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IN THE
COURT OF APPEALS OF INDIANA

SAMMY JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0702-CR-195
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 48C01-0312-FC-363

July 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Sammy Johnson appeals his twenty-year sentence following his conviction for Class C felony battery and the finding that he is an habitual offender. We affirm.

Issue

The sole restated issue before us is whether Johnson's sentence is proper.

Facts

On November 26, 2003, Johnson was an inmate at the Pendleton Correctional Facility. That morning, he got into an argument with Correctional Officer Terry Fouch regarding a pass. Officer Fouch told him the pass was not valid because the time for its use had expired, and he ordered Johnson to return to his cell. Johnson responded by grabbing Officer Fouch and slamming him up against a wall at least twice. Officer Fouch lost consciousness and sustained cuts or abrasions to his head. Johnson later bragged, "I did a good job on that officer. I'm proud of myself." Tr. p. 43. Johnson also told a prison investigator, "I would do it again if I had a chance." Id. at 113.

On December 30, 2003, the State charged Johnson with Class C felony battery resulting in serious bodily injury; shortly thereafter, it also alleged that Johnson is an habitual offender. However, Johnson was released from prison without being held on this charge. Upon his release, he apparently was evaluated by the Grant-Blackford Mental Health Center and was diagnosed with either paranoid schizophrenia or schizo

affective disorder.[1] He went to live in an apartment complex for persons with mental health problems, and was receiving medication and began searching for employment.

On April 2, 2006, Johnson was arrested for this offense. On September 28, 2006, a jury found Johnson guilty as charged and found that he is an habitual offender. At sentencing on October 16, 2006, Debbie Alabach, a counselor from Grant-Blackford Mental Health Center, testified on Johnson's behalf. The trial court thereafter discussed Johnson's mental health at length but ultimately decided that a maximum sentence was called for in this case—eight years for the C felony battery conviction enhanced by twelve years for the habitual offender finding; it did recommend in its sentencing order that Johnson "be sent to a facility where he can be evaluated for mental health issues." App. p. 98. Johnson now appeals his sentence.

Analysis

The sole issue Johnson raises is that the trial court did not give proper mitigating weight to his mental health issues.[2] When faced with a non-Blakely challenge to an enhanced sentence, the first step is to determine whether the trial court issued a sentencing statement that (1) identified all significant mitigating and aggravating circumstances; (2) stated the specific reason why each circumstance is determined to be

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[1] The presentence report contains the paranoid schizophrenia diagnosis, while a counselor who testified at sentencing related the schizo affective diagnosis. The difference between the two illnesses is not explained in the record, although the counselor did state they are different.

[2] Johnson committed this crime before our legislature changed the sentencing statutes to replace "presumptive" sentences with "advisory" ones, although he was sentenced after the change. In such a situation, we apply the "presumptive" sentencing scheme and the case law developed under it. See Walsman v. State, 855 N.E.2d 645, 652 (Ind. Ct. App. 2006).

mitigating or aggravating; and (3) articulated the court's evaluation and balancing of the circumstances. Payne v. State, 838 N.E.2d 503, 506 (Ind. Ct. App. 2005), trans. denied. We review the trial court's assessment of the proper weight of mitigating and aggravating circumstances for a manifest abuse of discretion. Patterson v. State, 846 N.E.2d 723, 727 (Ind. Ct. App. 2006). If there is an irregularity in a trial court's sentencing decision, we may remand to the trial court for a clarification or new sentencing determination, affirm the sentence if the error is harmless, or reweigh the proper aggravating and mitigating circumstances independently at the appellate level. Payne, 838 N.E.2d at 506. "Even if there is no irregularity and the trial court followed the proper procedures in imposing a sentence, we still may exercise our authority under Indiana Appellate Rule 7(B) to revise a sentence that is inappropriate in light of the nature of the offense and the character of the offender." Id.

Our supreme court has stated that there is a need "for a high level of discernment when assessing a claim that mental illness warrants mitigating weight." Covington v. State, 842 N.E.2d 345, 349 (Ind. 2006). Factors to consider in weighing the mitigating force of a mental health issue include the extent of the inability to control behavior, the overall limit on function, the duration of the illness, and the nexus between the illness and the crime. Id. We also note that a verdict of guilty but mentally ill "may signal that significant evidence of mitigating value on the point has been presented." Weeks v. State, 697 N.E.2d 28, 30 (Ind. 1998). There was no such verdict here.

Most of the evidence regarding Johnson's mental health came from Alabach, his counselor at Grant-Blackford Mental Health Center. It does not appear that Alabach is a

medical doctor; at least, no evidence regarding Alabach's education and qualifications is in the record. She did testify that she had reviewed Johnson's medical records and noted his diagnosis of schizo affective disorder. Regarding that mental illness, Alabach testified, "I'm not an expert in that area, but I do know that according to the information on schizo affective disorder that I have, it can cause irritability. Okay? And other things like mood swings, mania and depending on the individual, hallucinations, paranoia." Tr. p. 211. The State also specifically asked Alabach if she believed Johnson's violent conduct was due to his mental health. She responded, "I couldn't say that for sure. . . . Whether or not it's based on his mental illness is not for me to be able to determine. I do know that when Sammy is taking medication he's better controlled, his symptoms are better controlled." Id. at 210.

The trial court recognized the evidence of mental illness on Johnson's part when it explained its sentencing decision. For example, the court stated:

> I mean your case is on the one hand is very easy. You have a history of violence. You committed a crime of violence and you're a habitual offender. On the other hand, you have mental health difficulties and you weren't on your medicine. When you're on medicine, you're fine. So how do I make this come out right?

Id. at 217. However, the trial court considered Johnson's extensive criminal record and concluded that the maximum possible sentence of twenty years was proper in this case. This clearly was not a situation in which the trial court failed to mention or consider giving any mitigating weight to evidence of Johnson's mental illness. The trial court did

consider its potential mitigating weight but found it to be significantly outweighed by Johnson's criminal history.

Despite Alabach's testimony, Johnson failed to present any expert testimony regarding the factors to consider when determining the mitigating weight of a defendant's mental health, namely the extent of the inability to control behavior, the overall limit on function, the duration of the illness, and the nexus between the illness and the crime. See Covington, 842 N.E.2d at 349. Alabach, whose credentials were unknown in any event, expressly declined to venture an opinion as to any connection between Johnson's mental health and his violent conduct. We cannot say it was an abuse of the trial court's discretion not to give Johnson's mental health more mitigating weight. There was no error in the trial court's sentencing statement.

We also believe that Johnson's sentence is not inappropriate in light of the nature of the offense and Johnson's character. The nature of the offense—slamming a correctional officer against a wall with enough force to cause him to lose consciousness—is particularly egregious. As for Johnson's character, we acknowledge the evidence of his mental health difficulties, as did the trial court, but do not give that evidence great mitigating weight for the reasons mentioned. Johnson's criminal history began in 1984, with a conviction for Class B felony armed robbery. Since then, he also has accumulated convictions for attempted robbery, three counts of battery, intimidation, two counts of resisting law enforcement, two counts of disorderly conduct, and three counts of theft. "In assigning weight to a defendant's criminal history, courts must consider the chronological remoteness of any prior convictions as well as the gravity,

nature, and number of prior crimes." Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). Although not all of Johnson's convictions are for violent offenses or for felonies, like the present case, many of them are. The sheer number of convictions—thirteen—is telling. There has hardly been a significant length of time in Johnson's life since committing his first crime in 1984 at the age of twenty-one that he has not been incarcerated for, or facing charges for, a crime. In sum, Johnson's overwhelmingly negative character as reflected by his criminal history, combined with the egregious nature of this offense, justifies the maximum possible sentence he received.

Conclusion

The trial court did not abuse its discretion in considering but declining to give more mitigating weight to evidence of Johnson's mental illness. Additionally, we do not believe his twenty-year sentence is inappropriate. We affirm.

Affirmed.

NAJAM, J., and RILEY, J., concur.