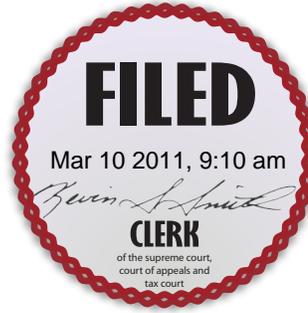


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ROBERT TILLINGHAST,
Appellant- Defendant,

vs.

STATE OF INDIANA,
Appellee- Plaintiff,

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No. 15A01-1010-CR-556

APPEAL FROM THE DEARBORN SUPERIOR COURT
The Honorable Jonathan Cleary, Judge
Cause No. 15D01-0912-FB-00024

March 10, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issue

Robert Tillinghast appeals his sentence following his guilty plea to receiving stolen property, a Class D felony. For our review, Tillinghast raises the sole issue of whether his one and one-half years fully-executed sentence is inappropriate in light of the nature of the offense and his character. Concluding the sentence is inappropriate, we revise and remand to the trial court to suspend one year of the sentence to probation.

Facts and Procedural History

On April 22, 2009, Tillinghast drove Timothy Litzinger to the home of Billie Jo Whippel and Tracey Hansell. Litzinger was directing Tillinghast where to drive and Tillinghast did not know the Whippel and Hansell residence was their destination until they arrived. Litzinger exited the vehicle and knocked on Whippel and Hansell's front door while Tillinghast waited in the vehicle. When no one answered the front door, Litzinger went around to the back door and entered the home through a window. After a period of time, Litzinger exited the home having taken several items belonging to Whippel and Hansell, including prescribed medication, the family dog, electronics, and various family heirlooms.

At this point, Tillinghast refused to drive Litzinger, but according to the affidavit for probable cause, Litzinger demanded Tillinghast drive, threatening him with a switch blade. Tillinghast acquiesced and drove back to Litzinger's apartment. Later that day Tillinghast received a phone call from Hansell, informing him a neighbor witnessed Tillinghast and Litzinger burglarizing the residence and requesting Tillinghast return the stolen property. Tillinghast gathered several of the stolen goods and returned them to Whippel and Hansell.

The State charged Tillinghast with Count I, burglary, a Class B felony, and Count II, theft, a Class D felony. Tillinghast pleaded guilty to an amended Count II, receiving stolen property, a Class D felony, and Count I was dismissed. After a sentencing hearing, the trial court sentenced Tillinghast to one and one-half years incarceration with no time suspended. Tillinghast now appeals his sentence.

Discussion and Decision

I. Standard of Review

Although a trial court may have acted within its lawful discretion in imposing a sentence, Article 7, sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences. Childress v. State, 848 N.E.2d 1073, 1079-80 (Ind. 2006). This court has authority to revise a sentence “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.” Ind. Appellate Rule 7(B). In determining whether a sentence is inappropriate, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied; see also McMahon v. State, 856 N.E.2d 743, 750 (Ind. Ct. App. 2006) (“[I]nappropriateness review should not be limited . . . to a simple rundown of the aggravating and mitigating circumstances found by the trial court.”). The burden is on the defendant to demonstrate that his or her sentence is inappropriate. Childress, 848 N.E.2d at 1080. “[W]hether 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).

II. Appropriateness of Sentence

Tillinghast pleaded guilty to receiving stolen property, a Class D felony, and was sentenced to one and one-half years incarceration with no time suspended. The advisory sentence for a Class D felony is one and one-half years to which one and one-half years may be added and from which a year may be subtracted. Ind. Code § 35-50-2-7.

A. Nature of Offense

As to the nature of the offense, the advisory sentence “is the starting point the Legislature has selected as an appropriate sentence for the crime committed.” Childress, 848 N.E.2d at 1081. We note that due to the guilty plea the record in this case is sparse. But according to the transcript from the guilty plea hearing, Tillinghast agreed the State could prove beyond a reasonable doubt he received stolen property in violation of Indiana Code section 35-43-4-2(b). However, the transcript also indicates Tillinghast returned many of the items stolen from the victims’ home soon after the crime was committed.

The probable cause affidavit also shows Tillinghast may not have been a completely willing participant in the commission of the crime. Tillinghast did not initially know where he was driving Litzinger and Tillinghast refused to drive away from the scene when he realized Litzinger had stolen property from the victims’ home. Only after Litzinger threatened him with a switch blade did Tillinghast relent and drive away. However, we also note that the items taken from the home were both deeply personal items, like the family dog, and necessary items, such as prescription medication, the absence of which could have led to serious health consequences to the victims.

In sum, we find this was a typical instance of receiving stolen property, one for which the advisory sentence is designed.

B. Character of the Offender

Although this was a fairly typical instance of receiving stolen property, Tillinghast's character is such that leniency is appropriate. Prior to the commission of this offense, Tillinghast had no criminal record as an adult or as a juvenile. Additionally, when Tillinghast committed this offense, he was nineteen years old. While Tillinghast's relatively young age at the time of the offense is not a strong mitigating factor in and of itself, see Smith v. State, 872 N.E.2d 169, 178 (Ind. Ct. App. 2007), trans. denied, it is strengthened by the fact that despite his youth, Tillinghast has shown an acceptance of responsibility for his actions. We note that Tillinghast took responsibility for the offense in four ways. First, he accepted responsibility for his actions by pleading guilty. "A guilty plea demonstrates a defendant's acceptance of responsibility for the crime and at least partially confirms the mitigating evidence regarding his character." Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005).¹ Second, Tillinghast apologized to the victims of the crime in open court. Third, to further show his remorse, Tillinghast elected to pay the victims' entire restitution on his own, despite having an accomplice in the offense.

Finally, we note and appreciate the sense of responsibility Tillinghast displayed by returning much of what was stolen to the victims shortly after the crime occurred. Whippel recognized and seemed to appreciate this display, and despite her desire to see Tillinghast serve some jail time, commented at Tillinghast's sentencing hearing that "at least [Tillinghast] was honest enough to bring some of our stuff back." Transcript at 14.

¹ Although, we note in consideration for his guilty plea, Tillinghast's Class B felony burglary charge was dismissed, thus slightly lowering the mitigating value of his plea. See Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005) (a guilty plea does not rise to the level of significant mitigation where the defendant has received a benefit from the plea), trans. denied.

In addition to accepting responsibility for the offense, Tillinghast has also shown a propensity to turn his life around and contribute to society as a responsible young adult. At sentencing, he demonstrated awareness of his poor decision making leading up to his arrest. He testified he ran around with a bad crowd and declared he is now more cognizant of the company he keeps. He also promised this offense was a one-time occurrence, and asserted the recent birth of his daughter following this offense has led him to become a more responsible person. Tillinghast has also established his ability to support his daughter and contribute to society by his steady employment.

Considering the combined effect of Tillinghast's character and the nature of his offense, we hold that Tillinghast's advisory sentence of one and one-half years executed is inappropriate. In recognition of Tillinghast's character in particular, we revise and remand to the trial court to suspend one year of the sentence to probation.

Conclusion

The trial court's imposition of a one and one-half year fully-executed sentence is inappropriate in light of the nature of Tillinghast's offense and his character. We therefore revise the sentence and remand for the trial court to order one year of the sentence suspended to probation.

Revised and remanded.

RILEY, J., and BROWN, J., concur.