "At that point, . . . [Robinson] said, okay, he's going outside, I'm going out here [sic] and beat him up." *Id.* Robinson followed Smith outside. Smith "pulled out [a] gun and started waving it." *Id.* Robinson "got into [a] struggle over the gun, . . . got control of it, . . . , and then [he] shot him twice." *Id.* One bullet struck Smith in the back of his neck, grazing the skin, and the other entered his back.

[1] Robinson submitted nine separate transcripts. The facts and quotations in this paragraph are from Robinson's testimony found in the transcript of the January 13, 2009 sentencing hearing.

On February 6, 2008, the State charged Robinson with battery by means of a deadly weapon, a class C felony, and conspiracy to commit battery, a class C felony. At the initial hearing, Robinson admitted that he had another criminal charge pending.

On December 16, 2008, Robinson tendered to the trial court a written plea agreement encompassing both pending charges. Robinson agreed to plead guilty to battery, as a class C felony; and to dealing in marijuana, as a class D felony, with sentencing as a class A misdemeanor. The State agreed to dismiss all other pending charges. The parties agreed that on the drug offense, the sentence would be one year suspended to probation but consecutive to the battery sentence; for the battery offense, the sentence was left to the trial court's discretion but "not [to] exceed six (6) years." (App. 11). At the guilty plea hearing on December 16, 2008, Robinson admitted that on August 5, 2007, he had arrived at a particular location with more than thirty grams (but less than ten pounds) of marijuana in his possession with the intent to sell it. Robinson further admitted that on February 5, 2008, he had knowingly or intentionally touched Smith in a rude, insolent, or angry manner with a gun. The trial court took Robinson's proffered guilty pleas under advisement, ordered a pre-sentence investigation report (PSI), and set a sentencing hearing for January 13, 2009.

At the sentencing hearing on January 13, 2009, Robinson testified to the events of the February 5, 2008 shooting. He also presented evidence of his having completed the Right Step program in jail and having had no disciplinary problems while in jail; his bond with his fifteen-month old son; the business he started in March of 2007 to promote positive rap music; his completion of a semester at Ivy Tech in the fall of 2007, and his

involvement in student government and community service; his award for poetry written while incarcerated; and his remorse for the "harm and pain" he caused Smith and his family. (Sent. Tr. 17). Counsel urged that Robinson's guilty plea, along with the foregoing mitigators, be given significant consideration, and asked for imposition of an executed term of two to four years.

The State noted that the facts of the case would have supported "a much more serious offense," and it "could easily have been a murder case." (Sent. Tr. 27, 28). The State also noted that it was Robinson who "decided to shoot Mr. Smith twice," and that one of the bullets fired by Robinson remained lodged in Smith's back. (Sent. Tr. 27). The State further noted that at the time of the shooting, Robinson had been out on bond for the August 2007 drug charge. A letter from Smith stated that the bullet remaining in his body caused him great pain and that surgery would be required to remove it. The State asked that the trial court sentence Robinson to a six-year executed term.

The trial court accepted Robinson's plea of guilty to the battery. It found Robinson's "genuine" remorse to be a mitigator. (Sent Tr. 39). As to his guilty plea, the trial court found it a mitigating circumstance insofar as "sav[ing] the county some resources by not proceeding to trial" but noted the "benefit" Robinson received with respect to sentencing for the lesser drug charge.[2] The trial court found as aggravating circumstances that Robinson was out on bond for another offense when he committed the

[2] The cause number for the drug offense, "FC-21," indicates that it was filed as a C felony offense. *See* Ind. Admin. R. 8(B). The plea agreement reflects that Robinson agreed to plead guilty to an "amended" charge of dealing in marijuana. (App. 11). At the December 16, 2008, guilty plea hearing, the trial court stated that "in anticipation" of the plea agreement, the State would be proceeding with "an information alleging the crime of dealing in marijuana as a class D felony." (December 16, 2008 Tr. 3-4).

battery, and that he had a prior misdemeanor criminal history. The trial court concluded that "the aggravating circumstances outweigh[ed] the mitigating circumstances," and ordered him to serve six years executed. (Tr. 39).

DECISION

1. Abuse of Discretion

Our Supreme Court has provided the considerations to be applied in appellate review of the sentence imposed by the trial court under the current "advisory" sentencing scheme. *See Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on re'hg on other grounds*, 875 N.E.2d 218 (Ind. 2007). First, the trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." *Id.* Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion; however, the weight given to those reasons, *i.e.*, to particular aggravators or mitigators, is not subject to appellate review. *Id.* The lack of a reasonably detailed sentencing statement, or a defect as to the trial court's findings or non-findings of aggravators and mitigators, is an abuse of discretion. *Id.*

Robinson argues that the trial court's imposition of a six-year executed sentence[3] was an abuse of its discretion because it "considered improper aggravating factors" and

[3] The "advisory" sentence for a class C felony is four years, with not more than four years added for aggravating circumstances and not more than two years subtracted for mitigating circumstances. *See* Ind. Code § 35-50-2-6. We bring to the attention of Robinson's counsel that such is no longer referred to as the "presumptive sentence." *See Anglemyer*, 868 N.E.2d at 488 (Ind. 2007) (In 2005, the "legislature eliminated fixed presumptive terms in favor of 'advisory sentences' that are between the minimum and maximum terms.")

"failed to consider a significant number of mitigating circumstances." Robinson's Br. at 10, 16. We disagree.

As to the assertion of improper aggravating factors, Robinson first asserts that the trial court's reference to his being on bond for the drug charge at the time of the battery was erroneous. He acknowledges that by statute, violating a condition of pretrial release is an aggravating factor for sentencing purposes. Nevertheless, he argues that because "the trial court's sentencing statement does not provide any specific reasoning as to why this factor was aggravating with respect to the charge of battery," *id.* at 12, such is an improper factor here. He cites to no authority for that proposition, and our Supreme Court held that the finding of an aggravating factor is an abuse of discretion if "the record does not support" the existence of that factor. *Anglemyer*, 868 N.E.2d at 490. However, Robinson admitted that he was on bond when he committed the battery, and the record supports the same.

He next asserts that the trial court abused its discretion in considering his criminal history to be an aggravating factor because his prior misdemeanor offenses were nonviolent. In effect, Robinson challenges the weight given by the trial court to his criminal history. Inasmuch as the trial court has no obligation "to 'weigh' aggravating and mitigating factors against each other when imposing sentence," such a challenge cannot prevail. *Id.* at 491.

Finally, Robinson argues that the trial court abused its discretion when it "considered [his] discharge [from the military] of 'Honorable with General Conditions' as an aggravating factor." Robinson's Br. at 15. The trial court stated as follows:

> As an aggravating circumstance I find that you were on probation when the immediate crimes were committed [sic] and also you have a prior misdemeanor criminal history in addition to that I saw you've received a couple of article 15's which is the same as a misdemeanor conviction in the military. And you received a general as opposed to an honorable discharge. So I find the aggravating circumstances outweigh the mitigating circumstances and . . . justify an aggravating sentence. . . .

(Tr. 39). The trial court did not specify that it found the nature of his military discharge to be an aggravating factor. Rather, it appeared to consider it in the context of Robinson's overall disrespect for the commands of the law, and the record supports the finding that Robinson had a criminal history reflecting such.

Robinson next offers a series of seventeen circumstances which he argues the trial court "overlooked" and failed to find to be mitigating circumstances. Robinson's Br. at 17. He argues that the trial court "abused its discretion by failing to find <u>and</u> <u>balance</u> these significant mitigating circumstances." *Id.* at 19 (emphasis added).

The trial court abuses its discretion when it fails to find mitigating circumstances "that are clearly supported by the record and advanced for consideration." *Anglemyer*, 868 N.E.2d at 491.

Robinson claims the trial court overlooked that his imprisonment would result in a hardship to his family relating to child visitation and financial support. However, the record reflects that he had no contact and provided no support to his older child; that his younger child was the subject of a guardianship, and that he provided no financial support but "got him little things" such as "a pacifier, bottles, baby items." (Tr. 9). Further, his counsel acknowledged that hardship to Robinson's children might not be "a

mitigator but . . . something to consider." (Tr. 75). Thus, the record does not reflect that such was clearly presented by Robinson or clearly supported as a mitigator.

Robinson additionally asserts that certain circumstances -- his completion of a semester in college; his college, community and charity activities; his creation of a record label promoting positive rap music; his poetry award; his completion of a drug and alcohol program while incarcerated; his previous gainful employment; his willingness to pay restitution to Smith; his lack of a juvenile criminal history; the unlikelihood of such circumstances happening again; his good behavior during incarceration – all warrant recognition as mitigators. We decline to individually address each, but find that none were "clearly supported by the record" such that their not being found a mitigating circumstance constitutes an abuse of discretion. *Anglemyer*, 868 N.E.2d at 491. Further, determining mitigating circumstances is within the discretion of the trial court, and the trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. *Cotto v. State*, 829 N.E.2d 520, 525 (Ind. 2005). Robinson concedes that "the trial court identified Robinson's remorse and agreement to plead guilty as . . . mitigating circumstances." Robinson's Br. at 17. Hence, we are puzzled by his assertion that the trial court overlooked his "remorse for shooting Smith." *Id.*

Finally, Robinson argues that the trial court abused its discretion by failing to find that "Smith provoked the situation by repeatedly calling Robinson a 'n*****.'" *Id.* According to Robinson's own narrative of events that evening, Smith used the racial epithet twice, and the bartender made him leave the bar. Further, it was after Smith had left the bar that Robinson made the decision to "go[] out here [sic] and beat him up." (Tr.

23). Hence, the record reflects that Robinson chose to provoke the ultimate confrontation with the victim.

2. Inappropriate Sentence

Robinson also argues that his "sentence of 6 years was manifestly unreasonable in light of the considerable mitigation evidence presented at the sentencing hearing." Robinson's Br. at 19. As the State correctly notes, an appeal seeking appellate revision of the sentence imposed invokes Indiana Appellate Rule 7(B), which since January 1, 2003, has provided for revision of a sentence upon our finding "that the sentence is inappropriate in light of the nature of the offense and the character of the offender."[4] "The burden is on the defendant to persuade" the appellate court that his sentence is inappropriate. *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006)).

As the trial court found (and undisputed by Robinson), at the time he committed the instant offense, he was out on bond after being charged with dealing in marijuana, as a felony. Further, according to the PSI, Robinson admitted his long-term marijuana use and "two Article 15's while in the military for using marijuana," and that he had been

[4] Before January 1, 2003, Indiana Appellate Rule 7(B) provided that the appellate court "shall not revise a sentence authorized by statute unless the sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender." *See Long v. State*, 865 N.E.2d 1031, 1034 n.2 (Ind. Ct. App. 2007), *trans. denied*.

In his reply, Robinson asserts that his appellant's brief argument "adequately requested" a revision "within the scope" of the current rule. Reply at 1. However, the argument in his appellant's brief consisted of no more than the request that we consider his "character and the surrounding circumstances of the offense" as discussed earlier in the brief's assertion of improper aggravating factors and seventeen mitigating circumstances that were not expressly found by the trial court. Robinson's Br. at 19.

convicted of two misdemeanors -- marijuana possession and driving while suspended. (PSI 8).

We find the most egregious fact to apply to both Robinson's character and the nature of the offense. Specifically, after Smith had chosen to remove himself from Robinson's presence, Robinson made the express decision to follow him and engage in a physical fight. When he found that Smith had a gun, Robinson proceeded to fight for control of that gun and when he "got control of it, . . . shot him twice." (Tr. 24).[5] Robinson decided to take an action that could well have resulted in Smith's death.

The six-year term imposed by the trial court is at the midpoint between the four-year advisory sentence and the eight-year maximum. *See* Ind. Code § 35-50-2-6. Robinson has failed to persuade us that based upon his character and the nature of the offense, the sentence ordered is inappropriate.

Affirmed.

BAILEY, J., and ROBB, J., concur.

[5] Robinson's reply seems to assert that the shooting was an accident, which simply "occurred . . . during the chaos of" a physical struggle. Reply at 8. However, according to Robinson's own version of events in the PSI, he admitted that he "pulled the trigger twice," and "made the wrong choice by pulling the trigger." (PSI 12, 13).