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IN THE COURT OF APPEALS OF INDIANA

ALOYSIUS FRAZIER, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 46A05-0703-CR-333
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAPORTE SUPERIOR COURT
The Honorable Walter P. Chapala, Judge
Cause No. 46D01-0308-FB-92

October 19, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Aloysius Frazier, Jr. appeals his twenty-year sentence for Class B felony robbery. We reverse and remand.

Issue

The restated issue we address is whether the trial court's imposition of a twenty-year sentence was proper.

Facts

On August 16, 2003, Frazier went to a McDonald's restaurant in Michigan City planning to steal a purse. He lingered in the restaurant until he saw an elderly woman enter the restroom. When other patrons exited the same restroom, Frazier entered and demanded the woman's purse. When she did not immediately accede to his demand, Frazier slapped the woman. He grabbed her purse and fled. Michigan City police apprehended Frazier nearby.

The State charged Frazier with Class B felony robbery on August 20, 2003. The defendant attended sixteen hearings before a trial was set for September 20, 2004. Frazier pled guilty on August 26, 2004, but did not enter into a formal plea agreement with the State. On October 14, 2004, the trial court sentenced Frazier to twenty years. The trial court also instructed Frazier that he would be allowed to file a petition to modify his sentence after he served ten years.

Frazier filed a petition for shock probation on January 25, 2005, and a motion for modification of his sentence on August 4, 2005. The trial court denied the motion for

modification. However, it eventually granted Frazier's motion for belated appeal. Frazier now appeals.

Analysis

Frazier argues that the maximum sentence of twenty years was inappropriate in his case because the court improperly identified and weighed aggravating and mitigating factors.[1] He contends that the trial court should have given his guilty plea more weight as a mitigating factor and that the age of the victim was not an aggravating factor with enough weight to warrant a ten-year increase in the presumptive sentence. Frazier also contends the maximum available sentence of twenty years was inappropriate here because he was not the worst possible offender and did not commit the worst offense.

When facing a challenge to an enhanced sentence under the presumptive statutory scheme[2], we must determine whether the trial court: (1) issued a sentencing statement that identified all the significant aggravating and mitigating circumstances; (2) stated specific reasons for each determination of mitigating and aggravating circumstances; and (3) stated its evaluation and balancing of the aggravating and mitigating circumstances. Hope v. State, 834 N.E.2d 713, 717-18 (Ind. Ct. App. 2005). When we find an

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[1] Frazier also appeals the trial court's denial of his motion for sentence modification. We agree that the trial judge's attempt to retain jurisdiction over Frazier beyond the 365 days allowed by the Indiana Code Section 35-38-1-17 was against the authority of Indiana law and the modification statute. See State v. Fulkrod, 753 N.E.2d 630, 633 (Ind. 2001). Any issues regarding this attempt and the subsequent denial of Frazier's petition are rendered moot by our opinion today.

[2] This offense occurred prior to the April 24, 2005 amendment to the sentencing statutes making the statute advisory rather than presumptive. The statute in effect at the time of Frazier's offense provided: "A person who commits a Class B felony shall be imprisoned for a fixed term of ten years, with not more than ten years added for aggravating circumstances or not more than four years subtracted for mitigating circumstances. In addition, he may be fined not more than ten thousand dollars." I.C. § 35-50-2-5 (2004).

irregularity in the trial court's sentencing decision we may remand for clarification, affirm if the error is harmless, or reweigh the circumstances independently. Id. at 718 (citing Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005)). Even if we do not find an irregularity or improper procedure by the trial court, we may still consider whether the sentence was appropriate under Indiana Appellate Rule 7(B). Under Rule 7(B) we may revise a sentence that is inappropriate in light of the nature of the offense and the character of the offender. Ind. App. Rule 7(B).

Frazier argues the trial court erred by not acknowledging his guilty plea or assigning it any weight. "Indiana courts have long held that a defendant who pleads guilty is entitled to some benefit in return." Banks v. State, 841 N.E.2d 654, 658 (Ind. Ct. App. 2006), trans. denied. Generally, a guilty plea is entitled to some mitigating weight, although the amount of weight can vary from case to case. Gibson v. State, 856 N.E.2d 142, 148 (Ind. Ct. App. 2006).

The State makes much of the fact that Frazier did not plead guilty until over a year after the charges were filed. It argues that such a delay negated any money saving or time saving value for the State when it had to appear at approximately sixteen hearings. The chronological case summary reveals that Frazier appeared with various public defenders during those hearings. The record is unclear as to why the hearings were chronically continued or why different attorneys appeared on Frazier's behalf. Given those facts, we cannot attribute this delay solely to Frazier. Nor can we discount the weight of this mitigating factor merely because the State had expended resources in the numerous hearings and there was a delay between the charging date and the guilty plea.

See Cotto, 829 N.E.2d at 526 (holding that even a guilty plea entered on the morning of trial was still entitled to some mitigating weight). Frazier still pled guilty prior to the trial without the benefit of a plea bargain or any type of cap with respect to sentencing, and this plea deserves at least some weight.

The State also contends that Frazier's plea was merely a pragmatic decision because the evidence against him was so strong. We cannot merely assume that the case was open and shut or that the trial would result in a clear guilty verdict. Hope, 824 N.E.2d at 718-19. ("[I]t is nearly impossible to gauge the strength of the State's evidence when a defendant has chosen to admit the truth of the language in the charging information when pleading guilty."). The fact that this guilty plea avoided the preparation and cost of trial and service of jury members cannot be ignored. Id. (explaining that even "easy" cases involve time and expense in consideration, preparation, planning, subpoenaing witnesses, and impaneling a jury). Frazier's guilty plea was accompanied by a personal apology to the victim and a statement of remorse, which can bolster the weight of the plea. Cotto, 829 N.E.2d at 526 (reasoning that expressions of remorse coupled with a guilty plea can increase the weight of this mitigating circumstance). Although we acknowledge that when a guilty plea is merely a pragmatic decision it is entitled to little weight, we still find that this plea should have been recognized by the court, given at least some weight, and considered in conjunction with the aggravating factor.

Having found error in the trial court's sentencing statement, we elect to analyze whether Frazier's sentence was appropriate in light of the nature of the offense and his

character under Rule 7(B). The nature of the crime involved a physical attack on an elderly woman. Thankfully, the victim did not sustain any permanent physical injuries; however, she testified she is afraid to enter public restrooms alone. Frazier's attack on a physically smaller and more fragile elderly woman does elevate the nature of this crime.

With respect to Frazier's character, his guilty plea is entitled to some mitigating weight. "A guilty plea demonstrates a defendant's acceptance of responsibility for the crime and at least partially confirms the mitigating evidence regarding his character." Id. at 525. His criminal history is minimal and includes a juvenile theft offense and a class A misdemeanor battery. Considering the nature of the crime and character of this defendant, we believe the twenty-year maximum sentence is inappropriate.

At the time Frazier committed this crime, the presumptive sentence for a Class B felony was ten years. See Ind. Code § 35-50-2-5 (2004). Under that statute, not more than ten years could be added for aggravating circumstances and not more than four years could be deducted for mitigating circumstances. Id. The age of the victim warranted increasing the presumptive sentence. Although we do not mean to discount the severity and callous nature of Frazier's attack on a senior citizen, we cannot agree that the offense warranted the maximum sentence. We also find that the guilty plea warrants consideration and weight as a valid mitigating factor. The nature and circumstances of this crime lead us to the conclusion that a fifteen-year sentence is appropriate here. We reverse and remand for a sentencing order consistent with this opinion.

Conclusion

The trial court erred in adding ten years to the presumptive sentence for Class B felony robbery and a twenty-year sentence was inappropriate here. Taking into account the victim's age and the defendant's guilty plea, an appropriate sentence is fifteen years. We reverse and remand with instructions to the trial court to reduce Frazier's sentence in accordance with this decision.

Reversed and remanded.

KIRSCH, J., concurs.

ROBB, J., dissents with opinion.

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ROBB, **Judge, dissenting**

I respectfully dissent from the majority's conclusions that the trial court should have found Frazier's guilty plea to be a mitigating factor and that Frazier's sentence is inappropriate in light of the nature of the offense and his character.

The majority states that Frazier's guilty plea "should have been recognized by the court, given at least some weight, and considered in conjunction with the aggravating factor." Slip op. at 5. I note initially that the trial court did at least recognize Frazier's guilty plea when it stated in its sentencing order that it "accepts [Frazier's] guilty plea." Appellant's Appendix at 25. However, the more significant issue is whether the trial court was within its discretion when it failed to find that Frazier's guilty plea was a mitigating factor.

Although I agree with the majority that a guilty plea is entitled to some mitigating weight and that the amount of weight varies based on the facts and circumstances of each case, I also note that a trial court's failure to find a mitigating factor is an abuse of discretion only if the defendant establishes that 1) the mitigating evidence is significant and 2) the evidence is clearly supported by the record. McCann v. State, 749 N.E.2d 1116, 1121 (Ind. 2001). A guilty plea generally is not considered a significant mitigating factor "where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one." Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied.

There are two points of evidence in the record that indicate Frazier's decision to plead guilty was pragmatic. First, at the sentencing hearing, Frazier acknowledged he had two other robbery charges pending, but stated he "was told [they were] going to be dismissed." Transcript at 13. The prosecutor later explained "the State may or may not proceed on [the other robbery charges], depending upon what the outcome of this proceeding obviously is in the way of sentencing." Id. at 21. Thus, Frazier's belief that the State would dismiss the other robbery charges indicates his guilty plea was pragmatic.

Second, although I agree with the majority that "[w]e cannot merely assume that the case was open and shut or that the trial would result in a clear guilty verdict," slip op. at 5, in numerous decisions this court has reviewed the strength of the evidence against the defendant to determine whether his guilty plea was pragmatic. See, e.g., Wells, 836 N.E.2d at 479-80; Glass v. State, 801 N.E.2d 204, 209 (Ind. Ct. App. 2004); Kinkead v. State, 791 N.E.2d 243, 248 (Ind. Ct. App. 2003), trans. denied. Here, the evidence against

Frazier was substantial. The arrest report states the victim identified Frazier as the man who robbed her and an eyewitness identified Frazier as the man who was running from the McDonald's restaurant with a purse.[3] The report also states Frazier had the money from the victim's purse when he was arrested. Although Frazier did not have the purse when he was arrested, the report states it was recovered close to "a red shirt and black hand towel that Frazier had been wearing at the time of the attack." Appellant's App. at 12. Thus, the substantial evidence against Frazier indicates his guilty plea was pragmatic.

It was Frazier's burden to prove his guilty plea constitutes a significant mitigating factor. Because the evidence indicates his guilty plea was pragmatic, I am convinced Frazier has not carried his burden and would therefore conclude the trial court acted within its discretion.

I also respectfully dissent from the majority's conclusion that Frazier's sentence is inappropriate in light of the nature of the offense and his character. Regarding the nature of the offense, I agree with the majority that "Frazier's attack on a physically smaller and more fragile elderly woman does elevate the nature of this crime." Slip op. at 6. However, additional evidence indicates Frazier's conduct was more egregious than a typical robbery. Specifically, the majority overlooks that Frazier selected his victim because she was elderly. The Presentence Investigation Report recounts Frazier's own version of the robbery, "I went to McDonald[']s to see whose purse I would take. I finally

[3] The report also states two other eyewitnesses observed a man running from the McDonald's restaurant, one of whom observed the man "dump" the purse in some bushes, although it is unclear whether these eyewitnesses had the opportunity to identity Frazier after his arrest. Appellant's App. at 13.

seen a lady that I wanted, so I went to the ladies bathroom and swung my fist so she would not fight back." Appellant's App. at 14. Thus, Frazier's own statement reveals the predatory and premeditated nature of the offense.

Regarding Frazier's character, the majority gives great weight to Frazier's guilty plea because "it was accompanied by a personal apology to the victim and a statement of remorse." Slip op. at 5. However, based on its sentence, the trial court discounted the sincerity of Frazier's apology and statement of remorse. Because the trial court was in a better position to judge Frazier's credibility, I would not second-guess the weight it gave to Frazier's apology and statement of remorse. See Mathews v. State, 849 N.E.2d 578, 590 (Ind. 2006); Georgopulos v. State, 735 N.E.2d 1138, 1145 (Ind. 2000). Moreover, the majority overlooks that Frazier denied the predatory nature of the offense despite his earlier statement that "I went to McDonald[']s to see whose purse I would take. I finally seen a lady that I wanted, so I went to the ladies bathroom and swung my fist so she would not fight back." Appellant's App. at 14. At the sentencing hearing, the following exchange occurred between the prosecutor and Frazier regarding Frazier's version of the robbery:

> Q: Well it wasn't the first lady that went in the bathroom, was it? You actually sat and watched several people go in and out of that bathroom; right?
> A: No.
>
> Q: No? She just showed up and at the same time you showed up, you saw this lady going in the bathroom and you just went in right after her?

A: Well it wasn't that long – or how long of a wait are you asking me? I mean, I would say no more than ten minutes, five.

Q: Ten minutes, maybe five minutes?

A: Yes, sir.

Q: And you didn't set [sic] and watch to see who was going in and out of the bathroom?

A: No, sir. I was just waiting on a person.

Q: Anyone could have done the trick.

A: Yes, sir.

Q: The fact that this was an elderly lady, incapable of defending herself, really had nothing to do with your decision, that she was the one that you wanted?

A: (No response.)

Q: It's a lot easier to take a purse from a 76-year-old woman than it is, say, a 26-year-old woman; isn't it?

A: Yes.

Tr. at 14-15. Frazier's recalcitrance convinces me that his character does not render his sentence inappropriate.

Because I would conclude that the trial court was within its discretion when it failed to find Frazier's guilty plea was a mitigating factor and that Frazier's sentence is

not inappropriate in light of the nature of the offense and his character, I respectfully dissent.