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IN THE
COURT OF APPEALS OF INDIANA

MATTHEW POISEL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A05-0701-CR-64
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79C01-0507-FA-20

July 27, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Matthew Poisel appeals his sentences for Robbery, as a Class A felony; Conspiracy to Commit Robbery, as a Class B felony; Carrying a Handgun Without a License as a Class C Felony; Battery, as a class C Felony; and Using a Firearm in the Commission of a Felony that Resulted in Serious Bodily Injury trial after he pleaded guilty. He presents three issues for our review, which we reorder as follows:

1. Whether Poisel's multiple convictions arising from the same conduct violate his right to be free from double jeopardy.

2. Whether Poisel's sentences from crimes arising in one episode of criminal conduct violate the sentencing limitations in Indiana Code Section 35-50-1-2.

3. Whether Poisel's sentence is inappropriate in light of the nature of his offenses and his character.

We affirm in part, reverse in part, and remand with instructions.

FACTS AND PROCEDURAL HISTORY

On June 11, 2005, Poisel and Corey Salinas agreed to commit a robbery. Poisel had a handgun loaded with hollow point bullets. Poisel and Salinas hid near an automatic teller machine. Brian Clawson approached the machine and withdrew $50 in cash. Poisel shot Clawson in the back, and Poisel and Salinas took Clawson's wallet and split the $50.

The State charged Poisel with Attempted Murder, a Class A felony; robbery causing serious bodily injury, as a Class A felony; Robbery While Armed with a Deadly Weapon, as a Class B felony; conspiracy to commit robbery while armed with a deadly weapon, as a Class B felony; Possession of a Handgun with Altered Identification Marks, a Class C felony; carrying a handgun without a license within 1000 feet of a school, as a

Class C felony; Theft, as a Class D felony; battery by means of a deadly weapon, as a Class C felony; and an additional penalty for using a firearm in the commission of a felony that resulted in serious bodily injury.

On July 10, 2006, Poisel entered into a written plea agreement with the State. The agreement provided that he would plead guilty to robbery, as Class A felony; conspiracy to commit robbery, as a Class B felony; carrying a handgun without a license, as a Class C felony; battery, as a Class C felony; and the additional penalty for use of a firearm. In exchange, the State agreed to dismiss the remaining counts.[1] The court held a hearing on that agreement, during which Poisel stated that he understood he was waiving his right to appeal his convictions. The court found that Poisel was pleading guilty "freely and voluntarily." Transcript at 24.

On November 1, the court held Poisel's sentencing hearing. After both parties presented evidence and argument, the court accepted the plea agreement and found Poisel guilty, but mentally ill, of the charges. The court found six aggravating circumstances: Poisel's extensive juvenile and criminal history; Poisel's need for treatment that can best be provided by commitment to a penal facility; prior attempts at rehabilitation had failed; Poisel was released on bond when he committed this offense; his history of substance abuse; and the nature and circumstances of his crime, namely, the "random[,] callous nature" of the shooting and the use of a hollow point bullet. Appendix at 105. The court also found Poisel's youth, his difficult childhood, his guilty plea, and his mental illness to be mitigating circumstances.

[1] The trial court granted Poisel's motion to dismiss the charge for possession of a handgun with altered identification marks, a Class C felony.

The court determined that the aggravators outweighed the mitigators and sentenced Poisel to enhanced consecutive sentences, as follows: forty-five years for Class A felony robbery; fifteen years for the Class B felony conspiracy; five years for the Class C felony carrying a handgun without a license; five years for Class C felony battery; and five years for the additional penalty for use of a firearm, for an aggregate seventy-five-year sentence.

This appeal ensued.

DISCUSSION AND DECISION

Issue One: Double Jeopardy

Poisel contends that his convictions violate his right to be free from double jeopardy, and the State responds that he waived such a claim by pleading guilty.

> [D]efendants who plead guilty to achieve favorable outcomes give up a plethora of substantive claims and procedural rights, such as challenges to convictions that would otherwise constitute double jeopardy.

Debro v. State, 821 N.E.2d 367, 372 (Ind. 2005) (quoting Lee v. State, 816 N.E.2d 35, 40 (Ind. 2004)). "[R]etaining a benefit while relieving oneself of the burden of the plea agreement 'would operate as a fraud upon the court.'" Games v. State, 743 N.E.2d 1132, 1135 (Ind. 2001) (quoting Spivey v. State, 553 N.E.2d 508, 509 (Ind. Ct. App. 1990)). This court has often cited and applied the principle that a defendant may not benefit from a bargain and then complain that the bargain was illegal. See, e.g., Mays v. State, 790 N.E.2d 1019, 1022 (Ind. Ct. App. 2003) ("Thus, by pleading guilty, Mays waived his right to directly challenge his convictions as violative of double jeopardy.").

This caselaw specifically requires that the defendant must either benefit or achieve a favorable outcome. In Mapp v. State, 770 N.E.2d 332, 334-35 (Ind. 2002), our Supreme Court rejected the defendant's argument that he was entitled to relief from the sentence he received after pleading guilty because his crimes were facially duplicative. "To hold otherwise would deprive both prosecutors and defendants of the ability to make precisely the kind of bargain that was made here. That would not be in the interest of either the State or of defendants." Id. at 335.

But in Mapp the defendant received a substantial benefit from his bargain. He was originally charged with possession of cocaine with the intent to deliver, as a Class A felony, and "knowingly deliver cocaine," as a Class B felony. Id. at 333. In exchange for his guilty plea, his Class A felony was reduced to a Class B felony, and his maximum possible sentence on that count reduced from fifty years in prison down to twenty years. Id. See also Games, 743 N.E.2d at 1135 (no double jeopardy violation where the State dropped death penalty request in exchange for guilty plea); O'Connor v. State, 789 N.E.2d 504, 510 (Ind. Ct. App. 2003) (no double jeopardy violation where "O'Connor received a significant benefit by entering into the agreements.")

Here, the State originally charged Poisel with eight different felonies all based on the same conduct—his shooting and robbing of Clawson—and sought enhancement of his sentence for committing the felonies while using a firearm. After the court dismissed one of the charges, Poisel pleaded guilty to four of those crimes in exchange for the dismissal of three other charges: attempted murder, a Class A felony; robbery, as a Class

B felony; and theft, as a Class D felony. And his plea agreement contained no limit on his sentences.

Had Poisel been convicted of all charges at trial, the court would have been required to vacate all convictions except for attempted murder, robbery while armed with a deadly weapon, and possession of a handgun. See Spears v. State, 735 N.E.2d 1161 (Ind. 2000). Poisel then would have faced the following sentences for: attempted murder, a Class A felony, with a maximum of fifty years; robbery, as a Class B felony with a maximum of twenty years; and possession of a handgun, as a Class C felony with a maximum of eight years. If a jury had found Poisel guilty as charged, the trial court also could have enhanced Poisel's sentence by five years under Indiana Code Section 35-50-1-2(e). If the court had imposed maximum consecutive terms, Poisel would have received a total aggregate sentence of eighty-three years.

On the other hand, and keeping in mind that Poisel pleaded guilty without any sentence limitation, the five charges to which Poisel pleaded guilty exposed him to a maximum potential of ninety-three years (robbery, as a Class A felony with a maximum of fifty years; conspiracy to commit robbery, as a Class B felony with a maximum sentence of twenty years; carrying a handgun without a license, as a Class C felony with a maximum sentence of eight years; battery with a deadly weapon, as a Class C felony with a maximum sentence of eight years; and the sentence enhancement for using a firearm in the commission of a felony that resulted in serious bodily injury, a maximum of five years).

When a defendant pleads guilty with no sentence limitation and he is exposed to a potential sentence greater than the sentence he could have received after trial and conviction, there is no benefit. On these facts, which are unique and unlikely to be repeated, we cannot say that Poisel's guilty plea produced a favorable outcome. The waiver of double jeopardy claims is expressly qualified by the defendant's receipt of a favorable outcome. When, as here, there is no favorable outcome, there is no waiver. [2]

Our reading of the charging information and underlying acts for the crimes to which Poisel pleaded guilty shows that two of Poisel's crimes—the robbery causing serious bodily injury and battery while armed with a deadly weapon—encompass all the elements of conspiracy to commit robbery while armed with a deadly weapon. See Fosha v. State, 747 N.E.2d 549 (Ind. 2001); Guffey v. State, 717 N.E.2d 103 (Ind. 1999). Thus, we remand this case to the trial court with instructions to vacate Poisel's conviction for conspiracy to commit robbery while armed with a deadly weapon. See Fields v. State, 825 N.E.2d 841, 848 (Ind. Ct. App. 2005) (on State's cross-appeal, approved trial court's merger of two convictions on double jeopardy grounds where defendant agreed to plead guilty to both crimes).

We also instruct the trial court to resentence Poisel to forty-five years enhanced by five years for using a firearm in the commission of a felony that resulted in serious bodily injury for his robbery conviction, as a Class A felony; five years for his conviction for carrying a handgun without a license, as a Class C felony; and five years for his

[2] The dissent states that we are creating a new exception. It is clear, however, that a benefit or favorable outcome has always been a condition precedent for determining that a defendant has waived his right to be free from double jeopardy by pleading guilty. Thus, we are simply applying this standard.

conviction for battery with a deadly weapon, as a Class C felony, for an aggregate sentence of sixty years.[3]

Issue Two: Consecutive Sentences

Poisel contends that the trial court violated Indiana Code Section 35-50-1-2, the consecutive sentencing statute, when it imposed consecutive sentences. While sentencing is generally left to the discretion of trial courts, we have a duty to correct sentences that violate the trial court's statutory authority. Fields v. State 825 N.E.2d 841, 843 (Ind. Ct. App. 2005), trans. denied.

The consecutive sentencing statute limits the aggregate sentence for convictions "arising out of an episode of criminal conduct" to "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." Ind. Code § 35-50-1-2(c) (West Supp. 2006). But "[c]rimes of violence" are specifically excluded from that limitation. Id. That statute also exhaustively defines "crime of violence," identifying the qualifying crime by name and citation. Ind. Code § 35-50-1(a).

One of Poisel's convictions, robbery, as a Class A felony, is identified in that list and is, therefore, excluded from the limitation. The State does not dispute that Poisel's remaining convictions are subject to the limitation. Because Poisel's conviction for conspiracy to commit robbery, as a Class B felony will be vacated, the highest-level felony among his remaining convictions is a Class C felony. Thus, the total aggregate sentence for Poisel's remaining convictions—excluding the Class A felony robbery—

[3] In Issue Two, we determine that the trial court correctly imposed consecutive sentences.

may not exceed the advisory sentence for a Class B felony, which is ten years. Ind. Code § 35-50-2-5. And it does not. The court sentenced Poisel to five years for his Class C felony carrying a handgun without a license conviction, and five years for his Class C felony battery conviction for an aggregate sentence of ten years.

The court also applied Indiana Code Section 35-50-1-2(e), which provides:

> If the factfinder determines under IC 35-50-2-11 that a person used a firearm in the commission of the offense for which the person was convicted, the term of imprisonment for the underlying offense and the additional term of imprisonment imposed under IC 35-50-2-11 must be served consecutively.

(emphasis added). Poisel pleaded guilty to the additional penalty, and the court ordered that five-year sentence to run consecutive to his other sentences. It is not clear, however, from the Abstract of Judgment to which offense this penalty attached. Trial courts must impose the resulting penalty enhancement on only one of the convictions and must specify the conviction so enhanced. Davis v. State, 843 N.E.2d 65, 67 (Ind. Ct. App. 2006), trans. denied. This enhancement should be attached to Poisel's sentence for robbery.

When it ordered all sentences to be served consecutive, the court essentially ordered the aggregate sentence for the non-violent crimes arising from the same episode to run consecutive to Poisel's sentence for his crime of violence. The consecutive sentencing statute does not prohibit a trial court from imposing the sentence for non-violent crimes consecutive to the sentence for a crime of violence. Fields, 844 N.E.2d at 844 (citing Ellis v. State, 736 N.E.2d 731, 733 (Ind. 2000)). The trial court did not violate its statutory authority to impose consecutive sentences.

Issue Three: Whether Poisel's Sentence is Inappropriate

Finally, we consider Poisel's claim that his sentence[4] is inappropriate. Poisel committed his crimes after the legislature amended the sentencing statutes, so the new statutes apply. Those amendments, resulting in the new "advisory" sentencing structure, were the legislature's response to Blakely v. Washington, 542 U.S. 296 (2004). Anglemyer v. State, No. 43S05-0606-CR-230, __N.E.2d__, slip op. at 6 (Ind. June 26, 2007). Poisel "must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." Id. at 15 (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)).

In this review, we recognize the special expertise of the trial court in making sentencing decisions and do not merely substitute our opinion for that of the trial court. Davis v. State, 851 N.E.2d 1264, 1267 (Ind. Ct. App. 2006), trans. denied. But even where a trial court has meticulously followed the proper procedure and legally imposed sentence, appellate courts may exercise their authority to revise a sentence deemed "inappropriate in light of the nature of the offense and the character of the offender." Childress, 848 N.E.2d at 1080. When a defendant pleads guilty with an "open plea," as Poisel did, the trial court's discretion is limited only by the Constitution and the relevant statutes. Id. at 1078.

As discussed above, the court correctly complied with the consecutive sentencing statute. The court also complied with the appropriate procedure. A trial court may not

[4] Poisel's aggregate sentence in accordance with this opinion will be sixty years (robbery, as a Class A felony, forty-five years enhanced by five years for using a firearm in the commission of a felony that resulted in serious bodily injury; carrying a handgun without a license, as a Class C felony, five years; and battery with a deadly weapon, as a Class C felony, five years). Thus, we review this sentence.

impose consecutive sentences unless it finds at least one aggravating circumstance. Plummer v. State, 851 N.E.2d 387, 390 (Ind. Ct. App. 2006). "[T]he only possible question regarding the propriety of the consecutive sentences is whether or not there were sufficient aggravating circumstances to support the decision to run the sentences consecutively." Id. (quoting Bryant v. State, 841 N.E.2d 1154, 1157 (Ind. 2006)). When a trial court imposes consecutive sentences not statutorily required,[5] it must explain its reasons for selecting the sentence imposed, including: 1) the identification of all significant aggravating and mitigating circumstances; 2) the specific facts and reasons that lead the court to find the existence of each such circumstance; and 3) an articulation demonstrating the balance of mitigating and aggravating circumstances to determine the sentence. Id.

Here, the court identified mitigators supported by the evidence, Poisel's youth, his tough childhood, his guilty plea, and his mental illness. The court also carefully reviewed Poisel's juvenile and criminal history and concluded that Poisel's history revealed "a pattern here of dishonesty and substance abuse that would tend to indicate you could very well re-offend." Transcript at 31. The court also stated that Poisel had "an extensive criminal history involving violence" and that "[t]here have been prior attempts at rehabilitation in the community and through incarceration that [have not] worked." Id. at 69. In addition, the court found that Poisel's extensive history of illegal drug use, his use of a hollow point bullet, and the fact that he was released on bond when

[5] As noted above, the court was statutorily required to impose the five-year additional penalty consecutively to Poisel's sentence for his underlying crimes.

he committed these crimes were aggravating factors. The court determined that the aggravators outweighed the mitigators and imposed enhanced consecutive sentences.

Using the trial court's statements as a guide, we cannot say Poisel's sentence is inappropriate. The use of hollow point bullets shows the extreme nature of his offenses, and Poisel's extensive and violent criminal history reflects his poor character. On these facts and after having reviewed and revised Poisel's sentence, we cannot say that his aggregate sixty-year sentence for his random and violent conduct is inappropriate in light of the nature of his offenses and what they reveal about his character.

Affirmed in part, reversed in part, and remanded with instructions.

RILEY, J., concurs.

BARNES, J., dissents with separate opinion.

IN THE
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MATTHEW POISEL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A05-0701-CR-64
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

BARNES, Judge, dissenting

I respectfully dissent. Specifically, I believe it is clear that Poisel cannot challenge any of his convictions on double jeopardy grounds after pleading guilty.

A card laid is a card played. The fact that Poisel pled guilty in an arrangement with the State but might have done better at trial seems to me to be on all fours with our supreme court's repeated holding that "[d]efendants waive a whole panoply of rights by voluntarily pleading guilty", including "the right to attack collaterally one's plea based on double jeopardy." Mapp v. State, 770 N.E.2d 332, 334-35 (Ind. 2002); see also Mills v. State, 868 N.E.2d 446, 453 (Ind. 2007); Lee v. State, 816 N.E.2d 35, 40 (Ind. 2004); Davis v. State, 771 N.E.2d 647, 649 n.4 (Ind. 2002); Games v. State, 743 N.E.2d 1132, 1135 (Ind. 2001).

The only exception to this rule is where a defendant has pled guilty to charges that are facially duplicative of previous convictions, not concurrent charges that arguably duplicate each other. See Mapp, 770 N.E.2d at 334 n.2. The majority essentially creates a new exception, by examining Poisel's maximum sentencing exposure under the original charges, minus charges it believes would have been precluded by double jeopardy, and comparing that to the maximum sentencing exposure Poisel faced under the plea agreement. I do not believe our supreme court has sanctioned such an exception and would leave it to that court to create one.

We must not forget that Poisel faced other charges that were dismissed as a result of his guilty plea. Additionally, Poisel makes no argument that he received ineffective assistance of counsel in connection with his plea, nor that his plea was unintelligent, unknowing, or involuntary. Such arguments, in any event, would have to be presented in a post-conviction proceeding, not a direct appeal following a guilty plea. See Mapp, 770 N.E.2d at 334. The trial court also clearly informed Poisel that he was waiving his right to appeal his convictions when he pled guilty, but the majority has circumvented that waiver by addressing his double jeopardy arguments in this appeal.

The blunt fact is plea agreements are entered into for many reasons: to cap sentencing exposure, to avoid a trial, to save the anguish of a potential witness, to promote judicial economy, and/or to take responsibility for one's actions, to name a few. Here, Poisel's sentencing exposure was capped, a trial was avoided, and a sentence within the parameters of the plea agreement was meted out, after the trial court

considered Poisel's guilty plea to be a mitigating circumstance. Nothing more is legally required or expected.

The question of a Rule 7(B) sentence reduction is a separate issue. It is one that I would have seriously considered based on these facts. However, I would not reduce Poisel's sentence to sixty years via the route taken by the majority, i.e. by vacating his conviction for Class B felony conspiracy to commit armed robbery, and its accompanying fifteen-year sentence, on double jeopardy grounds.[6]

[6] I do agree with the majority's analysis and rejection of Poisel's argument regarding consecutive sentences.