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IN THE
COURT OF APPEALS OF INDIANA

ADAM RISNER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 25A04-0904-CR-226
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FULTON CIRCUIT COURT
The Honorable Douglas B. Morton, Judge
Cause No. 25C01-0811-FC-92

September 11, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Adam Risner appeals his sentence for receiving stolen property as a class D felony.[1] Risner raises two issues, which we revise and restate as:

I. Whether the trial court abused its discretion in sentencing Risner; and

II. Whether the sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

The relevant facts follow. On November 9, 2008, Risner was in possession of a handgun which he knew was stolen, and Risner did not know to whom the handgun belonged. On November 14, 2008, the State charged Risner with Count I, burglary as a class C felony, and Count II, receiving stolen property as a class D felony. Pursuant to a plea agreement filed with the trial court on March 9, 2009, Risner agreed to plead guilty to Count II, receiving stolen property as a class D felony, and in return the State would dismiss Count I. The agreement left it to the trial court's discretion on the length of sentence Risner would receive. Before sentencing, the trial court ordered a pre sentence investigation report and recommendation ("PSI").

On March 30, 2009, the trial court held a sentencing hearing. At the hearing, Risner objected to some of the entries in section II of the PSI which listed Risner's prior legal history. First, Risner objected to the PSI's listing that Risner had been found guilty of intimidation as a class C felony because Risner believed that he had been charged as a

[1] Ind. Code § 35-43-4-2 (2004) (subsequently amended by Pub. L. No. 158-2009, § 8 (eff. July 1, 2009)).

juvenile.[2] Second, Risner objected to the listing of an offense of possession of stolen property under his "Adult Criminal History" because Risner maintained that he was a juvenile at the time of that offense. Third, Risner stated that, with regard to a theft offense listed to have occurred on February 27, 1999, "he was never changed [sic] with anything and disagrees with regard to this theft allegation."[3] Transcript at 29. Finally, Risner objected to the PSI's listing that he was on parole or probation at the time the present offense was committed. The trial court made handwritten annotations on the PSI report based on Risner's statements. The State did not make any statements or present any evidence in response to Risner's objections.

The trial court accepted Risner's guilty plea and sentenced Risner to the maximum three years. In identifying the aggravating circumstances, the trial court stated:

> The Court will adopt the aggravating circumstances as laid out in the presentence investigation[4] and primarily and as everybody has talked about the aggravating circumstance is your prior . . . your prior record. . . . you're a poor candidate for probation and that you've had prior revocations and issues in [sic] which relates [sic] to your probation.

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[2] We note that the intimidation charge was listed under subsection A. of section II, which was titled "Juvenile Delinquency History."

[3] We note that in the PSI's entry on this theft offense, the PSI states that the "Tippecanoe County Clerk's Office denied finding any criminal filings in this cause." Appellant's Appendix Vol. 2 at 72.

[4] The PSI lists the aggravating circumstances as follows:

1. The Defendant's lengthy criminal history.
2. The Defendant is a poor candidate for probation as he has had many probations revoked.
3. The Defendant has had a poor work history of short term employments.

Appellant's Appendix Vol. 2 at 78.

Id. at 40. The trial court did not identify any mitigating circumstances. The trial court also stated that the "call in [the trial court's] mind is kind of easy in your case. I mean [Risner] . . . you really built a history here." Id.

I.

The first issue is whether the trial court abused its discretion in sentencing Risner. Sentencing decisions are reviewed for an abuse of discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances before the court." Id.

A trial court abuses its discretion if it: (1) fails "to enter a sentencing statement at all;" (2) enters "a sentencing statement that explains reasons for imposing a sentence--including a finding of aggravating and mitigating factors if any--but the record does not support the reasons;" (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration;" or (4) considers reasons that "are improper as a matter of law." Id. at 490-491. If the trial court has abused its discretion, we will remand for resentencing "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." Id. at 491.

Risner appears to argue that the trial court considered reasons which were improper as a matter of law when it enhanced Risner's sentence based upon, in large part,

his criminal history as it appeared in the PSI.[5] Before a trial court commits a criminal defendant to the Department of Correction on a class D felony, a probation officer must prepare a PSI that contains, among other things, "the convicted person's history of delinquency or criminality . . . ." Ind. Code § 35-38-1-8(c), 9. The convicted person should be afforded a fair opportunity to controvert the material contained within the report. See Gardner v. State, 270 Ind. 627, 634, 388 N.E.2d 513, 517 (1979). "[W]here a defendant vigorously contests his criminal history, and that criminal history is highly relevant to his sentence, it is incumbent upon the State to produce some affirmative evidence . . . to support a criminal history alleged in a PSI and urged as the basis for sentence enhancement." Carmona v. State, 827 N.E.2d 588, 599 (Ind. Ct. App. 2005).

As noted above, Risner argued (1) that Risner's prior intimidation offense, listed as a class C felony, was actually handled as a juvenile delinquency adjudication; (2) that Risner's possession of stolen property offense, listed under his "Adult Criminal History," was incorrect because he was a juvenile at the time of that offense; (3) that a theft offense listed in the PSI is not a part of his criminal history; and (4) that the PSI's listing that he was on parole or probation at the time the present offense was committed was false. Risner appears to argue that, based upon Carmona, the trial court abused its discretion in

[5] Risner also argues that the trial court failed to account for his "mental health diagnoses" in mitigation. Appellant's Brief at 5. Risner cites the PSI which diagnoses him with Dysthymic Disorder, Major Depressive Disorder, and Posttraumatic Stress Disorder. Risner did not argue to the trial court that his mental health should be considered as a mitigating circumstance. To the contrary, Risner himself, in answering the trial court's question whether he had ever been treated for a mental illness, told the trial court that he had not. Because Risner failed to advance at sentencing his mental health condition as a potential mitigator, "this court will presume that the circumstance is not significant" and is therefore waived. Sargent v. State, 875 N.E.2d 762, 770 (Ind. Ct. App. 2007).

considering Risner's criminal history listed in the PSI because the State did not produce affirmative evidence supporting the genuineness of the PSI's contents.

The facts in this case are readily distinguishable from those in Carmona. In Carmona, the defendant contested almost the entire criminal history listed in his PSI; the defendant admitted to only two of the criminal acts listed, but "vigorously asserted that the remaining charges, which included armed robbery, aggravated assault, assault, battery, and various drug-related offenses, were not his." Id. at 597-598. Conversely, Risner contests the listing of three out of seventeen offenses, see supra part II, as well as the listing that he was on probation or parole when the offense was committed. More importantly, with regard to two of the three offenses Risner disputes, Risner does not argue that they did not occur; rather, Risner argues that those offenses were improperly classified as adult crimes when they should have been classified as juvenile offenses. Risner contends that only one listed offense for theft was not part of his criminal history. However, regarding the theft offense, the PSI provided that "Tippecanoe County Clerk's Office denied finding any criminal filings in this cause." Appellant's Appendix Vol. 2 at 72.

Finally, we presume that the trial court knows the law, and Risner has not shown any evidence to the contrary. Emerson v. State, 695 N.E.2d 912, 919 (Ind. 1998), reh'g denied; see also Donaldson v. State, 904 N.E.2d 294, 300 (Ind. Ct. App. 2009) (holding

that we presume the trial court knows and follows the applicable law). Here, the trial court made annotations based on the statements made by Risner.[6]

Based on our review of the record, and in light of the presumption that the trial court knows and follows the law, we cannot say that the trial court relied upon the disputed offenses. It was within the trial court's discretion to enhance Risner's sentence based on Risner's lengthy criminal history which was not in dispute. To the extent that Risner challenges the trial court's reliance on his remaining criminal history, Risner asks us to review the weight given to an aggravating factor for abuse of discretion, which we cannot do. See Anglemyer, 868 N.E.2d at 491 (holding that the relative weight or value assignable to aggravating and mitigating factors properly found is not subject to review for abuse of discretion).

II.

The next issue is whether the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

[6] We reiterate that the State was under no obligation to make an affirmative showing that the many other charges listed in Risner's PSI were genuine. Carmona, 827 N.E.2d at 599 n.12.

Our review of the nature of the offense reveals that Risner received a handgun which he knew was stolen.

Our review of the character of the offender reveals that Risner has an extensive juvenile and adult criminal history. Accepting Risner's assertions regarding the PSI's criminal history as true, Risner has been adjudicated as a delinquent for intimidation, runaway, incorrigibility, and possession of stolen property. Also, since May 19, 2000, Risner has been found guilty as an adult of four felonies: three separate incidents of auto theft as class D felonies[7] and one instance of aiding theft as a class D felony.[8] For these four felonies, Risner has been sentenced to a total of eight years in the Department of Correction, of which over four years of those sentences have been suspended.

Since March 19, 1999, Risner has also been found guilty of three misdemeanors: operating a vehicle while intoxicated as a class A misdemeanor, public intoxication as a class B misdemeanor, and Risner's most recent charge prior to the instant incident, conversion as a class A misdemeanor, for which he was convicted on August 17, 2007. For these incidents, Risner spent another fifteen months in jail. Risner had judgment withheld and was placed on 60 days non-reporting probation for operating a motor vehicle in violation as a class C misdemeanor on March 19, 1999. In addition, Risner has been charged with four additional misdemeanors which have been dismissed pursuant to various plea agreements: criminal recklessness as a class A misdemeanor, operating a

[7] The auto theft convictions were entered on May 19, 2000, April 27, 2001, and July 1, 2005.

[8] The aiding theft conviction was entered on October 16, 2002.

vehicle while under the influence of a schedule I or II controlled substance as a class C misdemeanor, and two separate incidents of illegal consumption of alcoholic beverage as a class C misdemeanor. Finally, Risner has violated probation on at least two occasions, and he was forced to serve another three months in jail for one of his probation violations.

Thus, Risner has been given many opportunities at reformation which he has yet to seize upon. After due consideration of the trial court's decision, we cannot say that the three-year maximum sentence imposed by the trial court is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Sloan v. State, 794 N.E.2d 1128, 1135 (Ind. Ct. App. 2003) (holding that a maximum sentence is not inappropriate in light of the nature of the offense and the character of the offender depicting a lengthy criminal history), trans. denied.

For the foregoing reasons, we affirm Risner's sentence for receiving stolen property as a class D felony.

Affirmed.

CRONE, J., and MAY, J., concur.