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IN THE
COURT OF APPEALS OF INDIANA

JAMES L. RICHARDSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 73A04-0705-CR-280
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE SHELBY SUPERIOR COURT
The Honorable Jack A. Tandy, Jr., Judge
Cause No. 73D01-0406-FA-15

December 5, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

James L. Richardson appeals the sentence imposed following his plea of guilty to conspiracy to manufacture methamphetamine, a class B felony.[1]

We affirm.

ISSUE

Whether the trial court erred in sentencing Richardson.

FACTS

In June of 2004, police officers arrested Richardson and two others after they attempted to steal anhydrous ammonia from a Shelby County agricultural co-operative. Police officers discovered other precursors for the manufacturing of methamphetamine, including batteries and cold medicine, in Richardson's vehicle.

On June 29, 2004, the State charged Richardson with the following: Count 1, conspiracy to manufacture methamphetamine, as a class A felony;[2] Count 2, attempting to manufacture methamphetamine, as a class A felony; Count 3, conspiracy to commit theft, as a class D felony; Count 4, possession of anhydrous ammonia with intent to manufacture methamphetamine, as a class C felony; Count 4, conspiracy to store or transport ammonia, as a class A misdemeanor; Count 5, possession of precursors with intent to manufacture methamphetamine, as a class C felony; and Count 6, maintaining a common nuisance, as a class D felony.

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[1] Ind. Code § 35-48-4-1.

[2] According to the charging information, the offense took place within 1,000 feet of school property or a youth program center. *See* I.C. § 35-48-4-1(b).

On May 10, 2005, the State and Richardson entered into a plea agreement, whereby Richardson agreed to plead guilty to one of count of conspiracy to manufacture methamphetamine, as a class B felony. The plea agreement provided that Richardson's sentence would be capped at thirteen years, with the executed and suspended portion, if any, of the sentence to be within the trial court's discretion.

On May 11, 2005, the trial court took the plea agreement under advisement and ordered a presentence investigation report ("PSI"). According to the PSI and Richardson's testimony, Richardson had convictions for the following misdemeanors: 1) non-support of a dependent in 1994; 2) vandalism in 1995; 3) driving while intoxicated in 1996; 4) possession of paraphernalia in 2003; and 5) operating while intoxicated in 2003. Richardson also had a charge pending in Vigo County for dealing in methamphetamine, as a class B felony.

The trial court held a sentencing hearing on June 17, 2005. The trial court found Richardson's "history of criminal activity" to be an aggravating circumstance but did not find any mitigating circumstances. (Tr. 44). The trial court sentenced Richardson to twelve years in the Department of Correction, with four years suspended to probation.

DECISION

Richardson argues the trial court erred in sentencing him.[3] Specifically, Richardson asserts that the trial court improperly found aggravating circumstances and that his sentence is inappropriate.

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[3] Subsequent to the date of Richardson's offense and prior to the date of his sentencing, the legislature amended Indiana Code section 35-50-2-5, which set forth the sentencing range for a class B felony, to

1. Aggravating Circumstances

Relying on *Blakely v. Washington*, 542 U.S. 296 (2004), Richardson contends that the trial court "found an erroneous aggravating factor that it was not empowered to find nor existed" because he did not waive the Sixth Amendment requirement that a jury determine beyond a reasonable doubt the existence of aggravating circumstances. Richardson's Br. 6. We disagree.

In *Blakely*, the United States Supreme Court held that the Sixth Amendment requires a jury to determine beyond a reasonable doubt the existence of aggravating circumstances used to increase the sentence for a crime above the presumptive sentence assigned by the legislature. 542 U.S. at 301. Furthermore, "the sort of facts envisioned by *Blakely* as necessitating a jury finding must be found by a jury under Indiana's [presumptive] sentencing laws." *Smylie v. State*, 823 N.E.2d 679, 686 (Ind. 2005), *cert. denied*, 546 U.S. 976 (2005). An exception to this rule is the fact of a prior conviction. *Blakely*, 542 U.S. at 301.

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provide for an "advisory" rather than "presumptive" sentence. *See* P.L. 71-2005, § 7 (eff. Apr. 25, 2005). The change from presumptive to advisory sentences should not be applied retroactively because the change alters a defendant's right to "have aggravating circumstances submitted to a jury and found beyond a reasonable doubt before a presumptive sentence is enhanced." *Weaver v. State*, 845 N.E.2d 1066, 1071 (Ind. Ct. App. 2006), *trans. denied*. Thus, we shall analyze the propriety of Richardson's sentence under the presumptive regime.

At the time of Richardson's offense, the statutory sentencing range for a class B felony was six to twenty years, with the presumptive sentence being a fixed term of ten years with not more than ten years added for aggravating circumstances. I.C. § 35-50-2-5 (amended 2005).

Here, the trial court found only one aggravating circumstance—Richardson's criminal history. We find no error.[4]

2. Inappropriate Sentence

Richardson also argues that his sentence is inappropriate in light of his character because "[t]here is no evidence that [he] had anything mo[r]e than misdemeanor convictions over a span of many years[.]" Richardson's Br. 5. We may revise a sentence authorized by statute if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). "When considering the appropriateness of the sentence for the crime committed, the sentencing court should focus initially on the presumptive sentence." *Rose v. State*, 810 N.E.2d 361, 368 (Ind. Ct. App. 2004). The trial court may deviate from the presumptive sentence based on general sentencing considerations contained in Indiana Code section 35-38-1-7.1, as well as aggravating and mitigating circumstances. *Id.*

Our review of the nature of the offense reveals that Richardson attempted to steal anhydrous ammonia in order to manufacture methamphetamine. As to his character, Richardson has several prior convictions, including one for possession of paraphernalia in

[4] We further note that Richardson signed an advisement of rights and waiver, which provided as follows: "You further specifically waive the right to have a jury determine aggravating factors, and consent to a judicial fact-finding for purposes of establishing aggravating . . . circumstances and agree[] that the court may rely upon information contained within any pre-sentence investigation report . . . ." (App. 24). By accepting the plea agreement, Richardson has waived any argument that any aggravating circumstances found must have been proven beyond a reasonable doubt. *See Strong v. State*, 820 N.E.2d 688, 690 (Ind. Ct. App. 2005) (finding that defendants may waive their rights to have aggravators proven beyond a reasonable doubt by consenting to judicial fact finding), *trans. denied*.

2003. Based upon all of the above, we find that both the nature of the offense and the character of the offender support Richardson's sentence.

Affirmed.

MAY, J., and CRONE, J., concur.