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**IN THE
COURT OF APPEALS OF INDIANA**

BOBBY E. HENARD,)
)
 Appellant-Defendant,)
)
 vs.) No. 52A02-0611-CR-1026
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE MIAMI SUPERIOR COURT
The Honorable Daniel C. Banina, Judge
Cause No. 52D01-0003-DF-36

July 6, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Bobby E. Henard (“Henard”) was convicted in Miami Superior Court of Class D felony battery and sentenced to serve three years. On direct appeal, we affirmed the conviction but remanded with instructions to the trial court to allow Henard to submit affidavits or statements from inmate witnesses for consideration in sentencing. The trial court later issued an order reaffirming its original sentencing order. Henard brings this belated appeal and raises two issues, which we restate as:

- I. Whether the trial court improperly weighed the aggravating significance of Henard’s criminal history; and,
- II. Whether his sentence violates the Sixth Amendment protections set forth in Blakely v. Washington.

Concluding that Henard has waived these arguments by failing to bring them in his direct appeal and that in any event he was properly sentenced, we affirm.

Facts and Procedural History

The facts found by this court on direct appeal are as follows:

On February 16, 2000, Henard, a prisoner at the Miami Correctional Facility (“MCF”), was walking with approximately fifty to seventy other inmates to the dining hall for breakfast when he and the others were instructed to take an alternate walking route. Henard decided to ignore that instruction and started walking, alone, along the usual route to the dining hall. Corrections Officer Robert Bess told Henard that he had to walk the same way as the rest of the inmates, but Henard refused and continued walking in the wrong direction.

Officer Bess radioed Sergeant Craig Delucio and reported Henard’s conduct. Sergeant Delucio arrived at the scene and yelled at Henard to turn around and rejoin the other inmates. Henard ignored Sergeant Delucio and continued walking in the wrong direction. Then Henard began cursing and waving his arms as he approached Sergeant Delucio. Sergeant Delucio again ordered Henard to rejoin the group and put his hands up to stop Henard. Henard responded by bumping his chest against Sergeant Delucio’s chest. Sergeant Delucio again told Henard to rejoin the group, and he also told Henard that he could technically “get [him] for assault” for

the chest bump. At that point, Henard said, “no, this is assault” and punched Sergeant Delucio in the side of his neck. Then Henard assumed a “boxer stance,” facing Sergeant Delucio with clenched fists, and Sergeant Delucio sprayed Henard with pepper spray. Officers then subdued Henard and placed him in handcuffs.

The State charged Henard with battery, as a Class D felony. Henard represented himself at the jury trial. The trial court denied Henard’s requests to call Superintendent VanNatta as a witness, to have the jury view the scene of the incident, and to call his inmate witnesses to testify at the sentencing hearing. In addition, the trial court ordered Henard to pay court costs, but the court failed to specify that Henard would not be imprisoned for failure to pay. The jury found Henard guilty as charged, and the trial court entered judgment accordingly. The trial court sentenced Henard to three years, to be served consecutive to the sentence he was already serving.

Henard v. State, No. 52A04-0108-CR-368, Slip. op. at 2-3 (Ind. Ct. App. May 29, 2002) (record citations omitted).

On direct appeal, Henard argued that the trial court violated his right to due process under the Fourteenth Amendment when it denied his request to call fellow inmates as witnesses at his sentencing hearing. We agreed and remanded to the trial court with instructions to allow Henard a reasonable opportunity to submit to the court affidavits or statements of any inmate witnesses listed on his original witness lists, after which the court should review Henard’s sentence and issue a new sentencing order. On June 12, 2002, the trial court issued an order granting Henard until July 15, 2002, to submit his witness statements. The trial court later granted Henard until September 2, 2002, to submit the statements. On December 6, 2002, noting that Henard had failed to submit any witness statements or affidavits, the trial court reaffirmed its original sentencing order.

Henard filed a petition for post-conviction relief on June 1, 2004, and later filed a petition for permission to file a belated notice of appeal. The trial court granted Henard's petition and on October 12, 2006, he filed a belated notice of appeal.

Discussion and Decision

In this belated appeal brought pursuant to Post-Conviction Rule 2(1), Henard argues that he was improperly sentenced. First, he contends that the trial court improperly weighed his criminal history, resulting in an inappropriate sentence. The State argues that Henard has waived these claims, as he did not raise them in his direct appeal. We agree. On an appeal from resentencing, the appellate court is confined to reviewing only the errors alleged to have occurred as a result of the resentencing. Becker v. State, 719 N.E.2d 858, 860 (Ind. Ct. App. 1999). If an issue was available for litigation in a direct appeal but was not in fact raised, then the issue has been waived. Id.

Waiver notwithstanding, Henard's arguments fail. The Indiana Supreme Court has emphasized that "the extent, if any, that a sentence should be enhanced [based upon prior convictions] turns on the weight of an individual's criminal history." Duncan v. State, 857 N.E.2d 955, 959 (Ind. 2006). "This weight is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability." Id. (quoting Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006)).

The record before us indicates that Henard had prior felony convictions for dealing in cocaine, conspiracy to commit dealing in cocaine, cocaine possession, and battery, and misdemeanor convictions of battery and obstructing or interfering with a law

enforcement officer. Record p. 314. Henard argues that these offenses, which all occurred in the 1980s, are too remote in time to be of significant aggravating weight. However, Henard has been incarcerated since 1990. Record p. 315. As such, we cannot conclude that the number of years since the convictions renders their aggravating weight insignificant.

Henard also contends that his sentence is inappropriate. Appellate courts have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, the court concludes the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B) (2007); Marshall v. State, 832 N.E.2d 615, 624 (Ind. Ct. App. 2005), trans. denied. In light of the proper aggravating circumstance found by the trial court and the lack of mitigating circumstances, we cannot conclude that Henard's three-year sentence for Class D felony battery is inappropriate.

Finally, Henard argues that his sentence violates the rule announced in Blakely v. Washington, 542 U.S. 296 (2004). Even if Blakely applies to Henard's belated appeal,¹ the Sixth Amendment permits a sentencing court to consider the fact of a prior conviction to enhance a sentence. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); Smith v. State, 825 N.E.2d 783 (Ind. 2005).

The trial court properly sentenced Henard.

¹ Our court is split on the issue of whether Blakely should apply to appellants pursuing belated appeals under Post-Conviction Rule 2. Compare, e.g., Hull v. State, 839 N.E.2d 1250, 1256 (Ind. Ct. App. 2005), trans. not sought and Sullivan v. State, 836 N.E.2d 1031, 1035 (Ind. Ct. App. 2005), trans. not sought. This question is currently under consideration by our supreme court. See Boyle v. State, 851 N.E.2d 996 (Ind. Ct. App. 2006), trans. pending; Gutermuth v State, 848 N.E.2d 716 (Ind. Ct. App. 2006), trans. granted, opinion vacated; Medina v. State, No. 71A03-0604-CR-163 (Ind. Ct. App. Nov. 29, 2006), trans. pending; Moshenak v. State, 851 N.E.2d 339 (Ind. Ct. App. 2006), trans. pending.

Affirmed.

DARDEN, J., and KIRSCH, J., concur.