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ATTORNEY FOR APPELLANT:

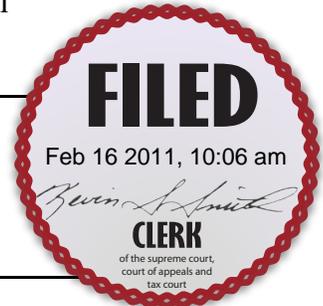
DERICK W. STEELE
Deputy Public Defender
Kokomo, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ANGELA N. SANCHEZ
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**



DON J. HERRINGTON, JR.,)

Appellant-Defendant,)

vs.)

No. 34A02-1008-CR-924)

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable Stephen M. Jessup, Judge
Cause No. 34D02-1001-FD-00006

February 16, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Don J. Herrington, Jr., (“Herrington”) pled guilty to Intimidation, as a Class D felony,¹ and was sentenced to three years imprisonment. He raises only one issue upon appeal, whether his sentence is inappropriate under Appellate Rule 7(B).

We affirm.

Facts and Procedural History

The facts as stipulated by the parties as part of Herrington’s guilty plea are as follows. On January 2, 2010, Herrington was arrested after driving a vehicle into a building. On January 2, 2010, while in the Howard County Jail awaiting an initial hearing, Herrington demanded of Sergeant Daniel Parvin (“Sergeant Parvin”) that Herrington be arraigned within twenty-four hours of his arrest and that he immediately receive his free phone call. Herrington persisted in his attempts to force Sergeant Parvin to comply with his wishes; Sergeant Parvin left Herrington’s cell door. Herrington told Sergeant Parvin that he wanted to fight, stared at Sergeant Parvin in an attempt to intimidate him, and punched the cell door.

Shortly afterward, Herrington started continually pressing his call button and demanded respect from Sergeant Parvin, an arraignment, and a phone call. He then began to throw a jail-issued plastic tote against the cell door, eventually breaking the glass on the door, threatening Sergeant Parvin and the other jail officers, and demanding to fight the officers. Herrington told the officers “that he was from New York and that we didn’t know who we were messing with” and that he could hear the officers “gearing up” and was ready for them,

¹ Ind. Code § 35-45-2-1.

insisting that there were not enough officers to handle him. (App. 20.)

Shortly after this, Sergeant Parvin and three other officers entered the cell, with a fifth officer at the door. Herrington was restrained by the officers, but demanded that Sergeant Parvin respect him and that Sergeant Parvin would “one way or the other.” (App. 21.) Sergeant Parvin told Herrington that continued threats of fighting, demands for respect, and threats of bodily harm to officers would result in charges of intimidation, but Herrington persisted in his conduct. Herrington told the officers that “if we went into a cell alone with him, he would make sure we didn’t come out.” (App. 21.)

Sergeant Parvin and the other officers then decided to place Herrington into a restraint chair. Herrington refused, resisting and pushing the officers. After Sergeant Parvin sprayed Herrington with a chemical spray, Herrington began kicking his legs, told officers that “I eat that shit for breakfast!”, then straightened his legs to avoid being placed into the restraint chair. (App. 21.) Sergeant Parvin obtained Herrington’s compliance only after using a Taser for several seconds. After agreeing to comply with instructions, Herrington was eventually placed into a padded cell in the jail, but refused to put on a prison-issued gown instead of standard clothes.

On January 5, 2010, Herrington was charged with Intimidation, Resisting Law Enforcement, as a Class A misdemeanor,² Mischief, as a Class A misdemeanor,³ and

² I.C. § 35-44-3-3.

³ I.C. § 35-43-1-2.

Operating While Intoxicated, as a Class A misdemeanor.⁴ Herrington entered into a plea agreement, pursuant to which on June 10, 2010, he pled guilty to Intimidation and, upon the State’s motion, the trial court dismissed the other charges. The trial court entered judgment against Herrington and sentenced him to three years imprisonment.

This appeal followed.

Discussion and Decision

Herrington argues that his sentence is inappropriate and asks us to review his sentence under Appellate Rule 7(B). In Reid v. State, the Indiana Supreme Court reiterated the standard by which our state appellate courts independently review criminal sentences:

Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a sentence 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. The burden is on the defendant to persuade us that his sentence is inappropriate.

876 N.E.2d 1114, 1116 (Ind. 2007) (internal quotation and citations omitted).

The Court more recently stated that “sentencing is principally a discretionary function in which the trial court’s judgment should receive considerable deference.” Cardwell v. State, 895 N.E.2d 1219, 1222 (Ind. 2008). Indiana’s flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented. See id. at 1224. One purpose of appellate review is to attempt to “leaven the outliers.” Id. at 1225. “Whether we

⁴ I.C. § 9-30-5-2.

regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case.” Id. at 1224.

The sentencing range for Intimidation, as a Class D felony, is six months to three years, with an advisory sentence of eighteen months. Ind. Code § 35-50-2-7(a). Herrington was sentenced to three years imprisonment with no time suspended to probation, the statutory maximum sentence. While acknowledging that this court is well situated to determine an appropriate sentence, Herrington nevertheless requests that we reverse the trial court’s sentence and remand the matter, presumably with instructions that he be afforded access to substance abuse rehabilitation programs.

Herrington insists that his conduct was no more than the statute seeks to punish, that is, he communicated a threat to law enforcement officers such that they would be placed into fear of retaliation for prior lawful acts. I.C. § 35-45-2-1(a)(2) & (b)(1)(B)(i). We disagree. Herrington reiterated his demands that officers fight him on numerous occasions, even after being warned that his conduct would result in a criminal charge of Intimidation against him, and even threatened that he would kill any officer that came into his cell alone. He only ceased his threats after officers stormed his cell, placed him in restraints, and used a chemical spray and Taser upon him.

As to his character, we note that Herrington has pled guilty to and been convicted of numerous prior misdemeanors and felonies in New York, including charges of burglary and robbery. While the last of his convictions occurred in 2000, Herrington has twice violated

parole since then, in 2004 and 2007, and was arrested in Indiana for possession of marijuana in 2009. He admits to abusing alcohol and other substances, particularly in the months since his mother's death in September 2008. While he claims to be seeking treatment for his substance abuse, there is no evidence that he sought such treatment prior to this case.

In light of the nature of his offense and his character, we cannot agree with Herrington that the three year sentence the trial court imposed is inappropriate.

Affirmed.

NAJAM, J., and DARDEN, J., concur.