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.

FILED
Jun 08 2009, 9:25 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

ANNA E. ONAITIS
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

GARY DAMON SECREST
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ROY ROMAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 84A01-0811-CR-535
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable David R. Bolk, Judge
Cause No. 84D03-0410-FC-2728

June 8, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Roy Roman ("Roman") was convicted after a jury trial of nonsupport of a dependent child in an amount greater than $15,000,[1] a Class C felony. The trial court sentenced him to four years in prison. He appeals, raising the following issues:

I. Whether Roman presented sufficient evidence to establish his affirmative defense that health problems rendered him unable to provide support; and

II. Whether Roman's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

FACTS AND PROCEDURAL HISTORY

Roman and Sally Foltz are the parents of two sons, who were twenty and eighteen years old at the time of trial. *Trial Tr*. at 62-63, 83. On January 19, 1995, a Vigo Circuit Court ordered Roman to pay Foltz child support in the amount of $45.00 per week, per child, beginning on January 27, 1995. *Id*. at 36-37, 83. From 1995 to 1997, Roman lived in Wisconsin and did not make any child support payments. *Id*. at 39-40, 66-67, 117-18. During that time period, Roman was employed at Schuster Metals in Milwaukee for approximately a year.

Roman returned to Indiana in 1997 and was employed at Benchmark Metals for approximately one year. *Id*. at 87, 107, 112. In late February 1998, Roman visited Dr. Oscar Limcaco complaining of back pain and bilateral leg pain. *Id*. at 125. Dr. Limcaco conducted a myelogram[2] for diagnostic purposes on February 27, 1998 and then

[1] *See* Ind. Code § 35-46-1-5(a).

[2] A diagnostic test where dye is inserted into the patient's spinal column and a CT scan is performed. *Def.'s Ex.* I.

performed a hemilaminectomy[3] on Roman in late March 1998. Dr. Limcaco identified Roman as "totally incapacitated" pending the completion of the diagnosis and operation. *Def.'s Ex.* B, C. Roman visited Dr. Limcaco numerous times during the remainder of 1998 for post-surgical follow-up and because he continued to experience pain. Dr. Limcaco ordered Roman to obtain a custom-fitted back brace in May 1998, but two months later, he had not yet obtained one. On a June 1998 visit, Dr. Limcaco ordered Roman to begin physical therapy "to strengthen his back in preparation for his release to go back to work," and when Roman returned for another appointment a month later, he was deficient in attending physical therapy.

Roman was terminated from Benchmark Metals sometime between July and December of 1998. *Id*. at 108. Although Roman claims to have injured his back while working at Benchmark Metals, he never filed a worker's compensation claim. *Id*. at 125, 133. Roman again visited Dr. Limcaco in April 1999 when experiencing back pain after falling off a ladder while working as a painter. *Id*. at 101, 108. He was seen at the emergency room at Union Hospital in July 2001 for lower back pain. *Id*. at 103. Roman filed numerous applications for Social Security Disability, but each request was denied. *Id*. at 105, 106.

In 1998, Roman paid a total of $400 in child support. *Id*. at 40. Roman made no payments toward his child support obligation for either child in 1999 or 2000. *Id*. at 40, 53. From March 2001 through 2004, Roman was subject to five civil contempt hearings

[3] A procedure where portions of the vertebral bone are removed. *Def.'s Ex.* G.

in the Vigo Circuit Court. At the last four of these hearings, Roman advised the court that he held some form of employment at the time of the hearing. At the last civil contempt hearing in August 2004, the court found support arrearages for Roman's oldest son to be $16,539.50 and for his youngest son to be $17,408.50.

The State filed charges against Roman in October 2004 for nonsupport of a dependent child in an amount of at least $15,000.00, a Class C felony. Roman was tried before a jury in August 2008. The State calculated that, as of April 30, 2004, Roman owed arrearages in the amounts of $16,162.50 and $17,032.50 for his oldest and youngest sons, respectively. Roman argued the affirmative defense of inability to pay due to his medical conditions. The jury rejected the defense and returned a guilty verdict. The trial court sentenced Roman to four years executed and ordered him to pay $45,045.77 in restitution, the amount of arrearages at the time of sentencing. Roman now appeals.

DISCUSSION AND DECISION

I. Sufficiency of Evidence

Roman first contends that he introduced sufficient evidence to establish his affirmative defense of inability to provide support. Inability to provide support is an affirmative defense to a charge of nonsupport of a dependent. Ind. Code §35-46-1-5(a). The defendant bears the burden of proving his or her inability to pay. *Stephens v. State*, 874 N.E.2d 1027, 1034 (Ind. Ct. App. 2007), *trans. denied, cert. denied* (2008). Thus, Roman is appealing from a negative judgment, and we will reverse only if the decision of the trial court is contrary to law. *Id.* When assessing the trial court's decision, we must

determine whether the undisputed evidence and all reasonable inferences lead to one conclusion, and the trial court reached a different conclusion. *Id*. At trial, Roman presented evidence of back problems tending to support his inability to maintain employment and pay child support: back surgery in 1998; the visit to Dr. Limcaco's office in 1999; and the visit to the emergency room at Union Hospital in 2001. Roman did not provide any corroborating evidence of back pain or treatment subsequent to the 2001 hospital visit. Although he claims he was unable to work, the record reflects that, , Roman held some form of employment after his back surgery. Additionally, Roman was never successful in his multiple attempts to receive a Social Security disability rating due to his back pain. Finally, Roman failed to make support payments prior to the onset of back pain. The jury, as the finder of fact, could have reasonably inferred that Roman did not have an inability to pay his child support obligation. The undisputed evidence and the reasonable inferences therefrom do not lead to a conclusion different from that of the jury. Accordingly, we affirm.

II. Inappropriate Sentence

Appellate courts may revise a sentence after careful review of the trial court's decision if they conclude that the sentence is inappropriate based on the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). The defendant bears the burden of persuading the court that his sentence is inappropriate. *Childress v. State,* 848 N.E.2d 1073, 1080 (Ind. 2006). We will give due consideration and deference to the trial court's sentencing decision. *Stewart v. State,* 866 N.E.2d 858, 866 (Ind. Ct. App. 2007).

Roman was convicted of a Class C felony and received the advisory sentence of four years in accordance with Indiana Code section 35-50-2-6(a). He argues that his sentence was inappropriate in light of the nature of the offense and the character of the offender. In particular, Roman asserts that his sentence should be reduced or completely suspended due to his health problems, his need for medication, and that the sentence further prevents him from paying his outstanding child support debt. *Appellant's Br.* at 8.

As to the nature of the offense, the evidence shows that Roman, at the time he was criminally charged, had failed to pay child support for ten years and had accumulated arrearages in excess of $16,000 for each of his dependent children. *State's Ex*. 4 at 1; *State's Ex*. 5 at 1. The length of time of nonpayment and the amount of arrearage is a proper aggravating circumstance and may be used to enhance a sentence. *Jones v. State*, 812 N.E.2d 820, 826 (Ind. Ct. App. 2004).

As to Roman's character, the evidence showed that Roman had a criminal history of four misdemeanor convictions. Although the trial court did not consider his "minimal" criminal history a "significant factor" in sentencing, the record before us reveals that Roman has been convicted of battery (1994), criminal mischief (1998), domestic battery (1998), and resisting law enforcement (2008). *Sent. Tr.* at 32. For each of these crimes, Roman received either probation or his sentences were suspended. Roman showed a disregard for the law in that he continued to accrue arrearages from 2001 to 2004 despite five civil contempt hearings. *Trial Tr*. at 47-50, 122. He now owes arrearages for each child, which together total more than $45,000. *Sent. Tr.* at 5-7.

In light of the nature of his offense and Roman's character and considering

Roman's longstanding failure to pay, even when he was working, we do not find that his sentence of four years for a Class C felony conviction was inappropriate.

Affirmed.

RILEY, J., and MATHIAS, J., concur.