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**IN THE
COURT OF APPEALS OF INDIANA**

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| <p>BILLY JOE BRILEY,</p> <p style="padding-left: 40px;">Appellant-Defendant,</p> <p style="text-align: center;">vs.</p> <p>STATE OF INDIANA,</p> <p style="padding-left: 40px;">Appellee-Plaintiff.</p> | <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> | <p>No. 61A01-0702-CR-82</p> |
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APPEAL FROM THE PARKE CIRCUIT COURT
The Honorable Sam A. Swaim, Judge
Cause No. 61C01-0408-FB-248

OCTOBER 15, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBERTSON, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Billy Joe Briley (“Briley”) is appealing his conviction by a jury of the Class B felony, possession of a firearm by a serious violent felon, and the Class C felony, possession of an altered handgun. Briley was sentenced to the maximum amount on each felony with the sentences to run consecutively for an aggregate sentence of twenty-eight years.

We affirm.

ISSUES

Briley states the issues as:

- I. “Whether the Serious Violent Felon statute was unconstitutionally applied to Mr. Briley?”
- II. “Whether the State carried its burden to prove that the defendant knew the serial number on the handgun had been obliterated?”
- III. “Whether the trial court erroneously sentenced Mr. Briley to maximum enhanced sentences to run consecutively?”
- IV. “Whether the aggregate sentence of twenty-eight (28) years is inappropriate for Mr. Briley?”

FACTS

Sheriff’s Deputy Salisbury was dispatched to Briley’s camper where a woman had been shot. Salisbury obtained a written consent to search the camper. He found a .22 “long rifle revolver” on the kitchen floor and, with Briley’s acknowledgement, Salisbury found a .32 caliber revolver in the bathroom cabinet. The .32 revolver’s serial number had been obliterated.

After being given the proper advisement by Sheriff Bollinger, Briley told them that the victim, his girlfriend, had threatened to kill herself. Briley loaded the .22 revolver and gave it to her. Briley told her that if she was going to kill herself to do it outside the camper. She took the gun, went outside, and then returned to tell Briley that the gun did not work. Briley examined the revolver, test fired the weapon, and returned it to his girlfriend. She then shot herself and subsequently died.

Additional facts will be added as needed.

DISCUSSION AND DECISION

Issue I.

Prior to trial Briley filed a motion to dismiss alleging that the serious violent offender statute was unconstitutional. The trial court denied the motion and found that the statute was not unconstitutionally vague or ambiguous, that it did not violate the equal protection clause of the state or federal constitutions, and that it did not violate due process. An attempt to bring an interlocutory appeal from this trial court ruling was denied. Subsequently another motion to dismiss was filed alleging the statute was an ex post facto law. This motion was also denied. Briley raises only a due process violation in this issue.

Briley had previously been convicted of the Class D felony, criminal confinement. Criminal confinement is when a person knowingly or intentionally confines another person without that person's consent. Ind. Code §35-42-3-3. At sentencing Briley testified that he shut his girlfriend in the trunk of his car. She escaped by kicking out the back seat.

Subsequently, our General Assembly passed a serious violent felon law. A serious violent felon is a person who has been convicted of one of some twenty-seven offenses specified in the statute, including criminal confinement. Ind. Code §35-47-4-5(b)(7). Briley's argument boils down to his observation that there is nothing inherently violent about criminal confinement as a Class D felony and, therefore, its inclusion by the General Assembly in the list of criminal offenses in the serious violent felon statute violates due process. We fail to find any factual basis in the record to sustain this statement.

Briley presents this argument under both the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the Article I, §23, the equal privileges and immunities provision of the Indiana Constitution.

Under the U.S. Constitution, challenges such as these are subject to a rational basis review. *See U.S. v. Jester*, 139 F.3d 1168, 1171 (7th Cir. 1998). A claim can succeed only by showing that no state of facts reasonably may be conceived to justify the classification in dispute. *Id.* This standard of review is extremely respectful of legislative determinations. *Id.* The statute under review will not be invalidated unless a distinction is drawn that makes no sense. *Id.*

Briley's prior conviction for Class D felony criminal confinement places him in the serious violent felon classification. The class of felony for criminal confinement varies depending upon the degree of violence inflicted upon the victim. Each class of criminal confinement, however, involves an act of violence upon the victim varying chiefly in degree. The rational basis for inclusion of all classes of criminal confinement as serious violent felonies is the inherent danger in all classes of criminal confinement. Therefore, Briley's argument here fails.

The serious violent felon statute does not violate Article 1, §23 of the Indiana Constitution. *See Teer v. State*, 738 N.E.2d 283, 288 (Ind. Ct. App. 2000). In order for a challenged statute to survive review the disparate treatment accorded by the statute must be reasonably related to the inherent characteristics that distinguish the unequally treated classes. *See Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994). Next, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated. *Id.*

Criminal confinement is inherently dangerous regardless of the class of felony charged. An inherent characteristic of that crime and the other serious violent felonies is a dangerous

attitude toward other human beings. It follows that felons who commit those types of crimes should be prohibited from possessing firearms. Firearms are potentially deadly, the variable more often than not being the attitude of the individual possessing the firearm. Therefore, the disparate treatment of forbidding those who espouse a dangerous attitude toward other human beings, is reasonably related to the distinction between those criminals who have been convicted of serious violent felonies, and those criminals who have not.

Briley had been convicted of criminal confinement because he had locked a girlfriend in the trunk of his car. In the present case, Briley provided a firearm to a girlfriend, test fired it after resolving the firearm's malfunction, and then returning the firearm to that girlfriend ultimately resulting in her suicide. The statute has not been applied in an unconstitutional manner as Briley. Briley's argument under the Indiana Constitution likewise fails.

Issue II.

Briley argues that the State did not prove that he knew the serial number on the handgun had been obliterated.

When reviewing a claim of insufficient evidence, we will not reweigh the evidence or judge witnesses' credibility. *Ware v. State*, 859 N.E.2d 708, 724 (Ind. Ct. App. 2007), *trans. denied*. We will only consider the evidence favorable to the judgment and the reasonable inferences drawn therefrom. *Id.* We will affirm a conviction if the lower court's finding is supported by substantial evidence of probative value. *Id.* When a defendant is convicted on circumstantial evidence, we will not reverse if the trier of fact could reasonably infer from the evidence presented that the defendant is guilty beyond a reasonable doubt. *Id.* To affirm, we need not find the circumstantial evidence overcomes every reasonable hypothesis of innocence.

Id. Instead, we must be able to say that an inference may reasonably be drawn from the circumstantial evidence to support the verdict. *Id.*

The State is required to prove Briley knew that the serial number had been altered. *See Robles v. State*, 758 N.E.2d 581, 583 (Ind. Ct. App. 2001). Briley's intent and knowledge may be proven by circumstantial evidence. *See Heavrin v. State*, 675 N.E.2d 1075, 1079 (Ind. 1996).

Briley admitted that he bought the gun about two weeks before from Joe Sparks who owned the land where Briley parked his camper. Briley also admitted that he knew the gun did not function properly, and that he thought it may have been stolen. Briley admitted to a deputy that the weapon's serial number had been removed. Based upon the evidence and the inferences drawn therefrom, a reasonable jury could find beyond a reasonable doubt that Briley knew the serial number had been obliterated. *See Robles*, 758 N.E.2d at 584.

Issue III.

Pursuant to Ind. Code §35-50-2-5 Briley was sentenced to the maximum of twenty years on the Class B felony, and under Ind. Code §35-50-2-6 he was sentenced to the maximum of eight years on the Class C felony. The sentences were to be served consecutively. The trial judge found three aggravating circumstances: Briley's substantial criminal history; Briley's history of violating probation; and, the particularly heinous nature of the crime.

Briley argues, citing *Blakely/Apprendi*¹ requirements, that except for a prior criminal record, other sentence enhancements must be found by a jury. Insofar as *Blakely* claims are

¹ *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

concerned, there are four proper ways to enhance a sentence with aggravating circumstances, one being criminal history and the other by admissions by the defendant, neither of which require a jury's finding. *Johnson v. State*, 830 N.E.2d 895, 897 (Ind. 2005). Obviously, Briley's criminal history is a proper aggravating circumstance. Also, Briley admitted being on probation on a suspended five-year sentence from Missouri. According to *Blakely* this also is a proper aggravating circumstance in that it is an admission by the defendant. A single aggravating circumstance is enough to justify an enhancement or the imposition of consecutive sentences. *Garland v. State*, 855 N.E.2d 703, 707 (Ind. Ct. App. 2006), *trans. denied*.

The trial judge's remarks about the heinous nature of the crime will be addressed in the next issue.

Issue IV.

Briley next argues that the maximum sentence is inappropriate. Under Ind. 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. A defendant must persuade the appellate court that his sentence had met this inappropriate standard of review. *Green v. State*, 870 N.E.2d 560, 567 (Ind. Ct. App. 2007). Sentence review under App. R. 7(B) is very deferential to the trial court's decision and we refrain from merely substituting our judgment for that of the trial court. *Felder v. State*, 870 N.E.2d 554, 559 (Ind. Ct. App. 2007).

The trial judge's sentencing statement contained the following evaluation:

With respect to aggravating circumstances the Court finds that the facts of the crime in and of itself are aggravating. This was a particularly heinous crime. Given the defendant's criminal history, the fact that he should not have had a firearm in his possession period, no matter what the circumstances are, coupled with the fact that he did have possession of this firearm and somebody actually

died as a result of his possession of that firearm, therefore the Court does find that the facts of the case in and of themselves are an aggravating circumstance.

Sent. Trans. p. 32.

A reading of the trial court's sentencing statement indicates that the proffered mitigating circumstances had little or no effect.

Regarding the nature of the offense, there is no doubt that the suicide of Briley's girlfriend coupled with the fact that Briley had no business possessing a handgun, was instrumental in the trial court's decision to find this aggravating circumstance. On the one hand, Briley was not charged with a count of murder, homicide, or manslaughter. However, his callous conduct in fixing the defective weapon, test firing it, and then handing it over to his girlfriend for the purpose of killing herself appears sufficient to allow consecutive and maximum enhancements of his sentence.

As for the character of the offender, Briley's criminal history consists of five prior misdemeanor convictions and two prior felony convictions. Briley has convictions for criminal confinement, battery resulting in bodily injury, burglary, among others. Further, Briley has a history of violating the conditions of probation.

Under this fact situation, we are of the opinion that Briley's character and the nature of the offense fails to qualify under App. R. 7(B) for a revision of his sentence.

CONCLUSION

The serious violent felon statute is not unconstitutional as applied to Briley. The evidence is sufficient to sustain the verdict. There is no error in Briley's sentence to run consecutively nor is the sentence inappropriate.

Judgment affirmed

SHARPNACK, J., and KIRSCH, J., concur.