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IN THE
COURT OF APPEALS OF INDIANA

JAMES ALLEN LEE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 87A01-0904-CR-199
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WARRICK CIRCUIT COURT
The Honorable David O. Kelley, Judge
Cause No. 87C01-0806-FD-55

August 25, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

James Allen Lee appeals the three-year aggregate sentence, to be fully executed, imposed following his guilty plea to class D felony operating a vehicle as a habitual traffic violator,[1] class A misdemeanor operating while intoxicated while endangering a person,[2] and class D felony operating while intoxicated with a prior conviction.[3] He contends that his sentence is inappropriate in light of the nature of the offenses and his character. We affirm.

Facts and Procedural History

On June 16, 2008, police responded to a complaint of a vehicle accident. They found an empty red Mustang in a ditch. Bystanders identified Lee as the person who was driving the car. Police spoke to Lee, who admitted to driving the car after having about six beers. Lee's blood alcohol content ("BAC") tested 0.24% on the portable breathalyzer test.

On June 17, 2008, the State charged Lee with Count I, class D felony operating a vehicle as a habitual traffic violator; Count II, class A misdemeanor operating while intoxicated while endangering a person; Count III, class D felony operating while intoxicated with a prior conviction; and Count IV, habitual substance offender. On April 6, 2009, Lee pled guilty to Counts I, II, and III, and the State agreed to dismiss Count IV pursuant to a plea agreement that left sentencing to the trial court's discretion. The trial court accepted Lee's plea and proceeded to sentencing. Lee asserted that he was taking steps to change his life for

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[1] Ind. Code § 9-30-10-16.

[2] Ind. Code § 9-30-5-2(b).

[3] Ind. Code § 9-30-5-3(1).

the better, such as getting married and enrolling in Ivy Tech Community College, and that the court had received notification from the Warrick County Community Corrections Program that it was willing to accept him in its program. He requested minimum sentences, suspended to the Warrick County Community Corrections Program.

The trial court made the following statements:

> In the Pre-Sentence, it says on page eight … alcohol, you used it three weeks prior to the date of the Pre-Sentence, which was March the 18th. It also indicates that you smoked marijuana three weeks prior to the 18th and that you smoked marijuana about twice a month. So, at least three weeks prior to the Pre-Sentence being prepared, if you were truthful with the probation Officer, you haven't refrained from either drugs or alcohol.
>
> ….
>
> The only thing you have done since June of 2008, is not get caught. Right? I mean, if you really wanted treatment, you would have gotten treatment on your own. You know, Mr. Lee, you have the worst record that I have ever seen in all the years I have been on the bench. You know you have got … one … two … three … four … this is … you have got five prior DUI's.[4] You have caught an incredible break here because the Prosecutor's Office apparently wasn't paying attention. You should have been charged as a Class C Felon, HTV for Life because your license were [sic] suspended for life in 2006 because of your problems in … Bartholomew County they suspended you for life and they only charged you with a D Felony here instead of a C Felony, so that would have been two to eight. You could have been looking at eight years instead of just looking at a maximum of three years and your lawyer wants me to put you in Community Corrections. So, what–what assurance do I have that you are going to comply with Community Corrections?
>
> ….
>
> So, April 2007 you were released [to parole] and then June of 2008 you got caught down here driving?
>
> ….
>
> Tested .24 this time. Mr. Lee, like I said, you have caught an incredible break here because of the State's failure to charge you a proper charge here. I

[4] Lee asserts that the trial court was mistaken when it said that he had five prior DUIs. Our review of the pre-sentence investigation report shows that the trial court was correct. *See* Appellant's Supplemental App. at 3-5 (showing convictions for operating a motor vehicle while under the influence in 1993, 1998, 2000, 2001, and 2005).

> don't see where I have any choice. Show in Count I, the Court will sentence the Defendant to three years in the Indiana Department of Corrections. In Count II and III, the Court will sentence the Defendant to three years in the Indiana Department of Corrections. Order those sentences to be served concurrently. Court will find that the aggravation of sentences is justified by the Defendant's terrible criminal history previously.

Tr. at 14-20.

Discussion and Decision

Lee asserts that both the length of and manner of serving his three-year aggregate sentence is inappropriate. Article 7, Section 6 of the Indiana Constitution authorizes this Court to independently review and revise a sentence imposed by the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. Indiana Appellate Rule 7(B) states, "The 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 of the offense and the character of the offender." "Although appellate review of sentences must give due consideration to the trial court's sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." *Purvis v. State*, 829 N.E.2d 572, 587 (Ind. Ct. App. 2005) (internal citations omitted), *trans. denied*. The defendant bears the burden of persuading us that the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

The advisory sentence for a class D felony is one and one-half years, with a fixed term of between six months and three years. Ind. Code § 35-50-2-7. "When determining whether a sentence is inappropriate, we recognize that the advisory sentence 'is the starting point the

Legislature has selected as an appropriate sentence for the crime committed.'" *Filice v. State*, 886 N.E.2d 24, 39 (Ind. Ct. App. 2008) (quoting *Weiss v. State*, 848 N.E.2d 1070, 1072 (Ind. 2006)), *trans. denied*. Lee received the maximum sentence of three years, executed.

As to the nature of the offenses, we note that Lee's BAC was 0.24%, three times above the legal limit, and that he drove his car into a ditch.

As to Lee's character, he argues that the maximum possible sentences are generally most appropriate for the worst offenders and that his character places him outside this group. *See Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) ("The maximum possible sentences are generally most appropriate for the worst offenders."). He asserts that the trial court failed to consider that he is married, attends college, and has asked for treatment of his alcoholism.[5] Lee's argument ignores the fact that he has *five* prior convictions for operating a motor vehicle while intoxicated, all received within about ten years of the current offenses. He also has convictions for conversion, battery, escape, and check deception. Further, he never successfully completed a term of probation, although he did successfully complete his parole in November 2007. The trial court stated that Lee had "the worst record that [he had] ever seen in all the years [he had] been on the bench." Tr. at 15. In addition, Lee admitted that he had taken no steps to deal with his alcoholism, and that he continued drinking after he was charged with the current offenses until three weeks before the pre-sentence investigation

[5] To the extent that Lee argues that the trial court failed to consider these factors as mitigating circumstances, we note that a "trial court is not required to find mitigating factors or to accept as mitigating the circumstances proffered by the defendant[.]" *Padgett v. State*, 875 N.E.2d 310, 316 (Ind. Ct. App. 2007), *trans. denied*. Moreover, our review of the record reveals that the trial court did consider them but determined that they were not deserving of mitigating weight. We agree.

report was completed. Although Lee expressed his desire to obtain help in dealing with his alcoholism, the Department of Correction provides such services. Accordingly, we conclude that Lee has failed to persuade us that his sentence is inappropriate in light of the nature of the offenses and his character.[6]

Affirmed.

MAY, J., and BROWN, J., concur.

[6] Lee also contends that the trial court erred in stating that it had no choice in sentencing him. Our reading of the record shows that the trial court was not making a statement of law, but was merely expressing that it felt compelled, given Lee's numerous prior convictions for operating while intoxicated, to impose the maximum sentence.

In addition, Lee argues that the trial court used the State's failure to charge him with a class C felony to support its sentencing determination. Our reading of the record shows that although the trial court observed that the State could have charged Lee with a class C felony, it did not base Lee's sentence on that fact but on Lee's criminal history.