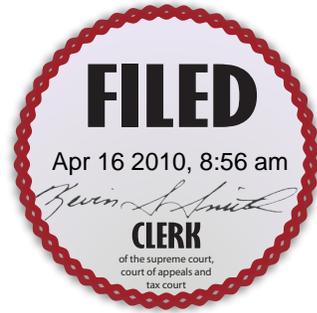


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ARVIL R. HOWE
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

MICHAEL LLOYD LINDSEY,)

Appellant-Defendant,)

vs.)

No. 71A03-0910-CR-486

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
Cause No. 71D03-0903-FB-18

April 16, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Michael Lindsey appeals his forty-year sentence for Class B felony attempted criminal confinement and Class B felony criminal confinement. We affirm and remand.

Issues

Lindsey raises two issues, which we restate as:

- I. whether the trial court properly determined that his actions were not a single episode of criminal conduct; and
- II. whether his sentence is inappropriate.

The State raises another issue, which we restate as whether the trial court should have ordered this sentence to run consecutive to any sentence imposed on Lindsey's parole violation.

Facts

On July 31, 2008, Lindsey was released from the Department of Correction ("DOC") after serving a twenty-six year sentence for rape and child molesting. On February 24, 2009, Lindsey, in an alleged attempt to "flee the jurisdiction" to avoid the revocation of his parole, approached a woman, Kellie Parker, in a Mishawaka parking lot while armed with a screwdriver and tried to force her into her car. Guilty Plea Hr. Tr. p. 43. Parker screamed, and Lindsey fled to his home. While at his home, Lindsey grabbed some money and a kitchen knife. Lindsey left on foot, went to a bank to withdraw more money, and tried to call a taxi to take him to the bus station. Lindsey was unable to call a taxi and noticed several police officers in the area. Assuming the police officers were looking for him, Lindsey went behind some buildings to stay out of sight. Lindsey then

saw another woman, Lyra Tirota, getting into her car. Lindsey approached her with a knife, forced her into the car, and drove to another county. Lindsey eventually let Tirota go, and he was later arrested.

The State charged Lindsey with one count of Class B felony attempted criminal confinement and one count of Class B felony criminal confinement. Lindsey pled guilty to the charges. At the sentencing hearing, the trial court determined that the offenses were not a single episode of criminal conduct, sentenced Lindsey to twenty years on each count, and ordered the sentences to be served consecutively. Lindsey now appeals.

Analysis

I. Single Episode of Criminal Conduct

Lindsey argues that, because his actions amounted to a single episode of criminal conduct, his sentence should have been capped at thirty years. Indiana Code Section 35-50-1-2(c) provides, “except for crimes of violence, the total of the consecutive terms of imprisonment . . . 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.” The advisory sentence for a Class A felony, the next highest class of felony here, is thirty years. See Ind. Code § 35-50-2-4. An “‘episode of criminal conduct’ means offenses or a connected series of offenses that are closely related in time, place, and circumstance.” I.C. § 35-50-1-2(b).

In Smith v. State, 770 N.E.2d 290 (Ind. 2002), our supreme court addressed whether depositing six forged checks at six different banks over the course of three hours

constituted a single episode of criminal conduct. The Smith court observed that the timing of the offenses was important and that simultaneous and contemporaneous crimes would constitute a single episode of criminal conduct. Smith, 770 N.E.2d at 294. The court concluded that Smith’s actions were neither simultaneous nor contemporaneous with one another. Id. The court also observed that it could recount each of the forgeries without referring to the other forgeries. Id. Specifically, “Each forgery occurred at a separate time, separate place and for a separate amount of money from the other.” Id. The court concluded that Smith’s conduct did not constitute a single episode of criminal conduct under Indiana Code Section 35-50-1-2.

Here, Lindsey attempted to force Parker into a car with a screwdriver. When Parker resisted, Lindsey fled to his home where he retrieved money and a knife. Lindsey then went to a bank and withdrew more money. On his way to the bus station, Lindsey saw Tirotta getting into her car, threatened her with the knife, and drove her to another county before letting her go. As in Smith, Lindsey’s conduct was neither simultaneous nor contemporaneous. Although Lindsey’s goal may have been the same in both instances—to flee the jurisdiction—the offenses involved two different victims at two different locations and occurred at least a half an hour apart. The trial court properly concluded that the offenses were not a single episode of criminal conduct.

II. Inappropriate Sentence

Lindsey also argues that his forty-year sentence is inappropriate in light of the nature of the offense and the character of the offender. See Ind. Appellate Rule 7(B). Although Indiana Appellate Rule 7(B) does not require us to be “extremely” deferential

to a trial court's sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. "Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id. The principal role of Rule 7(B) review "should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived 'correct' result in each case." Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008). We "should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count." Id.

Lindsey claims we should revise his sentence because the trial court did not consider his guilty plea and because the trial court alluded to the fact that his conduct, as it related to Tirota, could have been charged as Class A felony kidnapping. Lindsey also asserts, "that at no time did he commit other crimes although it had only been seven (7) months since he had gotten out of prison, but he had spent and done exemplary things while in prison for the twenty-seven (27) years." Appellant's Br. p. 7.

Lindsey did not include his pre-sentence investigation report in his appendix on appeal, which severely limits our ability to consider the merits of his claims. Nevertheless, when considering the nature of the offenses and the character of the offender, we cannot conclude that Lindsey's forty-year sentence is inappropriate.

Lindsey attempted to force Parker into her car using a screwdriver. Despite having his own car, Lindsey wanted to avoid apprehension when he fled the jurisdiction.

Lindsey was fleeing because he feared his parole would be revoked after he lost his job. When this effort failed, Lindsey drove to his house and retrieved money and a knife. Lindsey then walked to a bank and withdrew more money, walked behind buildings to avoid police, and then used the knife to force Tirota into her car. Lindsey drove her to another county where he left her in the cold. Lindsey admitted that it crossed his mind “to do something sexual” because he had nothing left to lose, but could not bring himself to do it. Sentencing Hr. Tr. p. 61. Nothing about the nature of these offenses warrants a reduction of his sentence.

As for his character, although Lindsey is obviously very religious and remorseful and pled guilty, his criminal history is significant. Lindsey was incarcerated when he was twenty-one for rape and child molesting. Only seven months after he was released from the prison, Lindsey committed these offenses. The fact that Lindsey felt ill-prepared to function outside of prison does not justify the commission of subsequent crimes in an attempt to flee the jurisdiction. Lindsey’s character does not warrant a reduction of his sentence. Lindsey has not established that his sentence is inappropriate.

III. Consecutive Sentence to Parole Violation Sentence

Finally, the State argues that, because Lindsey was on parole when he committed these offenses, the trial court was statutorily required to order this sentence to be served consecutive to any sentence imposed on the parole violation. Indiana Code Section 35-50-1-2(d) provides:

If, after being arrested for one (1) crime, a person commits another crime:

(1) before the date the person is discharged from probation, parole, or a term of imprisonment imposed for the first crime; or

* * * * *

the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed.

At the guilty plea hearing, Lindsey admitted he was on parole when he committed the offenses and stated that he had “already pled guilty to the parole violation.” Guilty Plea Hr. Tr. pp. 16-17. Because Lindsey had not been discharged from parole when he committed the February 24, 2009 offenses, the trial court should have ordered the forty-year sentence to be served consecutive to any sentence imposed for the parole violation. Thus, we remand for the trial court to determine whether a sentence was imposed for a parole violation and, if so, to order this sentence to be served consecutive to that sentence.

Conclusion

These offenses were not a single episode of criminal conduct, and Lindsey has not established that his sentence was inappropriate. We remand for the trial court to determine whether a sentence was imposed for the violation of Lindsey’s parole and, if it was, to order this sentence to be served consecutive to that sentence. We affirm and remand.

Affirmed and remanded.

BAILEY, J., and MAY, J., concur.