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**IN THE
COURT OF APPEALS OF INDIANA**

JERRY JACKSON,)
)
Appellant-Defendant,)
)
vs.) No. 49A05-0610-CR-574
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila Carlisle, Judge
Cause No. 49G03-0601-FA-12027

August 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Jerry L. Jackson (“Jackson”) appeals his sentences subsequent to pleading guilty to one count of burglary, as a class A felony, and two counts of criminal deviate conduct, as class B felonies.

We affirm.

ISSUE

1. Whether Jackson's enhanced and consecutive sentences are statutorily permissible.
2. Whether Jackson's consecutive sentences are inappropriate.

FACTS

On January 25, 2005, the State charged Jackson with Count I, burglary, as a class A felony; Count II, rape, as a class B felony; Count III, rape, as a class B felony; Count IV, criminal deviate conduct, as a class B felony; Count V, criminal deviate conduct, as a class B felony; Count VI, criminal deviate conduct, as a class B felony; Count VII, criminal deviate conduct, as a class B felony; and Count VIII, theft, as a class D felony.

On August 30, 2006, Jackson pled guilty pursuant to a plea agreement. As part of that agreement, Jackson agreed to plead guilty to Count I, burglary, as a class A felony; Count IV, criminal deviate conduct, as a class B felony; and Count VI, criminal deviate conduct, as a class B felony, and the State agreed to dismiss the other five counts, as well as another case under a different cause number. The sentencing was left to the discretion of the trial court, with the parties free to argue the length of the initial executed sentence and the length of any suspended sentence; however, Jackson’s sentence had a cap of seventy-five years. The parties stipulated to the following summarized factual basis.

Specifically, Jackson did break and enter L.M.'s residence. That Jackson beat and violently raped L.M., a sixty-nine year-old woman, and committed acts of deviate sexual conduct by forcing his penis into her anus and mouth. That the ordeal lasted for approximately three hours. Jackson acknowledged that these facts were accurate.

After the trial court accepted the plea agreement, the sentencing hearing was set for September 8, 2006.¹ At the sentencing hearing the trial court found as aggravating factors: 1) Jackson's extensive criminal history; 2) that Jackson was on probation at the time he committed the offenses against L.M.; 3) that Jackson's victim was sixty-nine years-old; and 4) the nature and circumstances surrounding the crimes in that Jackson burglarized L.M.'s residence and violently raped and sodomized her for three hours. The trial court gave moderate mitigating weight to Jackson's statements of remorsefulness and his acceptance of responsibility. However, the trial court did not extend any mitigating weight to Jackson's drug and alcohol problems.

The trial court found that the aggravating factors far outweighed the mitigating factors and sentenced Jackson to a forty-five year executed sentence on Count I, burglary, as a class A felony; a fifteen year executed sentence on Count IV, a separate act of criminal deviate conduct, as a class B felony; and a fifteen year executed sentence on Count VI, another separate act of criminal deviate conduct, as a class B felony. All of the sentences were ordered to run consecutively for a total executed sentence of seventy-five years. The trial court dismissed all the other charges against Jackson.

¹ On September 7, 2006, the State filed a motion to continue the sentencing hearing because the State was unable to obtain a certified interpreter for the September 8 date; therefore, the trial court reset the hearing for September 13, 2006.

DECISION

1. Advisory Sentence

Jackson first argues that the trial court was required to use the statutory advisory sentence when imposing consecutive sentences, and cited the case of *Robertson v. State*,² 860 N.E.2d 621 (Ind. Ct. App. 2007) in support. We disagree.

Sentencing determinations are within the sound discretion of the trial court, and we will only reverse for an abuse of that discretion. *Field v. State*, 843 N.E.2d 1008, 1010 (Ind. Ct. App. 2006), *trans. denied*. The advisory sentence is merely “a guideline sentence that courts may voluntarily consider as the midpoint between the maximum sentence.” *See* I.C. § 35-50-2-1.3(a). Moreover, courts are “not required to use an advisory sentence” when imposing “consecutive sentences in accordance with I.C. 35-50-1-2.” *Id.* at (c). Pursuant to Indiana Code section 35-50-1-2(c), “except for crimes of violence,” the sentence for a single episode of criminal conduct is limited 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.” Further, that section of statute expressly provides that “crimes of violence” includes rape, criminal deviate conduct, and burglary. I.C. § 35-50-1-2(a). Jackson committed three crimes of violence. Therefore, the statute does not require that the trial court impose only the advisory sentence when it orders the sentences to be run consecutively to each other.

Jackson does not dispute the trial court’s finding of the following aggravating circumstances: (1) Jackson’s extensive criminal history; (2) that he was on probation at

² Jackson cites *Robertson v. State*, 860 N.E.2d 621 (Ind. Ct. App. 2007), *trans. granted*, in support of his argument, but since transfer has been granted, our opinion is vacated.

the time he committed the offenses; (3) that his victim was sixty-nine years-old; and (4) the nature and circumstances of the offenses. Further, Jackson does not challenge that any of these offenses were improper aggravating circumstances in this case. Therefore, the trial court did not abuse its discretion when it imposed Jackson's enhanced and consecutive sentences.

2. Inappropriate Sentence

Jackson argues that his sentence was inappropriate in light of the nature of the offense and the character of the offender. Specifically, he argues that the trial court failed to give sufficient mitigating weight to his plea of guilty; that he suffers from drug and alcohol addiction; and, that he was remorseful. We disagree.

It is well established that “a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.” *Anglemyer v. State*, No. 43305-0606-CR-230, slip op. at 15 (Ind. June 26, 2007) (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)). 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.” *Jones v. State*, 807 N.E.2d 58, 69 (Ind. Ct. App. 2004), *trans. denied*.

Jackson argues that the trial court erred when it failed to give sufficient mitigating weight to his plea of guilty. Moreover, where a defendant has received some benefit in exchange for his guilty plea, he may be “entitled to little, if any, mitigating weight for it at sentencing.” *See Banks v. State*, 841 N.E.2d 654, 658-659 (Ind. Ct. App. 2006), *trans.*

denied. Thus, the mere fact that Jackson pled guilty does not necessarily require the trial court to extend significant weight to his guilty plea. *See Mull v. State*, 770 N.E.2d 308, 314 (Ind. 2002) (stating a guilty plea is not automatically a significant mitigating factor at sentencing). At the sentencing hearing, the trial court did note Jackson's guilty plea and considered it a slight mitigating factor. However, the trial court also noted that Jackson had "received a significant benefit" as a result of his guilty plea because Jackson could have "faced triple digits if [he] w[as] convicted at trial on all of th[e] counts." (Tr. 69). For that reason, we find no error here.

Jackson next argues that the trial court erred by refusing to find his drug and alcohol addiction as a mitigating factor. Jackson argues that this factor warrants significant mitigation because the drugs and alcohol were the intervening factors that changed him; otherwise, he is a caring and kind person when not on drugs. When a defendant is aware of his substance abuse problem but takes no steps to correct it, it may properly be considered an aggravating factor. *See Bennett v. State*, 787 N.E.2d 938, 948 (Ind. Ct. App. 2003), *trans. denied.* The trial court took notice that Jackson has had a substance abuse problem since he was a teenager. The State had offered to assist Jackson with his problem in 1998, but Jackson failed to comply with the services. Therefore, under the circumstances of this case, it was not erroneous for the trial court to refuse to consider Jackson's substance abuse problem as a mitigating factor. Thus, we are not persuaded by Jackson's argument.

Jackson further argues that the trial court failed to consider his remorsefulness as a significant mitigating factor. However, the record reveals that the trial court did find

Jackson's remorsefulness to be a mitigating factor in his behalf. The trial court specifically stated that it believed that Jackson's remorse was genuine and was coming from his heart and accorded some mitigating weight to it. In essence, Jackson appears to argue that the trial court failed to accord enough significant mitigating weight to his liking. On the other hand, our Supreme Court has more recently stated that "the weight or value assignable to" reasons found by the trial court in imposing a sentence "is not subject to review for abuse" of discretion. *Anglemyer*, slip op. at 11. We find no abuse of discretion herein.

As to the nature of the offense, Jackson admitted to burglarizing L.M.'s residence, and violently forced L.M., a sixty-nine year-old woman, to submit to sexual intercourse and other acts of deviate sexual conduct over a three-hour period. He forced his penis into L.M.'s vagina, anus, and mouth. At sentencing, L.M. testified that Jackson asked her to show him where she kept her gun and he "took that gun . . . pointed it at [her] and started laughing." (Tr. 53) With respect to the character of the offender, as already noted, Jackson does not dispute that he has an extensive criminal history. Further, the trial court noted that Jackson committed the current offenses while he was on probation from a previous conviction. Therefore, Jackson's sentence was not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.