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**IN THE
COURT OF APPEALS OF INDIANA**

DEREK PAOLUCCI,)
)
Appellant-Defendant,)
)
vs.) No. 45A04-0704-CR-221
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Salvador Vasquez, Judge
Cause No. 45G01-0604-MR-5

December 14, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Derek Paolucci (“Paolucci”) appeals his sentences for reckless homicide, a Class C felony, and carrying a handgun without a license as a Class C felony. He argues that the trial court abused its discretion by imposing an aggregate sentence of eleven years and by failing to find remorse as a mitigating factor. Finding no error, we affirm.

Facts and Procedural History

On April 4, 2006, shortly after 7:00 p.m., officers from the Hammond Police Department responded to a report of shots fired at 5945 Hyslop Place. Twenty-two-year-old Paolucci told the officers that his father, Howard Paolucci (“Howard”), shot Paolucci’s girlfriend, sixteen-year-old Candace Mejia (“Mejia”). In turn, Howard accused Paolucci of shooting Mejia. Subsequently, the two men were placed in separate patrol vehicles, and an evidence technician performed gun residue tests on both Paolucci and his father. Gunshot residue was detected on Paolucci but not on Howard. Later that evening, Paolucci admitted that he stole a gun the previous day and shot Mejia. Mejia died as a result of a gunshot wound to her head.

The State charged Paolucci with Count I, murder,¹ and Count II, reckless homicide, a Class C felony.² Thereafter, the State amended the information and added Count III, carrying a handgun without a license as a Class C felony.³ After a jury trial, the jury found Paolucci not guilty of murder but guilty of reckless homicide and carrying

¹ Ind. Code § 35-42-1-1.

² Ind. Code § 35-42-1-5.

³ Ind. Code § 35-47-2-1, 35-47-2-23(c). Paolucci was convicted of a felony in 2003, which elevated this offense to a Class C felony.

a handgun without a license. The trial court sentenced Paolucci to seven years on Count II and four years on Count III and ordered the sentences to be served consecutively, for an aggregate sentence of eleven years. Paolucci now appeals.

Discussion and Decision

Paolucci raises two issues on appeal: (1) whether the trial court abused its discretion by sentencing him to consecutive sentences totaling eleven years and (2) whether the trial court abused its discretion by failing to find remorse as a mitigating factor.

I. Length of Sentence

Paolucci first argues that the trial court abused its discretion by sentencing him in excess of the statutory limitation imposed by Indiana Code § 35-50-1-2(c). Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *reh'g granted on other grounds*, 875 N.E.2d 218 (Ind. 2007). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances. *Id.* In some cases, the trial court's discretion when imposing consecutive sentences is restricted by statute. Indiana Code § 35-50-1-2(c) provides, in part:

The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. However, except for crimes of violence, the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under IC 35-50-2-8 and IC 35-50-2-10, to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

Paolucci argues that Indiana Code § 35-50-1-2(c) applies here and that his aggregate sentence may not exceed ten years, the advisory sentence for a Class B felony. Ind. Code § 35-50-2-5. It is undisputed that reckless homicide is a crime of violence. Ind. Code § 35-50-1-2(a)(5). However, carrying a handgun without a license is not delineated as a crime of violence under Indiana Code § 35-50-1-2(a). Paolucci argues that, because carrying a handgun without a license is not a crime of violence, Indiana Code § 35-50-1-2(c) limits his sentence. Paolucci contends that the rule of lenity should apply and require that both crimes be crimes of violence for an aggregate sentence greater than ten years to be permissible. However, our Supreme Court addressed this precise issue in *Ellis v. State*, where it held,

Adherence to this rule requires that we interpret the statute to exempt from the sentencing limitation (1) consecutive sentencing among crimes of violence, and (2) consecutive sentencing between a crime of violence and those that are not crimes of violence. However, the limitation should apply for consecutive sentences between and among those crimes that are not crimes of violence.

736 N.E.2d 731, 737 (Ind. 2000). Thus, because reckless homicide is a crime of violence, Indiana Code § 35-50-1-2(c) did not limit the trial court's discretion in imposing consecutive sentences totaling more than ten years. The trial court did not abuse its discretion in imposing an aggregate eleven-year sentence.⁴

II. Mitigating Factor

Paolucci also contends that the trial court abused its discretion by failing to recognize his remorse as a mitigating factor. On appeal, our review of a trial court's

⁴ Paolucci also argues that his convictions arose out of a single "episode of criminal conduct." See I.C. § 35-50-2-1(c). We do not reach this argument because the "crimes of violence" issue is dispositive.

determination of a defendant's remorse is similar to our review of credibility judgments: without evidence of some impermissible consideration by the trial court, we accept its determination. *Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002). At his sentencing hearing, Paolucci argued that he was very remorseful. However, Paolucci initially blamed his father for the shooting, Appellant's App. p. 9, and the trial court did not find him remorseful, Tr. p. 455. Because the trial court hears and sees testimony, it is in the best position to judge the sincerity of a defendant's remorsefulness. *Stout v. State*, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005), *trans. denied*. We discern no impermissible consideration in this case. Therefore, we find no error.

Affirmed.

BAKER, C.J., and BAILEY, J., concur.