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IN THE
COURT OF APPEALS OF INDIANA

ERICK COREY MORRIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0902-CR-118
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause Nos. 79D02-0803-FB-10 & 79D02-0803-FC-13

September 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Erick Morris pled guilty pursuant to a plea agreement to burglary as a Class B felony and dealing in a substance represented to be a controlled substance as a Class C felony. In exchange, the State agreed to dismiss the remaining charges in the burglary and dealing cases as well as charges in an unrelated cause. The plea agreement also called for concurrent sentences. On appeal, Morris contends that the trial court erred by ordering the burglary and dealing sentences to be served consecutively and that his sentence is inappropriate in light of the nature of the offenses and his character. After considering the oral and written sentencing pronouncements, we conclude that the written statements erroneously call for consecutive sentences in violation of the plea agreement but that the sentence intended by the trial court, as evidenced by the oral pronouncement, is proper. We remand with instructions to correct the written sentencing statements to reflect the correct sentence. We also conclude that Morris's sentence is not inappropriate.

Facts and Procedural History

On October 10, 2008, Morris pled guilty pursuant to a plea agreement to burglary as a Class B felony[1] under Cause Number 79D02-0803-FB-10 ("Cause No. FB-10") and dealing in a substance represented to be a controlled substance as a Class C felony[2] under Cause Number 79D02-0803-FC-13 ("Cause No. FC-13"). In exchange, the State agreed to dismiss the three counts of theft as a Class D felony remaining under Cause No. FB-

[1] Ind. Code § 35-43-2-1.

[2] Ind. Code § 35-48-4-4.6(a).

10, one count of dealing in a substance represented to be a controlled substance remaining under Cause No. FC-13, and the charges for conversion as a Class A misdemeanor and resisting law enforcement as a Class A misdemeanor in an unrelated case under Cause Number 79D05-0801-CM-126.[3] The parties also agreed that the sentences in Cause No. FB-10 and Cause No. FC-13 would run concurrently and that Morris would serve a minimum of eight years and a maximum of fifteen years executed. Appellant's App. p. 23.

At the guilty plea hearing, a factual basis was established for both Cause Nos. FB-10 and FC-13. Morris testified that an individual approached him to buy crack cocaine. Unbeknownst to Morris, this individual was a detective with the Tippecanoe County Drug Task Force. Morris sold the detective a small baggie containing a substance that appeared to be crack cocaine, when in fact Morris knew that the substance was not crack cocaine. Morris also testified that, before he was arrested for dealing the false crack cocaine, he and Arlo Kelly had been traveling around Tippecanoe County, searching for apartments where students appeared to live. Upon finding such an apartment, Morris and Kelly checked to see if the door was unlocked. If it was, they then went inside to steal electronic devices. Morris and Kelly entered one such apartment and stole laptops and an iPod.

The trial court later accepted the plea agreement. At the sentencing hearing, the trial court asked Morris if there were any corrections to make to the PSI. Morris told the court that the PSI indicated that he had been convicted in October 2004 of check

[3] Although the plea agreement provides 79D05-0801-CM-16 as the cause number of the dismissed case, the PSI indicates that the correct cause number is 79D05-0801-CM-126. Appellant's App. p. 165.

deception but that he had repaid the checks, and the case was dismissed as a result. The PSI reveals a history of previous offenses, mental illness, and substance abuse. Also included in the PSI is a report compiled by Dr. Jeffrey Wendt, the examining psychologist. Morris told Dr. Wendt that his half-brother was murdered in 1998. *Id.* at 187. Morris's mother testified at the hearing about his traumatic childhood. Morris witnessed a shooting, ran away from home, and was beaten and robbed by others in the neighborhood. Morris's mother testified that Morris's father had tied him up in the basement and whipped him. Morris told the court that he apologized for his actions and that he was depressed and acting on impulse at the time of his crimes. After argument from both sides, the trial court sentenced Morris as follows:

> The aggravating factors are the defendant's history of criminal or delinquent behavior. The defendant's violation of the conditions of probation. And the multiple burglaries the defendant committed. The mitigating factors [are] the defendant's plea of guilty and taking responsibility for his crime. His cooperation with law enforcement to close numerous cases and which resulted in orders of restitution, which may or may not help the victims in the long run. His mental illness. His low IQ. His family support and the childhood abuse that he suffered as a child. The Court finds that the aggravating circumstances outweigh the mitigating circumstances. I'm going to sentence the defendant to 18 years in the Department of Correction of which 13 years shall be executed and 5 suspended on supervised probation.

Tr. p. 62-63. The trial court's written sentencing order describes the sentence as a period of fifteen years for Cause No. FB-10 and a period of three years for Cause No. FC-13, to be served consecutively in the Department of Correction for an aggregate of eighteen years. Appellant's App. p. 30. The sentencing order also states that Morris shall execute thirteen years of the sentence in the Department of Correction, with five years suspended to supervised probation. *Id.* at 30-31. The abstracts of judgment for Cause Nos. FB-10

and FC-13 reflect that the trial court imposed a sentence of fifteen years with three years suspended for Cause No. FB-10 to run consecutive to a sentence of three years with two years suspended for Cause No. FC-13. *Id.* at 40 (Cause No. FC-13), 146 (Cause No. FB-10). The CCS reflects that Morris was sentenced to fifteen years for Cause No. FB-10 and three years for Cause No. FC-13 for a total of eighteen years with thirteen years executed and five years suspended. *Id.* at 2, 58. Morris requested and received permission to file this belated appeal because appellate counsel was not timely notified of his appointment. Morris now appeals.

Discussion and Decision

On appeal, Morris contends that the trial court violated the terms of his plea agreement in sentencing him and that his sentence is inappropriate in light of the nature of the offenses and his character.

I. Compliance with the Plea Agreement

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only 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 or the reasonable, probable, and actual deductions to be drawn therefrom. *Id*. A plea agreement is "contractual in nature, binding the defendant, the State, and the trial court." *Bennett v. State*, 802 N.E.2d 919, 921 (Ind. 2004). "It is within the trial court's discretion to accept or reject a plea agreement and the sentencing provisions therein; however, if the court accepts such an agreement, it is strictly bound by its

sentencing provision and is precluded from imposing any sentence other than required by the plea agreement." *Id*. at 921-22.

The State concedes that the trial court abused its discretion by ordering the sentences to run consecutively, when the plea agreement called for concurrent sentences. Morris argues that it is nevertheless impossible to discern the sentence intended by the trial court because the oral pronouncement at sentencing conflicts with the written sentencing order and abstract of judgment and the oral pronouncement does not delineate between the two charges to which Morris pled guilty. When faced with an inconsistency between oral and written sentencing statements, the appellate court can "credit[] the statement that accurately pronounces sentence or remand[] for resentencing."[4] *McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007).

Although the trial court's written sentencing statements improperly reflect consecutive sentences, in violation of the plea agreement, we can discern the trial court's intent upon consideration of all the statements together. The trial court clearly stated at the sentencing hearing that it sentenced Morris to eighteen years, with thirteen of those years executed and five suspended. The written sentencing statements reflect that the trial court sentenced Morris to fifteen years for Cause No. FB-10 and three years for Cause No. FC-13. But all the written statements reach the same conclusion: Morris

[4] Morris argues that this rule only applies to findings of aggravators and mitigators and should not apply to pronouncements of the sentence itself. We disagree. Our Supreme Court applied the *McElroy* rule in *Dowell v. State*, 873 N.E.2d 59 (Ind. 1997), a case involving an inconsistency between the oral and written sentencing statements regarding whether a three-year sentence for a criminal confinement conviction was to be executed or suspended. After considering the oral and written statements, the Court concluded that the trial court intended that the three-year sentence was to be executed rather than suspended, resulting in a forty-three-year aggregate rather than a forty-year aggregate sentence. *Id.* at 60-61.

should serve thirteen years executed and five additional years should be suspended on probation. The trial court's oral sentencing statement reaches this result without violating the plea agreement, but simply omits that the three-year sentence for dealing in a substance represented to be a controlled substance is to be served concurrent with the eighteen-year sentence for burglary. Because of the inconsistency, we remand with instructions for the trial court to clarify the written sentencing statements to reflect that Morris was sentenced to three years for the dealing count to be served concurrent with eighteen years for the burglary count, with thirteen of those years executed and five suspended to probation. *See Windhorst v. State*, 868 N.E.2d 504, 507 (Ind. 2007), *reh'g denied*.

II. Inappropriateness

Morris argues that we should revise his sentence because it is inappropriate in light of the nature of the offenses and his character. In reviewing the imposition of a trial court's decision, Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences 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 of the offense and the character of the offender." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer*, 868 N.E.2d at 491). The burden is on the defendant to persuade us that his or her sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

Morris pled guilty to burglary as a Class B felony and dealing in a substance represented to be a controlled substance as a Class C felony. A person convicted of a Class B felony can be sentenced to a term between six and twenty years, with the advisory sentence being ten years. Ind. Code § 35-50-2-5. A person convicted of a Class C felony can be sentenced to a term between two and eight years, with the advisory sentence being four years. Ind. Code § 35-50-2-6.

We see nothing particularly aggravating about his offenses when compared to other similar crimes, but his character is a different story. As a juvenile, Morris ran away from home. He was adjudicated a delinquent child in 2002 for criminal conversion. He was placed on probation for this offense, but Morris failed probation and was detained at the Lake County Juvenile Center. As an adult, Morris was arrested for misdemeanor criminal mischief in 2001. In 2003, he was arrested and charged with two counts of check deception as a Class A misdemeanor. He stated at his sentencing hearing that these charges were dismissed after he repaid the victims in full. In 2005, Morris was convicted of burglary as a Class C felony and sentenced to three years in the Indiana Department of Correction, with all three years suspended to probation. His probation was revoked two times. In 2007, Morris was convicted of possession of marijuana as a Class A misdemeanor and sentenced to one year. Once again, Morris's probation was revoked after he failed to comply with its terms. Morris committed the dealing offense and burglaries in the instant cases while he was on probation. We acknowledge that Morris suffers from mental illness and substance dependence, that he was twenty-five years old at the time of sentencing and had endured a difficult childhood, and that he took

responsibility for his crimes by cooperating with police and pleading guilty. But we are also mindful that Morris received a substantial benefit by pleading guilty because of the State's agreement to drop other charges pending against him. On balance, we cannot say that Morris's sentence is inappropriate in light of his history of criminal behavior and failed second chances.

Morris compares his situation to that of the defendant in *Feeney v. State*, 874 N.E.2d 382 (Ind. Ct. App. 2007), whose sentence we found inappropriate. But the cases are distinguishable. Feeney was only eighteen years old at the time of his offenses and had no juvenile delinquency or adult criminal history. And Feeney was sentenced to forty years, with thirty of those years in the Department of Correction, four years with Tippecanoe County Community Corrections, and six years on supervised probation. In contrast, Morris is older, has a juvenile delinquency and adult criminal history, and was sentenced to eighteen years, with thirteen of those years executed.

Nor does the fact that Morris's executed sentence of thirteen years is eight times longer than any previous sentence ordered against Morris make his sentence in the instant cases inappropriate, especially in light of his criminal history. Even Morris notes that he agreed to a minimum that was five times the length of any of his previous executed sentences. We conclude that Morris's sentence is not inappropriate in light of the nature of the offense and his character.

Affirmed and remanded for correction of the written sentencing statements.

BAILEY, J., and BRADFORD, J., concur.