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IN THE
COURT OF APPEALS OF INDIANA

DARRYL ABRON,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

No. 49A02-0811-CR-986

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol Orbison, Judge
Cause No. 49G22-0805-FC-116813

July 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Darryl Abron appeals his conviction for criminal mischief as a class A misdemeanor[1] and his sentence for criminal mischief as a class A misdemeanor, burglary as a class C felony,[2] resisting law enforcement as a class A misdemeanor,[3] and being an habitual offender.[4] Abron raises two issues, which we revise and restate as:

I. Whether Abron's convictions for burglary and criminal mischief violate the prohibition against double jeopardy; and

II. Whether Abron's sentence was disproportionate to the crimes for which he was convicted.[5]

We dismiss in part and affirm in part.

The relevant facts follow. Dean Wilson, the owner of an Indianapolis restaurant, was closing his restaurant in the early morning hours on May 16, 2008. Wilson heard a loud noise and footsteps in the kitchen and called the police. The police arrived, and Abron ran back and forth in the restaurant, ran towards the front door and threw his body against the front door, which broke the door frame and glass that was connected to the

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[1] Ind. Code § 35-43-1-2 (Supp. 2007).

[2] Ind. Code § 35-43-2-1 (2004).

[3] Ind. Code § 35-44-3-3 (Supp. 2006).

[4] Ind. Code § 35-50-2-8 (Supp. 2005).

[5] Abron mentions Ind. Appellate Rule 7(B), which provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Abron also mentions that we review sentences for abuse of discretion. However, Abron makes no argument as to why his sentence is inappropriate in light of the nature of the offense and the character of the offender or that the trial court abused its discretion in sentencing him. Therefore, the arguments are waived for failure to make a cogent argument. See Ind. Appellate Rule 46(A)(8)(a); Ford v. State, 718 N.E.2d 1104, 1107 n.1 (Ind. 1999).

door. Abron ran past the police officers, who ordered him to stop. Abron did not stop and ran through the parking lot and nearby yards before police officers arrested him. Wilson and the police later discovered that the cash box inside the restaurant had been opened.

On May 20, 2008, the State charged Abron with Count I, burglary as a class C felony; Count II, resisting law enforcement as a class A misdemeanor; and Count III, criminal mischief as a class A misdemeanor. The State also charged Abron with being an habitual offender.

On September 30, 2008, Abron and the State entered a plea agreement in which Abron agreed to plead guilty to Count I, burglary as a class C felony; Count II, resisting law enforcement as a class A misdemeanor; and to being an habitual offender. The State agreed to dismiss Count III, criminal mischief as a class A misdemeanor. The plea agreement provided that an initial executed sentence would not exceed twelve years.

At the guilty plea hearing, Abron withdrew his guilty plea and stated that he wished to plead guilty to all of the charges except for the habitual offender charge. The trial court accepted Abron's amended guilty plea and conducted a jury trial as to the habitual offender allegation. The jury found Abron guilty of being an habitual offender. The trial court sentenced Abron to eight years for burglary as a class C felony, one year for resisting law enforcement as a class A misdemeanor, and one year for criminal mischief as a class A misdemeanor. The trial court ordered the sentences to be served consecutively and enhanced Abron's sentence for burglary by twelve years for his status

as an habitual offender. Thus, Abron received a total sentence of twenty-two years in the Indiana Department of Correction.

I.

The first issue is whether Abron's convictions for burglary and criminal mischief violate the prohibition against double jeopardy. Abron argues that his conviction and sentence for criminal mischief should be vacated. Abron pled guilty to burglary and criminal mischief. Because Abron pled guilty to criminal mischief, he cannot challenge the propriety of that conviction on direct appeal.[6] See Collins v. State, 817 N.E.2d 230, 231 (Ind. 2004) ("A person who pleads guilty is not permitted to challenge the propriety of that conviction on direct appeal."); Tumulty v. State, 666 N.E.2d 394, 395 (Ind. 1996) ("One consequence of pleading guilty is restriction of the ability to challenge the conviction on direct appeal."). Rather, the appropriate forum is post-conviction relief. See Tumulty, 666 N.E.2d at 396 (holding that post-conviction relief was exactly the vehicle for pursuing the defendant's claim); Mapp v. State, 770 N.E.2d 332, 333-334

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[6] Abron argues that this court should address the merits of his argument and relies upon Douglas v. State, 878 N.E.2d 873 (Ind. Ct. App. 2007). In Douglas, the State charged the defendant with failing to register as a sex offender. 878 N.E.2d at 877. The defendant filed a motion to dismiss and argued that the sex offender registry statute violated *ex post facto* laws by imposing additional punishments that were not in effect at the time of conviction. Id. The trial court denied the motion, and the defendant pled guilty to the charge. Id. On appeal, the defendant argued that the law at issue constituted an *ex post facto* law. Id. We reviewed the merits of the defendant's challenge to his conviction, in part, because the defendant raised a question of law on appeal and the issue presented on appeal had been raised in the trial court and both parties presented fully briefed arguments. Id. at 878. We also noted, "this is such a narrow set of circumstances that it would not open the floodgates of additional cases coming before this Court." Id.

We find Douglas distinguishable. Here, unlike in Douglas, the issue raised by Abron, whether the evidentiary facts used to establish the essential elements of his criminal mischief charge may also have been used to establish the essential elements of his burglary charge, requires an examination of the facts. Second, unlike in Douglas, Abron did not present this issue to the trial court. Further, the double jeopardy issue raised by Abron does not present such a narrow set of circumstances unlikely to open the floodgates of additional cases coming before this court.

(Ind. 2002) (holding that a direct appeal is not the proper procedural avenue for a defendant to attack a plea agreement on double jeopardy grounds and that the proper venue for challenging a plea agreement is the filing of a petition for post-conviction relief). Accordingly, we dismiss Abron's appeal as it relates to his challenge of his guilty plea. See Crain v. State, 875 N.E.2d 446, 447 (Ind. Ct. App. 2007) (dismissing defendant's appeal because his claim must be brought through a petition for post-conviction relief).

II.

The next issue is whether Abron's sentence is proportionate to the nature of the crime. "In its direction that '[a]ll penalties shall be proportioned to the nature of the offense,' Article I, Section 16 of the Indiana Constitution makes clear that the State's ability to exact punishment for criminal behavior is not without limit." Conner v. State, 626 N.E.2d 803, 806 (Ind. 1993). In cases involving challenges to sentences enhanced according to the habitual offender statute, a two-part analysis reviews the nature and gravity of the present offense as well as the nature of prior offenses. Id. While this court cannot set aside a legislatively sanctioned penalty merely because it seems too severe, the fact that an appellant's sentence falls within parameters affixed by the legislature does not relieve this court of the constitutional duty under Section 16 to review the duration of the appellant's sentence as it is possible for the statute under which the appellant is convicted to be constitutional, and yet be unconstitutional as applied to the appellant in a particular instance. Id. (citing Clark v. State, 561 N.E.2d 759, 765 (Ind. 1990)).

In this case, Abron broke into a restaurant. When police arrived, Abron ran back and forth in the restaurant, ran towards the front door, threw his body against the front door, which broke the door frame and glass that was connected to the door. Abron ran past the police officers, who ordered him to stop. Abron did not stop and ran through the parking lot and yards before police officers arrested him. Wilson and the police later discovered that the cash box inside the restaurant had been opened.

The habitual offender charging information alleged that Abron had been convicted of battery as a class C felony in 1987, attempted robbery as a class B felony in 1994, and theft as a class D felony in 2006. The presentence investigation report reveals that Abron has convictions beginning in 1980 and continuing through 2005 for two counts of robbery as class B felonies, attempted robbery as a class B felony, three counts of theft, battery as a class C felony, and carrying a handgun without a license as a class C felony. Under these circumstances, we cannot say that the sentence constituted a disproportionate penalty. See Taylor v. State, 511 N.E.2d 1036, 1039 (Ind. 1987) (holding that the defendant's sentence of thirty-two years for the theft of fifty dollars worth of spark plugs did not constitute a disproportionate penalty, especially in light of his prior criminal record); Hensley v. State, 497 N.E.2d 1053, 1055-1056 (Ind. 1986) (holding that a thirty-two-year sentence was not an unconstitutionally disproportionate penalty for theft of gasoline by a repeat offender), reh'g denied.

For the foregoing reasons, we dismiss Abron's appeal as it relates to his challenge of his guilty plea and conviction for criminal mischief and affirm Abron's sentence for

criminal mischief as a class A misdemeanor, burglary as a class C felony, resisting law enforcement as a class A misdemeanor, and being an habitual offender.

Dismissed in part, affirmed in part.

CRONE, J., and BRADFORD, J., concur.