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IN THE
COURT OF APPEALS OF INDIANA

JOHN CRUMP,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0607-CR-581
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark Stoner, Judge
Cause Nos. 49F09-0509-FD-154858 & 49F09-0509-FD-160564

August 3, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant John Crump ("Crump") appeals his sentences for two convictions of operating a vehicle while intoxicated as Class D felonies.[1] We affirm.

Issues

Crump raises one issue, which we restate as two:

I. Whether Crump's enhanced and consecutive sentences are statutorily permissible pursuant to Indiana Code Section 35-50-2-1.3; and

II. Whether his sentences are inappropriate.

Facts and Procedural History

On September 10, 2005, a police officer on the Marion County DUI Task Force, Chris Whittaker ("Officer Whittaker"), observed Crump's car cross the yellow dividing line at 3600 East Raymond. Officer Whittaker initiated a traffic stop and observed the smell of alcohol on Crump's breath as well as Crump's bloodshot eyes and poor balance. Officer Whittaker administered three field sobriety tests, and Crump failed all of them. After being advised of the Indiana Implied Consent Law, Crump refused to submit to a chemical breathalyzer test. Officer Whittaker discovered that Crump had a prior conviction of operating while intoxicated in the past five years and placed Crump under arrest.

On the evening of September 19, 2005, Indianapolis Police Officer Christopher Smith ("Officer Smith") observed Crump driving without his headlights turned on and initiated a traffic stop. After noticing the smell of alcohol and Crump's slurred speech

[1] Ind. Code § 9-30-5-3.

and bloodshot eyes, Officer Smith administered three field sobriety tests, all of which Crump failed. Crump then was given a breathalyzer test, resulting in a blood alcohol level reading of 0.18 grams of alcohol per 210 liters of breath. Officer Smith placed Crump under arrest.

The State charged Crump with Operating a Vehicle While Intoxicated as a Class D felony and Public Intoxication as a Class B misdemeanor[2] for the September 10th incident. For the September 19th incident, the State filed charges for Operating a Vehicle While Intoxicated as Class D felony and Operating a Vehicle with a blood alcohol level exceeding 0.15 as a Class D felony.[3]

Crump entered into two separate plea agreements with the State, agreeing to plead guilty to one count of Operating a Vehicle While Intoxicated, as a Class D felony, in both cases. In exchange, the State agreed to drop the charges for public intoxication as a Class B misdemeanor, the second count of operating as a Class D felony from the September 19th incident, and agreed to not file Habitual Substance Offender allegations. Both plea agreements included that Crump's license would be suspended for two years, Crump's sentence would be left to the discretion of the trial court, and Crump would not be a candidate for alternative misdemeanor sentencing. The two plea agreements were accepted by the trial court on April 18, 2006.

Sentencing for the two causes was held on May 30, 2006. At the sentencing hearing, Crump testified that he had participated in three in-patient programs for

[2] Ind. Code § 7.1-5-1-3.

[3] Ind. Code § 9-30-5-3; Ind. Code § 9-30-5-1(b).

substance abuse in Florida, the last being in 1994. After those programs, Crump was able to abstain from alcohol for approximately four years. Prior to being arrested for the current charges, Crump had participated in the Secure Continuous Remote Alcohol Monitoring ("SCRAM") program, and he did well on the program. He also testified to having finished the New Life Behavior program during incarceration for the present charges. Crump also expressed regret for the multiple times he had driven while intoxicated and the fact that by doing so he put others at risk. Additionally, Crump requested sexual abuse counseling due to incidents that took place while he had been in jail.

The trial court found Crump's criminal history including four convictions for operating a vehicle while intoxicated to be a significant aggravating circumstance. For the conviction related to the September 10th incident, the trial court sentenced Crump to three years imprisonment with one and one-half years suspended. Crump was sentenced to two and one-half years imprisonment with one and one-half years suspended for the September 19th incident. The trial court ordered the sentences to be served consecutively. In addition, the trial court ordered Crump to participate in the SCRAM program and to receive sexual abuse counseling as conditions of his probation.

On July 5, 2006, Crump filed a Motion to File a Belated Appeal. Subsequent to the grant of his motion, Crump filed a belated notice of appeal on July 14, 2006.

Discussion and Decision

I. Enhanced Consecutive Sentences

Crump contends that the trial court, when imposing consecutive sentences, was required to impose the advisory sentence of one and a half years on each Class D felony count in light of Indiana Code Section 35-50-2-1.3.

The trial court made Crump's sentences consecutive pursuant to Indiana Code Section 35-50-1-2(d) ("Section 2(d)"), because Crump was out on bond or released for the September 10th incident when the September 19th incident occurred. Section 2(d) provides:

> If, after being arrested for one (1) crime, a person commits another crime:
>
> (1) before the date the person is discharged from probation, parole, or a term of imprisonment imposed for the first crime; or
> (2) while the person is released:
> (A) upon the person's own recognizance; or
> (B) on bond;
>
> the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed.

Indiana Code Section 35-50-2-1.3 provides:

> (a) For purposes of sections 3 through 7 of this chapter, "advisory sentence" means a guideline sentence that the court may voluntarily consider as the midpoint between the maximum sentence and the minimum sentence.
>
> (b) Except as provided in subsection (c), a court is not required to use an advisory sentence.
>
> (c) In imposing:
>
> (1) consecutive sentences in accordance with IC 35-50-1-2;

> (2) an additional fixed term to an habitual offender under section 8 of this chapter; or
> (3) an additional fixed term to a repeat sexual offender under section 14 of this chapter;
>
> 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.

In support of his contention that the trial court was limited to imposing the advisory sentence for his crimes, Crump relies on Robertson v. State, 860 N.E.2d 621 (Ind. Ct. App. 2007), trans. granted, and its interpretation of Indiana Code Section 35-50-2-1.3.

Currently there is a difference of interpretation regarding this statute. In White v. State, a panel of this court held:

> Indiana Code § 35-50-2-1.3 instructs: "In imposing consecutive sentences in accordance with IC 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 consecutive sentences, and therefore, is not ameliorative.

849 N.E.2d 735, 743 (Ind. Ct. App. 2006), trans. denied.

In Robertson, a separate panel of this court rejected the analysis in White and held: "[T]he advisory sentencing statute, IC 35-50-2-1.3, is clear and unambiguous and

imposes a separate and distinct limitation on a trial court's ability to deviate from the advisory sentence for any sentence running consecutively." 860 N.E.2d at 625. The Robertson panel noted the reasons for reaching a different conclusion from that reached in White:

> Our concern with the analysis in White is that (1) it renders the language in IC 35-50-2-1.3 surplusage since the consecutive sentencing statute, IC 35-50-1-2, clearly limits the total of the consecutive sentences for non-violent offenses to the advisory sentence for the next highest class of felony; and (2) nothing in the advisory sentencing statute, IC 35-50-2-1.3, limits its application to non-violent offenses. Although the White decision argues that the legislature could not have intended the results the statute is capable of generating, the argument is moot "'[w]hen the language of the statute is clear and unambiguous.'" White, 849 N.E.2d at 742-43 (quoting Woodward v. State, 798 N.E.2d 260, 262 (Ind.Ct.App.2003)), trans. denied.

Pursuant to its holding, the Robertson panel remanded the case to the trial court with instructions to reduce Robertson's enhanced, consecutive sentence to the advisory sentence for the Class D felony.

In Barber v. State, another panel of this court adhered to the White analysis rather than that in Robertson. 863 N.E.2d 1199 (Ind. Ct. App. 2007). In making its decision, the Barber panel noted that Indiana Code Section 35-50-2-1.3 serves an important purpose:

> In the wake of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), and Smylie v. State, 823 N.E.2d 679 (Ind. 2005), our legislature transformed Indiana's sentencing scheme from a presumptive scheme to an advisory scheme. See McMahon v. State, 856 N.E.2d 743, 747 (Ind. Ct. App. 2006). Under the former presumptive scheme, a trial court was required to impose the "presumptive" sentence for a felony conviction unless the court found aggravating circumstances to enhance the sentence or mitigating circumstances to reduce the sentence. See id. at 746. 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 . . . . 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.

Id. at 1211 (emphases in original).

We agree with the analysis delineated in White and Barber.[4] When Indiana Code Section 35-50-2-1.3 and Section 35-50-1-2 are read together, it seems clear that the phrase "appropriate advisory sentence" in Section 35-50-2-1.3 refers to the limitation on imposing consecutive terms for a situation involving a single episode of criminal conduct in Section 35-50-1-2(c). The phrase as used in Section 35-50-2-1.3 does not provide any further limitation; rather, it clarifies the advisory sentence in imposing consecutive sentences for a single episode of criminal conduct. Therefore, Section 35-50-2-1.3 does not limit a trial court in enhancing both sentences that are required to be served consecutively under Section 35-50-1-2(d). To hold otherwise would prohibit a trial court from imposing enhanced, consecutive sentences on the worst offenders. Accordingly, we hold that the trial court had the authority to impose enhanced, consecutive sentences for the offenses committed by Crump.

[4] Recent amendments to I.C. 35-50-2-1.3 via P.L. 178-2007, effective July 1, 2007, appear to clarify the intention of the legislature that this statute applies only to consecutive sentences imposed for non-violent felony convictions resulting from one episode of criminal conduct. As of July 1, 2007, the statute will include a new subsection (d): "This section does not require a court to use an advisory sentence in imposing consecutive sentences for felony convictions that do not arise out of an episode of criminal conduct." 2007 Ind. Legis. Serv. 178 (West).

II. Appropriateness of Sentence

Crump also contends that his sentences are inappropriate.[5] Specifically, he argues that his education, continued employment, guilty plea, remorse for his actions, and decision to take substance abuse classes in jail while awaiting adjudication of the present cases warrant a reduction in his sentences. Although Crump pled guilty in both causes according to a plea agreement, he can still challenge the appropriateness of his sentence because the plea agreement was "open", leaving his sentence to the discretion of the trial court. See Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Pursuant to Indiana Appellate Rule 7(B), he seeks revision of his sentences.

In imposing the sentences, the trial court found in aggravation that Crump had four prior convictions for operating a vehicle while intoxicated and a felony conviction for forgery. Although Crump's education, remorse, and guilty pleas were offered as possible mitigating factors, the trial court was silent as to finding any mitigating factors. When imposing sentence for the September 10th incident, the trial court stated that it "does find significant aggravating circumstances to sentence the Defendant to three (3) years." Sentencing Transcript at 58.

Indiana Appellate Rule 7(B) 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."

[5] Crump does not raise the separate issue of whether the trial court abused its discretion in failing to find certain proffered mitigators. Nevertheless, because we address the appropriateness of his sentence under Indiana Appellate Rule 7(B), he is foreclosed from raising this issue in any subsequent proceeding.

Regarding the nature of the offense, Crump operated a vehicle while intoxicated twice within a span of nine days. Crump was observed on both occasions to have bloodshot eyes, the smell of alcohol on his breath, and the inability to complete any of the administered field sobriety tests. On September 10th, Crump's car crossed the yellow line. When stopped on September 19th, Crump's blood alcohol level registered as .18, more than double the legal limit of .08. Although thankfully Crump's actions of driving while intoxicated did not result in an accident or injury, Crump placed others in potential danger and if these incidents had resulted in an accident, those actions would have constituted a more serious offense. See Ind. Code §§ 9-30-5-4 (C felony when driver with prior OWI conviction causes serious bodily injury); 9-30-5-5 (B felony when driver with prior OWI causes death). Drunk drivers are not entitled to mitigated sentences just because they were lucky and did not cause an accident. Despite the record not indicating that this was one of the worst conceivable acts of operating a vehicle while intoxicated, and that the nature of the offense alone would not support a maximum sentence, we are not prepared to say that Crump's offenses were not egregious.

In regard's to Crump's character, Crump has previously been arrested five times for operating a vehicle while intoxicated, resulting in four convictions. Crump also has a conviction for forgery. Crump's criminal history while he lived in Florida includes charges of battery, neglect of a child, resisting law enforcement, and aggravated battery on a pregnant woman all to which Crump pled nolo contendere.[6] He violated probation two times and also violated his work release and parole. This history demonstrates a

[6] Commonly known as a no contest plea.

continuing disregard for the law. Furthermore, although Crump testified that he was having success on the SCRAM program, he committed the present offenses after being on SCRAM for six weeks. Finally, after being arrested for the September 10th incident, Crump proceeded to repeat his dangerous behavior only nine days later.

Crump contends that his education, employment record, remorse, and guilty pleas are reasons that his sentences are inappropriate. Crump informs us that he has a two-year degree from Indiana University in general studies, but fails to explain why this warrants a reduction in his sentences. As for his employment history, the Pre-Sentence Report indicates that has worked for several companies, normally for less than one year. In regards to Crump's expression of remorse, we will accept the trial court's determination that his remorse did not warrant lesser sentences, because Crump does not allege that the trial court made an impermissible consideration in its determination. See Johnson v. State, 855 N.E.2d 1014, 1016-17 (Ind. Ct. App. 2006), trans. denied. Finally, we are not convinced that Crump's decision to plead guilty warrants a reduction in his sentences. In exchange for Crump's guilty pleas, the State agreed to dismiss charges for public intoxication as a Class B misdemeanor,[7] another count of operating a vehicle while intoxicated as a Class D felony, and agreed to not file Habitual Substance Offender charges. Crump received a substantial benefit from the plea agreement as Habitual Substance Offender allegations could have added three to eight years of imprisonment onto each sentence. See Ind. Code § 35-50-2-10.

[7] Ind. Code § 7.1-5-1-3.

We cannot say that Crump's sentences are inappropriate in light of the nature of the offense and his character.

Conclusion

The trial court had the authority to impose the enhanced, consecutive sentences. Crump's sentences are not inappropriate.

Affirmed.

MAY, J., concurs.

SHARPNACK, J., dissents with opinion.

IN THE
COURT OF APPEALS OF INDIANA

JOHN CRUMP,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0607-CR-581
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

SHARPNACK, Judge, dissenting

I respectfully dissent. I was a member of the panel that decided Robertson v. State, 860 N.E.2d 621 (Ind. Ct. App. 2007), trans. granted. Oral argument was held before the Indiana Supreme Court on May 30, 2007. Until the Supreme Court renders its decision, I remain convinced that Robertson was correctly decided and that the plain language of Ind. Code § 35-50-2-1.3 clearly requires use of the advisory sentence when imposing consecutive sentences.

The term "advisory sentence" is used in Ind. Code § 35-50-1-2(c) only to describe the limit on the total of terms of a sentence for convictions arising out of an episode of criminal conduct. Ind. Code § 35-50-1-2 contains no provision for the use of advisory sentences in imposing sentences. Ind. Code § 35-50-2-1.3 does contain provisions

defining the term "advisory sentence" and a specific provision that a trial court "is required to use the appropriate advisory sentence in imposing a consecutive sentence . . . ." There is nothing inconsistent or contradictory between limiting the total sentence for an episode to the advisory sentence for the next highest level of felony and requiring that consecutive sentences (episodial or not) be the advisory sentence for the particular felonies.

As the majority notes, the legislature has amended, effective July 1, 2007, the statute to provide that a court is not required "to use an advisory sentence in imposing consecutive sentences for felony convictions that do not arise out of an episode of criminal conduct." Pub. L. No. 178-2007, § 4 (eff. July 1, 2007). Whether this is a clarification or a correction, it was not in effect when Crump was sentenced. The Supreme Court's decision in Robertson should determine how those cases, where sentences were given post-April 25, 2005, and pre-July 1, 2007, are to be resolved.