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IN THE
COURT OF APPEALS OF INDIANA

RAY BEAN, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0905-CR-231
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT NO. 3
The Honorable George W. Biddlecome, Judge
Cause Nos. 20D03-0709-FC-41 & 20D03-0710-FC-44

November 10, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Ray Bean, Jr. (Bean), appeals his two convictions for operating a motor vehicle while his driving privileges are forfeited for life, Class C felonies, Ind. Code § 9-30-10-17.

We affirm in part, reverse in part, and remand with instructions.

ISSUES

Bean presents two issues for our review, which we restate as:

(1) Whether the State presented evidence sufficient to prove beyond a reasonable doubt that he operated a motor vehicle; and

(2) Whether his sentence is inappropriate when the nature of his offenses and character are considered.

FACTS AND PROCEDURAL HISTORY

On June 27, 2007, Officer Adam Paciorkowski (Officer Paciorkowski) of the Elkhart City Police Department saw Bean riding a Yamaha Zuma scooter on Harrison Street in Elkhart, Indiana. Officer Paciorkowski asked Bean to speak with him so that he could inform Bean that the Zuma needed to be plated, insured, and could not be driven on the sidewalk. Bean showed Officer Paciorkowski a sheet of paper "which had some of the rules as to what determines a motorized scooter and what does not." (Transcript p. 11). Officer Paciorkowski "attempted to show [Bean] [] that he was missing some of the regulations. He wanted no part of that." (Tr. p. 11). Officer Paciorkowski learned that Bean had been suspended as an habitual traffic violator, but did not arrest him at that time. On August 20,

2007, the State filed an Information charging Bean with operating a motor vehicle while privileges are forfeited for life, a Class C felony, I.C. § 9-30-10-17, in Cause No. 20D03-0709-FC-41.

On August 24, 2007, Officer Timothy Freel (Officer Freel) of the Elkhart City Police Department spotted Bean riding the Zuma on Middlebury Street in Elkhart, Indiana. Officer Freel was aware that a warrant had been issued for Bean's arrest for operating a motor vehicle while his driving privileges were forfeited on June 27, 2007, the day that Bean interacted with Officer Paciorkowski. Officer Freel stopped Bean and placed him under arrest. On October 22, 2007, the State filed another Information charging Bean with operating a motor vehicle while privileges are forfeited for life, a Class C felony, I.C. § 9-30-10-17 in Cause No. 20D03-0710-FC-44. The two causes were combined together for trial and Bean waived his right to a jury.

On November 19, 2008, a bench trial was held. During the trial, the State introduced evidence that the Zuma which Bean was witnessed driving on June 27 and August 24, 2007, had a 49 cubic centimeter capacity engine and 4.9 horsepower. The salesman at the cycle shop which sold Bean the scooter testified that "[i]t was our understanding that [Bean] didn't need a license at the time when we sold [Bean] that scooter." (Tr. p. 61). The trial court convicted Bean of operating a motor vehicle while driving privileges are forfeited for life in both Causes.

On March 19, 2009, the trial court conducted a sentencing hearing. During the hearing, the trial court acknowledged that Bean's first offense may have been due to a

mistake of law which would mitigate Bean's culpability for that offense. However, the trial court noted that Bean persisted in driving the scooter after Officer Paciorkowski stopped him and attempted to provide him with information. The trial court ordered a sentence of three years for Bean's first offense, six years for his second offense, and ran those sentences consecutively because Bean was on probation at the time of his offenses, with both sentences to be served in the Indiana Department of Correction.

Bean now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Sufficiency*

Bean first contends that the evidence was not sufficient to prove beyond a reasonable doubt that the Zuma was a motor vehicle. Our standard of review for sufficiency of the evidence challenges is well settled.

> In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. We will consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. A conviction may be based upon circumstantial evidence alone. Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense.

Perez v. State, 872 N.E.2d 212-13 (Ind. Ct. App. 2007), *trans. denied* (internal citations omitted).

Indiana Code section 9-30-10-17 provides that "A person who operates a motor vehicle after the person's driving privileges are forfeited for life . . . commits a Class C

felony." Excluded from the definition of a motor vehicle are motorized bicycles. I.C. § 9-13-2-105(d). A "motorized bicycle" is a:

> two (2) or three (3) wheeled vehicle that is propelled by an internal combustion engine or battery powered motor, and if powered by an internal combustion engine, has the following:
>
> (1) An engine rating of not more than two (2) horsepower and a cylinder capacity not exceeding fifty (50) cubic centimeters.
>
> (2) An automatic transmission.
>
> (3) A maximum design speed of not more than twenty-five (25) miles per hour on a flat surface.
>
> The term does not include an electric personal assistive mobility device.

I.C. § 9-13-2-109.

Bean focuses his sufficiency argument on a contention that the State failed to prove that the Zuma had a maximum designed speed of more than twenty-five miles per hour. However, we need not consider whether the State sufficiently proved that fact, because the State proved that the vehicle had a rating of 4.9 horsepower, which is more than twice the allowable horsepower for motorized bicycles powered by an internal combustion engine. Therefore, the vehicle was not a motorized bicycle.

Bean's only challenge to the sufficiency of the State's evidence is his claim that the State failed to disprove that his Zuma was a motorized bicycle and not a motor vehicle under Indiana law. That claim has failed. Therefore, the State has presented evidence sufficient to prove beyond a reasonable doubt that he twice operated a motor vehicle while his driving privileges were forfeited for life.

II. *Sentencing*

Bean argues that his sentence is inappropriate when the nature of his offenses and character are considered. Regardless of whether the trial court has sentenced the defendant within its discretion, we have the authority to independently review the appropriateness of a sentence authorized by statute through Appellate Rule 7(B). *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008). That rule permits us to revise a sentence 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. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). "Ultimately the length of the aggregate sentence and how it is to be served are the issues that matter." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). "The principle role of appellate 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." *Id*. at 1225. The defendant carries the burden to persuade us that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

The uncontroverted evidence is that Bean inquired at the store where he purchased the Zuma and at a Bureau of Motor Vehicle's branch about whether he needed a valid driver's license in order to operate the vehicle. The man who sold Bean the Zuma testified that he did not think Bean needed a driver's license in order to ride it. We cannot be sure what the response was that he received from the license branch because the trial court excluded that evidence. However, we are convinced from the record that Bean was attempting to comply

with the law by purchasing the Zuma. The trial court acknowledged that Bean's mistake of law detracted from his culpability when he was first stopped.

Admittedly, Bean persisted in riding the Zuma after Officer Paciorkowski tried to inform him about the applicable law, but we do not know what Officer Paciorkowski actually told Bean. Officer Paciorkowski testified that his "intentions were to give Mr. Bean some information," and that he "attempted to show him in the Indiana law book that he was missing some of the regulations," but conceded "[Bean] wanted no part of that." (Tr. p. 10). At the end of the discussion, Officer Paciorkowski did not arrest Bean, but simply left. It is likely that Officer Paciorkowski conveyed the message to Bean that he should not be riding the Zuma anymore, but it is unlikely that these actions from Officer Paciorkowski would impress upon Bean that he was committing a Class C felony each time he rode the Zuma.

Altogether, a total of nine years in the Indiana Department of Correction is inappropriate for Bean's offenses. He was operating a vehicle that, at least initially, he had reason to believe was legal for him to operate. We reverse and remand ordering the trial court to enter a sentence of two years for his conviction in Cause No. 20D03-0709-FC-41 and two years for his conviction in Cause No. 20D03-0710-FC-44, to be served consecutively, for a total of four years in the Indiana Department of Correction.

CONCLUSION

Based on the foregoing, we conclude that the State presented sufficient evidence to prove that Bean twice operated a motor vehicle while his driving privileges were forfeited for

life, but his sentence is inappropriate when the nature of his offenses and character are considered.

Affirmed in part, reversed in part, and remanded with instructions.

BAKER, C.J., and FRIEDLANDER, J., concur.