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IN THE
COURT OF APPEALS OF INDIANA

DAVID L. MCDANIEL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-1102-CR-72
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-0903-FB-26

September 20, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

David L. McDaniel appeals his sentence of four years for criminal recklessness, a class C Felony. We affirm.

Issues

The issues before us are:

I. whether the trial court abused its discretion in imposing the four year sentence; and

II. whether the sentence was inappropriate in light of the nature of the offense and McDaniel's character.

Facts

On March 22, 2009, McDaniel was living in a trailer on Donald Birlson's property in Lake County. On that date, after McDaniel and Birlson had been drinking, Birlson attempted to enter McDaniel's trailer. McDaniel shoved Birlson out of the trailer, and they began to roll around on the ground. Eventually, Birlson returned to his residence and McDaniel to his trailer.

Soon after, Birlson returned to McDaniel's trailer and began banging on the door. McDaniel then went to his dresser, pulled out his .45 Lama semi-automatic handgun, racked the slide to load it, and cocked the hammer. McDaniel ordered Birlson to step away from the trailer door. When Birlson did not step away, McDaniel opened the trailer door and shot the gun once over Birlson's head. Birlson, armed with a piece of wood, struck McDaniel's hand with the wood when McDaniel's finger was on the gun's trigger. The gun then fired a second shot, which struck Birlson in the head. As a result of the gunshot wound, Birlson has permanent brain damage, paralysis to the left side of his

body, and had a titanium plate inserted over his brain because part of his skull is missing. He has spent a total of fourteen months in rehabilitation centers. At the time of sentencing, Birlson was walking with a cane, had trouble eating, and, for example, had to label his shoes because he could not remember which is left and which is right.

The State charged McDaniel with aggravated battery as a class B felony, battery as a class C felony, and criminal recklessness as a class C felony. On June 30, 2010, McDaniel accepted a plea agreement in which he pled guilty to criminal recklessness. The plea agreement capped McDaniel's sentence at four years. In exchange for his guilty plea, the State dismissed the remaining charges. On July 23, 2010, the trial court sentenced McDaniel to the Department of Correction for four years.

In the sentencing statement entered on July 26, 2010, the trial court outlined the circumstances it considered in rendering its decision. The trial court considered as an aggravating circumstance that McDaniel has a history of juvenile adjudications and misdemeanor and felony convictions. The mitigating circumstances considered were that McDaniel "admitted his guilt by way of plea agreement, thus saving the Court and the tax payers of [Lake] [C]ounty the time and expense of a trial," and McDaniel "acted under some degree of provocation but not sufficient to justify his response." Appellant's App. p. 66. McDaniel now appeals his sentence.

Analysis

McDaniel argues that the trial court abused its discretion by not properly identifying and weighing certain mitigating and aggravating circumstances. Specifically, McDaniel asserts that the trial court failed to identify or properly consider the following

mitigating factors: (1) McDaniel has repeatedly expressed remorse for his actions that left Birlson paralyzed; (2) McDaniel did not act intentionally in inflicting the injuries upon Birlson; (3) McDaniel acted under provocation at the time of the incident; (4) McDaniel has no history of violent offense or being a violent person; and (5) McDaniel had no felony convictions for more than twenty years prior to the March 22, 2009 incident.

We engage in a four-step process when evaluating a sentence under the current "advisory" sentencing scheme. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). First, the trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e. to particular aggravators or mitigators, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id. Even if a trial court abuses its discretion by not issuing a reasonably detailed sentencing statement or in its findings or non-findings of aggravators and mitigators, we may choose to review the appropriateness of a sentence under Rule 7(B) instead of remanding to the trial court. See Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007).

I. Abuse of Discretion

McDaniel asserts that the trial court abused its discretion in failing to identify certain claimed mitigating circumstances and not considering circumstances surrounding the aggravating factor. An abuse of discretion in identifying or not identifying mitigators

occurs if it is "'clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.'" Id. at 490 (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)). Additionally, an abuse of discretion occurs if the record does not support the reasons given for imposing sentence, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Id. at 490-91.

Here, the trial court found McDaniel's prior criminal history, which consists of one conviction for burglary as a juvenile and three felony and two misdemeanor convictions as an adult, to be an aggravating circumstance. It found his guilty plea and the fact that McDaniel "acted under some degree of provocation but not sufficient to justify his response," as mitigating circumstances. Appellant's App. p. 66. Ultimately, the trial court found that the aggravating circumstance outweighed the mitigating circumstances.

McDaniel argues that the trial court should have given more weight to the fact he has no history of violent offenses or being a violent person and that he has not been convicted of a felony in more than twenty years when it considered his criminal record as an aggravator. He also argues that the trial court should have given more weight to the fact that he acted as a result of provocation by Birlson. To the extent McDaniel complains that the trial court abused its discretion in failing to give his proffered mitigating factors greater weight, this claim is not available for appellate review. Anglemyer, 868 N.E.2d at 493-94. Furthermore, the trial court did take into

consideration Birlson's provocation of the incident as a mitigating circumstance in its sentencing statement.

With respect to McDaniel's argument that the trial court did not take into consideration his remorse for the crime and that he did not act intentionally, although the trial court has an obligation to consider all mitigating circumstances identified by a defendant, it is within the trial court's sound discretion whether to find mitigating circumstances. Heyen v. State, 936 N.E.2d 294, 305 (Ind. Ct. App. 2010), trans. denied. Although McDaniel may not have acted intentionally, as he alleges, he does admit that he acted recklessly. McDaniel is the one that introduced the handgun into the altercation, which gun resulted in Birlson's brain damage and paralysis. Furthermore, the trial court did, in fact, take into consideration McDaniel's plea as a mitigating circumstance. We will not remand for reconsideration of alleged mitigating factors that have debatable nature, weight, and significance. Id. As such, we do not find that the trial court erred when it did not give more weight to McDaniel's remorse for his crime and contention that he did not act intentionally.

II. Inappropriate Sentence

Although McDaniel mentions in his brief that his sentence is inappropriate pursuant to Indiana Rule of Appellate Procedure 7(B), he fails to fully develop an argument as to the inappropriateness of his sentence. However, McDaniel's counsel does address McDaniel's character and nature of the offense. The State also develops an argument under Appellate Rule 7(B). Therefore, we address his inappropriateness claim.

Although Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. "Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id.

The principal role of Rule 7(B) review "should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived 'correct' result in each case." Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008). We "should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count." Id. Whether a sentence is inappropriate ultimately turns on 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. When reviewing the appropriateness of a sentence under Rule 7(B), we may consider all aspects of the penal consequences imposed by the trial court in sentencing the defendant, including whether a portion of the sentence was suspended. Davidson v. State, 926 N.E.2d 1023, 1025 (Ind. 2010).

With regard to the character of the offender, we note that McDaniel has a lengthy criminal history, which began in 1969 and includes two felony and three misdemeanor convictions. Included in that are convictions for leaving the scene of an accident and reckless driving, which he pled guilty to in exchange for dismissal of a charge of

operating while intoxicated.

McDaniel has abused alcohol since the age of sixteen and asserts that alcohol contributed to the escalation of the incident on the part of both himself and Birlson. Despite his long history of alcohol abuse and a history of alcohol abuse in his family, he had not sought treatment for his addiction until after this incident.[1] Also, his addiction and remorse do not mitigate the fact that he chose to grab the handgun and introduce it into the altercation with Birlson. Furthermore, McDaniel acknowledges that his actions did not rise to the level of self-defense. McDaniel's history of alcohol abuse and his remorse do not necessarily outweigh his criminal history. Perhaps this incident was a "wake-up" call for McDaniel to get the treatment he needs.

With regard to the nature of the offense, Birlson was severely injured by McDaniel's gunshot. Although Birlson is not innocent of provocation, we agree with the State that McDaniel drastically escalated the situation by "when he consciously chose to interject a loaded and cocked handgun into a situation where he was drinking alcohol." Appellee's Br. p. 6. However remorseful McDaniel may be, his decision led to Birlson's severe and life-long injuries, as described above.

McDaniel pled guilty to a class C felony, for which the maximum sentence is eight years imprisonment and the minimum is two years. Ind. Code § 35-50-2-6(a). McDaniel received the advisory sentence and the cap, per the plea agreement, of four years. Based on McDaniel's character and the nature of the offense, most importantly the severity of

[1] McDaniel attended a seventy-five hour long drug and alcohol treatment program at the Adult Addiction Center in Hammond, Indiana. He began the program in June 2009 and completed the program in August or September 2009.

the victim's injury, we cannot say that his sentence was inappropriate in light of the nature of the offense and his character.

Conclusion

Based on the foregoing, we conclude that the trial court did not abuse its sentencing discretion, and McDaniel's sentence is not inappropriate in light of his character and the nature of his offense. We affirm.

Affirmed.

ROBB, C.J., and BRADFORD, J., concur.