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IN THE
COURT OF APPEALS OF INDIANA

LARRY D. SMITH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 57A03-1102-CR-89
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE NOBLE CIRCUIT COURT
The Honorable G. David Laur, Judge
Cause No. 57C01-0911-FC-80

August 24, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Larry D. Smith ("Smith") pled guilty to one count of Aiding in Burglary, as a Class C Felony[1], and admitted that he is a Habitual Offender.[2] He now challenges the underlying sentence for Aiding in Burglary conviction as inappropriate. We affirm.

Facts and Procedural History

On November 14, 2009, Smith provided transportation for Stephen Bilyeu ("Bilyeu") to the Dollar General Store in Ligonier, knowing that Bilyeu intended to burglarize the store. Smith also provided transportation for Bilyeu from the store, knowing that the burglary had occurred.

On November 18, 2009, Smith was charged with Conspiracy to Commit Burglary, as a Class C felony. On March 10, 2010, the State filed its information alleging that Smith is a habitual offender. On May 3, 2010, the State amended its information, charging Smith with Aiding in Burglary, as a Class C felony.

On May 20, 2010, Smith and the State entered into a plea agreement, whereby Smith agreed to an open plea of guilty to Aiding in Burglary and admitted being a habitual offender. The State agreed to a fixed sentence enhancement of four years for Smith's habitual offender status, and further agreed to dismissal of all other charges against him in Noble County, the county of the offense, and several other counties in which charges were pending. The trial court accepted the agreement the same day.

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[1] Ind. Code §§ 35-43-2-1 & 35-41-2-4.
[2] I.C. § 35-50-2-8.

On July 1, 2010, the trial court conducted a sentencing hearing, at the end of which it sentenced Smith to six years imprisonment for Aiding in Burglary, with the addition of a four-year enhancement for Smith's habitual offender status, as provided by the plea agreement.

On February 18, 2011, Smith filed a motion for permission to seek a belated appeal, which the trial court granted on February 28, 2011. This appeal followed.

Discussion and Decision[3]

Smith contends that the six-year term of imprisonment the trial court imposed for his conviction of Aiding in Burglary is inappropriate under Appellate Rule 7(B) and requests that we revise his sentence for this charge downward to the advisory term of four years.

In Reid v. State, the Indiana Supreme Court reiterated the standard by which our state appellate courts independently review criminal sentences:

> Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a sentence through Indiana Appellate Rule 7(B), which provides that a court 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

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[3] On August 1, 2010, Smith filed pro se a Motion to Dismiss Appeal with Prejudice, requesting that this court dismiss the instant appeal in order to allow him to promptly pursue post-conviction remedies. Smith was represented by counsel from the Indiana State Public Defender's Office, and the motion also sought to dismiss the Office from its representation of him. "[T]he proper procedure for an individual who has pled guilty in an open plea to challenge the sentence imposed is to file a direct appeal or, if the time for filing a direct appeal has run, to file an appeal under [Post-Conviction Rule] 2." Collins v. State, 817 N.E.2d 230, 233 (Ind. 2004). A belated appeal under Rule 2 was granted here. Moreover, Smith's motion does not articulate the basis for his intended action for post-conviction relief. See Slusher v. State, 823 N.E.2d 1219 (Ind. Ct. App. 2005) (granting a motion to appeal to pursue post-conviction relief under Davis/Hatton proceeding when facts and arguments supporting a claim of ineffective assistance of trial counsel were articulated to this court). Therefore, in an order issued concurrent with this opinion, we deny his motion to dismiss this appeal.

> of the offense and the character of the offender. The burden is on the defendant to persuade us that his sentence is inappropriate.

876 N.E.2d 1114, 1116 (Ind. 2007) (internal quotation and citations omitted).

The Court more recently stated that "sentencing is principally a discretionary function in which the trial court's judgment should receive considerable deference." Cardwell v. State, 895 N.E.2d 1219, 1222 (Ind. 2008). Indiana's flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented. See id. at 1224. One purpose of appellate review is to attempt to "leaven the outliers." Id. at 1225. "Whether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." Id. at 1224.

Smith was convicted of Aiding in Burglary, as a Class C felony. The sentencing range for a Class C felony runs from two to eight years imprisonment, with an advisory sentence of four years. I.C. § 35-50-2-6(a). The trial court sentenced Smith to six years imprisonment, two years above the advisory but below the eight-year maximum. The trial court's sentencing statement explained that while inclined to sentence Smith to the eight-year maximum term, it chose the six-year term in consideration of Smith's guilty plea and expressed remorse.

Smith's offense is not particularly egregious. He admitted that he knew Bilyeu planned to burglarize the Ligonier Dollar General Store, and provided transportation to Bilyeu both to and from the store. While Smith attempts to draw our attention to Bilyeu's

long career as a burglar and insists that Bilyeu might well have burglarized the Ligonier Dollar General Store even without Smith's help, we cannot help but observe that Smith nevertheless did decide to aid in the burglary when he could have decided to do otherwise.

Smith's character, however, does not reflect particularly well upon him. Smith's Presentencing Report shows that Smith admitted a long history of substance use, including regular use of marijuana until 2009. He has a long history of encounters with law enforcement, including numerous arrests in Indiana and New York for burglary, larceny, possession of controlled substances, and possession of weapons. Apart from the two convictions for Attempted Robbery in 1981 and Attempted Burglary in 1991 that formed the basis for his adjudication as a habitual offender, Smith was convicted of possession of a firearm as a felon in 2005 in the U.S. District Court for the Central District of Illinois. Moreover, pending criminal cases in six different counties in Indiana were dismissed in exchange for his guilty plea in this case.

As against this background, Smith observes that he pled guilty, expressed remorse, and has earned two Associates degrees and was working on a third Associates degree and earning straight A's at the time of his offense. He also notes that he had successfully maintained employment until being laid off from his most recent job. While we commend his education and employment, we nevertheless observe that his most recent achievements come on the heels of a recent federal firearms conviction and a considerable criminal history.

Taken together, the nature of Smith's offense and his character do not persuade us that the six-year sentence imposed by the trial court for the Aiding in Burglary conviction is

inappropriate under Appellate Rule 7(B).

Affirmed.

MATHIAS, J., and CRONE, J., concur.