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**IN THE
COURT OF APPEALS OF INDIANA**

SURESHBHAI B. PATEL,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 75A05-0611-CR-652

APPEAL FROM THE STARKE CIRCUIT COURT
The Honorable Walter Chapala, Senior Judge
Cause No. 75C01-0508-FB-019

June 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Sureshbhai B. Patel appeals his conviction for Deviate Sexual Conduct,¹ a class B felony. Specifically, Patel contends that Judge Chapala improperly presided over this case, that the trial court erroneously failed to provide a qualified interpreter, and that the trial court erroneously denied his motion to withdraw his guilty plea. Patel also challenges the sentence imposed by the trial court, arguing that the trial court improperly ordered him to pay \$10,000 to the victim's assistance account and that the sentence was inappropriate in light of the nature of the offense and his character. Finding that the relevant statute provides that the court may impose, at most, a \$1000 sexual assault victim's assistance fee and finding no other error, we affirm in part, reverse in part, and remand with instructions to amend the sentencing order to reflect that Patel shall pay \$1000 to the victim's assistance account.

FACTS

On August 22, 2005, Patel inserted his fingers into L.J.'s vagina by force and without her consent. On August 26, 2005, the State charged Patel with class B felony criminal deviate conduct. Patel understands some conversational English but does not understand English well enough to engage in a meaningful conversation about "legal stuff[.]" Plea Tr. p. 5-6. The trial court provided a certified interpreter for Patel's initial hearing, but at all subsequent proceedings, Patel had family members who interpreted on his behalf.

On June 23, 2006, Patel pleaded guilty as charged pursuant to a plea agreement that capped his executed sentence at ten years and dismissed all pending, unrelated matters. At

¹ Ind. Code § 35-42-4-2.

the guilty plea hearing, Patel informed the trial court that his son, Manish Patel, would be a sufficient interpreter for that proceeding. The trial court ascertained that Manish had lived in the United States for almost ten years and had passed an English proficiency examination before he obtained his job with the United States Postal Service, which he had held for seven years. The trial court emphasized to Manish that he must inform the court if he did not understand something and that he must ensure that his father understood exactly what was happening in the courtroom. The court advised Patel regarding the possible penalties he faced and confirmed that Patel's attorney had discussed the nature of the charges and potential penalties with Patel and that Patel understood those matters and the terms of the plea agreement. Patel admitted to a factual basis to support the charge.

The trial court took the guilty plea under advisement and ordered Patel to undergo a psychosexual evaluation. The report filed following the psychosexual evaluation indicated that during that interview, Patel had denied committing the offense. At the start of the sentencing hearing on August 25, 2006,² the trial court sua sponte questioned Patel about whether he had denied committing this act during that interview:

Q. . . . when [Patel] did the assessment, the psychosexual assessment, he indicated to the person doing the assessment that he did not commit the act he's charged with. Ask him if he made that statement?

A. He says he did not understand what she was asking him at that time.

Q. Okay. In the—when I took his plea of guilty, he admitted to attempting to rape the victim in this case. Is that still his position?

A. He says yeah. (Inaudible.)

² At the sentencing hearing, Patel's other son, Sasheen "Sonny" Patel, acted as interpreter.

Q. Pardon?

A. He says yeah. He is (inaudible). He is taking the plea guilty.

THE COURT: . . . The Court is going to proceed on with sentencing. I'm satisfied that the statement made [during the psychosexual evaluation] was an error At the plea entry, he did enter a plea with two sons being interpreters and admitted the act at that point. And with his admission today that his statement to [the evaluator] was not correct, that he did commit the act, I am going to proceed on with the sentencing.

Sent. Tr. p. 5-7.

Following that exchange, Patel's attorney moved to withdraw the guilty plea, arguing, among other things, that Patel had not

appeared in court with a certified interpreter, nor has he appeared in court with an interpreter that has been sworn in to accurately interpret the conversations that are held. Your Honor, it's my fear that—it's my fear that this is not a free and voluntary act on the part of my client.

Id. at 8. The trial court denied the motion, finding that Patel had agreed at the guilty plea hearing that his sons were competent interpreters.

The trial court imposed the advisory ten-year sentence on Patel but stated that, because of Patel's age—sixty-four—the sentence would be reduced to seven years if Patel paid a \$10,000 fee to the victim's assistance account and \$2,245.80 in restitution to the victim. Patel now appeals.

DISCUSSION AND DECISION

I. Patel's Objection to Judge Chapala

Patel first contends that Judge Chapala improperly presided over his case because the judge was not appointed as a special judge and lacked jurisdiction as a result. The record reveals that Judge Chapala was not serving as a special judge in this case; rather, he was a senior judge who was appointed to the case by Judge Hall.³

Even if we assume for argument's sake that the way in which Judge Chapala assumed jurisdiction in this case was improper, Patel cannot succeed on this basis. Initially, we observe that this argument is a challenge to the validity of his conviction—an argument Patel may not pursue on appeal because, by pleading guilty, Patel waived the right to contest the validity of his conviction on direct appeal. See Tumulty v. State, 666 N.E.2d 394, 395 (Ind. 1996) (holding that once judgment is entered, a defendant may not challenge his guilty plea on direct appeal; the correct avenue for such claims is post-conviction relief). Moreover, this is essentially a challenge to the trial court's personal jurisdiction over Patel and/or an argument that there was a procedural irregularity in the appointment of the judge—both of which are waived when, as here, the defendant fails to object at the time of the alleged error. See K.S. v. State, 849 N.E.2d 538, 540 (Ind. 2006) (holding that arguments regarding

³ The Honorable Kim Hall is the elected judge in Starke Circuit Court. Patel argues that Judge Hall should have recused himself, inasmuch as he is the uncle of Patel's attorney. Although Judge Hall does not appear to have entered a formal recusal order, the record reveals that he did not preside over any matter in this case. Magistrate Mary DeBoer presided over the initial hearing, Senior Judge Raymond Kickbush presided over the pretrial conferences and hearings, and Judge Chapala presided over the guilty plea, sentencing, and motion to correct error hearings. Consequently, even if we assume for argument's sake that Judge Hall should have recused himself, the failure to do so formally was merely a harmless error, inasmuch as he did not preside over any matter in this case.

“jurisdiction of the case,” which refers to procedural errors or irregularities in the case, are waived if not objected to in a timely fashion); Twyman v. State, 459 N.E.2d 705, 707 (Ind. 1984) (holding that an argument regarding personal jurisdiction is waived if defendant fails to make a timely objection). Therefore, we decline to find that Judge Chapala improperly assumed jurisdiction of this case.

II. Provision of a Certified Interpreter

Patel next argues that the trial court erroneously failed to provide him with a certified interpreter at all stages of the proceedings below following the initial hearing. Initially, we again observe that this argument is a challenge to Patel’s conviction and he is not entitled to raise it on direct appeal following a guilty plea. Tumulty, 666 N.E.2d at 395. Furthermore, we note that Patel suggested that his son, Manish, act as the interpreter at the guilty plea hearing and that Patel’s son, Sonny, acted as the interpreter at the sentencing hearing. At no point did Patel object to the lack of a certified interpreter. Consequently, Patel has invited this alleged error and waived the argument, and we therefore decline to address it. See Wright v. State, 828 N.E.2d 904, 907 (Ind. 2005) (holding that under the doctrine of invited error, ““a party may not take advantage of an error that she commits, invites, or which is the natural consequence of her own neglect or misconduct””) (quoting Witte v. Mundy, 820 N.E.2d 128, 133 (Ind. 2005)).⁴

⁴ We note that another panel of this court expounded very recently on the circumstances under which a trial court should consider appointing an interpreter and the standard of review to be applied to such a decision:

Whenever a trial court is put on notice that a defendant has a significant language difficulty, the court shall make a determination of whether an interpreter is needed to protect the defendant’s due process rights. A trial court is put on notice of a

III. Withdrawal of Guilty Plea

Next, Patel contends that the trial court erred by refusing to permit him to withdraw his guilty plea. At the outset, we acknowledge that a defendant is entitled to contest on direct appeal the trial court's denial of a motion to withdraw a guilty plea. Tumulty, 666 N.E.2d at 395-96.

After a guilty plea is entered, but before a sentence is imposed, a defendant may move to withdraw his guilty plea for any fair and just reason unless the State has been substantially prejudiced by its reliance upon the plea. Ind. Code § 35-35-1-4(b); Brightman v. State, 758 N.E.2d 41, 44 (Ind. 2001). The defendant must prove by a preponderance of the evidence that the withdrawal is necessary to correct a manifest injustice. I.C. § 35-35-1-4(b). Absent such a showing, the decision to grant or deny the motion is solely within the trial court's discretion. Id.

As such, we review the trial court's denial of a motion to withdraw guilty plea for an abuse of discretion. Id. On appeal, the trial court's ruling is cloaked with a presumption of

potential language barrier when a defendant manifests a significant language difficulty or when an interpreter is specifically requested. The court's decision as to whether an interpreter is needed should be based on factors such as the defendant's understanding of spoken and written English, the complexity of the proceedings, issues, and testimony, and whether, considering those factors, the defendant will be able to participate effectively in his defense. Absent such indications, however, the court is under no obligation to inquire into the defendant's need for an interpreter.

A trial court's decision whether to appoint an interpreter is reviewed for an abuse of discretion. . . . The abuse of discretion standard applies if the issue of appointing an interpreter is raised at the trial court level, either by the parties or by the court on its own motion. Where no request is made for an interpreter and the record shows that the defendant has no significant language difficulty, a trial court does not abuse its discretion by failing to appoint an interpreter.

validity. Brightman, 758 N.E.2d at 44. We will not reverse the trial court's ruling if it was based on conflicting evidence. Johnson v. State, 734 N.E.2d 242, 245 (Ind. 2000).

A motion to withdraw a guilty plea must be in writing and verified and must state facts in support of the relief demanded. I.C. § 35-35-1-4(b). When the defendant fails to submit a written, verified motion to withdraw a guilty plea, the issue has been waived. Smith v. State, 593 N.E.2d 1208, 1209 (Ind. Ct. App. 1992). Here, Patel failed to submit a written, verified motion to withdraw. Instead, his attorney made an oral motion to withdraw the guilty plea during the sentencing hearing. Consequently, Patel has waived this issue.

Waiver notwithstanding, Patel moved to withdraw his guilty plea based on his statement during the psychosexual evaluation that he did not commit the underlying offense and based on the lack of a certified interpreter at the guilty plea hearing. As to his statement during the evaluation, the trial court found that Patel had repudiated any such assertion of innocence when Patel clarified the situation at the sentencing hearing. Specifically, Patel informed the trial court that he had misunderstood the evaluator's question and that it was still his position that he was guilty.

Moreover, a trial court is forbidden to accept a guilty plea only if the defendant asserts his innocence at the same time that he is attempting to plead guilty; if he pleads guilty and then professes his innocence at a later time, his guilty plea is still valid and the court is not required to allow the withdrawal of the plea. Carter v. State, 739 N.E.2d 126, 128-31 (Ind.

Nur v. State, --- N.E.2d ---, No. 49A02-0606-CR-486, slip op. p. 6-7 (Ind. Ct. App. June 6, 2007) (footnotes omitted).

2000). Thus, the trial court did not abuse its discretion in concluding that Patel's statement to the evaluator, which occurred nearly one month after he pleaded guilty and which he later repudiated, was an insufficient basis on which to withdraw the guilty plea.

As to the lack of a certified interpreter at the guilty plea hearing, we have already observed that Patel suggested that his son, Manish, act as interpreter during that hearing. Patel did not request that the trial court appoint an interpreter at that time. Furthermore, the record reveals that Manish has lived in this country for ten years, that he has passed an English proficiency examination, and that he has worked for the United States Postal Service for seven years. Patel has provided no citation to the record establishing that Manish's interpretation was inaccurate or flawed. Patel has not established, therefore, that the lack of a certified interpreter in any way rendered his guilty plea unreliable. The trial court carefully and meticulously ensured that Patel understood the charges and possible penalties that he was facing and the terms of his guilty plea. Given that it was Patel's suggestion that Manish act as the interpreter, that Manish is a proficient English speaker, that there is no evidence of interpretation errors, and that the trial court found that Patel understood the proceedings and their import, we find that the trial court did not abuse its discretion by denying Patel's motion to withdraw his guilty plea.

IV. Sentence

A. Victim's Assistance Account

The trial court ordered Patel to pay \$10,000 to the “Victim’s Assistance Fund.” Appellant’s App. p. 152. Patel argues that no such fund exists; consequently, he insists, the fine is illegal.

Indiana Code section 33-37-4-1 states that a “sexual assault victims assistance fee” may be collected from a defendant if it is required under Indiana Code section 33-37-5-23. I.C. § 33-37-4-1(b)(14). Indiana Code section 33-37-5-23, in turn, specifically requires that the court “shall assess” a “sexual assault victims assistance fee” against a defendant who has been convicted of criminal deviate conduct, among other things. I.C. § 33-37-5-23(b)(2). Additionally, Indiana Code section 4-23-25-11 specifically establishes a “sexual assault victim’s assistance account” that is created, in part, from the fees collected pursuant to Indiana Code section 33-37-5-23.

Patel seems to argue that because the trial court used the word “fund” rather than “account,” the fine is illegal. Initially, we note that this argument elevates form over substance to a point that pushes the bounds of credibility. Furthermore, we observe that the former statute⁵ regulating this account provided for the creation of a “sexual assault victim’s assistance fund,” which was funded in part by the fees collected pursuant to Indiana Code section 33-37-5-23. As of March 21, 2006, that statute was repealed, but the new

⁵ That statute, repealed by the same Public Law that enacted Indiana Code section 4-23-25-11, was formerly codified at Indiana Code section 16-19-13-6.

terminology—referring to an “account” rather than a “fund”—had been in effect for only a few months at the time the trial court sentenced Patel. Consequently, it is apparent that the trial court’s terminology was merely a few months out of date, and we find that the trial court properly ordered Patel to pay a fine to the sexual assault victim’s assistance account.

As the State concedes, however, the statute provides that the amount of the fine is limited to a maximum of \$1000. I.C. § 33-37-5-23(b). Thus, the trial court erred by ordering Patel to pay \$10,000 into the account and we remand with instructions to amend the sentencing order to reflect that Patel shall pay \$1000 to the victim’s assistance account.

B. Appropriateness

Finally, Patel argues that the sentence imposed by the trial court is inappropriate in light of the nature of the offense and his character. Patel is subject to Indiana’s amended sentencing statutes because he committed the instant offense and was sentenced after the statute’s effective date of April 25, 2005. Under the amended sentencing scheme, a defendant may no longer claim that a trial court abused its discretion under statutory guidelines in imposing the sentence. See Ind. Code § 35-38-1-7.1(d) (providing that a trial court “may impose any sentence that is . . . authorized by statute . . . regardless of the presence or absence of aggravating circumstances or mitigating circumstances”) (emphasis added).

Thus, our review is now confined to an analysis under Indiana Appellate Rule 7(B): “The Court 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.” We also observe, however, that we are entitled to consider, among other things, aggravating and mitigating factors found—or not found—by the trial court as we conduct a Rule 7(B) review. See, e.g., Prowell v. State, 787 N.E.2d 997, 1005 (Ind. Ct. App. 2003) (considering statutory aggravators and mitigators as part of an analysis of the character of the offender); Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003) (same).

Initially, we observe that Patel entered into a plea agreement that capped his executed sentence at ten years. Although he is entitled to argue that the ten-year sentence imposed by the trial court was inappropriate, we note that courts evaluating the appropriateness of a sentence following a capped plea agreement should award relief “only in the most rare, exceptional cases.” Childress v. State, 848 N.E.2d 1073, 1083 (Ind. 2006) (Dickson, J., concurring). Ten years is the advisory sentence for a class B felony. I.C. § 35-50-2-5. Consequently, Patel must carry a heavy burden to establish that his is the rare, exceptional case warranting relief.

As to the nature of the offense, Patel forced his finger into L.J.’s vagina. The assault has caused L.J. to suffer from health problems and a great deal of trauma. Her dentures were shattered during the attack and had to be replaced, she has had to undergo counseling, and she had to go to the hospital and receive post-assault care from doctors.

As to the nature of Patel’s character, Patel committed a prior battery for which he was given a pretrial diversion and ordered to complete sexual harassment counseling. Another woman testified at the sentencing hearing that she lived at the motel operated by Patel and

that he has fondled her breasts on more than one occasion, tried to put his hand down her pants, and grabbed and kissed her. When the trial court asked Patel if there was anything he wanted to say, he merely complained about his health problems. Patel expressed no remorse for his conduct, nor did he apologize to the victim.

The trial court took Patel's age of sixty-four into account, reducing his executed sentence to seven years—only one year above the statutory minimum—if Patel paid restitution and the fine to the victim's assistance account. Under these circumstances, we find that the seven-year executed sentence imposed by the trial court is not inappropriate in light of the nature of the offense and Patel's character.

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions to amend the sentencing order to reflect that Patel shall pay \$1000 to the sexual victim's assistance account.

FRIEDLANDER, J., and CRONE, J., concur.