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IN THE
COURT OF APPEALS OF INDIANA

MONTY COOK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 44A03-0610-CR-480
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAGRANGE SUPERIOR COURT
The Honorable George E. Brown, Judge
Cause No. 44D01-0307-FB-9

June 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Monty Cook appeals the modified sentence imposed after he was convicted of arson. We affirm.

In *Cook v. State*, 44A03-0508-CR-382 (Ind. Ct. App. May 31, 2006), we addressed Cook's sentence for arson. We determined Cook's prior criminal history could not be considered an aggravating circumstance because it included only a minor offense remote in time, and the risk he would re-offend was not a proper aggravator because it was premised on that criminal history. We vacated Cook's sentence of twenty years for arson and remanded for re-sentencing.

On re-sentencing, the trial court stated:

> What you have here was a situation that was burglary that . . . the burglary was complete upon the defendant entering the building and with the intent to commit a crime. And I think at the time it was theft. As I recall he was looking for some evidence on a personal matter, let's leave it like that. He could've stopped there and left the building and had a burglary charge. Unfortunately, he chose instead to take a further step in, or to engage in some further criminal activity, I guess I should say, and burn the building down. And that's the problem we're faced with today. Certainly the burglary and the arson are separate crimes. A single criminal episode to be sure, but separate crimes nonetheless. And the burglary was complete before the arson was perpetrated. The arson really compounded his criminal conduct here. And I think — I think that's an aggravating factor. I think the fact that he made a second choice to — first choice was to burglarize the building. But the second choice was to go on and take that other step of burning it down. That was — to me, the burglary constitutes an aggravating factor in the sentence for the arson. After the arson was completed, and the defendant was incarcerated, he committed the crimes of conspiracy to commit criminal confinement. That was while he was awaiting trial on the burglary and arson charges while he was still in custody. The fact that he committed new offenses was [sic] he was awaiting trial on pending charges, to me at least, demonstrates a risk that he would re-offend. Now, I would note, kind of parenthetically here, that during the time period he also accumulated some other criminal charges which were dismissed in the course of the plea agreement. So, I don't know what was going on in 2003, but there was a number of things,

> apparently, happening that got Mr. Cook crossways with the law. I believe there was an attempted arson charge. And drunk driving charge. And a fleeing — a "D" felony fleeing charge. Is that not correct? And those were dismissed in the course of the plea agreement. I think all of those items demonstrate that there is a distinct possibility, in fact a distinct risk, that the defendant would re-offend. And I think I have to take that into account as an aggravating factor as well. Also, there was a substantial impact on the community in the course of this arson. This wasn't just burning down an old building. This was burning down a building that impacted a number of people's lives. As Monty just said here, it had a big impact. I think that's pretty much common knowledge. That, too, is an aggravating factor. . . . I will sentence the defendant on the arson charge to 15 years.

(Tr. at 10–12.)

Cook asserts two errors in his re-sentencing: 1) the trial court erred in considering the dismissed charges as aggravating circumstances; and 2) the trial court erred in considering the simultaneous burglary as an aggravating circumstance.

1. The Dismissed Charges

Cook argues the trial court's determination his dismissed charges indicate he is likely to re-offend is impermissible under *Blakely v. Washington*, 542 U.S. 296 (2004), *reh'g denied* 542 U.S. 961 (2004), and *Trusley v. State*, 829 N.E.2d 923, 925 (Ind. 2005), and is inconsistent with our remand for re-sentencing. In *Cook*, we noted a risk of re-offending is not a separate aggravator, but rather a comment on the weight to be given a defendant's criminal history. *Cook*, slip op. at 10.

The State does not directly address that argument, asserting instead the enhanced sentence is supported by other aggravators. We agree. The trial court found Cook's admission that the fire had a big impact on the community was an aggravating factor. That aggravator is valid, as Cook admitted it. *See, e.g., Trusley*, 829 N.E.2d at 925 (trial

court may enhance a sentence based only on those facts that are established: 1) as a fact of prior conviction; 2) by a jury beyond a reasonable doubt; 3) when admitted by a defendant; and 4) in the course of a guilty plea where the defendant has waived *Apprendi* rights and stipulated to certain facts or consented to judicial factfinding).

2. Burglary Conviction

In *Cook*, we noted the nature and circumstances of the crime is a proper aggravator only if the sentencing court specifies why the defendant deserves an enhanced sentence under the particular circumstances. Cook's sentencing court had offered no such explanation, so we were unable to evaluate whether that aggravator was permissible.

After reviewing the re-sentencing transcript, we conclude the trial court provided an adequate explanation why the nature and circumstances surrounding the arson, specifically Cook's burglary of the building before he set fire to it, served as an aggravator. Cook asserts the burglary was not a "prior criminal act" that could be considered an aggravating circumstance because the "burglary and arson were one single episode of criminal conduct." (Appellant's Br. at 14.) He relies on *Jennings v. State*, 687 N.E.2d 621, 622 (Ind. Ct. App. 1997), where we found three separate trips to the crime scene, the first two for the purpose of burglary and theft and third to commit arson to cover up the other crimes, amounted to a single episode of criminal conduct.

His reliance on *Jennings* is misplaced. *Jennings* was decided under our statute limiting consecutive sentences for crimes arising out of single episode of criminal

conduct.[1] Cook does not argue, and we decline to hold, that statute limits a sentencing court's discretion to consider as an aggravating circumstance a criminal act that was completed immediately prior to a second criminal act for which the defendant is sentenced. We affirm Cook's sentence after remand.

Affirmed.

SHARPNACK, J., and BAILEY, J., concur.

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[1] Ind. Code § 35-50-1-2 provided in pertinent part:

> [T]he total of the consecutive terms of imprisonment . . . to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the presumptive sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.