

Case Summary and Issues

Following a guilty plea, Brian Roberts appeals his convictions and sentences for burglary, a Class B felony, and auto theft, a Class D felony. Roberts raises three issues, which we restate as: 1) whether the trial court abused its discretion in denying Roberts's motion to withdraw his guilty plea; 2) whether the trial court improperly ordered Roberts to serve his sentence consecutively to a sentence under a different cause number; and 3) whether the sentence is inappropriate based on the nature of the offense and Roberts's character. Concluding the trial court acted within its discretion in denying Roberts's motion to withdraw his guilty plea, the trial court properly ordered consecutive sentences, and the sentence is not inappropriate, we affirm.

Facts and Procedural History

Although the guilty plea transcript reveals little about the nature of Roberts's offenses, a more detailed version exists in the probable cause affidavit, which Roberts cites in his appellate brief in relating the following version of the offenses:

Roberts, his housemate Bryan Dunham and a juvenile A.S. burglarized Richard Maggard's residence while he was gone. Roberts or A.S. kicked the door open and both entered the house. They stole six guns, two chain saws and a small safe from the house. They put the stolen items in Maggard's Ford Tempo and met with Dunham where the stolen items were put into Roberts's car. A.S. shot out two windows in the Ford Tempo. A.S., Dunham and Roberts confessed. The stolen items were recovered though the safe had been broken open. Maggard indicated he employed Roberts.

Appellant's Brief at 7 (citations omitted). On August 31, 2005, the State charged Roberts with burglary, a Class B felony, and auto theft, a Class D felony. The trial court set a jury trial for January 8, 2007. On December 7, 2006, Roberts filed a motion for a continuance,

which the trial court granted on December 15, 2006, setting the jury trial for March 26, 2007.

On December 18, 2006, the State added a count alleging that Roberts was an habitual offender. On December 21, 2006, the trial court vacated its order granting Roberts's motion for a continuance.

On January 4, 2007, Roberts pled guilty to burglary and auto theft. Also on that date, Roberts pled guilty to possession of cocaine, a Class D felony, and theft, a Class D felony, under two separate cause numbers.

On January 25, 2007, Roberts filed a pro se motion to withdraw his guilty plea. In this motion, Roberts stated that he had been coerced into pleading guilty and that he had lied about his participation in the crime at the guilty plea hearing because his attorney had told him the court would not accept his plea unless he lied and indicated that he had committed the crimes. On January 30, 2007, the trial court denied this motion.

On January 31, 2007, the trial court held a sentencing hearing at which it sentenced Roberts to twenty years with five years suspended for burglary, and three years for auto theft. The court ordered the sentences to run concurrently. However, the trial court ordered the sentences to run consecutively to a three-year sentence for possession of cocaine and a three-year sentence with one year suspended for theft. The trial court did not find aggravating or mitigating circumstances, but noted Roberts's criminal history at the sentencing hearing. Roberts now appeals his convictions and sentence.

Discussion and Decision

I. Motion to Withdraw Guilty Plea

“After entry of a plea of guilty . . . but before imposition of sentence, the court may allow the defendant by motion to withdraw his plea of guilty . . . for any fair and just reason unless the state has been substantially prejudiced by reliance upon the defendant's plea.” Ind. Code § 35-35-1-4(b). If the defendant shows that manifest injustice has occurred, “the court shall allow the defendant to withdraw his plea of guilty.” Ind. Code § 35-35-1-4(b); Bland v. State, 708 N.E.2d 880, 882 (Ind. Ct. App. 1999). The party seeking to withdraw the guilty plea must establish the grounds for relief by a preponderance of the evidence. Ind. Code § 35-35-1-4(e). The trial court’s decision to deny a motion to withdraw a guilty plea “arrives in this Court with a presumption in favor of the ruling.” Coomer v. State, 652 N.E.2d 60, 62 (Ind. 1995). We will reverse the trial court’s ruling on such a motion only if we conclude the trial court abused its discretion. Ind. Code § 35-35-1-4(b); Bland, 708 N.E.2d at 882.

In his motion to withdraw his guilty plea, Roberts stated he was coerced into pleading guilty by his counsel and claimed his counsel informed him that the trial court had vacated its order granting Roberts’s motion for a continuance on January 3, 2007, leaving only a few days before the January 8 trial date.

Although improper threats may result in a denial of a defendant’s substantive rights and warrant withdrawal of a guilty plea, see Groves v. State, 787 N.E.2d 401, 404 (Ind. Ct. App. 2003), trans. denied, Roberts has failed to explain how his attorney coerced him into pleading guilty. At the guilty plea hearing, Roberts stated the plea was of his own free

choice and decision, no one had offered him anything in exchange for his plea, and his plea was not the result of force or threats. Under these circumstances, Roberts has failed to demonstrate his plea was the result of improper threats or coercion.

Roberts also claims he was informed of the trial court's order vacating the previous grant of a continuance close to his trial date, and "[t]he limited amount of time left to prepare for trial could have rendered defense counsel's performance deficient." Appellant's Br. at 14. Although ineffective assistance of counsel is a valid reason for withdrawing a guilty plea, see Gillespie v. State, 736 N.E.2d 770, 775 (Ind. Ct. App. 2000), trans. denied, Roberts has failed to explain how his counsel was ineffective. Although Roberts expressed displeasure with his counsel at his sentencing hearing,¹ he stated at his guilty plea hearing that he was satisfied with his counsel's performance. See Coomer, 652 N.E.2d at 62. If Roberts is arguing that his counsel was left with insufficient time to prepare for trial, he has likewise failed to point to any evidence to that effect. Most importantly, he has failed to explain or even claim that this short period of time affected his decision to plead guilty.

Finally, although Roberts's motion does not explicitly proclaim his innocence, it may be interpreted to imply as much. Our supreme court has spoken to the situation in which defendants move to withdraw a guilty plea on the ground that they are actually innocent.

Admissions of guilt and assertions of innocence come in many shades of gray, and the trial judge is best situated to assess the reliability of each. A credible admission of guilt, contradicted at a later date by a general and unpersuasive assertion of innocence, may well be adequate for entering a conviction.

¹ "Expressing displeasure" is a mild way of describing Roberts's statements. Roberts referred to his counsel in a disparaging manner, first identifying his counsel as the offspring of a female canine, and then voicing his opinion that his counsel was not fit to represent a canine of either gender.

Carter v. State, 739 N.E.2d 126, 130 (Ind. 2000). In Carter, the court found no abuse of discretion where the defendant had provided a specific factual basis for his guilty plea and later proclaimed his innocence. Id. at 131; see also Owens v. State, 426 N.E.2d 372, 375 (Ind. 1981) (no abuse of discretion in denying motion to withdraw guilty plea where defendant gave general statement of innocence). Here, Roberts’s explanation of the offense was not as detailed as the explanation in Carter. See Guilty Plea Transcript at 7 (Roberts admitting he “did knowingly break in and enter the dwelling of another person, a Richard Maggard, with the intent [to] commit a felony in it, theft of personal property . . . [and] knowingly exerted unauthorized control of a motor vehicle of another person, Richard Maggard’s Ford Tempo, with the intent to deprive Richard of any part of its value or use.”). However, he also failed to explain his innocence in his motion to withdraw his guilty plea. The only explanation in the record is in the pre-sentence report, which contains Roberts’s following version of the offenses: “I did not burglarize the house. How can you burglarize a house when you live there? I returned all the guns that were stolen.” Appellant’s Appendix at 79. This vague, unsupported statement does not convince us that the trial court abused its discretion.

Roberts has failed to meet his burden of convincing this court that the trial court abused its discretion in denying his motion to withdraw his guilty plea.

II. Consecutive Sentences

Roberts argues the trial court was required to sentence him to the advisory sentence for burglary, as the sentence was to run consecutively to his sentences under other cause

numbers, based on Indiana Code section 35-50-2-1.3. Roberts's argument was supported by another panel of this court in Robertson v. State, 860 N.E.2d 621, 624-25 (Ind. Ct. App. 2007), trans. granted, vacated in relevant part, 871 N.E.2d 280 (Ind. 2007). However, subsequent to Roberts's submission of his appellate brief, our supreme court vacated this opinion and held that this section does not "impose additional restrictions on a trial court's ability to impose consecutive sentences." Robertson v. State, 871 N.E.2d 280, 285-86 (Ind. 2007). Based on our supreme court's opinion, the trial court was allowed to sentence Roberts to a term above the advisory and order the sentence to run consecutively to the sentences under other cause numbers.

III. Appropriateness of Sentence

When reviewing a sentence imposed by the trial court, we "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." Ind. Appellate Rule 7(B). We have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). We must examine both the nature of the offense and the defendant's character. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When conducting this inquiry, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied.

We agree that there appears to be nothing particularly egregious about these offenses. It does not appear that these crimes involved any violence (although the potential for

violence is inherently present in any home break-in), and as the majority of the property was returned, the pecuniary loss was limited to the damage to the vehicle, safe, and residence. See Frye v. State, 837 N.E.2d 1012, 1014 (Ind. 2005). We do note that Roberts, who was thirty-four at the time of the crime, committed this crime along with a juvenile. We further note that Roberts has failed to point to any aspect of his crimes making them less egregious than typical burglaries and thefts.

In regard to Roberts's character, the pre-sentence report indicates that Roberts has two prior felony convictions, eighteen previous misdemeanor convictions, one probation violation, and nine pending cases. Although many of these convictions are non-violent offenses involving drugs or alcohol, Roberts also has been convicted of intimidation, battery, criminal trespass, criminal recklessness, rape, and criminal deviate conduct. Such convictions clearly demonstrate Roberts's lack of respect for others' persons and property. Roberts also pled guilty to theft simultaneously to pleading guilty to the instant offenses, and his pending charges included fraud, residential entry, and robbery. Such a record clearly indicates the risk that Roberts will commit other crimes relating to others' property and involving the risk of violence. See Cox v. State, 780 N.E.2d 1150, 1157 (Ind. Ct. App. 2002) (“[A] trial court may consider an arrest record as reflective of the defendant's character and as indicative of the risk that the defendant will commit other crimes in the future.”). Finally, Roberts's conduct at his sentencing hearing, see supra note 1, demonstrated not only a lack of remorse, but also a lack of respect for the court and the justice system. Cf. Haynes v. State, 479 N.E.2d 572, 575 (Ind. 1985) (holding sentence not “manifestly unreasonable” given the

nature of the offenses and the defendant's character as evidenced by his demeanor before the court).

Although nothing about the nature of the offense appears to warrant a sentence above the advisory, given Roberts's character, as evidenced by his significant criminal history, arrest record, and conduct at the sentencing hearing, we are unable to conclude his sentence is inappropriate. See App. R. 7(B) (requiring this court to review both the nature of the offense and the character of the offender); Felder v. State, 870 N.E.2d 554, 559 (Ind. Ct. App. 2007) (although nothing about the nature of the offense warranted an enhanced sentence, the sentence was appropriate based on the defendant's character).

Conclusion

We conclude the trial court acted within its discretion in denying Roberts's motion to withdraw his guilty plea, the trial court properly sentenced Roberts to a sentence above the advisory, and Roberts's sentence is not inappropriate given his character and the nature of the offense.

Affirmed.

KIRSCH, J., and BARNES, J., concur.