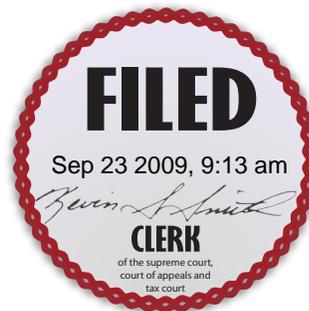


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

NATHAN SUTTON,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A04-0901-CR-34
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
Cause No. 49G06-0808-FB-197512
Cause No. 49G06-0808-FB-197519

September 23, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Nathan Sutton appeals the concurrent eight-year sentences imposed by the trial court after he pled guilty to two counts of burglary¹ each as a Class B felony. We restate the issue presented as whether the trial court properly sentenced Sutton.

We affirm.

FACTS AND PROCEDURAL HISTORY

Sometime during the late evening of July 31, 2008 or the early morning of August 1, 2008, Sutton broke into the Victory Memorial Union Methodist Church in Indianapolis. Sutton took several items from the church without permission, which he later pawned. Police were able to identify Sutton as the burglar based on fingerprints he left inside the church. As a result of this incident, on August 26, 2008, under Cause Number 49G06-0808-FB-197519 (“Cause Number 19”), the State charged Sutton with burglary as a Class B felony and two counts of theft as Class D felonies.

On August 21, 2008, Sutton and two accomplices broke into the Trinity Baptist Church in Indianapolis. Sutton and his accomplices took multiple items from the church without permission. Later that night, police encountered Sutton and his accomplices sitting in a car. The police received consent to search the vehicle and located items that a pastor from Trinity Baptist Church later identified as having been stolen from the church. Because of his involvement in the burglary of Trinity Baptist Church, on August 26, 2008, under Cause Number 49G06-0808-FB-197512 (“Cause Number 12”) the State charged Sutton with burglary as a Class B felony, forgery as a Class C felony, and two counts of theft as Class D felonies.

¹ See Ind. Code § 35-43-2-1.

At the time he committed the offenses charged under Cause Numbers 12 and 19, Sutton was on probation for a prior conviction in Hamilton County for failure to stop after an accident with injury or death and was also on pretrial release for the charge of Class A misdemeanor resisting law enforcement, which had been filed in Marion County under Cause Number 49G06-0807-CM-175591 (“Cause Number 91”). Additionally, at the time Sutton committed the offenses charged under Cause Number 12, he was on pretrial release for the charges of Class D felony theft/receiving stolen property and Class A misdemeanor criminal trespass, both of which were filed in Marion County under Cause Number 49G06-0808-FD-188550 (“Cause Number 50”).

On December 5, 2008, Sutton entered into a plea agreement with the State. Under the agreement, Sutton agreed to plead guilty to the Class B felony burglary charges filed under Cause Numbers 12 and 19. In exchange, the State agreed to dismiss the remaining charges under Cause Numbers 12 and 19 and to completely dismiss the charges filed under Cause Numbers 50 and 91. The plea agreement specified that there would be a ten year cap on the initial executed portion of Sutton’s sentence. At a hearing held that same day, the trial court accepted the plea agreement.

On December 19, 2008, the trial court held a sentencing hearing. During the hearing, evidence was introduced indicating that in addition to his Hamilton County conviction for failure to stop after an accident with injury or death, Sutton had also been convicted in January 2007 of Class A misdemeanor possession of marijuana. At the conclusion of the hearing, the trial court made the following comments:

You do have some criminal history, in which you've been pretty active here in the last two years. I'm not sure what's going on but drugs I know aren't helping you one bit. You had a marijuana conviction in January of 2007. You had a traffic conviction out of Hamilton County, in which you've been placed on probation and were on probation at the time of the offense. You were arrested for resisting law enforcement under [Cause Number 91]. You've been released on custody from that when you committed these two burglaries, same thing for [Cause Number 50]. You were released from custody on one of those when you went out and committed this second burglary. It seems like a one year crime spree here.

Tr. at 33-34. The trial court then sentenced Sutton to eight years on each burglary conviction with the sentences to run concurrently. The court specified that two years of the sentence would be executed with the remaining six years suspended. Two of the six suspended years of the sentence were to be served on probation. Sutton now appeals.

DISCUSSION AND DECISION

Sutton argues that the trial court abused its discretion in sentencing him. Sentencing decisions are within the discretion of the trial court and are reviewed on appeal for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (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, or the reasonable, probable, and actual deductions to be drawn therefrom.'" *Id.* (quoting *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006)). A trial court may abuse its discretion by failing to issue a sentencing statement, or by issuing a sentencing statement that either bases a sentence on reasons that are not supported by the record, omits reasons both advanced for consideration and clearly supported by the record, or includes reasons that are improper as a matter of law. *Id.* at 490-91.

Sutton argues that in sentencing him, the trial court considered the charges that were dismissed in Cause Numbers 50 and 91 and that this constituted an abuse of discretion. He contends that *Hunter v. State*, 854 N.E.2d 342 (Ind. 2006) supports his position. In that case, Hunter escaped from the Miami County Jail where he had been incarcerated for a burglary conviction. Hunter subsequently voluntarily turned himself in to authorities and was charged and convicted of escape as a Class C felony. At the sentencing hearing, the trial court found no mitigating circumstances and identified Hunter's criminal history as an aggravating circumstance. The trial court noted that Hunter's criminal history consisted of three felony and two misdemeanor charges that had been dismissed when Hunter pled guilty to burglary. The trial court sentenced Hunter to the maximum term of eight years. This court affirmed Hunter's conviction and sentence, and our Supreme Court granted transfer.

Before our Supreme Court, Hunter argued that his sentence violated his Sixth Amendment rights under *Blakely v. Washington*, 542 U.S. 296 (2004) because the trial court improperly considered his prior dismissed criminal charges to enhance his sentence. Initially, the court noted:

The Sixth Amendment requires that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury" but permits a sentencing court to consider "the fact of a prior conviction." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000); *Smith v. State*, 825 N.E.2d 783 (Ind. 2005). Accordingly, consistent with the Sixth Amendment, the trial court could have found that Hunter's prior convictions were an aggravating circumstance, but prior dismissed charges were not a permissible factor. The trial court's sentencing statement suggests that the court may have considered dismissed charges as part of Hunter's prior "criminal history"

that constituted the sole aggravating circumstance justifying his enhanced sentence.

Hunter, 854 N.E.2d at 344. The Supreme Court, though, chose not to address the issue raised by Hunter and instead exercised its authority “under Article VII, Sections 4 and 6 of the Indiana Constitution and Indiana Appellate Rule 7(B) to revise the sentence to the presumptive (now advisory) four years.” *Id.*

Sutton appears to rely on the statement in *Hunter* that “prior dismissed charges were not a permissible factor.” *Id.* Yet, with this statement, the *Hunter* court was merely indicating that pursuant to *Blakely* prior dismissed charges cannot be used to increase a sentence beyond the statutory maximum. Here, there was no *Blakely* violation because Sutton was sentenced under the advisory sentencing scheme and his sentence did not exceed the twenty year statutory maximum established by Indiana Code section 35-50-2-5. *See Rogers v. State*, 897 N.E.2d 955, 964 (Ind. Ct. App. 2008) (noting that under the current advisory sentencing scheme there can be no *Blakely* violation), *trans. denied*.

Hunter did not address the issue presented here, which is whether the consideration of prior dismissed charges in sentencing an offender constitutes an abuse of discretion. Rather, the *Hunter* court chose to exercise its authority under the Indiana Constitution and Indiana Appellate Rule 7(B) to revise Hunter’s sentence. *Hunter*, 854 N.E.2d at 344. Thus, *Hunter* is not controlling.

In considering the charges that were dismissed under Cause Numbers 50 and 91, the trial court stated:

You were arrested for resisting law enforcement under [Cause Number 91].
You’ve been released on custody from that when you committed these two

burglaries, same thing for [Cause Number 50]. You were released from custody on one of those when you went out and committed this second burglary.

Tr. at 34. The trial court's principal concern with regard to the charges dismissed under Cause Numbers 50 and 91 was that Sutton had burglarized Victory Memorial Union Methodist Church and Trinity Baptist Church while on pretrial release for those charges. We have previously held that being on pretrial release at the time one commits a subsequent offense is a proper aggravating circumstance "because the fact that a defendant was on bond in another matter when he committed the [subsequent] offense is not derivative of his criminal history, inasmuch as it neither springs from a prior conviction nor qualifies as a judicial statement." *Field v. State*, 843 N.E.2d 1008, 1011 (Ind. Ct. App. 2006), *trans. denied*. We further explained, "A defendant's violation of the conditions of his bond does not spring from a prior conviction because it is a direct violation of a trial court's order. Accordingly, just as a probation violation is not derivative of criminal history, neither is conduct that violates the conditions of the bond." *Id.* The fact that Sutton was on pretrial release for the charges dismissed under Cause Numbers 50 and 91 at the time he committed the instant offenses was a proper aggravating circumstance that the trial court could consider. *See id.* Therefore, the trial court's consideration of the dismissed charges when it sentenced Sutton was not an abuse of discretion.

Sutton also argues that the trial court violated the spirit and intent of the plea agreement he entered into with the State by considering the charges dismissed under Cause Numbers 50 and 91 when it sentenced him. First, we note that we have already

determined that the trial court did not abuse its discretion by considering the charges dismissed under Cause Numbers 50 and 91. Under the plea agreement, Sutton agreed to plead guilty to the Class B felony burglary charges filed under Cause Numbers 12 and 19, and in exchange, the executed portion of his sentence was capped at ten years. The trial court accepted the plea agreement and sentenced Sutton to eight years on both burglary convictions with the sentences to run concurrently. The sentence imposed by the trial court complied with the terms of Sutton's plea agreement. As such, we find no error in the sentence imposed by the trial court.

Affirmed.

NAJAM, J., and BARNES, J., concur.