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IN THE
COURT OF APPEALS OF INDIANA

ROBERT WELCHES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A05-0606-CR-341
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Richard W. Maroc, Judge
Cause No. 45G01-9407-CF-206

September 5, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Robert Welches appeals his 1995 sentence for murder in perpetration of a burglary. We affirm.

Issues

Welches raises three issues, which we restate as:

I. whether Blakely applies retroactively;

II. whether the trial court abused its discretion in sentencing him; and

III. whether his sentence is appropriate.

Facts

In July 1994, Welches planned the burglary of an office located in a building at which he had previously been employed as a security guard. Through his employment, Welches became familiar with the security procedures and routines at the office building. Also during his employment, he stole a handgun from the same office he intended to burglarize. Welches knew that Steven Kotul, another security guard at the office building, would be on duty and would be unarmed. Welches planned to take Kotul's keys at gunpoint and use the keys to enter the office and steal more guns.

On July 27, 1994, Welches, William Easton, armed with a handgun, and Shawn Shoesmith, armed with the stolen handgun, approached Kotul while he was outside of the building moving parking barriers. The men ordered Kotul into the lobby of the building at gunpoint, and Easton fatally shot Kotul in the back of the head. Kotul fell to the floor. Welches approached Kotul and removed the keys from Kotul's belt.

Welches used the keys to operate the elevator to gain access to the floor of the office from which he intended to steal the guns. Easton tried to kick in the office door, but was unable to do so. At that point, Welches returned to the main floor and used the stolen keys to unlock the door to a main office where he retrieved the keys for the office. Welches then took the keys back up to the other office and used them to unlock the door. The three men stole three guns and a lockbox from the office. The men fled in Welches's car, returned to Welches's apartment, emptied the lockbox, disassembled the gun used to shoot Kotul, and eventually threw the gun and the lock box in a river.

On July 28, 1994, when first questioned by the Lake County Police, Welches denied any involvement in the offense. Later that day, Welches, in a fourteen-page statement, admitted to the police the details of the incident. In the statement, Welches told the police that he did not intend for Kotul to get shot during the incident.

On July 29, 1994, the State charged Welches with one count of murder in the perpetration of robbery. At some point the State amended the information to include a charge of murder in the perpetration of burglary. On January 5, 1995, Welches pled guilty to the charge of murder in the perpetration of burglary, and the State agreed to dismiss the murder in the perpetration of robbery charge. At the guilty plea hearing, the trial court explained to Welches that recent legislative changes regarding sentencing in murder cases made it unclear which version applied. The trial court applied the "traditional murder statute." Supp. App. p. 242. The trial court advised Welches that the presumptive sentence for murder was forty years and that it may be enhanced by twenty years or reduced by ten years.

Welches subsequently moved to withdraw his guilty plea, and the trial court denied this motion. On July 11, 1995, a sentencing hearing was held at which Welches was sentenced to forty-two years. In 2005, Welches sought permission to file a belated appeal.[1] He now appeals his sentence.

Analysis

I. Application of Blakely

Welches argues that he is entitled to challenge the validity of his sentence under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). He contends that Blakely should apply retroactively to his 1995 sentencing because his case was not final as long as the possibility of challenging his sentence via a Post-Conviction Rule 2 belated appeal was still available to him.

Our supreme court has recently addressed this issue and concluded that Blakely is not retroactive for purposes Post-Conviction Rule 2 belated appeals. Gutermuth v. State, 868 N.E.2d 427, 435 (Ind. 2007). The court reasoned:

> we think that a defendant's case becomes "final" for purposes of retroactivity when the time for filing a timely direct appeal has expired. This conclusion recognizes the importance of finality without sacrificing fairness. It also furthers the purpose of allowing belated appeals because a faultless and diligent defendant can pursue claims that would have been available if they filed a timely appeal. At the same time, cases will not remain perpetually "not yet final" . . . .

Id. at 434-35.

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[1] The propriety of granting the belated appeal was addressed in Welches v. State, 844 N.E.2d 559 (Ind. Ct. App. 2006).

Thus, Welches's case became final thirty days after he was sentenced in 1995. He may not now seek the retroactive application of Blakely.

II. Abuse of Discretion

Welches also argues that the trial court improperly sentenced him. A trial court's sentencing decision is reviewed for an abuse of discretion. White v. State, 847 N.E.2d 1043, 1045 (Ind. Ct. App. 2006).

> If a trial court uses aggravating or mitigating circumstances to modify the presumptive sentence, the trial court must: (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate its evaluation and balancing of the circumstances.

Id. A trial court's assessment of the proper weight of mitigating and aggravating circumstances is entitled to great deference and will be set aside only on a showing of a manifest abuse of discretion. Id.

As the trial court explained, the applicable presumptive sentence when Welches committed the offense was forty years. The trial court sentenced Welches to an enhanced sentence of forty-two years. In its written sentencing order, the trial court observed:

> The reasons for the imposition of the sentence are as follows: the court has considered the risk that the defendant will commit another crime; the nature and circumstances of the crime committed; the defendant's prior criminal record, character and condition; the oral statement made by Elizabeth Kotul, the victim's representative; and the following:
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> The Court finds in mitigation: 1) Defendant has presented evidence, through the Indiana Public Defender Council Sentencing Consultants, showing that the defendant, who is

> nineteen years of age, is the product of an extremely deprived youth; the victim of physical and mental abuse by his step-parent and neglect by his parents. 2) The defendant has expressed remorse and that the defendant did not intend deadly force when he and his co-defendants embarked on their criminal enterprise. 3) Defendant cooperated with law enforcement in this cause by giving a statement as to his own involvement and the recovery of evidence.
>
> The Court finds in aggravation: 1) While defendant does not have any prior criminal record, he was adjudicated delinquent in the Juvenile Court for 3 counts of Theft on 4/15/93 and placed on probation for a period of 2 years. Defendant participated in the Thefts with a co-defendant in this case. Defendant also accumulated several traffic offenses in a city court in 1993 and 1994, along with a failure to appear warrant. Defendant was also charged along with the same co-defendant, with Mischief and Property Damage to a vehicle in March, 1994. Significantly, the offense occurred at a business where defendant had previously been employed. Approximately, one month prior to this offense, a report of Criminal Recklessness was filed wherein another young man reported that defendant had confronted him, pulled out a handgun and fired at him, then followed him to a mini-mart where the alleged victim placed a 911 call. 2) The facts and circumstances of the offense indicate that defendant "masterminded" the plan to break into the office complex where defendant had been a former security guard. The defendant knew it was an unarmed site. Defendant provided the weapons used in the offense for the purpose of intimidation, including the weapon used by a co-defendant to shoot and kill the victim. Defendant had stolen one of the weapons and others from one of the offices while employed as a security guard. After the shooting of the victim, the defendant continued his participation in and the completion of the planned burglary.

App. pp. 60-61. In addition to the written sentencing order, the trial court made a statement at the sentencing hearing. The trial court concluded, "I feel all things

considered, that there is a mixture of aggravating and mitigating factors in this case. And as I look at it, I think the aggravating, to a degree, outweigh the mitigating." Id. at 48.

Welches argues that the trial court improperly considered his criminal record, his juvenile delinquency and traffic violations, the substantial risk that he would reoffend, and the statement of the victim's representative as aggravating circumstances. In assessing the totality of the trial court's sentencing statement, however, we believe that the defendant mischaracterizes how the trial court reached that sentence.

Pursuant to the applicable version of Indiana Code Section 35-38-1-7.1, the trial court was required to consider the risk that Welches would reoffend; the nature and circumstances of the crime; Welches's criminal record, character, and condition; and any statement made by the victim, or in this case, the victim's representative. It is clear that the trial court considered these factors but did not necessarily find them all to be aggravating factors. Instead, the trial court found as aggravating Welches's character as evidenced by his increased criminal activity and the nature and circumstances the offense. It is with that in mind that we review the trial court's finding and weighing of the aggravating and mitigating circumstances.

It appears that the trial court considered Welches's criminal history in terms of the "nature of the offender[.]" App. p. 47. The trial court recognized that nineteen-year-old Welches had been adjudicated a delinquent for three counts of theft and had accumulated numerous traffic offenses in a short period of time. Also, shortly before the commission of this offense, Welches had allegedly been involved in an incident resulting in the filing of criminal mischief and property damage to a vehicle charges. Finally, another man had

reported to the police that Welches confronted him, pulled out a handgun, and fired at him.

The trial court considered Welches's criminal activity as a "slide toward the criminal acts which has led him here today" and as "the escalation of the antisocial acts this defendant was committing." Id. at 48, 47. In this context, the trial court may properly consider an individual's prior involvement with the criminal justice system. See Monegan v. State, 756 N.E.2d 499, 503 (Ind. 2001) ("Rather than as evidence of prior criminal history, the trial court properly deemed Monegan's four prior apprehensions as evidence that his antisocial behavior was not deterred by numerous encounters with the law. There was no error on this point."); Tunstill v. State, 568 N.E.2d 539, 545 (Ind. 1991) ("While a record of arrests does not establish the historical fact of prior criminal behavior, such a record does reveal to the court that subsequent antisocial behavior on the part of the defendant has not been deterred even after having been subject to the police authority of the State and made aware of its oversight of the activities of its citizens. This information is relevant to the court's assessment of the defendant's character . . . ."). The trial court was within its discretion to consider as an aggravating circumstance the increase in Welches's involvement in the criminal justice system in terms of his character and anti-social behavior.

The trial court also considered as aggravating the nature and circumstances of the offense. Here, the trial court did not include a bare recitation of the elements of the offense as Welches suggests. The trial court noted that Welches "masterminded" the plan

based on his prior employment as a security guard.[2] App. p. 61. Despite Welches's knowledge that the security guard on duty would be unarmed, he provided weapons to his fellow accomplices. In fact, Welches had stolen one of his weapons from an office while he had been employed as a security guard. Finally, after the victim was shot, Welches continued and completed the burglary as planned.

Although a trial court may not use factors constituting material elements of an offense as an aggravating circumstance, a trial court may enhance a sentence based on the particular individualized circumstances of the offense. Pagan v. State, 809 N.E.2d 915, 926-27 (Ind. Ct. App. 2004), trans. denied. The trial court's description of the offense contains the necessary indication that the manner in which the crime was committed was particularly egregious, beyond what the legislature contemplated when it prescribed the presumptive sentence for that offense. See id. at 927. The trial court properly considered the nature and circumstances of the offense as aggravating.

Further, Welches asserts the trial court erred by not identifying his guilty plea as a mitigating circumstance. See Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005) ("A guilty plea demonstrates a defendant's acceptance of responsibility for the crime and at least partially confirms the mitigating evidence regarding his character.") Although the trial court did not specifically identify Welches's guilty plea as mitigating, it did observe that he showed remorse and cooperated with law enforcement by giving a statement of his

[2] Welches's statement to the police was admitted into evidence during the guilty plea hearing. In the statement, Welches admitted that the burglary was planned in advance and that it was executed based on his prior knowledge of the security operations.

own involvement. The trial court's consideration of such is a sufficient acknowledgement of Welches's character and of the benefit Welches provided to the State by his confession. The trial court did not abuse its discretion in failing to specifically identify Welches's guilty plea as mitigating.

Finally, we conclude, contrary to Welches's assertion, that the trial court properly weighed the aggravating and mitigating circumstances. At the sentencing hearing, the trial court stated, "I feel all things considered, that there is a mixture of aggravating and mitigating factors in this case. And as I look at it, I think the aggravating, to a degree, outweigh the mitigating." App. p. 48. This statement supports the trial court's decision to enhance Welches's sentence by two years. We find no abuse of discretion.

III. Appropriateness

Welches also argues that his sentence is inappropriate. Under Indiana Appellate Rule 7(B) we may revise a sentence that is inappropriate based on the nature of the offense and the character of the offender. Pagan, 809 N.E.2d at 926.

The nature of this offense is particularly egregious. Welches, through his employment as a security guard, learned the routines and security procedures prior to the burglary. Despite his knowledge that the security guard on duty would be unarmed, he supplied guns, one of which was stolen from the office they intended to burglarize, to his cohorts. Further, assuming Welches did not intend Kotul's death when he planned the crime, he continued and completed the offense. He then left Kotul dead or dying while he disposed of the weapon used to shoot him.

Regarding the character of the offender, indeed, Welches was young when he committed the offense and he cooperated with the police by admitting to his participation and pleading guilty. Further, Welches was remorseful and suffered a difficult childhood. Nevertheless, Welches's criminal activity and disregard for the law had increased rapidly. Based on these considerations we cannot conclude that the forty-two year sentence is inappropriate.

Conclusion

Blakely does not apply retroactively to our review of Welches's sentence. The trial court did not abuse its discretion in analyzing the aggravating and mitigating circumstances. Welches's forty-two-year sentence is appropriate. We affirm.

Affirmed.

NAJAM, J., and RILEY, J., concur.