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IN THE
COURT OF APPEALS OF INDIANA

OCIE BRASHER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0901-CR-85
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patricia Gifford, Judge
Cause No. 49G04-0803-FC-059496
Cause No. 49G04-0808-FD-185093

August 18, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Ocie Brasher appeals following his plea of guilty to Robbery,[1] a class C felony, Criminal Confinement,[2] a class D felony, Obstruction of Justice,[3] a class D felony, and his admission that he was a Habitual Offender.[4] Brasher challenges his robbery and criminal confinement convictions on double jeopardy grounds and argues that the three-year sentence imposed for the obstruction of justice charge is inappropriate in light of the nature of the offense and his character. Finding that he waived the double jeopardy argument by pleading guilty and finding the obstruction sentence appropriate, we affirm.

FACTS

On March 12, 2008, James Smiley and Jennifer Floyd were looking for a recycling center. They pulled into the parking lot of a gas station to ask for directions. Brasher, who was at the gas station, offered to lead them to the recycling center. Smiley and Floyd followed Brasher, and when they arrived at the recycling center, Smiley and Brasher exited their respective vehicles. Brasher approached Smiley from behind, grabbed him in a "bear hug fashion," tr. p. 7, stuck his hand into Smiley's front pants pocket, and took approximately $420 in cash. After stealing the money, Brasher fled the scene. On March 18, 2008, under cause number 49G04-0803-FC-059496 (cause 96), the State charged Brasher with class C felony robbery and class D felony criminal confinement, later adding a habitual offender enhancement.

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[1] Ind. Code § 35-42-5-1.

[2] I.C. § 35-42-3-3.

[3] Ind. Code § 35-44-3-4.

On June 4 and July 2, 2008, Brasher was served with a subpoena to appear in Marion Superior Court to testify in a murder trial taking place on July 7 and 8. Brasher appeared in court on July 8, but he left the courthouse shortly after 9:00 a.m. without testifying, and the State lost contact with him thereafter. Local authorities and United States Marshals searched extensively for Brasher, eventually locating him based on an anonymous tip on July 14. On August 6, 2008, under cause number 49G04-0808-FC-185093 (cause 93), the State charged Brasher with class D felony obstruction of justice.

On October 24, 2008, Brasher pleaded guilty as charged in causes 93 and 96 without the benefit of a plea agreement. On December 23, 2008, the trial court sentenced Brasher to six years imprisonment for the robbery conviction, enhanced by four years for the habitual offender finding, and to a concurrent two-year term for criminal confinement. The trial court sentenced Brasher to three years for obstruction of justice, to be served consecutively to the ten-year sentence in cause 96. Brasher now appeals.[5]

DISCUSSION AND DECISION

I. Double Jeopardy

Brasher first argues that his convictions for robbery and criminal confinement violate the double jeopardy clause of the Indiana Constitution. It is well established, however, that

> "'a conviction based upon a guilty plea may not be challenged by motion to correct errors and direct appeal.'" [Tumulty v. State,] 666 N.E.2d 394, 395 (Ind. 1996) (quoting Weyls v. State, 266 Ind. 301, 362

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[4] Ind. Code § 35-50-2-8.

[5] Causes 93 and 96 have been consolidated on appeal.

> N.E.2d 481, 482 (1977)). The proper avenue for challenging one's conviction pursuant to a guilty plea is through filing a petition for post-conviction relief and presenting evidence at a post-conviction proceeding. Tumulty, 666 N.E.2d at 396.

Hayes v. State, 906 N.E.2d 819, 821 n.1 (Ind. 2009). Our Supreme Court has explained the rationale for prohibiting direct challenges to convictions following a guilty plea:

> The long-standing judicial precedent limiting the avenue of direct appeal for guilty plea challenges stands on multiple grounds. First, the plea as a legal act brings to a close the dispute between the parties, much as settling civil parties do by submitting an agreed judgment. To permit appeal by settling parties would, of course, make settlements difficult to achieve in any litigation.
>
> There is a practical reason for the limit on appeals. Of the 31,973 criminal cases adjudicated by Indiana trial courts in 1994 (the most recent figures available), some 28,867, or ninety percent were disposed of by guilty plea. Allowing the new remedy of direct appeal for those 28,867 guilty pleas has the potential to multiply dramatically the caseload in the appellate courts by offering appeals to thousands of admitted felons. In the same year the state's appellate courts heard 1,116 direct criminal appeals.

Tumulty, 666 N.E.2d at 396 (internal footnotes omitted). A double jeopardy claim is a challenge to the conviction, not to the sentence; therefore, when a defendant pleads guilty the proper venue to make a double jeopardy argument is via a petition for post-conviction relief rather than a direct appeal. Collins v. State, 740 N.E.2d 143, 146 (Ind. Ct. App. 2000).

In Hayes, the defendant entered into an open guilty plea to all charges. 906 N.E.2d at 820. On direct appeal, this court found, sua sponte, that there was no factual basis supporting one of his convictions and vacated that conviction. 906 N.E.2d at 821. Our Supreme Court granted transfer and affirmed Hayes's convictions, finding that because Hayes had pleaded

guilty, he was not entitled to conviction-based relief on direct appeal and that in awarding such relief, this court had acted contrary to Tumulty. Id. Though Brasher argues that a defendant is prohibited from directly challenging convictions following a guilty plea only if the defendant reaped some sort of benefit from the plea, our Supreme Court has never limited the rule in such a fashion. Indeed, the Hayes court imposed the Tumulty rule on Hayes regardless of the fact that he had pleaded guilty as charged with an open plea agreement. Therefore, we decline to limit the rule as Brasher requests.

Brasher also directs our attention to this court's recent opinion in Graham v. State, 903 N.E.2d 538 (Ind. Ct. App. 2009). In Graham, the defendant pleaded open as charged, resulting in an improper double sentencing enhancement of his unlawful possession of a firearm by a serious violent felon sentence by a habitual offender enhancement. Though this court referred to Graham's challenge as a double jeopardy challenge, in fact, it was a challenge based upon a sentencing defect rather than a double jeopardy violation. The remedy was remand for resentencing rather than an order that one of his convictions be vacated. See Jones v. State, 807 N.E.2d 58, 67 (Ind. Ct. App. 2004) (holding that the proper remedy for a double jeopardy violation is to vacate one of the problematic convictions rather than ordering the imposition of concurrent sentences). Graham, therefore, merely reaffirms that a defendant who pleads guilty is entitled to challenge his sentence on direct appeal; it does not affect the long-standing Tumulty rule that defendants who plead guilty are prohibited from challenging their convictions on direct appeal. Consequently, we will not address Brasher's double jeopardy argument herein.

II. Obstruction of Justice Sentence

Brasher next argues that the three-year sentence imposed by the trial court on his obstruction of justice conviction is inappropriate in light of the nature of the offense and his character. In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Here, Brasher received the maximum term of three years for this class D felony conviction. Ind. Code § 35-50-2-7.

As for the nature of the offense, Brasher was a key witness for the State in a murder trial. He was served with more than one subpoena and knew that his testimony was needed. Though he appeared in court on the morning he was to testify, he left court and disappeared before he was called as a witness. As a result, some of the evidence the prosecutor intended to rely on was found to be inadmissible. Tr. p. 11, 42.

Brasher argues that it is undisputed that he was afraid of retaliation if he were to testify. The trial court acknowledged the risk of retaliation; however, it also noted that much of the media attention and threats Brasher received were the result of his own actions. He chose to go into hiding for a week, attracting attention to himself and causing the local authorities to divert attention away from other people in their attempts to locate him. The trial court found that Brasher had wasted State resources, multiple agencies' time, and jeopardized a murder conviction because he chose to flee from trial and hide for a week. We do not find that the nature of the offense aids Brasher's inappropriateness argument.

As for Brasher's character, as a juvenile, he was adjudicated delinquent for actions that would have been auto theft and possession of cocaine had they been committed by an adult. As an adult, he has amassed eight convictions, including theft, robbery, forgery, possession of cocaine, auto theft, and intimidation. He committed the obstruction of justice offense while on probation for a forgery conviction. Under these circumstances, we find that the maximum three-year sentence imposed by the trial court was not inappropriate.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and RILEY, J., concur.