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IN THE
COURT OF APPEALS OF INDIANA

JOHN D. WICKERSHAM,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 09A05-0701-CR-54
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CASS SUPERIOR COURT
The Honorable Richard A. Maughmer, Judge
Cause No. 09D02-0104-CF-34

July 27, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

John D. Wickersham appeals his sentence for Rape, as a Class B felony.[1] We affirm.

Issue

Wickersham raises a single issue on appeal, which we re-state as: whether his sentence is inappropriate.

Facts and Procedural History

In 2001, Wickersham handcuffed M.M., hit her, and forced her to submit to sexual intercourse. He later acknowledged that he may have also bitten her. The State filed an Information, charging Wickersham with Rape, Criminal Confinement, and Battery. The State later amended its Information to include an additional count of Rape. Wickersham and the State entered a Plea Agreement, whereby Wickersham pled guilty to Rape and the State dismissed the other three counts. The Plea Agreement left sentencing to the discretion of the trial court.

At sentencing in 2002, Wickersham admitted that he had had a drug and alcohol problem for at least fifteen years. He acknowledged that the judicial system had afforded him opportunities to address that problem in 1988 and 1991. Furthermore, he acknowledged that drugs or alcohol had had a part in his slapping one of his ex-wives. Finally, he admitted having used drugs as late as two months prior to the sentencing hearing.

The trial court found three aggravating circumstances: Wickersham's criminal history, a long history of drug and alcohol use, and the fact that "a sentence less than the enhanced term would depreciate the seriousness of the crime." Transcript vol. 9, at 28. His

criminal history consisted of three misdemeanor convictions, Criminal Trespass and two related to drinking alcohol and driving. All three convictions were at least nine years prior to the instant offense. The trial court found a single mitigating circumstance in Wickersham's statement of remorse, and found that the aggravating circumstances outweighed the mitigating circumstance. The trial court imposed the maximum, twenty-year term of imprisonment for a Class B felony, to be fully executed.[2] He did not appeal within thirty days.

On October 27, 2006, Wickersham filed his Petition for Permission to File a Belated Notice of Appeal, granted by the trial court on December 15, 2006. He now appeals.

Discussion and Decision

While Wickersham's sentence comes belatedly to this Court, the parties have provided neither record nor argument of the trial court's decision to grant Wickersham's Petition for Permission to File a Belated Notice of Appeal. Under Indiana Post-Conviction Rule 2(1), a Petition for Permission to File a Belated Notice of Appeal may be filed where the failure to file timely a Notice of Appeal "was not due to the fault of the defendant and" the defendant "has been diligent in requesting permission to file a belated notice of appeal." Ind. Post-Conviction Rule 2(1)(a), (b) (emphasis added); see also Gutermuth v. State, 868 N.E.2d 427, 434 (Ind. 2007). The trial court must consider these factors in ruling on the Petition. P-C.R. 2(1).

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[1] Ind. Code § 35-42-4-1(a).

[2] The trial court ordered this sentence during a hearing on April 25, 2002, but the Chronological Case Summary indicates that the order was amended on July 19, 2002. We do not have the benefit of reviewing the amended order.

Our Supreme Court held recently that Blakely v. Washington does not apply to sentences from which the time for filing a timely direct appeal had expired as of June 24, 2004, the date the Unites States Supreme Court issued that case. Blakely v. Washington, 542 U.S. 296 (2004); Gutermuth, 868 N.E.2d at 434. Meanwhile, for recent opinions regarding the consideration of petitions under Indiana Post-Conviction Rule 2, see Moshenek v. State, 868 N.E.2d 419 (Ind. 2007); and Witt v. State, 867 N.E.2d 1279 (Ind. 2007). Within this context, there should be less ambiguity regarding Indiana Post-Conviction Rule 2 and a greater opportunity for the State, defendants, and trial courts to implement its terms.

Review under Indiana Appellate Rule 7(B)

On direct appeal, Wickersham asks us to exercise our independent review of sentences, arguing that his sentence is inappropriate and that it should be revised from the maximum to the presumptive term. Under Indiana Appellate Rule 7(B), this "Court may 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." A defendant "'must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.'" Anglemyer v. State, 868 N.E.2d 482, 494 (Ind. 2007) (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)).

As to Wickersham's character, his criminal history consisted of three misdemeanor convictions, all of which were at least nine years prior to the instant offense. More troubling is his admission that he slapped one of his ex-wives and that in both that event and the instant offense, drugs or alcohol played some role. Furthermore, Wickersham admitted that he had

had a drug and alcohol problem for at least fifteen years, that he had been given opportunities to address that problem in 1988 and 1991, and that he had used drugs as late as two months prior to his sentencing hearing.

In raping his victim, Wickersham handcuffed her, hit her, and may have bitten her. His sentence for the maximum term of imprisonment for a Class B felony is not inappropriate.

Conclusion

Based upon our review of the case and our consideration of the trial court's decision, we conclude that Wickersham's sentence is not inappropriate.

Affirmed.

SHARPNACK, J., and MAY, J., concur.