

Case Summary

Jerry Lee Downs was sentenced pursuant to a plea agreement for criminal confinement, possession of a firearm by a serious violent felon, dealing in methamphetamine, and possession of a machine gun. In this belated direct appeal, he argues that the trial court violated the terms of his plea agreement in sentencing him, that his sentence violates the prohibition against double jeopardy, and that his consecutive sentences violate *Blakely v. Washington*, 542 U.S. 296 (2004). Because the trial court sentenced Downs in accordance with the plea agreement, the sentence does not constitute double jeopardy, and consecutive sentences do not implicate *Blakely*, we affirm.

Facts and Procedural History

The following brief recitation of the facts underlying Downs's convictions was included in a previous decision from this Court:

On April 18, 2003, [Downs] placed a 911 call to report the murder of Michele Jaynes. Michael Andry with the Grant County Sheriff's Department arrived at [Downs's] residence and found [Downs] outside his home. [Downs] told Deputy Andry that he had witnessed Michael Collins murder the victim. Later Sergeant James Kinzie received Collins's statement about [Downs's] involvement in the incident.

Downs v. State, 827 N.E.2d 646, 648 (Ind. Ct. App. 2005) (quotation omitted), *trans. denied*.

The State charged Downs with two counts of Class B felony criminal confinement,¹ Class B felony unlawful possession of a firearm by a serious violent felon,²

¹ Ind. Code § 35-42-3-3(b)(2). Although the charging information purports to charge Downs with two counts of Class B felony criminal confinement, Appellant's App. p. 50, only Count 1 alleges the elements necessary to support a Class B felony conviction, *id.* at 51. Count 2 cites (and alleges the elements of) Indiana Code § 35-42-3-3(a)(2), the portion of the criminal confinement statute that provides

Class D felony possession of chemical reagents or precursors with intent to manufacture,³ Class B felony dealing in methamphetamine,⁴ Class D felony maintaining a common nuisance,⁵ Class C felony possession of a machine gun,⁶ and Class D felony neglect of a dependent.⁷ Appellant's App. p. 50-53. Pursuant to a plea agreement, Downs pled guilty to one count of criminal confinement (Count 1), possession of a firearm by a serious violent felon (Count 3), dealing in methamphetamine (Count 5), and possession of a machine gun (Count 7). *Id.* at 44-49. Specifically, Downs admitted that

[he] did knowingly and/or intentionally confine Kenny Kendall without his consent while armed with a deadly weapon, to-wit: a handgun, . . . [he], a serious violent felon for having been convicted of the violent felonies of Robbery and Kidnapping on or about July 13, 1986 in the 12th Circuit Court in Sarasota, Florida, did knowingly and/or intentionally possess a firearm; . . . [he] did knowingly and/or intentionally manufacture methamphetamine, pure or adulterated, classified in Schedule I or II; . . . [and he] did knowingly and/or intentionally own and/or possess a machine gun

Id. at 51-53. The State dismissed the remaining charges. Downs's plea agreement provided, in part:

[T]he STATE OF INDIANA and the Defendant agree that the sentence shall be on Count 1, Count 3, and Count 5, twenty (20) years incarceration with a cap of fifteen (15) years executed. . . . Count 7, eight (8) years incarceration with a cap of six (6) years executed. . . . Counts 1, 3, and 7

the elements of Class D felony criminal confinement. *Id.* at 51. This discrepancy has no bearing upon our analysis, however, because Count 2 was dismissed pursuant to Downs's plea agreement.

² Ind. Code § 35-47-4-5(c).

³ Ind. Code § 35-48-4-14.5(c).

⁴ Ind. Code § 35-48-4-1(a)(1)(A). There is now a more specific statutory provision pertaining to dealing and manufacturing methamphetamine, Indiana Code § 35-48-4-1.1.

⁵ Ind. Code § 35-48-4-13(b)(2)(A)-(B).

⁶ Ind. Code § 35-47-5-8.

⁷ Ind. Code § 35-46-1-4(a)(1).

shall run concurrent to each other but it is left up to the discretion of the Court whether Count 5 runs concurrent or consecutive to Counts 1, 3, and 7.

Id. at 44-45. After a sentencing hearing, the trial court sentenced Downs to terms of twenty years each, with fifteen years executed, on Counts 1, 3, and 5, and to a term of eight years, with six years executed, on Count 7. Tr. p. 38. The trial court ordered that the sentences for Counts 1, 3, and 7 be served concurrent with each other and consecutive to the sentence for Count 5. *Id.* Downs therefore received an aggregate sentence of forty years, with thirty years executed and ten years of probation.

Downs timely filed a notice of appeal but then shortly thereafter filed a petition for post-conviction relief. The post-conviction court denied relief, and this Court affirmed. *Downs*, 827 N.E.2d 646. At that time, Downs did not pursue his direct appeal, and we dismissed it. Appellant's App. p. 123. Later, Downs filed a motion to correct erroneous sentence, which the trial court denied. *Id.* at 8-9. Downs appealed that ruling, but, for reasons irrelevant to the instant appeal, the appeal was dismissed. *Id.* at 32. In September 2008, Downs filed a petition for permission to file a belated appeal, which the trial court denied. *Id.* at 218-21, 224-26. Upon Downs's motion, this Court then reinstated Downs's direct appeal. *Id.* at 13-14 (citing Ind. Post-Conviction Rule 2(3)). We now address the merits of Downs's claims in this direct appeal from the sentence imposed by the trial court upon his guilty pleas.

Discussion and Decision

Downs appeals his sentence. Specifically, he argues that the trial court violated the terms of his plea agreement in sentencing him, that his sentence violates the prohibition against double jeopardy, and that his consecutive sentences violate *Blakely*.

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (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 to be drawn therefrom. *Id.* A plea agreement is “contractual in nature, binding the defendant, the State, and the trial court.” *Bennett v. State*, 802 N.E.2d 919, 921 (Ind. 2004). “It is within the trial court’s discretion to accept or reject a plea agreement and the sentencing provisions therein; however, if the court accepts such an agreement, it is strictly bound by its sentencing provision and is precluded from imposing any sentence other than required by the plea agreement.” *Id.* at 921-22.

I. Compliance with the Plea Agreement

Downs first argues that the trial court sentenced him in contravention of the terms of his plea agreement. He points to paragraph 2 of his plea agreement and contends that it imposed a cap of fifteen years upon the aggregate sentence that the trial court could impose for Counts 1, 3, and 5. Appellant’s Br. p. 10-11. Therefore, he argues, the trial court violated the terms of his plea agreement by ordering him to serve his sentence for Count 5 consecutive to his sentences on the other counts, resulting in a total sentence for Counts 1, 3, and 5 in excess of fifteen years executed. He acknowledges that paragraph 5

of his plea agreement, however, permitted the trial court to run his sentence for Count 5 either concurrent with or consecutive to his other sentences, but he alleges that this provision of the plea agreement is “ambiguous” and “severable.” *Id.* at 11. We disagree. The plea agreement expressly allowed the trial court to impose its sentence on Count 5 concurrent with or consecutive to Downs’s other sentences, and Downs cannot on appeal pick apart his plea agreement to ignore this unambiguous provision. Our reading of the entirety of the plea agreement reveals that the agreement required the trial court to impose twenty-year sentences for each B felony count but capped the executed portion of those sentences at fifteen years. Appellant’s App. p. 44-45. It also required the trial court to impose an eight-year sentence, with a cap of six years executed, for the Class D felony. *Id.* at 45. The plea agreement further provided that the sentences for Counts 1, 3, and 7 would be concurrent, while the trial court possessed the discretion to order Downs to serve his sentence for Count 5 concurrent with or consecutive to the other sentences. *Id.* The trial court sentenced Downs pursuant to these terms. There is no error in this regard.

Further, we observe that Downs’s alleged confusion about the terms of his plea agreement is belied by material he submitted to the trial court in an earlier motion to correct erroneous sentence. In that motion, Downs quotes⁸ the trial court’s explanation to him regarding how the terms of the plea agreement exposed him to thirty years of executed time, and the quotation reveals that the trial court informed him, “[I]f you feel uncomfortable about that we’re willing to let you set this plea aside and we can set this

⁸ We were not provided with the transcript of the hearing during which this exchange took place.

case down for trial.” *Id.* at 145-46. This explanation by the trial court of the terms of the plea agreement, coupled with the trial court’s statement to Downs that he could withdraw his guilty plea if he felt “uncomfortable” with the plea agreement’s terms, undermines the position Downs now advances.

II. Double Jeopardy

Downs next argues that the trial court was precluded by the prohibition against double jeopardy from ordering him to serve his sentence for Count 5 consecutive to his sentences for Counts 1, 3, and 7. Although his argument in this regard is not well-developed and not entirely clear, we direct Downs’s attention to *Mapp v. State*, 770 N.E.2d 332, 334 (Ind. 2002), wherein our Supreme Court clarified that a defendant waives his right to challenge convictions on double jeopardy grounds when he enters a plea agreement. Further, to the extent that Downs contends that the trial court sentenced him twice for Count 5 by running it consecutive to his sentences for Counts 1, 3, and 7, that is simply not the case. Pursuant to the terms of the plea agreement, the trial court sentenced Downs to twenty years, with fifteen years executed, on Count 5 and ordered that the sentence be served consecutive to Downs’s other sentences. Tr. p. 38; Appellant’s App. p. 44-45. Downs’s argument in this regard fails.

III. *Blakely*

Finally, Downs argues that his consecutive sentences violate the United States Supreme Court’s decision in *Blakely*. However, our Supreme Court has already held that the imposition of consecutive sentences does not implicate *Blakely*. *Estes v. State*, 827 N.E.2d 27, 29 (Ind. 2005) (citing *Smylie v. State*, 823 N.E.2d 679, 686 (Ind. 2005), *cert.*

denied). Further, “[w]hen sentencing a defendant on multiple counts, an Indiana trial judge may impose a consecutive sentence if he or she finds at least one aggravator.” *Smylie*, 823 N.E.2d at 686. Downs concedes that the trial court properly recognized his criminal history as an aggravating circumstance. Appellant’s Br. p. 10. Downs’s argument in this regard is unavailing.

Affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.