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IN THE
COURT OF APPEALS OF INDIANA

REGINALD ORRIN SISTRUNK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0611-CR-973
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis Carroll, Judge
Cause No. 48D01-0510-FC-287

August 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Reginald Orrin Sistrunk appeals his convictions and sentences for forgery as a class C felony[1] and theft as a class D felony.[2] Sistrunk raises three issues, which we revise and restate as:

I. Whether the trial court abused its discretion by trying Sistrunk in absentia;

II. Whether Sistrunk's convictions violate the prohibition against double jeopardy;

III. Whether the trial court abused its discretion in sentencing Sistrunk; and

IV. Whether Sistrunk's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

The relevant facts follow. Sistrunk and Belinda Wright were friends, and Wright occasionally allowed Sistrunk to borrow her vehicle. In June 2005, Wright was painting her house, and Sistrunk offered to help. On June 26, 2005, Sistrunk borrowed Wright's vehicle to run some errands and get them lunch. Wright's checkbook was in the console of the vehicle, and Wright discovered the following day that two checks were missing.

One of Wright's checks was presented at Wright's credit union on June 27, 2005, for $345 and had been made payable to Sistrunk. Wright reviewed surveillance from the credit union and identified Sistrunk cashing a check on that date. Wright called Sistrunk

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[1] Ind. Code § 35-43-5-2 (2004) (subsequently amended by Pub. L. No. 45-2005, § 2 (eff. July 1, 2005); Pub. L. No. 106-2006, § 3 (eff. July 1, 2006)).

[2] Ind. Code § 35-43-4-2 (2004).

about the missing checks, and Sistrunk told Wright that "he could not believe that [she] called the police," that he was not going to talk to the police, and that she "was not safe." Transcript at 123.

The State charged Sistrunk with forgery as a class C felony and theft as a class D felony. At a hearing on April 10, 2006, the trial court set the trial date for August 29, 2006, and Sistrunk was present at the hearing. Sistrunk did not appear at the August 29, 2006, trial, and he was tried in absentia. The jury found Sistrunk guilty as charged. Sistrunk appeared at his sentencing hearing, and the parties discussed that Sistrunk was in the Delaware County Jail on different charges at the time of the trial. Sistrunk had informed his public defender in Delaware County that he had charges pending in Madison County, but took no steps to inform his Madison County public defender or the trial court that he was in the Delaware County Jail. Sistrunk acknowledged that he had been told of his trial date. The trial court determined that Sistrunk had waived his right to be present at the trial.

The trial court found one aggravator, Sistrunk's criminal history. The trial court found two mitigators: (1) Sistrunk's service in the U.S. military; and (2) his good work record. The trial court sentenced Sistrunk to serve six years in the Indiana Department of Correction on the forgery conviction concurrent with two years on the theft conviction.

I.

The first issue is whether the trial court abused its discretion by trying Sistrunk in absentia. A defendant in a criminal proceeding has a right to be present at all stages of

his trial. U.S. Const. amend. VI; Ind. Const. art. I, § 13; Fennell v. State, 492 N.E.2d 297, 299 (Ind. 1986). However, "[a] defendant may waive this right and be tried in absentia if the trial court determines that the defendant knowingly and voluntarily waived that right." Lampkins v. State, 682 N.E.2d 1268, 1273 (Ind. 1997), modified on other grounds by 685 N.E.2d 698 (Ind. 1997); Jackson v. State, 868 N.E.2d 494, 498 (Ind. 2007). "The trial court may presume a defendant voluntarily, knowingly and intelligently waived his right to be present and try the defendant in absentia upon a showing that the defendant knew the scheduled trial date but failed to appear." Brown v. State, 839 N.E.2d 225, 227 (Ind. Ct. App. 2005), trans. denied. A defendant who has been tried in absentia "must be afforded an opportunity to explain his absence and thereby rebut the initial presumption of waiver." Id. "As a reviewing court, we consider the entire record to determine whether the defendant voluntarily, knowingly, and intelligently waived his right to be present at trial." Id. at 228. Finally, a defendant's explanation of his absence is a part of the evidence available to a reviewing court in determining whether it was error to try him in absentia. Id.

According to Sistrunk, he did not knowingly or voluntarily waive his right to be present during his trial because he was incarcerated at the time. We addressed this same argument in Brown. There, the defendant was aware of his trial date and had been advised of the State's right to try him in absentia if he did not appear. 839 N.E.2d at 226. However, he did not appear at the trial because he was incarcerated in another county at that time. Id. After he was tried in absentia, the defendant sought to vacate his

conviction. Id. On appeal, we noted that he had presented no evidence that he made any attempt to notify his attorney or the court of his incarceration or that he was somehow prevented from communicating with anyone regarding his situation. Id. at 229. We concluded that the defendant had "not rebutted the initial presumption of waiver created by his failure to appear for his trial despite knowledge of its date." Id. Consequently, we held that the trial court did not err "in determining that Brown voluntarily waived his right to be present at trial or by denying his motion to vacate his conviction by trial in absentia." Id.

Similarly, here, Sistrunk was aware of his trial date, but he did not appear because he was incarcerated in another county at the time. Sistrunk informed his public defender in Delaware County that he had charges pending in Madison County, but he took no steps to inform his Madison County public defender or the trial court that he was in the Delaware County Jail. Sistrunk attempts to distinguish Brown on the basis that the defendant there was advised of the State's right to try him in absentia if he did not appear, but Sistrunk was not advised of this right.[3] However, the Indiana Supreme Court rejected this argument in Blatz v. State, 486 N.E.2d 990, 991 (Ind. 1985), as follows:

> Appellant was present at several pretrial hearings including the pretrial conference. At that time the trial date of April 25, 1983, was established. Appellant, who was free on bond, failed to appear on April 25 and was tried in absentia. Appellant argues this was error as there was no

[3] In arguing that we should reconsider Brown, Sistrunk also relies upon federal court decisions. In Brown, we noted that we were unpersuaded by the federal authorities and that Federal Rule of Criminal Procedure 43 was not applicable to our case. 839 N.E.2d at 229-231. We again find the federal decisions and reliance upon Federal Rule of Criminal Procedure 43 unpersuasive.

> evidence he was advised that if he voluntarily, knowingly and without justification failed to appear trial would proceed in his absence.
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> In Ramos v. State (1984), Ind., 467 N.E.2d 717 and Bullock v. State (1983), Ind., 451 N.E.2d 646, we held one who has knowledge of a scheduled trial date and does not appear has knowingly waived his right to appear at trial. These cases are controlling in the case at bar. The court did not err in conducting trial in appellant's absence.

Consequently, the trial court was not required to advise Sistrunk of the State's right to try him in absentia if he did not appear.

Sistrunk was aware of the trial date and made no effort to secure his appearance at the trial. As in Brown, Sistrunk failed to rebut the initial presumption of waiver created by his failure to appear for his trial despite knowledge of its date. We conclude that Sistrunk voluntarily, knowingly, and intelligently waived his right to appear at trial, and the trial court did not err by trying Sistrunk in absentia. See, e.g., Jackson, 868 N.E.2d at 499 (holding that the trial court properly concluded that the defendant's knowledge of the trial date coupled with a lack of explanation for his absence supported a determination that there was a voluntary and knowing waiver); Lampkins, 682 N.E.2d at 1273 (holding that the trial court did not err by proceeding with the defendant's trial in absentia).

II.

The next issue is whether Sistrunk's convictions violate the prohibition against double jeopardy. Article I, Section 14 of the Indiana Constitution provides in part that: "No person shall be put in jeopardy twice for the same offense." The Indiana Supreme Court held in Richardson v. State that:

> two or more offenses are the "same offense" in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. Both of these considerations, the statutory elements test and the actual evidence test, are components of the double jeopardy "same offense" analysis under the Indiana Constitution.

717 N.E.2d 32, 49-50 (Ind. 1999) (footnote omitted).

Here, Sistrunk argues that his convictions violate the actual evidence test. Under the actual evidence test, we examine the actual evidence presented at trial to determine whether each challenged offense was established by separate and distinct facts. Id. at 53. "To show that two challenged offenses constitute the 'same offense' in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense." Id. The Indiana Supreme Court has clarified that, "under the Richardson actual evidence test, the Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense." Bald v. State, 766 N.E.2d 1170, 1172 (Ind. 2002) (quoting Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002)). Moreover, "double jeopardy under this test will be found only when it is reasonably possible that the jury used the same evidence to establish two offenses, not when that possibility is speculative or remote." Hopkins v. State, 759 N.E.2d 633, 640 (Ind. 2001).

According to Sistrunk, his convictions for forgery and theft were based upon the same evidence. The forgery charging information provided:

> On or about June 27, 2005 in Madison County, State of Indiana, [Sistrunk] did, with intent to defraud, make or utter a written instrument, to wit: check #1700 in the amount of three hundred forty five dollars ($345), in such a manner that it purports to have been made by another person, to wit: Belinda B. Wright.

Appellant's Appendix at 94. The theft charging information provided:

> On or about June 26, 2005 in Madison County, State of Indiana, [Sistrunk] did knowingly or intentionally exert unauthorized control over the property of another person, to wit: checks belonging to Belinda B. Wright, with the intent to deprive Belinda B. Wright of any part of the use or value of the property.

Id.

According to Sistrunk, the fact that he went into the credit union to cash one check was the evidentiary support for both convictions. We disagree. The facts supporting the theft conviction were that Sistrunk took Wright's checks from her vehicle on June 26, 2005, while the facts supporting the forgery conviction were that Sistrunk presented one of Wright's checks at Wright's credit union on June 27, 2005, and that Sistrunk had made the check payable to himself and signed Wright's name. We conclude that there is no reasonable possibility that the jury used the same evidence to establish all of the essential elements of both offenses.[4] See, e.g., Benberry v. State, 742 N.E.2d 532, 538 (Ind. Ct.

[4] Sistrunk also argues that he cannot be convicted for both forgery and theft under the continuous crime doctrine. "The continuing crime doctrine essentially provides that actions that are sufficient in themselves to constitute separate criminal offenses may be so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction." Riehle v. State, 823 N.E.2d 287, 296 (Ind. Ct. App. 2005), trans. denied. The doctrine is not applicable here because the theft

App. 2001) (holding that the defendant's convictions for forgery and theft did not violate the prohibition against double jeopardy).

III.

The next issue is whether the trial court abused its discretion in sentencing Sistrunk. We note that Sistrunk's offenses were committed after the April 25, 2005, revisions of the sentencing scheme. In clarifying these revisions, the Indiana Supreme Court has held that "the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007). We review the sentence for an abuse of discretion. Id. An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Id.

A trial court abuses its discretion if it fails "to enter a sentencing statement at all," enters "a sentencing statement that explains reasons for imposing a sentence – including a finding of aggravating and mitigating factors if any – but the record does not support the reasons," enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration," or considers reasons that "are improper as a matter of law." Id. at 490-491. If the trial court has abused its discretion, we will remand for resentencing "if we cannot say with confidence that the trial court would have

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and the forgery occurred on different days and in different locations. Thus, the actions were separate offenses. See, e.g., id. (holding that the continuing crime doctrine did not apply because "the conspiracy [was] separate in time from the child molesting and [was] not a continuous part of the child molesting charges").

imposed the same sentence had it properly considered reasons that enjoy support in the record." Id. at 491. However, under the new statutory scheme, the relative weight or value assignable to reasons properly found, or those which should have been found, is not subject to review for abuse of discretion. Id.

Sistrunk does not challenge the aggravators or mitigators found by the trial court; rather, he argues that the trial court "did not balance the aggravating and mitigating circumstances to determine whether the aggravating circumstances outweigh the mitigating circumstances." Appellant's Brief at 17. Pursuant to Anglemyer, the balancing of the aggravators and mitigators is not subject to our review for abuse of discretion. Consequently, we cannot review Sistrunk's argument. See, e.g., Anglemyer, 868 N.E.2d at 491.

IV.

The final issue is whether Sistrunk's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. 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." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Sistrunk attempts to minimize the nature of the offense by arguing that Wright had agreed to pay him for painting her house but failed to do so. However, our review of the nature of the offense reveals that Sistrunk stole checks from Wright when she let him borrow her vehicle to run errands and get them lunch. Sistrunk forged one of the checks in the amount of $345 and cashed it. When Wright confronted him, Sistrunk told her that "he could not believe that [she] called the police," that he was not going to talk to the police, and that she "was not safe." Transcript at 123.

Our review of the character of the offender reveals that, as the trial court noted, Sistrunk served in the military and has a good work history. However, Sistrunk also has an extensive criminal history, which includes convictions in 1981 for theft, 1982 for possession of marijuana, 1993 for driving while license suspended or revoked, 1994 for driving under the influence, 1995 for forgery, 1995 for driving under the influence, 1997 for driving while suspended, and 1999 for forgery. Additionally, his probation was revoked in 2002. At the time of sentencing, Sistrunk had pending charges for theft, driving while suspended, armed robbery, robbery resulting in bodily injury, and battery resulting in bodily injury.

Given Sistrunk's extensive criminal history, we cannot say that his six-year sentence is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Farris v. State, 787 N.E.2d 979, 985 (Ind. Ct. App. 2003) (holding that the defendant's eight-year sentence for forgery was not inappropriate).

For the foregoing reasons, we affirm Sistrunk's convictions and sentences for forgery as a class C felony and theft as a class D felony.

Affirmed.

MAY, J. and BAILEY, J. concur