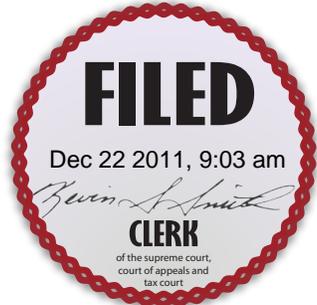


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

CURTIS W. BIRNER,)
)
Appellant-Defendant,)
)
vs.) No. 52A02-1104-CR-462
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MIAMI SUPERIOR COURT
The Honorable Daniel C. Banina, Judge
Cause No. 52D02-1010-FC-163

December 22, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Curtis Birner pled guilty to carrying a handgun without a license and intimidation. He was sentenced to six years in the Department of Correction (“DOC”), one year on home detention, and one year on probation. Birner argues that his sentence is inappropriate in that a larger portion of his sentence should be served in community corrections. Birner asserts that past periods of incarceration and detention in juvenile facilities have hindered rather than promoted his rehabilitation; however, he has not persuaded us that the sentence is inappropriate as structured by the trial court.

Facts and Procedural History

On October 7, 2010, Birner got into an altercation with Anthony Townsend, during which Birner threatened Townsend with a gun. When Birner was arrested, the police searched his vehicle and found marijuana. Birner was charged with carrying a handgun without a license, intimidation, possession of marijuana, and being a habitual offender. On April 18, 2011, Birner pled guilty to carrying a handgun without a license and intimidation, both class C felonies, and the State dismissed the remaining counts. The parties agreed that the sentences would be concurrent, but sentencing was otherwise left to the court’s discretion.

In his testimony and statements in the pre-sentence investigation report (“PSI”), he described his offenses as follows. After being released from incarceration for a previous offense, Birner had trouble finding a job and started selling marijuana and weapons to earn money. On October 7, 2010, he got into an argument with another drug dealer. Later that

day, Townsend pulled up next to him at a stoplight. Birner thought that Townsend was staring at him and started to worry that Townsend was an associate of the rival dealer. After they started moving again, Townsend pulled in front of Birner, slammed on his brakes, and then turned slowly. Townsend pulled into a parking lot and got out of his vehicle, and Birner did the same. Townsend told him that he was following too closely, and Birner pulled out the gun and told him not to “start sh** with people he didn’t know for no reason.” Appellant’s App. at 88.

Birner wrote a letter to the court and also provided extensive answers to the PSI questions about his background. He was twelve at the time of his first adjudication, which was for battery, a class A misdemeanor if committed by an adult. According to Birner, he got into a fight with another boy while playing football or basketball. He was placed on informal probation, which he completed successfully.

Later, Birner ran away with a friend because they both felt like they were not wanted. They stole a vehicle and started driving aimlessly until they were located by a sheriff, who took them into custody. As a result, Birner was adjudicated for auto theft, a class D felony if committed by an adult. He was given a two-year commitment suspended to formal probation. The PSI indicates that Birner violated the conditions of his probation, but the basis is unclear; Birner believes that it was because he stole a case of pop.

Thereafter, Birner spent most of the rest of his teen years in various juvenile facilities. Some facilities had a military-like regimen, including being awakened to reveille, standing at attention, calisthenics, memorizing rules, and punishment for even minor rule violations.

Punishments usually consisted of loss of privileges or solitary confinement. By his account, the education and mental health care that he received was fairly bare-bones. In some facilities, Birner experienced bullying from other juveniles in the form of teasing, beating, stealing his personal items, and coercing him to give up his food. He would not report these issues to staff for fear of retaliation. Birner became acquainted with juveniles who belonged to gangs, and he started affiliating himself with a gang in order to protect himself. Birner also claimed to have been physically and sexually abused by staff members at certain facilities. Birner was in a transitional unit at Pendleton Juvenile Correctional Facility when he turned eighteen. According to Birner, he was doing well there, but because he was released before completing the transitional program, his record shows an unsuccessful completion.

After his release in February 2005, he worked at Next Marketing for two weeks, but then quit because he did not like the hours. Then he worked for his father's business. Birner stated that his father smoked marijuana every day, and apparently he also supplied Birner with marijuana. After a fight with his father, he attempted to hang himself, but the rope broke and he decided to go live with his grandparents. He got a job at American Stationery, but was eventually fired. He believed that it was because of a supervisor who knew and disliked some of his family members.

After he lost his job, Birner started spending a lot of time with people who would drink, use drugs, and steal. He experimented with drugs, became addicted to cold medication, and also started stealing and acting as a get-away driver for others. In 2006, he

had a string of new convictions. In February 2006, he was charged with class C misdemeanor illegal possession of alcohol, which was dismissed pursuant to a diversion agreement. He was convicted of class D felony theft in March 2006 and class A misdemeanor dealing in marijuana in May 2006. He received partially suspended sentences in both cases. Several probation violations were alleged, and the disposition of those is unclear, but Birner's own statements make it clear that he continued using drugs and stealing. In September 2006, he pled guilty to class C felony burglary and was sentenced to four years in the DOC.

Birner was initially placed in Westville Correctional Facility. Birner claimed to be a member of the Imperial Gangsters in order to protect himself. He was placed in a dorm that he called the "Gladiator Dorm." *Id.* at 255. A large number of offenders were housed together with no cameras and no guards in the immediate vicinity. His bunk was near an open area where people would fight and gamble. He saw people get stabbed, beaten with locks, and robbed of their possessions. He was unable to get into rehabilitative programs because of long waiting lists. According to Birner, a guard who believed that Birner had reported certain misconduct started calling him a "snitch" in front of other inmates, which made him a target. *Id.* at 259. Birner felt like he had to fight to protect himself and sustained a broken jaw on one occasion.

Birner was later transferred to Pendleton Correctional Facility, and he initially felt safer because he had his own cell. He continued to associate with gang members to protect himself, but eventually was stabbed in a fight between rival gangs. After that, he was wary

of recreation times. He discovered that there was a “blind spot” between two buildings, but this was an unauthorized area, and he was disciplined when he got caught there. *Id.* at 275. Conduct reports attached to the PSI also indicate that he was written up for using profanity toward a staff member, getting in the medication line at a time when he was not being prescribed any medication, possessing a tattoo gun, hitting an inmate with a lock, going to the chow hall without his ID card, and refusing to remove a blanket that he hung in his cell while using the toilet.

After his release on parole in December 2009, Birner struggled to find a job. He testified that transportation was a problem because he had to pay fees to have his license reinstated, and he had little money for gas. He wanted to enroll at Ivy Tech, but could not get financial aid. He had an outstanding fine associated with the diversion he received in 2006, which his grandmother ultimately paid for him. He also owed fines and costs for a conviction of class B misdemeanor false informing that was entered in June 2010.

Birner was living with his mother, who apparently had an ongoing dispute with a neighbor. When the neighbor threatened his mother, she attempted to get a protective order, but was denied. Birner was eventually arrested and charged with intimidation in connection with his mother’s dispute with her neighbor, but the record does not reflect the specific allegations. Birner was released on bond, and that case was still pending at the time of his sentencing in this case.

The PSI included a Community Corrections Program Report, which indicated that Birner was an acceptable candidate for home detention. However, the report also classified

him as a high risk to reoffend based on the Indiana Risk Assessment System. The PSI indicated past diagnoses of acute paranoia, acute psychosis, depression, conduct disorder, ADHD, and oppositional defiant disorder. Birner testified that while in prison, he was given a medication that caused his face to “lock[up].” Tr. at 32. He was taken off the medication and given no further treatment.

At the sentencing hearing, Birner apologized for threatening Townsend. He attributed his actions to the suspicious mindset and self-preservation tactics that he learned in prison and in juvenile facilities. Several family members testified that Birner was trying hard to find a job, that he wanted to change, and that additional time in the DOC would only solidify the mindset that he developed during previous periods of institutionalization.

The court imposed a sentence of eight years with six in the DOC, one on home detention, and one on probation. As aggravating circumstances, the court noted Birner’s criminal record and the fact that he committed additional offenses while on bond. As mitigating circumstances, the court found that Birner was sincerely remorseful and pled guilty. Birner now appeals his sentence.

Discussion and Decision

Birner argues that his sentence is inappropriate based on the nature of the offense and his character. Article 7, Section 6 of the Indiana Constitution authorizes this Court to independently review and revise a sentence imposed by the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218. Indiana Appellate Rule 7(B) states, “The 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." "Although appellate review of sentences must give due consideration to the trial court's sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." *Purvis v. State*, 829 N.E.2d 572, 588 (Ind. Ct. App. 2005) (internal citations and quotations omitted), *trans. denied, cert. denied*. The defendant bears the burden of persuading us that the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

Birner does not challenge the length of his sentence, but asks that we revise it so that two years are served in the DOC, six in community corrections, and two on probation. The location where a sentence is to be served is an appropriate focus for application of our review and revise authority. *Biddinger v. State*, 868 N.E.2d 407, 414 (Ind. 2007). A defendant challenging the placement of a sentence must convince us that the given placement is inappropriate, not that a different placement might be considered more appropriate. *Fonner v. State*, 876 N.E.2d 340, 344 (Ind. Ct. App. 2007).

Birner characterizes his offense as an "overreact[ion]." Appellant's Br. at 23. He attributes his behavior to the suspicious mindset and self-preservation tactics that he learned in prison and in juvenile facilities. He does not dispute that he must serve at least two years in the DOC, but he argues that any additional time in the DOC above the minimum non-suspendible sentence will merely solidify his defensive mindset. *See* Ind. Code § 35-50-2-2(b)(2) (if a class C felony was committed less than seven years after release from parole,

minimum sentence cannot be suspended); Ind. Code § 35-50-2-6 (minimum sentence for a class C felony is two years, advisory is four, and maximum is eight). Birner's description of his time in juvenile detention and prison paints a grim picture of the chances for rehabilitation offered by those facilities. It is unclear to what extent the trial court credited his statements, but it appears safe to say that Birner had a difficult childhood.

However, Birner's defensive mindset cannot take the blame for all his actions. After being released from juvenile detention, Birner worked a few different jobs until he was fired. By his own account, he stopped looking for a job and started associating with people who stole and used drugs. He became more and more involved with that lifestyle, resulting in a slew of convictions and time in prison. The PSI includes several conduct reports, and while Birner explains some of them as being related to his efforts to protect himself, others have no apparent relationship to any defensive action. When he was released from prison, he began supporting himself by selling drugs and weapons. Although his defensiveness may have contributed to the altercation with Townsend, by Birner's own account, his involvement in selling drugs appears to have been a significant factor as well.

The trial court found that Birner was sincerely remorseful and found that his remorse and decision to plead guilty were mitigating circumstances. On the other hand, the court recognized that Birner has an extensive criminal and juvenile record given the fact that he was only twenty-four at the time of sentencing. He also committed the current offenses while on bond, and by his own admission, he was selling guns and marijuana. Although community corrections found that he would be an acceptable candidate for home detention,

he was also characterized as a high risk to reoffend. Prison may not afford Birner the ideal level of rehabilitation, but he has not persuaded us that the sentence is inappropriate as structured by the trial court.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.