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# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| JYSHAWN D. MOORE, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 71A03-1102-CR-115 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause Nos. 71D01-1003-FB-16 and 71D01-1004-FB-46

**October 5, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**DARDEN, Judge**

## STATEMENT OF THE CASE

Jyshawn D. Moore belatedly appeals his sentence imposed following his guilty plea to three counts of Class B felony burglary.[1]

We affirm.

## ISSUE

Whether Moore's sentence is inappropriate pursuant to Indiana Appellate Rule 7(B).

## FACTS

On February 10, 2010, Moore forced open the door of Ryan Willerton's house in South Bend and removed several items near an entertainment center.

On March 1, 2010, Moore and some accomplices broke into Colleen Kelsick's house in South Bend and removed items from the home.

Later that same day, Moore and his accomplices then went to Joel Bowers's home in Mishawaka, forced their way into the home, and took property from the home.

On March 4, 2010, the State charged Moore with two counts of class B felony burglary, under cause number 71D01-1003-FB-16 ("FB-16"), for the crimes committed on March 1, 2010. On April 30, 2010, State charged Moore with one count of class B felony burglary, under cause number 71D01-1004-FB-46 ("FB-46"), for the crime committed on February 10, 2010.

On May 28, 2010, Moore pled guilty, without a plea agreement, to all three burglary counts as charged in both causes. The trial court held a sentencing hearing on July 13, 2010. During sentencing, Moore, who was eighteen years old and attended

[1] Ind. Code § 35-43-2-1.

school until the tenth grade, admitted that he "made some bad mistakes" and stated that he "just wasn't thinking at the time[.]" (Tr. 27). Thereafter, when imposing Moore's sentence, the trial court addressed Moore's statement of remorse and the reasons for crafting the sentence imposed:

> You know, I hear this all the time, Jyshawn. People standing in front of me looking contrite or sorrowful telling me they made a bad choice. Well you didn't make one bad choice. You committed three criminal acts, and as [the State] points out, on separate occasions. You went into people's homes. I don't know what you were thinking, but I suspect it was more than -- Well I suspect you were thinking. You knew exactly what you were doing. You invaded this home just to take their stuff. To take whatever you could find and do whatever you wanted with it, and that shows a real meanness, that you don't display here to me. But you know the old saying, actions speak louder than words. To some extent that's absolutely true here, because I look at you, and you do look remorseful, and I suspect that you do feel remorseful, but there's another side of you that would, in the middle of daylight, break into people's homes, kick open their doors and take their stuff.
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> * * * * *
>
> I'm really torn here, Jyshawn. You're only 18 years old, and I do look at your juvenile record, and a lot of the runaway [sic], you know, that's not anything that I can consider. But when I look at the one adjudication that there was, and it was a battery, and you were very young . . . You were 10. But what I find, it isn't so much the fact of the battery, but you were in the juvenile system on that case, as the juvenile system is able to do, for five years, completing your last episode of electronic monitoring, if I'm reading this correctly, in July of 2007. That suggests to me that the JJC probably saw the same part of you that [defense counsel] is wanting me to see. So they kept you in the system and tried to work with you and tried to get you back on the right track, but despite all of their efforts you became a kid who at 18 would callously break into people's homes in the middle of the day kicking open the doors, and that reflects on you very badly.
>
> On the other hand, I don't think it's -- the one thing when I look at someone's youth, especially I know that your brain isn't fully developed of who you are at 18 isn't necessarily who you'd be at 30, and you probably have a lack of concern for others and a desire to take risks that you won't have when you're older. But right now you are a danger, and that [sic] that's something that I have to consider.

> The sentences that I'm going to impose on these counts I am going to run consecutively, recognizing that these are three separately [sic] incidents, three separate homes were violated, three separate times that you had to decide that you were going to break the law and you were going to break into somebody's home when breaking the law, and you now have to suffer the consequence of having made that decision. The question is then what do I do from there?

(Tr. 27-30).

The trial court found Moore's guilty plea and acceptance of responsibility to be mitigating and then, under cause FB-16, sentenced Moore to the minimum term of six years for each of his class B felony burglary convictions and ordered that they be served consecutively and served at the Department of Correction. For Moore's class B felony burglary conviction in cause FB-46, the trial court sentenced Moore to the minimum term of six years, suspended three years, and ordered that the executed three-year term be served on work release with St. Joseph County Community Corrections followed by one year of probation. The trial court ordered that the sentence in FB-46 be served consecutively to the sentence in FB-16.

The trial court then explained to Moore:

> This puts you in the D.O.C. realistically, with good time, for six years. You need to, I would suggest, Jyshawn, while you're in the D.O.C. get your education. Get some training. As you know, that can result in time cuts, but more importantly it can give you some skills that you're going to need when you get out to lead your life in a different way than you've been leading it so far. By the time you get out, maybe you will be less inclined to do these kinds of things that cause people so much harm and so much grief and so much sadness . . . .

(Tr. 33).

On November 30, 2010, Moore filed a pro se motion for permission to file a belated notice of appeal under both causes. Following a hearing, the trial court granted Moore's motion, and Moore filed a belated notice of appeal.

DECISION

Moore contends that his aggregate sentence of fifteen years executed, with three years suspended, for his three class B felony convictions is inappropriate. Moore does not challenge the trial court's decision to order consecutive sentences in FB-16, and he acknowledges that his sentence on each count falls below the advisory for a class B felony. Instead, he argues that his sentence was inappropriate because the trial court did not order his sentence in FB-46 to be served concurrently to his sentence in FB-16.

We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). The defendant has the burden of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

The principal role of a 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.* Additionally, "[i]n assessing whether a sentence is inappropriate, appellate courts may take into account whether a portion of the sentence is ordered suspended or is otherwise crafted

using any of the variety of sentencing tools available to the trial judge." *Sharp v. State*, 951 N.E.2d 282, 289 (Ind. Ct. App. 2011) (citing *Davidson v. State*, 926 N.E.2d 1023, 1025 (Ind. 2010)). "These tools include probation, home detention, placement in a community corrections program, executed time in a Department of Correction facility, concurrent rather than consecutive sentences, and restitution/fines." *Id.*

The advisory sentence for a class B felony is ten years, with a minimum sentence of six years and a potential maximum sentence of twenty years. Ind. Code § 35-50-2-5. Thus, Moore faced a potential sentence of sixty years. Here, however, the trial court sentenced Moore to an aggregate sentence of eighteen years, with fifteen years executed, three years suspended, and one year on probation, for his three class B felony convictions. Specifically, under FB-16, sentenced Moore to the minimum term of six years for each of his class B felony burglary convictions and ordered that they be served consecutively at the Department of Correction. For Moore's conviction in FB-46, the trial court sentenced him to the minimum term of six years, suspended three years, and ordered that the executed three-year term be served on work release followed by one year of probation. The trial court ordered that the sentence in FB-46 be served consecutively to the sentence in FB-16.

Regarding Moore's offenses, the record reveals that in less than one month, eighteen-year-old Moore forcibly entered three separate homes by kicking in the door and took personal property from each of them. The probable cause affidavits provide details of each of the crimes and reveal that on February 1, 2010, Moore kicked in the front door of Willerton's house and took a video game and a camera. While Moore was there, he

left fingerprints that were later recovered by police and used to charge him with the crime. On the morning of March 1, 2010, Moore and his accomplices drove a white van without a license plate to the South Bend home of Kelsick, where Moore then kicked in her door, rifled through her house, and took a ring. Later that morning, Moore and his accomplices drove to the Mishawaka home of Bowers, where he again kicked in the door and took a television, a laptop computer, and a handgun in a plastic case. During the sentencing hearing, Bowers testified that Moore's act of burglarizing his home really "shook up" his wife and children and that the theft of his laptop resulted in the loss of several irreplaceable items, including videos and photos of his children's birth, first steps, and first bath. (Tr. 20). Furthermore, the record reveals that the gun Moore took from Bowers's house was never recovered.

As to Moore's character, he had a criminal history consisting of juvenile adjudication at the age of ten for battery as well as multiple juvenile referrals. Moore also has an adult misdemeanor conviction for carrying a handgun without a permit, and the presentence investigation report ("PSI") indicates that at the time of sentencing, he had a pending charge for possession of marijuana. The PSI also reveals that eighteen-year-old Moore had a three-year-old child and that Moore was suspended from school for talking back to teachers and was eventually expelled after the ninth grade. Additionally, the PSI indicates that Moore admitted to using marijuana since the age of sixteen and that he used it on a daily basis.

In support of his character, Moore points to his young age of eighteen, remorse, and willingness to plead guilty. The trial court, however, considered these factors during

sentencing, and as shown above, clearly factored those into the sentence it crafted for Moore. Indeed, it is clear that the trial court's sentence—when viewed from the forest, *see Cardwell*, 895 N.E.2d at 1225—was an exercise of thoughtful consideration of the nature of the offenses and Moore's character as well as a resourceful use of the variety of available sentencing tools. *See Davidson*, 926 N.E.2d at 1025.

Moore has not persuaded us that that his aggregate sentence of twelve years executed at the Department of Correction followed by three years executed on work release and one year on probation for the commission of three class B felony burglaries is inappropriate. Therefore, we affirm the trial court's sentence.

Affirmed.

FRIEDLANDER, J., and VAIDIK, J., concur.