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**IN THE
COURT OF APPEALS OF INDIANA**

ELIJAH GIBSON,)

Appellant-Defendant,)

vs.)

No. 41A01-0704-CR-175

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE JOHNSON SUPERIOR COURT
The Honorable Cynthia S. Emkes, Judge
Cause No. 41D02-0506-FA-5

October 3, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Elijah Gibson appeals the thirty-year sentence that was imposed following his guilty plea to Dealing in Methamphetamine,¹ a class A felony. Specifically, Gibson argues that the sentence is inappropriate in light of his character and the nature of the offense. Concluding that a reduction of Gibson's sentence is warranted, we remand this cause to the trial court with instructions to issue an amended sentencing order and to issue or make any other documents or docket entries necessary to impose a sentence of twenty-two years with eleven years executed, five years on work release, and the remainder suspended to probation.

FACTS

On March 31, 2005, Gibson sold a one-fourth ounce of methamphetamine to a confidential informant from his Greenwood residence. Thereafter, on April 6, 2005, Gibson sold an additional one-fourth ounce of that drug to the informant. As a result, the State charged Gibson with two counts of dealing in methamphetamine, as a class A felony.

Thereafter, Gibson negotiated a plea agreement with the State, which provided that Gibson would plead guilty to one count of dealing in exchange for the dismissal of the remaining charge. It was further agreed that the State would dismiss three charges in an unrelated matter that included possession of a narcotic drug, a class A felony, two class C felony charges of possession of a controlled substance, and possession of marijuana, a class A misdemeanor. The unrelated charges resulted "from drugs found in the possession of the Defendant when Greenwood Police exercised a warrant for the defendant's arrest based upon

¹ Ind. Code § 35-48-4-1(a)(1).

the transactions that were filed [in this cause].” Sent. Mem. at 3. The plea agreement was also “open” with regard to sentencing. Appellant’s App. p. 11-15.

The trial court accepted the plea agreement, and at the sentencing hearing which commenced on March 1, 2007, the trial court observed that Gibson had admitted “a lot of criminal activity [involving] . . . illegal drug usage and drug sales during a very substantial period of time” before the instant offense occurred. Tr. p. 5. The trial court further commented that “the reason that the drugs were sold, and again this isn’t that unusual, but the Court is considering it to be an aggravating circumstance, was to support your own drug habit [,which] admittedly had spiraled out of control for a very long time without treatment.”

Id. at 7. Finally, the trial court observed:

You are remorseful and I think it’s sincere remorse that you’re showing. I do recognize you don’t have any prior criminal convictions despite the activity that we, we’ve just discussed. I do believe that you’ve made some great efforts in regard to staying substance abuse free, especially your contacts with Beacon House and your commitments in regard to Beacon House when, when this is over with. I recognize that you have a child that is going to suffer, a severe hardship based on the Court’s sentence. I do believe that you have a very strong support group, and I recognize the family situations that you deal with and that the difficulty that you went through for a very long time fighting what would have been a pretty easy decision to get in a drug life a lot earlier than you did. Especially in light of your high intelligence level. I think you’ve been cooperative in regard to the investigation. Despite the fact that I, again, I cited a lot of charges that were dismissed, you’ve still been cooperative. I mean it’s not, it’s not as if you didn’t early on want to cooperate and work toward a plea agreement. You did. And I, I’ve seen that from the beginning in this case. You’ve, although by Court order, to a great extent remained incarcerated. You’ve not had any problems while you’ve been in the Johnson County Jail. You’ve tried to participate in any activity available to you in regard to substance abuse. And again, you’ve been cooperative in regard to your incarceration.

Id. at 8-9. The trial court then concluded that the aggravating and mitigating circumstances balanced “each other out.” Id. at 9-10. As a result, the trial court sentenced Gibson to a total of thirty years. Specifically, Gibson was ordered to serve fifteen years at the Department of Correction, five years on work release, and ten years suspended to probation. Gibson now appeals.

DISCUSSION AND DECISION

Gibson contends that his sentence was inappropriate.² Specifically, he maintains that “a thirty year sentence—with twenty of those years executed—for a single count of dealing one-quarter ounce of methamphetamine is inappropriate for a 24 year-old defendant with no criminal history who pleaded guilty, showed genuine remorse, and whose incarceration imposes a hardship on his young daughter.” Appellant’s Br. p. 4.

Before proceeding to the merits of Gibson’s claim, we initially observe that on April 25, 2005, the General Assembly amended Indiana’s felony sentencing statutes, which now provide that the person convicted is to be sentenced to a term with a range of years, with an “advisory sentence” somewhere between the minimum and maximum terms. See Ind. Code §§ 35-50-2-3 to -7. The statutes were amended to incorporate advisory sentences rather than presumptive sentences and comply with the holdings in Blakely v. Washington, 542 U.S. 296 (2004), and Smylie v. State, 823 N.E.2d 679 (Ind. 2005).

² Gibson makes no claim that the trial court abused its discretion in sentencing him or in identifying various aggravating and mitigating circumstances. Indeed, we have read and acknowledge the sentencing statement the trial court issued in this case. A trial court’s sentencing statement assists in the comprehensive 7(B) review that we undertake. Stewart v. State, 866 N.E.2d 858, 865 n.2 (Ind. Ct. App. 2007).

Here, Gibson committed the offense before the amended statutes took effect. In Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007), our Supreme Court observed that “the sentencing statute in effect at the time a crime is committed governs the sentence for that crime.” When Gibson committed the offense, the relevant statute, Indiana Code section 35-50-2-4, provided that: “A person who commits a Class A felony shall be imprisoned for a fixed term of thirty (30) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances.”

Indiana Appellate Rule 7(B) provides that this court has the constitutional authority to revise a sentence 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.” However, sentence review under Appellate Rule 7(B) is very deferential to the trial court’s decision, Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003), and we refrain from merely substituting our judgment for that of the trial court. Foster v. State, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003). The burden is on the defendant to persuade us that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Under the prior sentencing scheme, the presumptive sentence is the starting point in reviewing a sentence. Ruiz v. State, 818 N.E.2d 927, 929 (Ind. 2004).

With regard to the nature of the offense, we acknowledge that dealing in methamphetamine is a serious crime. Thus, Gibson’s nature of the offense argument does not aid his inappropriateness claim.

On the other hand, an analysis of Gibson's character demonstrates compelling reasons to revise his sentence below the presumptive term and suspend a portion of it. Although Gibson acknowledged that he had been previously involved with drugs and was arrested for other drug-related offenses, he has no prior criminal convictions. P.S.I. p. 3. Gibson was twenty-four years old when he committed the offense, graduated from high school in 1999 with a 3.998 grade-point average, and was gainfully employed after graduation. Id. at 1, 7. Gibson fathered a daughter—who is presently six years old—and was supporting her financially until he became addicted to methamphetamine and was no longer employed. Sent. Mem. p. 8. Moreover, Gibson established a positive relationship with his daughter and visited with her frequently until his arrest in this case. Id. at 4-5, 8. Obviously, Gibson's lengthy incarceration would impose a substantial hardship on his daughter.

The record also shows that Gibson has been in jail without incident since his initial arrest on June 6, 2005.³ Id. at 9. Gibson pleaded guilty and the trial court acknowledged that Gibson demonstrated "sincere remorse" for his actions. Tr. p. 8; Appellant's App. p. 5, 11-15. The trial court also recognized that Gibson participated in "any activity available . . . in regard to substance abuse" during his incarceration. Tr. p. 9. Finally, the Johnson County Probation Department concluded that Gibson would likely "respond affirmatively to probation or short-term imprisonment." P.S.I. p. 5.

Given these circumstances, we believe that Gibson has met his burden of establishing that his sentence is inappropriate. In our view, Gibson's character is positive to the extent

that it counteracts the aggravating weight of the nature of the offense. However, while a sentence below the presumptive term is warranted, we cannot say that the minimum sentence is appropriate in light of Gibson's arrest for other drug-related criminal activity and the fact that he had engaged in that type of conduct over a period of time. Therefore, we find that a total sentence of twenty-two years is appropriate in these circumstances. Hence, we reverse Gibson's sentence of thirty years and remand to the sentencing court with instructions to issue an amended sentencing order and to issue or make any other documents or docket entries necessary to impose an aggregate sentence of twenty-two years with eleven years executed, five years on work release, and the remainder suspended to probation.

The judgment of the trial court is reversed and remanded with instructions.

BAILEY, J., concurs.

VAIDIK, J., dissents with opinion.

³ Gibson served 634 actual days of incarceration in this cause at the Johnson County Jail as of the March 1, 2007 sentencing hearing. Tr. p. 13.

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)	

VAIDIK, Judge, dissenting

I respectfully dissent from the majority’s conclusion that Gibson’s sentence is inappropriate and from its decision to revise Gibson’s sentence to twenty-two years with eleven years executed, five years on work release, and six years suspended to probation. Rather, given the nature of the offense and Gibson’s character, I would affirm Gibson’s thirty-year sentence with fifteen years executed, five years on work release, and ten years suspended to probation.

As for the nature of the offense, it is agreed that dealing in methamphetamine is a serious crime. As for Gibson’s character, the record reflects that he has a longstanding

history of both drug use and drug sales, which resulted in unrelated charges for possessing drugs. Although there are admirable aspects to Gibson's character, they are simply overshadowed by his extensive drug involvement. Review under Indiana Appellate Rule 7(B) is very deferential to the trial court, and, in crafting Gibson's mitigated sentence, the trial court was very careful to tailor his sentence to his rehabilitative needs. Given that at the time of sentencing Gibson had already served nearly two years, Gibson has failed to persuade me that his sentence of thirty years with fifteen years executed, five years on work release, and ten years suspended to probation is inappropriate.