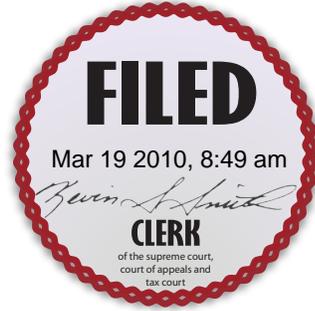


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

CLIFFORD L. FALLON,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 10A01-0909-CR-450

APPEAL FROM THE CLARK SUPERIOR COURT
The Honorable Vicki L. Carmichael, Judge
Cause No. 10D01-0812-FC-297

March 19, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Clifford L. Fallon, an eighty-year-old man with diabetes and congestive heart failure, appeals the eight-year sentence he received after pleading guilty, without the benefit of a plea agreement, to Class C felony theft. He challenges the trial court's sentencing discretion in several aspects. Under our constitutional authority to review and revise, we revise Fallon's sentence to four years with two years suspended to community corrections.

Facts and Procedural History

The Fallon family is a large and close-knit family. During the final months of Martin Fallon's life, he moved back to the Louisville area, revised his will, and named his brother, Fallon, the executor of his estate. Fallon then took care of Martin during his final days. After Martin passed away in October 2006, Fallon paid approximately \$650,000 in estate assets to himself, leaving no assets in the estate and over \$50,000 in unpaid expenses. This was despite the fact that Martin's will provided for twenty-four beneficiaries, many of whom were Fallon's elderly siblings with limited income.

After Fallon's actions were discovered by the alternate executor, the State charged Fallon with Class C felony theft on December 30, 2008. On June 29, 2009, Fallon pled guilty as charged without the benefit of a plea agreement. At the guilty plea hearing, Fallon, who had turned eighty years old while incarcerated for this charge, agreed to the following factual basis: between January 15, 2007, and July 1, 2008, he knowingly or intentionally exerted unauthorized control over property of another person, specifically the beneficiaries of his brother Martin's estate, with the intent to deprive those

beneficiaries of any part of the estate's value or use, and the estate's fair market value was at least \$100,000.

A sentencing hearing was held on July 20, 2009. Many of Fallon's relatives either testified at the hearing or submitted letters. Specifically, they testified about how Fallon violated his position of trust as executor of Martin's estate and had been convicted of theft in 1957. Also, they asked for the "maximum" sentence because of the magnitude of harm Fallon had caused their family. Defense counsel, on the other hand, asked for a sentence "toward the lower end of the 'C' Felony." Tr. p. 38. Counsel noted that eighty-year-old Fallon suffered from diabetes and congestive heart failure and surmised that a prison term "could very well be a life sentence for him." *Id.* at 36. Defense counsel also pointed out that, although Fallon's relatives alleged that he had a conviction from fifty years ago, the PSI revealed that a search of Fallon's criminal history revealed "no priors." Appellant's App. Vol. II p. 36. In fact, the probation officer reported that he could not locate such records without an original fingerprint card. Defense counsel also highlighted that Fallon was a member of the United States Army and served in Korea from 1951 to 1952.

The trial court concluded:

The Court finds that the Defendant's age is a consideration and is a mitigating factor as well as his health conditions. The fact that he took responsibility by entering a blind plea is also considered by the Court and the likelihood that he will commit another crime is considered by the Court to be minimal at this sta[g]e of his life, however, the aggr[a]vating factors of this case, this Court believes certainly outweigh the mitigating factors. There's no evidence that the Defendant did not know or understand what he was doing in violating the trust of his family, that violation of trust is devastating to the entire family. The age of the number of victims in this case is also considered by the Court as an aggravating factor as well as the

number of victims. The circumstances that surround this crime are consider[ed] [to be egregious] to this Court. While the beneficiaries who testified here today do have an interest in this case based upon the fact that they are beneficiaries, that is now diminished completely, as there are no assets remaining in the Estate, and very minimal to the Court, other than a condominium unit owned by the Defendant as noted in the Pre-Sentence Investigation Report. However, the Court will find that the Defendant does owe restitution to the victims to the Estate in this case in the amount of [\$718,500] and the Court will file a recommendation of the Probation Department giving the Defendant an eight year sentence with four years of that suspended, four years to serve The four years that are suspended, two of those will be served with Community Corrections.

Tr. p. 41-42. Fallon now appeals his sentence.

Discussion and Decision

Fallon contends that the trial court abused its discretion in sentencing him in a number of ways. For example, he argues that the trial court failed to identify as a mitigator his lack of a criminal history and failed to identify the circumstances of the crime which it found to be particularly egregious. The State responds that remand for a new sentencing statement may be necessary. Instead of addressing Fallon's various abuse-of-discretion arguments, we instead choose to exercise our constitutional authority to revise his sentence. *See Hollin v. State*, 877 N.E.2d 462, 463, 465 (Ind. 2007) (using constitutional authority to revise sentence despite fact that defendant did not raise Indiana Appellate Rule 7(B) claim on appeal).

A person who commits a Class C felony shall be imprisoned for a fixed term of between two and eight years, with the advisory sentence being four years. Ind. Code § 35-50-2-6(a). Here, the trial court sentenced Fallon to eight years, with four years to be served in the DOC and four years suspended (two of which were to be served on community corrections).

“Although a trial court may have acted within its lawful discretion in determining a sentence, Article [7], Sections 4 and 6 of the Indiana Constitution ‘authorize[] independent appellate review and revision of a sentence imposed by the trial court.’” *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007) (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)), *clarified on reh’g*, 875 N.E.2d 218 (Ind. 2007). Our appellate authority is implemented through Indiana Appellate Rule 7(B), which allows us to “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.”

As for the nature of the offense, we find that it was devastating to the Fallon family. Fallon violated the trust of a number of his relatives, including his own elderly siblings, by depleting over \$650,000 of his brother Martin’s estate.

The character of the offender, however, reveals that an eight-year sentence is inappropriate for this offender. Fallon, an Army veteran who served in Korea, was eighty years old at the time of sentencing and suffered from diabetes and congestive heart failure. Although his family members claimed that he had a theft conviction from 1957, the criminal history search did not reveal a single conviction. In addition, Fallon pled guilty without the benefit of a plea agreement. And as the trial court found, it is very unlikely that Fallon will commit another crime. Given these considerations, we find the advisory sentence of four years to be appropriate, with two years to be served on community corrections.

Reversed and remanded.

CRONE, J., concurs.

RILEY, J., concurs in part and dissents in part with separate opinion.

