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FILED
Dec 09 2009, 9:41 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

ROBERT NILES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0904-CR-371
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas Busch, Judge
Cause No. 79D02-0805-FB-14

December 9, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Robert Niles ("Niles") pleaded guilty in Tippecanoe Superior Court to Class B felony conspiracy to commit robbery while armed with a deadly weapon and Class D felony dealing in a sawed-off shotgun. He was ordered to serve an aggregate sentence of twelve years with three years suspended to probation. Niles appeals and argues that the State failed to establish an adequate factual basis for his plea and that his sentence is inappropriate in light of the nature of the offense and the character of the offender. We affirm.

Facts and Procedural History

On April 21, 2008, Niles conspired with two other individuals to rob a Village Pantry store in Lafayette, Indiana. The group drove to the Village Pantry, and Niles entered the store armed with a sawed-off shotgun. He pointed the shotgun at the store clerk and demanded money. The clerk did not respond to the demand, and Niles fled the store.

On May 1, 2008, Niles was charged with Class B felony attempted robbery, Class D attempted theft, and Class D felony pointing a firearm. The charges were later amended to include counts of Class D felony dealing in a sawed-off shotgun and Class B felony conspiracy to commit robbery while armed with a deadly weapon.

On February 6, 2009, Niles and the State entered into a plea agreement whereby Niles agreed to plead guilty to Class B felony conspiracy to commit robbery while armed with a deadly weapon and Class D felony dealing in a sawed-off shotgun. In exchange for Niles's guilty plea, the State agreed to dismiss the remaining charges. A guilty plea hearing was held on that same date, and the trial court accepted Niles's guilty plea.

At the sentencing hearing held on March 30, 2009, the trial court found as aggravating circumstances: the seriousness of the crime, Niles's criminal history, and that Niles pleaded guilty in Tippecanoe Superior Court to Class B felony conspiracy to commit robbery while armed with a deadly weapon and Class D felony dealing in a sawed-off shotgun. The trial court also considered the fact that Niles had previously violated the conditions of probation, parole, pardon, community corrections or pre-trial release. The trial court found as mitigating circumstances: Niles's guilty plea, Niles's expression of remorse, Niles's decision not to complete the robbery, the fact that incarceration would be an undue hardship for Niles's child, and the fact that Niles had taken advantage of correctional rehabilitation programs. The court concluded that the aggravating circumstances outweighed the mitigating circumstances. Niles was then sentenced to twelve years for Class B felony conspiracy to commit robbery with eight years executed in the Department of Correction, one year executed through community corrections and three years suspended to supervised probation. The court ordered Niles to serve a concurrent two-year term for the Class D felony conviction. Niles now appeals. Additional facts will be provided as necessary.

I. Niles's Guilty Plea

Niles argues that the State failed to establish an adequate factual basis on his guilty plea for Class D felony dealing in a sawed off shotgun. However, Niles's claim is not available on direct appeal.[1] See Hayes v. State, 906 N.E.2d 819, 821 (Ind. 2009) (citing

[1] Even if Niles's claim was available to him on direct appeal, our review of the record leads us to the conclusion that the State presented an adequate factual basis on the Class D felony dealing in a sawed-off shotgun conviction. Pursuant to Indiana Code section 35-47-1-10 (2004), a sawed-off shotgun is defined as a shotgun with one (or more) barrels less than eighteen inches in length. When questioned concerning

Tumulty v. State, 666 N.E.2d 394, 395 (Ind. 1996) (stating that a conviction resulting from a guilty plea may not be challenged by a motion to correct error or on direct appeal. "The proper avenue for challenging one's conviction pursuant to a guilty plea is through filing a petition for post-conviction relief and presenting evidence at a post-conviction proceeding.")).

II. Inappropriate Sentence

Niles also argues that his aggregate twelve-year sentence, with three years suspended to supervised probation is inappropriate in light of the nature of the offense and the character of the offender. 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 bears the burden of persuading us his sentence is inappropriate. Reid v. State, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)). Finally, "whether we regard a sentence as appropriate at the end of the day turns on our sense of 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." Cardwell v. State, 895 N.E.2d 1219, 1224 (Ind. 2008).

A Class B felony conviction subjects the offender to a sentence in a range of six to twenty years, with the advisory sentence being ten years. Ind. Code 35-50-2-5 (2004 & Supp. 2009). Niles was sentenced to twelve years for his Class B felony conspiracy to commit robbery conviction, with eight years executed in the Department of Correction,

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the length of the shotgun barrel, Niles initially stated that he thought it was nineteen and one-half inches long. Tr. p. 12. However, when asked "[i]f the officer later measured it as fourteen point five inches would you have any reason to dispute that," Niles answered, "[o]kay. No, sir." Tr. p. 12.

one year executed in community corrections, and three years suspended to supervised probation.[2]

Concerning the nature of the offense in this case, Niles and two other individuals planned to rob a Village Pantry and obtained a sawed-off shotgun to use in the commission of the robbery. Niles went into the Village Pantry, pointed the shotgun at the store clerk, and demanded money. However, when the clerk failed to react to Niles's demand, Niles fled. As Niles notes in his brief, Niles fled the store without taking any money or property and no one was injured during the attempted robbery.

With regard to Niles's character, Niles, who was twenty-seven when he committed these offenses, had a misdemeanor conversion conviction in 2000 and a misdemeanor possession of marijuana conviction in 2008. Niles committed the instant offense while on bond for the marijuana charge. However, Niles was cooperative with the police, accepted responsibility for his actions, and expressed his remorse at the sentencing hearing. Niles also stated he was under the influence of alcohol and drugs in an attempt to place blame for his commission of the offenses, at least in part, on his addiction. See Sentencing Tr. pp. 5, 11.

Niles committed a serious offense, which involved planning a robbery with two other individuals, and he obtained a sawed-off shotgun to commit the planned robbery. Niles committed the offenses while on bond. Moreover, the trial court's consideration of Niles's character is reflected in its decision to suspend three years of Niles's aggregate twelve-year sentence. For all of these reasons, we conclude that Niles's aggregate

[2] As we stated above, Niles was ordered to serve a concurrent two-year sentence for his Class D felony dealing in a sawed-off shotgun conviction.

twelve-year sentence, with eight years executed in the Department of Correction, one year executed in community corrections, and three years suspended to supervised probation is not inappropriate in light of the nature of the offense and the character of the offender.

Conclusion

Niles may not challenge his conviction for Class D felony dealing in a sawed-off shotgun on direct appeal. Moreover, we conclude that his aggregate twelve year sentence with eight years executed in the Department of Correction, one year executed in community corrections, and three years suspended to supervised probation is not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

DARDEN, J., and ROBB, J., concur.