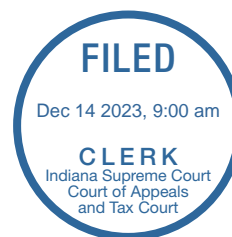


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



ATTORNEY FOR APPELLANT

Benjamin S. Loheide
Law Office of Benjamin Loheide
Columbus, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Erica S. Sullivan
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Jacob Dale Rice,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 14, 2023

Court of Appeals Case No.
23A-CR-623

Appeal from the
Bartholomew Circuit Court

The Honorable
Kelly S. Benjamin, Judge

Trial Court Cause No.
03C01-2107-F1-3792

Memorandum Decision by Senior Judge Baker
Judges May and Taviton concur.

Baker, Senior Judge.

Statement of the Case

- [1] Jacob Dale Rice appeals from his sentence after being convicted of one count of Level 4 felony unlawful possession of a firearm by a serious violent felon,¹ one count of Level 6 felony criminal recklessness,² one count of Level 6 felony theft of a firearm,³ and one count of Level 6 felony theft,⁴ arising from his theft of items from homes in a neighborhood and shooting at an officer who was trying to apprehend him. The trial court sentenced him to an aggregate term of thirty-six years. On appeal, Rice contends that the trial court abused its discretion in sentencing him “by finding aggravating circumstances that contradicted the jury’s verdict.” Appellant’s Br. p. 11. We affirm.⁵

Facts and Procedural History

- [2] Donald Snyder and his family were out of town on June 27, 2021. Early that morning, Snyder received a notification on his phone from his home security system, which prompted him to look at the camera views of his house that were transmitted from his security system. He saw a man pushing a bicycle down his

¹ Ind. Code §35-47-4-5(c) (2020).

² Ind. Code §35-42-2-2(a) (2019).

³ Ind. Code §35-43-4-2(a) (2019).

⁴ Ind. Code §35-43-4-2(a)(1)(A) (2019).

⁵ Rice admitted to his status as an habitual offender for which he received a twenty-year enhancement to his sentence. The sentence enhancement is not challenged on appeal.

driveway toward his fenced-in backyard. Snyder watched for approximately ten minutes to see if the camera showed the person exiting his yard. When he did not see the person leave, he called the Batholomew County dispatch at 3:30 a.m. Snyder continued to watch the camera as police responded.

[3] Columbus Police Department Sergeant Lukas Nibarger was the first to arrive at the Snyders' home. Sergeant Nibarger took measures to conceal his arrival on the scene. From his vantage point behind a tree, he observed an individual, later identified as Rice, going around Snyder's home and looking into it. Nibarger radioed his visual confirmation that someone was in Snyder's yard and requested backup.

[4] As Rice crossed the driveway, Sergeant Nibarger shone his flashlight on him and identified himself as a police officer. Before Nibarger could complete his identification, Rice ran from the driveway and toward the backyard. During the ensuing pursuit, Sergeant Nibarger observed Rice's right arm extend backward, and he could see a black object in Rice's right hand. Rice continued to run despite Sergeant Nibarger's commands to show his hands. Once in the backyard, Rice moved behind a shed and the officer temporarily lost sight of him.

[5] Sergeant Nibarger adjusted the direction he was running with his weapon drawn and flashlight activated to regain sight of Rice. The officer then observed Rice attempting to climb over the fence. He repeatedly commanded Rice to show his hands to no avail. While trying to scale the fence, Rice fell backward

from the fence and landed on his feet. He then reached his right hand over his left shoulder. Sergeant Nibarger observed an object in Rice's hand and heard a loud pop like a gunshot.

[6] In response to that sound, the officer fired his own handgun multiple times. The flashlight attached to his handgun temporarily malfunctioned, and when the flashlight function was restored, the officer saw Rice on the ground screaming. Sergeant Nibarger approached Rice, ordered him not to move except to put his hands up and asked where the gun was. Rice refused to respond to the officers' questions and commands, choosing instead to yell at the officer.

[7] Although Sergeant Nibarger was extremely concerned about locating the missing gun, he moved Rice to a flat surface in the yard and placed Rice in a recovery position. He radioed for backup and requested first aid kits and a medic pack. He then placed his flashlight in strobe mode so arriving officers could easily locate him.

[8] Two other officers arrived on scene and began to administer first aid. Sergeant Nibarger returned to the location where Rice had fallen, and saw a black, bloody pistol. After locating the weapon, Sergeant Nibarger returned to his squad car while other officers took over the investigation.

[9] While administering aid to Rice, responding officers searched him and discovered two gift-card sized cards and an unspent round in his pocket. A paramedic administered Narcan to Rice, who was going in and out of

consciousness. Rice regained responsiveness after receiving the dose and was transported to the hospital for treatment.

[10] The Indiana State Police took over the investigation and canvassed the neighborhood. They discovered five casings at the scene. Four of the casings were consistent with being fired from Sergeant Nibarger's clip. The other was consistent with having been fired from the gun observed in Rice's hand.

[11] The officers also gathered camera footage from multiple home security systems. One of Snyder's neighbors reported that a firearm with a serial number matching the serial number of the firearm in Rice's possession had been stolen from his truck that night. Another neighbor reported the theft of a bicycle whose description matched that of the bicycle Rice had with him. That bicycle, with an estimated value of \$2,000, was located in a neighbor's yard on the opposite side of the fence and was returned to its owner.

[12] Indiana State Police Detective Brian Earls interviewed Rice at the hospital at Rice's request. After waiving his *Miranda* rights, Rice remembered only that he had used illegal drugs that night. He recalled nothing about possessing a handgun or a bicycle. Detective Earls interviewed Rice again a few weeks later. At that time Rice recalled using illegal drugs, climbing a fence, falling off the fence, and that a gun had discharged. Although he remembered being chased, he did not recall being chased by a police officer.

[13] The State charged Rice with attempted murder, unlawful possession of a firearm by a serious violent felon, criminal recklessness, theft of a firearm, and

theft. The State also alleged that Rice was an habitual offender. A jury found Rice not guilty of attempted murder but guilty on all remaining counts. Rice then admitted to being a serious violent felon and an habitual offender.

[14] The trial court sentenced Rice to a term of twelve years executed for unlawful possession of a firearm by a serious violent felon, enhanced by twenty years for his status as an habitual offender. He received a sentence of two years executed for his criminal recklessness conviction, to be served concurrently with his conviction for unlawful possession of a firearm by a serious violent felon. The trial court also sentenced Rice to a term of two-and-one-half years executed for theft of a firearm, and a term on one-and-one-half years executed for theft, to be served consecutively for an aggregate sentence of thirty-six years to be served in the Indiana Department of Correction. This appeal ensued.

Discussion and Decision

[15] Rice challenges the trial court's sentencing decision, claiming that the trial court abused its discretion. Sentencing decisions rest 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. So long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Id.* An abuse of discretion occurs if the 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.* at 491. A trial court abuses its discretion during sentencing by: (1) failing to enter a sentencing statement at all; (2)

entering a sentencing statement that includes aggravating and mitigating factors that are unsupported by the record; (3) entering a sentencing statement that omits reasons that are clearly supported by the record; or (4) entering a sentencing statement that includes reasons that are improper as a matter of law. *Id.* at 490-91.

[16] More specifically, Rice claims that the trial court's sentencing decision reflects punishment for maintaining his innocence on the attempted murder count. He says that he did not fire at the officer; therefore, finding his failure to apologize to the officer for firing the gun at him as an aggravating circumstance constituted an abuse of discretion.

[17] Even if we were to find error, which we do not, that error would be harmless. "When a sentencing court improperly applies an aggravating circumstance, but other valid aggravating circumstances do exist, a sentence enhancement may still be upheld." *Bacher v. State*, 722 N.E.2d 799, 803 (Ind. 2000). "A single aggravating circumstance may be sufficient to support imposition of an enhanced sentence." *Thacker v. State*, 709 N.E.2d 3, 10 (Ind. 1999). Here, he challenges one aggravating circumstance, which even if erroneously found, leaves seven other valid aggravating circumstances he does not challenge.

[18] Rice's extensive criminal history was also found by the trial court as an aggravating circumstance. The presentence investigation report showed that Rice's adult criminal history dated back to 2001. His adult history included convictions for (1) Class C felony burglary in 2001; (2) Class A misdemeanor

battery in 2004; (3) Class D felony resisting law enforcement in 2004; (4) Class D felony possession of chemical reagents with intent to manufacture in 2007; (5) Class D felony maintaining a common nuisance in 2007; (6) Class C felony burglary in 2008; (7) Class D felony attempted theft in 2009; (8) Class D felony neglect of a dependent in 2009; (9) Class A misdemeanor domestic battery in 2009; (10) two counts of Class D felony resisting law enforcement in 2009; (11) Level 6 felony attempted theft in 2015; (12) Class A misdemeanor resisting law enforcement in 2015; (13) Class A misdemeanor resisting law enforcement in 2016; and (14) Level 5 felony battery resulting in bodily injury to a public safety officer in 2018. Thus, the record clearly and overwhelmingly supports the trial court's finding of this aggravating circumstance, which alone would support Rice's sentence.

[19] In addition to Rice's prior criminal history, the trial court also found that: (1) Rice had been placed on probation in the past and had violated probation; (2) Rice was on probation at the time of the offense; (3) Rice had been offered treatment in the past and had refused it or not taken advantage of it; (4) Rice had four pending criminal cases at the time of sentencing; (5) multiple victims and people were negatively affected by his criminal activity in this situation, others had been affected by his past criminal behavior, and he was a danger to society; and (6) Rice not only stole a firearm and ammunition, but he loaded the firearm and fired a shot from it after being ordered to stop and show his hands by a law enforcement officer. As with Rice's prior criminal history, any and all of these factors support Rice' sentence.

[20] We conclude that the trial court did not abuse its discretion when sentencing Rice.

Conclusion

[21] Based on the foregoing, we affirm the trial court's judgment.

[22] Affirmed.

May, J., and Tavitas, J., concur.