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IN THE
COURT OF APPEALS OF INDIANA

BRIAN C. FEELY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-1101-CR-20
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John M. Marnocha, Judge
Cause No. 71D02-1003-FC-63

August 30, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Brian Feely appeals his eight-year sentence with two years suspended for Class C felony operating a vehicle while intoxicated after having been convicted of operating a vehicle while intoxicated causing death. He contends that his sentence is inappropriate. Concluding that Feely has failed to persuade us that his sentence is inappropriate, we affirm.

Facts and Procedural History

In the early morning hours of March 26, 2010, Feely fell asleep in his vehicle in the drive-through lane of a South Bend Burger King. When police responded, Feely was still asleep in his vehicle, which was running and in gear, with his foot on the brake. An officer opened the door, put the car in park, and woke Feely. Upon observing Feely's eyes to be bloodshot and watery and smelling alcohol on his breath and in the car, officers administrated three field sobriety tests, all of which Feely failed. A portable breath test was also given, which indicated the presence of alcohol on Feely's breath. Officers asked Feely to take a certified breath test at the county jail, to which Feely agreed. Feely's blood alcohol content registered at .07.

The State charged Feely with Class C misdemeanor operating a vehicle while intoxicated and Class C felony operating a vehicle while intoxicated after having been convicted of operating a vehicle while intoxicated causing death. A bench trial was held in November 2010. After the trial court found Feely guilty of Class C misdemeanor operating a vehicle while intoxicated, Feely admitted to Class C felony operating a vehicle while intoxicated after having been convicted of operating a vehicle while

intoxicated causing death. The trial court entered judgment of conviction on the Class C felony only.

At the sentencing hearing, evidence was presented that in July 2004, Feely was charged with two counts of Class C felony operating a vehicle with a controlled substance causing serious bodily injury (death). Then, while on bond in early 2005, Feely was arrested and charged with operating a vehicle while intoxicated and minor consumption. In December 2005, Feely pled guilty to the two Class C felonies. The OWI and minor consumption charges were dismissed as part of the plea agreement. He was sentenced to one year in the St. Joseph County Jail, one year in a residential program, and two years of probation. He also received a six-year suspended sentence. In December 2006, Feely was released on probation. Two months later, the State filed a petition to revoke Feely's probation based upon his theft and consumption of alcohol, and in May 2007, Feely was sentenced to his previously-suspended sentence of six years. He was released on parole in November 2009. Approximately four months later, Feely was still on parole when he committed the offense in this case.

Feely explained that on the night he was arrested in March 2010, he knew he should not have been drinking. Feely expressed remorse, stating:

> I learned a lot from what I've seen and what I've been through. . . . But I always think there's time for rehabilitation, no matter what. . . . And I honestly understand and agree that people can change. I'm not trying to build my sorrows or show. . . I know I made a mistake, I should have gone home. But I know my purpose now. I want to talk to people who have been in my position. I want to help change those people. . . the youth, I want to talk to them, I want to help rehabilitate them, so that they don't go down the path that I've been in.

Tr. p. 227-28 (formatting altered). Before pronouncing sentence, the trial court said:

> And one would have thought, and "one" being me, I guess. That given the terrible things that occurred in 2004, that maybe you would have been a bit more careful. And by more careful, I don't mean maybe you would have just driven home. But like maybe you wouldn't have consumed any alcohol. Maybe you would have decided that that combination of things given what happened, simply wasn't a good thing for you to do. And yet you did it anyway. . . . You were remorseful back in 2004, I don't doubt that. But that doesn't change the facts in this case. . . . You say you're not going to do it, but your history doesn't tell me that. . . . I believe, that based upon your conduct here, that you do present a danger to the public, and you were on parole at the time, and the sentence that I'm going to craft is my hope and intent, that provides you with the best chance at rehabilitation and provides the public with the best chance of future safety.

Id. at 231-35. The court then sentenced Feely to eight years, with two years suspended. The court ordered four of those years to be served in the DOC and two years to be served in a community corrections program. Feely now appeals his sentence.

Discussion and Decision

Feely contends that his eight-year sentence is inappropriate.[1] Although a trial court may have acted within its lawful discretion in imposing a sentence, Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a 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." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g,*

[1] We note that Feely raises a single issue on appeal, "Whether the sentence imposed was *manifestly unreasonable* pursuant to Appellate Rule 7(B)." Appellant's Br. p. 8 (emphasis added). He does not make a separate argument that the trial court abused its discretion in identifying aggravators or failing to identify mitigators. To the extent that Feely challenges aggravators or mitigators, we address them within the context of our inappropriate sentence analysis.

875 N.E.2d 218 (Ind. 2007)). The defendant has the burden of persuading us that his sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)). In assessing whether a sentence is inappropriate, appellate courts may take into account whether a portion of the sentence is ordered suspended or is otherwise crafted using any of the variety of sentencing tools available to the trial judge. *Davidson v. State*, 926 N.E.2d 1023, 1025 (Ind. 2010).

Here, Feely was sentenced to eight years for Class C felony operating a vehicle while intoxicated after having been convicted of operating a vehicle while intoxicated causing death. "A person who commits a Class C felony shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years." Ind. Code § 35-50-2-6(a). The trial court sentenced Feely to four years to be served in the DOC, two years to be served in community corrections, and two years suspended to probation.

As for the nature of the offense, Feely was convicted of the elevated Class C felony because of his previous convictions for operating a vehicle with a controlled substance causing death. As the trial court correctly stated at sentencing, the court could not again enhance his sentence because of those deaths because they are an element of the Class C felony. *See* Appellant's App. p. 110. However, it is proper to consider that Feely committed this offense a mere four months after being released on parole. *See id.* ("But I can consider the fact that I believe that based upon your conduct here, that you do present a danger to the public, and you were on parole at the time . . . .").

Feely argues that his actions presented no danger to the public because he was found asleep in a drive-through lane rather than awake on the road. In fact, Feely posed a significant danger to the public when he operated the vehicle in an intoxicated state en route to the local Burger King. It was good fortune that Feely's foot remained on the brake while he was asleep.

As to Feely's character, Feely points out his youth, academic achievements, and pursuit of employment. However, the record clearly indicates that despite his contacts with the legal system, Feely has not modified his criminal behavior. Instead, he has repeatedly engaged in the same type of criminal conduct which resulted in the death of two people. Although Feely expressed remorse for his actions at his sentencing hearing, a trial court is in the best position to judge the sincerity of a defendant's remorse. *Stout v. State*, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005), *trans. denied.* The trial court was therefore entitled to find Feely's recurring criminal conduct more compelling than his expressions of remorse.

Feely has failed to persuade us that his sentence of eight years with two years suspended and two years to be spent in community corrections is inappropriate. We therefore affirm the trial court.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.