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**IN THE
COURT OF APPEALS OF INDIANA**

DAVID PRICE,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A04-0812-CR-741

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Heather Welch, Judge
Cause No. 49F09-0808-FD-193905

JULY 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Senior Judge

David Price (“Price”) appeals the sentence imposed following his guilty plea to Operating a Vehicle while Intoxicated, a Class A misdemeanor, which was elevated to a Class D felony by reason of a previous conviction for “OVWI” within the preceding five years. For this offense, Price was sentenced to a term of two and one-half years.

Price asserts that the sentence is inappropriate given the nature of the offense and the character of the offender and that it should be revised pursuant to Indiana Appellate Rule 7 (B). A threshold issue must be first addressed, i.e., whether Price waived the right to appeal his sentence by pleading guilty.

WAIVER OF RIGHT TO APPEAL SENTENCE

Prior to the court’s acceptance of his guilty plea, Price signed an “Advisement and Waiver of Rights-Class D Felony,” which provided by pleading guilty, he “would give up and waive...the right to appeal any decision made by the Judge.” (Appellant’s App. at 39). The plea agreement itself left the matter of sentencing to the discretion of the court. (App. at 38).

At the guilty plea hearing and before the plea was accepted by the court, the court asked:

You understand if you had gone to trial today and if the court had found that you were guilty of any of these offenses¹, the law would require that I enter Judgment of Conviction and impose a sentence which you could appeal to the Indiana Court of Appeals or the Indiana Supreme Court. You understand by entering this plea of guilty you’re giving up the right to appeal the Judgment of Conviction?

¹ The charging information contained multiple counts. Pursuant to the plea agreement, all counts were dismissed except the OVWI, as a Class D felony.

(Tr. at 11). (Emphasis supplied). The trial court immediately followed this advisement by stating, “Now I do have a great deal of discretion at your sentencing hearing. So if you feel I do not follow the law in determining that sentence, you would have the right to appeal that to the Indiana Court of Appeals or the Indiana Supreme Court.” (App. at 11). (Emphasis supplied).

These two statements by the court clearly and unmistakably advise that although by pleading guilty Price was giving up the right to appeal the conviction, he retained the right to appeal the sentence imposed for that conviction. In its brief, the State commendably agrees that Price is entitled to review of his sentence.

Nevertheless, we choose to consider the question. Our analysis of this issue necessarily focuses upon two cases: Creech v. State, 887 N.E.2d 73 (Ind. 2008) and Ricci v. State, 894 N.E.2d 1089 (Ind. Ct. App. 2008), trans. denied. In Creech, our Supreme Court noted that by the time the trial court erroneously advised Creech at the sentencing hearing of the possibility of appeal, Creech had already pled guilty and received the benefit of his bargain because the plea had been accepted by the court. Therefore, the court reasoned that the erroneous advisement “presumably had no effect” on the knowing and voluntary plea itself. 887 N.E.2d at 77.

In Ricci, however, a different scenario was presented, and this court correctly observed that “*Creech* does not address how a trial court’s misstatements *at the plea hearing* impact the determination of whether a defendant’s waiver was knowing, voluntary and intelligent.” 894 N.E.2d at 1093. (Original emphasis). The Ricci court

held that the defendant had not waived his right to appeal the sentence imposed. We hold likewise and turn to a consideration of the appropriateness of Price's sentence.

APPROPRIATENESS OF SENTENCE

Price pleaded guilty to a Class D felony, the advisory sentence for which is one and one-half years. Price was sentenced to two and one-half years. He argues that the sentence is inappropriate with respect to the nature of the offense (Operating a Vehicle While Intoxicated) because no one was injured in the occurrence and the amount of restitution for the property damage was only six hundred dollars.

The record reflects that Price was driving a vehicle around midnight in the Castleton area of Indianapolis and struck the rear end of a motorcycle upon which there were two persons. The occupants were thrown from the cycle and fortunately landed in a grassy area instead of the pavement. Parts of Price's damaged vehicle were at the scene. Price fled in his vehicle and was apprehended approximately one and one-half miles away. When taken into custody, he became very belligerent and abusive toward the arresting officer.

The fact that the two occupants of the motorcycle were not severely injured or killed was indeed fortuitous, but it does not inure to Price's credit. Additionally, the fact that the motorcycle was not more seriously damaged does not help his cause.

Price also asserts that the sentence is inappropriate in light of his character. He seizes upon the fact that he pleaded guilty and that incarceration will work a hardship upon his three children for whom he pays support.

With regard to the guilty plea, it is to be noted that Price received benefit from the plea in that charges for Failure to Stop after an Accident Resulting in Property Damage were dismissed. The trial court found that the plea was a mitigator, but we conclude that the court was not obligated to find it a significant mitigating circumstance. See McElroy v. State , 865 N.E.2d 584 (Ind. 2007); Powell v. State, 895 N.E.2d 1259 (Ind. Ct. App. 2008), trans. denied; Swain v. State, 870 N.E.2d 1058 (Ind. Ct. App. 2007). With respect to the hardship to the children for loss of child support, the court noted that it was indeed a mitigating circumstance. However, the court also enumerated various aggravating circumstances and was entitled to give those circumstances more weight in the selection of the slightly enhanced sentence.

In its sentencing statement, the court observed that Price had an extensive criminal record. This record, in part, consisted of two convictions of driving while suspended, two convictions of driving while intoxicated, two convictions of possession of marijuana, and a conviction for domestic battery. On multiple occasions, his probations had been revoked.

Given the nature of the offense and the character of the offender, we hold that the sentence was appropriate.

The judgment is affirmed.

KIRSCH, J., and MATHIAS, J., concur.