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FILED
Aug 03 2010, 9:19 am
CLERK
of the supreme court, court of appeals and tax court

IN THE COURT OF APPEALS OF INDIANA

ASHLEY SMITH,	)	
	)	
Appellant/Defendant,	)	
	)	
vs.	)	No. 48A02-1001-CR-7
	)	
STATE OF INDIANA,	)	
	)	
Appellee/Plaintiff.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Rudolph R. Pyle, III, Judge
Cause Nos. 48C01-0810-FD-598, 48C01-0907-FD-416, 48C01-0909-FD-501

August 3, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Ashley Smith appeals her convictions and sentences for Cause Number 48C01-0907-FD-416 ("Cause No. FD-416") and Cause Number 48C01-0909-FD-501 ("Cause No. FD-501") following her guilty pleas in each for Class A misdemeanor Operating While Intoxicated[1] ("OWI") and Class D felony OWI.[2] Smith additionally appeals the trial court's order regarding her probation violation in Cause Number 48C01-0810-FD-598 ("Cause No. FD-598"). We affirm.

FACTS AND PROCEDURAL HISTORY

The stipulated facts relating to Cause No. FD-416 establish that on July 5, 2009, Smith operated a vehicle while under the influence of Suboxone, a controlled substance. Smith drove her vehicle through a chain-link fence into an unnamed individual's yard. When police arrived Smith was confused and exhibited slurred speech and poor balance. Smith also failed the field sobriety test that was administered by the investigating officer.

The stipulated facts relating to Cause No. FD-501 establish that on September 5, 2009, Smith again operated a vehicle while under the influence of Suboxone. On this date, Smith's vehicle sideswiped two parked vehicles. When police arrived, Smith exhibited slurred speech and poor balance. Smith also failed multiple field sobriety tests that were administered by the investigating officer.

On June 27, 2007, Smith had been convicted, pursuant to a guilty plea, of Class D felony OWI in Cause No. FD-598. Smith had been sentenced to thirty-six months of

[1] Ind. Code § 9-30-5-2(b) (2009).

[2] Ind. Code § 9-30-5-3 (2009).

incarceration, with thirty months suspended to probation. Smith was still on probation in Cause No. FD-598 when she committed the instant crimes. Smith was also on probation for 2005 convictions for conversion and identity deception under Cause Number 48C01-0810-FD-597 when she committed the instant crimes.

On July 27, 2009, the State charged Smith with one count of Class A misdemeanor OWI and one count of Class D felony OWI in Cause No. FD-416. On September 8, 2009, the State charged Smith with one count of Class A misdemeanor OWI and one count of Class D felony OWI in Cause No. FD-501. On September 15, 2009, the State filed a petition alleging that Smith had violated her probation in Cause No. FB-598 by committing two new OWI offenses in July and September of 2009.

On November 2, 2009, Smith pled guilty as charged in both Cause Nos. FD-416 and FD-501. Smith also admitted that she violated the terms of her probation in Cause No. FB-598. The trial court accepted Smith's guilty plea and sentenced Smith to twenty-four months of incarceration in Cause No. FD-416, twenty-four months of incarceration in Cause No. FD-501, and ordered that she serve twenty-four months of her previously-suspended sentence in Cause No. FD-598. The trial court ordered that Smith's sentences be fully executed and served consecutively, for an aggregate term of seventy-two months. Smith now appeals.

DISCUSSION AND DECISION

I. Smith's Challenges Relating to Her Convictions in Cause Nos. FD-416 and FD-501

Upon appeal, Smith challenges her convictions in Cause Nos. FD-146 and FD-501 on

double jeopardy grounds and argues that the sentences imposed in these causes are inappropriate.

A. Double Jeopardy

Smith challenges her convictions under Cause Nos. FD-416 and FD-501 by claiming that her state double jeopardy protections were violated because she was convicted of one count of Class A misdemeanor and one count of Class D felony operating while intoxicated under both Cause Nos. FD-416 and FD-501. However, the Indiana Supreme Court has made it clear that a defendant waives her right to challenge the propriety of her convictions, including challenges on double jeopardy grounds, when she enters a guilty plea. *Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004); *Tumulty v. State*, 666 N.E.2d 394, 395 (Ind. 1996). Therefore, we conclude that because Smith entered guilty pleas for Cause Nos. FD-146 and FD-501, she has waived her right to challenge her convictions in these causes on double jeopardy grounds.

B. Appropriateness

Smith also challenges the sentences imposed by the trial court following her guilty pleas. It is well-established that a plaintiff who enters into a plea agreement is entitled to challenge her sentence on direct appeal so long as the plaintiff's sentence was not fixed by a plea agreement. *Collins*, 817 N.E.2d at 231; *Tumulty*, 666 N.E.2d at 396. Here, Smith's sentence was not fixed by a plea agreement, but was left to the discretion of the trial court following her guilty plea.

Smith claims on appeal that the sentences imposed in Cause Nos. FD-416 and FD-501

are inappropriate in light of the nature of her offenses and her character. Indiana Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute 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." The defendant bears the burden of persuading us that her sentence is inappropriate. *Sanchez v. State*, 891 N.E.2d 174, 176 (Ind. Ct. App. 2008).

With respect to the nature of Smith's offenses, our review reveals that although Smith claims that her offenses were isolated in nature, the record indicates that Smith is a habitual traffic offender who has been convicted of four separate OWIs since 2005, three of which were felony convictions. In the instant offenses, Smith's decision to operate a vehicle while under the influence of Suboxone on two separate occasions resulted in a great deal of property damage, and we are unconvinced that her apparent luck that nobody was seriously injured as a result of her actions mitigates the seriousness of the offenses.

With respect to Smith's character, our review reveals that Smith has amassed a substantial criminal record that includes numerous misdemeanor and felony convictions. Smith's previous misdemeanor convictions include convictions for battery, conversion, OWI, minor consumption of alcohol, operating a vehicle with a BAC of .08 or more, possession of marijuana, and leaving the scene of an accident. Her previous felony convictions include convictions for identity deception and OWI. Smith has previously been placed on probation and has received treatment for issues relating to her substance abuse. However, despite these opportunities to reform her behavior, Smith has failed to modify her behavior to conform to

the laws of this state. We acknowledge that Smith appears to be remorseful and to have accepted responsibility for her actions. However, despite her apparent remorse, Smith has, by the young age of twenty-five, amassed a substantial criminal record that demonstrates a disregard for the laws of this state. Smith appears to be an addict who has responded negatively to the trial court's prior attempts to help her by placing her on probation and ordering that she receive treatment for her substance abuse. In short, we are struck by the fact that Smith continues to operate vehicles while under the influence even after receiving multiple misdemeanor and felony OWI convictions. Based on our review of the evidence, we see nothing in Smith's character or in the nature of her offenses that would suggest that the sentences imposed in Cause Nos. FD-416 and FD-501 are inappropriate.

II. Smith's Challenges Relating to the Sentence Imposed for the Violation of Her Probation in Cause No. FD-598

Smith additionally challenges the trial court's order regarding her admitted probation violation. Smith specifically argues that the trial court abused its discretion by ordering her to serve twenty-four of the previously suspended thirty months following the violation of the terms of her probation in Cause No. FD-598.

> Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled. The trial court determines the conditions of probation and may revoke probation if the conditions are violated. Once a trial court has exercised its grace by ordering probation rather than incarceration, the judge should have considerable leeway in deciding how to proceed. If this discretion were not afforded to trial courts and sentences were scrutinized too severely on appeal, trial judges might be less inclined to order probation to future defendants. Accordingly, a trial court's sentencing decisions for probation violations are reviewable using the abuse of discretion standard. An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances.

Prewitt v. State, 878 N.E.2d 184, 188 (Ind. 2007) (quotations omitted). If the trial court determines that a person has violated a condition of her probation, the court may order execution of all or part of the sentence that was previously suspended. *Id*. at 186 (citing Ind. Code § 35-38-2-3(g)).

In arguing that the trial court abused its discretion in ordering execution of twenty-four months of her previously suspended thirty-month sentence, Smith again asserts that the crimes that she committed in violation of her probation were not the worst of the worst and were isolated in nature and of a short duration. As we stated above, we are unconvinced by these assertions in light of Smith's tendency to be a repeat OWI offender. We find Smith's argument that her instant OWI convictions were isolated in nature to be particularly meritless in light of the fact that she committed two separate OWI offenses within a period of less than three months, coupled with the fact that the underlying offense for which she was on probation at the time she committed the instant offenses was felony OWI. Moreover, we are unmoved by Smith's assertion that the trial court abused its discretion in ordering execution of twenty-four months of her previously suspended thirty-month sentence because she has shown remorse and has accepted responsibility for her actions. Again, Smith has amassed a substantial criminal record and has failed to respond positively to previous attempts to reform her conduct through probation and treatment for her seemingly ongoing substance abuse. In light of Smith's apparent disregard for Indiana laws against operating a vehicle while under the influence of drugs and alcohol, the lives she places at risk, and her apparent failure to

respond positively to previous attempts to reform her conduct through alternatives to incarceration, we conclude that Smith has failed to convince us that the trial court abused its discretion in this regard.

The judgment of the trial court is affirmed.

RILEY, J., and MATHIAS, J., concur.