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ATTORNEY FOR APPELLANT:

JOHN PINNOW
Special Assistant to the Public Defender
Greenwood, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General Of Indiana

RICHARD C. WEBSTER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ANDREW BRADY,)
)
Appellant-Defendant,)
)
vs.) No. 76A03-0703-CR-119
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE STEUBEN CIRCUIT COURT
The Honorable Allen N. Wheat, Judge
Cause No. 76C01-0603-FD-254

July 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following his plea of guilty to operating a vehicle while intoxicated, a Class D felony, Andrew Brady was sentenced to three years, to be served consecutively to his sentence for a prior unrelated conviction. He now appeals that sentence, asserting the trial court was required to impose an advisory sentence. Concluding the trial court did not abuse its discretion in sentencing Brady, we affirm.

Facts and Procedural History

On March 4, 2006, Police Officer Thomas Johnson stopped Brady for speeding. Upon encountering Brady, Officer Johnson also suspected that Brady was intoxicated. Brady attempted to perform field sobriety tests and took a breathalyzer test whose results showed that Brady's BAC was .19 percent.

Brady had a prior conviction for operating a vehicle while intoxicated in Noble County and was on probation at the time of the instant offense.

On March 6, 2006, the State charged Brady with operating a vehicle while intoxicated, as a Class C misdemeanor and as a Class D felony because of a prior conviction, operating a vehicle with at least .15 grams alcohol content, as a Class A misdemeanor and as a Class D felony because of a prior conviction, habitual traffic offender, and habitual substance offender.

On December 4, 2006, Brady and the State entered into a plea agreement that provided for Brady to plead guilty to operating a vehicle while intoxicated, a Class D felony, with sentencing to be determined by the trial court. In return, the State would dismiss the

remaining charges and also dismiss a charge in an unrelated case. At the change of plea hearing, Brady advised the trial court that he discussed the plea agreement with his attorney and also admitted to the essential facts of the crime in that he operated his vehicle knowing that he was intoxicated. Brady also admitted that he had a prior conviction for operating a vehicle while intoxicated in Noble County, from March 11, 2005. The court accepted Brady's guilty plea to operating a vehicle while intoxicated, a Class D felony.

At sentencing, the court found Brady's extensive criminal history, as set out in the pre-sentence investigation report, and the fact that he was on probation when he committed the instant offense as significant aggravating circumstances. No significant mitigating factors were found. The court acknowledged that Brady did plead guilty, but that he received extensive benefits in return for his plea in the dismissal of the remaining charges and the dismissal of charges in an unrelated case. The trial court found the aggravating circumstances far outweighed any mitigating circumstances. The trial court sentenced Brady to three years incarceration in the Department of Correction to be served consecutively to the sentence in Noble County. This is above the advisory sentence for the crime.¹ The trial court further ordered that Brady could serve the entire sentence on work release. Brady now appeals his sentence.

Discussion and Decision

Brady asserts the trial court improperly sentenced him to serve a three-year sentence

¹ The advisory sentence for operating a vehicle while intoxicated, a Class D felony, is one and one-half years. Ind. Code § 35-50-2-7.

consecutively with his previous Noble County sentence. He claims that because any sentence imposed in this case was required to be served consecutively to the sentence for which he was on probation when he committed the instant crime, the court was required to impose the advisory sentence of one and one-half years.

Brady bases his claim on his interpretation of the advisory sentencing statute, Indiana Code section 35-50-2-1.3(c). That statute provides, in pertinent part:

In imposing consecutive sentences in accordance with I.C. 35-50-1-2 . . . a court is required to use the appropriate advisory sentence in imposing a consecutive sentence or an additional fixed term. However, the court is not required to use the advisory sentence in imposing the sentence for the underlying offense.

Ind. Code § 35-50-2-1.3(c). The relevant portion of Indiana Code section 35-50-1-2(c), the consecutive sentencing statute, provides:

The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. However, except for crimes of violence, the 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 advisory 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.

Brady argues these statutes require the trial court to impose consecutive advisory sentences.

Brady relies on Robertson v. State, 860 N.E.2d 621, 624-25 (Ind. Ct. App. 2007), trans. granted.

In Robertson, the court concluded that Indiana Code section 35-50-2-1.3 prohibited the trial court from deviating from the advisory sentence for any sentence ordered to run consecutively. Id. at 624-25. The Robertson court specifically rejected the interpretation of

the advisory sentencing statute, Indiana Code section 35-50-2-1.3, found in White v. State, 849 N.E.2d 735 (Ind. Ct. App. 2006), trans. denied. However, after Brady filed his brief² in this appeal, our supreme court granted transfer in Robertson, thereby vacating that opinion.

In White, the defendant was convicted of murder and attempted murder in the same cause, and the trial court sentenced him to the maximum terms of sixty-five and fifty years, respectively. The trial court also ordered the sentences to run consecutively, for an aggregate sentence of 115 years. On appeal, the defendant argued that Indiana Code section 35-50-2-1.3 required the court, in imposing consecutive sentences under Indiana Code section 35-50-1-2, to use the advisory sentences for both of his convictions. The White court rejected the defendant's claim, concluding that Indiana Code section 35-50-2-1.3 imposed no additional restrictions on the ability of a trial court to impose consecutive sentences. 849 N.E.2d at 743.

The White court stated:

Indiana Code § 35-50-2-1.3 instructs: “In imposing consecutive sentences in accordance with Ind. Code 35-50-1-2[,] a court is required to use the appropriate advisory sentence in imposing a consecutive sentence[.]” We conclude that when the General Assembly wrote “appropriate advisory sentence,” it was referring to the total penalty for “an episode of criminal conduct,” which, except for crimes of violence, is not to exceed “the advisory 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.” See Ind. Code § 35-50-1-2(c). In other words, the advisory sentence for a felony which is one class of felony higher than the most serious of the felonies for which the person has been convicted is the “appropriate advisory sentence” for an episode of non-violent criminal conduct. Indiana Code § 35-50-1-2 in no other way limits the ability of a trial court to impose consecutive sentences. In turn, Indiana Code § 35-50-2-1.3, which references Indiana Code § 35-50-1-2, imposes no additional restrictions on the ability of trial courts to impose

² Brady filed his Brief of Defendant-Appellant on April 5, 2007. The supreme court granted transfer in Robertson on April 17, 2007.

consecutive sentences

Id. The White court's interpretation of the advisory sentencing statute has been further explained in Barber v. State, 863 N.E.2d 1199 (Ind. Ct. App. 2007), as follows:

Under the new advisory scheme, trial courts are generally not required to use an advisory sentence. See I.C. § 35-50-2-1.3 ("Except as provided in subsection (c), a court is not required to use an advisory sentence."). Because an advisory sentence is in most cases exactly that - advisory - the legislature included subsection (c) of Indiana Code § 35-50-2-1.3 to remind Indiana's trial courts of those statutory provisions that do require the "use" of an advisory sentence: (1) in imposing consecutive sentences in accordance with Indiana Code § 35-50-1-2; (2) in imposing an additional fixed term to an habitual offender under Indiana Code § 35-50-2-8; and (3) in imposing an additional fixed term to a repeat sexual offender under Indiana Code § 35-50-2-14. We acknowledge that nothing in Indiana Code § 35-50-2-1.3(c) limits its application to any specific subsections of Indiana Code §§ 35-50-1-2, 35-50-2-8, and 35-50-2-14, but each of those statutes only includes one subsection that refers to advisory sentences.

863 N.E.2d at 1211 (emphases in original).

We agree with the analysis set forth in White and Barber. The trial court was not limited to imposing the advisory sentence simply because consecutive sentences were statutorily required. The consecutive sentencing statute limitation applies only to non-violent crimes committed in the same criminal episode. White, 849 N.E.2d at 743. Thus, we reject Brady's argument that the trial court was required to impose the advisory sentence when it ordered his sentence for operating a vehicle while intoxicated to be served consecutively with his previous Noble County sentence, as these crimes were not part of a single episode of criminal conduct.

Conclusion

The trial court did not err in sentencing Brady to three years incarceration on his

conviction for operating a vehicle while intoxicated, to be served consecutively to the sentence in Noble County. Accordingly, we affirm the trial court.

Affirmed.

SULLIVAN, J., and VAIDIK, J., concur.