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IN THE
COURT OF APPEALS OF INDIANA

JAMES A. FALK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 77A04-1102-CR-127
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE SULLIVAN SUPERIOR COURT
The Honorable Robert E. Springer, Judge
Cause No. 77D01-1004-FB-39

August 29, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

James Falk appeals his sentence for Class B felony burglary and Class D felony theft. We affirm.

Issues

Falk raises two issues, which we restate as:

I. whether the trial court abused its discretion by imposing a sentence consecutive to his sentence for offenses committed in Greene County; and

II. whether his sentence is inappropriate in light of the nature of the offense and the character of the offender.

Facts

In March 2010, Falk went on a three-county crime spree. On March 12, 2010, Falk stole a vehicle from a car dealership in Morgan County. On March 15, 2010, Falk burglarized a home in Greene County. There, he stole guns, cameras, tools, a video game system, jewelry, keys, and medication. On March 17, 2010, Falk broke into his ex-girlfriend's residence in Sullivan County and stole a gun and money. Falk was apprehended on March 22, 2010.

In Morgan County, Falk pled guilty to Class D felony auto theft and was sentenced to two years in the Department of Correction. In Greene County, Falk pled guilty to Class B felony burglary, and the trial court sentenced him to eighteen years. The Morgan County and Greene County sentences are concurrent with each other.

The instant case involves the Sullivan County burglary. The State charged Falk with Class B felony burglary and Class D felony theft, and Falk pled guilty as charged

without a plea agreement. At the sentencing hearing, the trial court refused to make Falk's sentence concurrent with his other sentences because the trial court felt that Falk needed to "pay a price for this crime in addition to the other crimes." Tr. p. 56. The trial court gave consideration to Falk's sincerity and guilty plea and also noted during the sentencing hearing that Falk's criminal history was "terrible." Id. at 54. The trial court sentenced him to ten years for the burglary conviction, which is the advisory sentence, and three years for the theft conviction, which is the maximum sentence. The trial court ordered that the sentences be served concurrent with each other but consecutive to his sentence in the Greene County case. Falk now appeals.

Analysis

I. Consecutive Sentencing

Falk argues that the trial court abused its discretion by ordering that his sentence be served consecutive to his sentence in the Greene County case. Sentencing decisions are within the sound discretion of the trial court. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218. However, a trial court may be found to have abused its sentencing discretion in a number of ways, including: (1) failing to enter a sentencing statement at all; (2) entering a sentencing statement that explains reasons for imposing a sentence where the record does not support the reasons; (3) entering a sentencing statement that omits reasons that are clearly supported by the record and advanced for consideration; and (4) entering a sentencing statement in which the reasons given are improper as a matter of law. Id. at 490–91. Moreover, an abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of

the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. Id.

Indiana Code Section 35-50-1-2 pertains to consecutive sentencing and provides, in part:

> c) Except as provided in subsection (d) or (e), the court shall determine whether terms of imprisonment shall be served concurrently or consecutively. The court may consider the:
>
> (1) aggravating circumstances in IC 35-38-1-7.1(a); and
>
> (2) mitigating circumstances in IC 35-38-1-7.1(b);
>
> in making a determination under this subsection. 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.
>
> d) 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
>
> (2) while the person is released:
>
> (A) upon the person's own recognizance; or
>
> (B) on bond;

> 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.

Falk points out that consecutive sentencing was not mandated here by Indiana Code Section 35-50-1-2(d). Rather, the trial court imposed consecutive sentences under Indiana Code Section 35-50-1-2(c), which allows a trial court to "order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time." Thus, the trial court had discretion to order either concurrent or consecutive sentences. However, according to Falk, the trial court found that the aggravating and mitigating circumstances were balanced and, thus, consecutive sentences were improper under Marcum v. State, 725 N.E.2d 852, 864 (Ind. 2000). Our supreme court held in Marcum that "[t]o impose consecutive sentences, the trial court must find at least one aggravating circumstance, and consecutive sentences are improper when aggravators and mitigators are in equipoise."[1] Marcum, 725 N.E.2d at 864.

Although the trial court here did not specifically identify aggravators and mitigators, it clearly took certain matters into consideration in imposing Falk's sentence. In particular, the trial court mentioned Falk's "terrible" criminal record, his sincerity, and his guilty plea. Tr. p. 54. The trial court then imposed the advisory sentence for the burglary conviction and the maximum sentence for the theft conviction, and the trial

[1] The State questions the continued viability of this proposition from Marcum given that Marcum was decided five years before the Indiana Legislature revised the sentencing statutes to provide for advisory sentences rather than presumptive sentences. We need not address that argument because, even if the proposition is still viable, Falk's argument fails.

court ordered that the burglary conviction be served consecutive to the Greene County sentence.

Falk contends that the trial court found the aggravating and mitigating circumstances in balance. As the State points out, this inference is of "dubious value" because Falk fails to take into account the trial court's imposition of a maximum sentence on the theft conviction. Appellee's Br. p. 5. Moreover, even if a trial court has stated that aggravators and mitigators are in equipoise but then considers an additional freestanding aggravating factor to impose consecutive sentences, the "initial finding of balance does not serve to invalidate the consecutive nature of the sentences." Lopez v. State, 869 N.E.2d 1254, 1259 (Ind. Ct. App. 2007), trans. denied. The trial court identified an additional freestanding reason for imposing consecutive sentences. The trial court specifically refused to make Falk's sentence concurrent with his other sentences because the trial court felt that Falk needed to "pay a price for this crime in addition to the other crimes." Tr. p. 56. In effect, the trial court found that Falk's multi-county crime spree was an aggravator. "The law is settled that the fact of multiple crimes is a valid aggravating factor." McDonald v. State, 868 N.E.2d 1111, 1114 (Ind. 2007). We conclude that the trial court did not abuse its discretion by ordering consecutive sentences.

II. Inappropriate Sentence

Falk argues that his sentence is inappropriate in light of the nature of the offense and the character of the offender. Falk asks that we order his ten-year sentence to be served concurrent with his Greene County sentence.

Indiana Appellate Rule 7(B) provides that we may revise a sentence authorized by statute if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. When considering whether a sentence is inappropriate, we need not be "extremely" deferential to a trial court's sentencing decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). Still, we must give due consideration to that decision. Id. We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

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.

The nature of the offense reveals that, while on a three-county crime spree, thirty-one-year-old Falk broke into his ex-girlfriend's residence in Sullivan County and stole a gun and money. An analysis of the character of the offender reveals that Falk has an extensive criminal history involving similar crimes. Between 1996 and 2003, Falk was convicted of Class D felony theft on four occasions, Class D felony auto theft, Class C felony forgery, Class C felony burglary on two occasions, and Class D felony receiving

stolen property. He was found to have violated his probation three times. As a result of the instant crime spree, he was also found guilty of Class D felony auto theft in Morgan County and Class B felony burglary in Greene County. Falk pled guilty as charged, accepted responsibility for his action, and expressed remorse.

Given Falk's extensive history of similar crimes and failure to respond to prior rehabilitation attempts, we conclude that the trial court's ten-year sentence, which it ordered to be served consecutive to Falk's Greene County sentence, is not inappropriate in light of the nature of the offense and the character of the offender.

Conclusion

The trial court did not abuse its discretion in ordering Falk's sentence to be served consecutive to his Greene County sentence, and we cannot say that Falk's sentence is inappropriate in light of the nature of the offense and the character of the offender. We affirm.

Affirmed.

ROBB, C.J., and BRADFORD, J., concur.