

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

LEANNA WEISSMANN
Lawrenceburg, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**



JAMES L. EDENS,)

Appellant-Defendant,)

vs.)

No. 15A04-1007-CR-518)

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE DEARBORN CIRCUIT COURT
The Honorable James D. Humphrey, Judge
Cause No. 15C01-0305-FA-6

February 17, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

James L. Edens appeals his sentence following his conviction for Dealing in Methamphetamine, as a Class A felony, pursuant to a guilty plea. He presents the following issues for our review:

1. Whether, in light of the United States Supreme Court's opinion in Blakely v. Washington, 124 S. Ct. 2531 (2004), the trial court abused its discretion when it imposed an enhanced sentence.
2. Whether his sentence is inappropriate in light of the nature of the offense and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

In 2003, the State charged Edens with dealing in methamphetamine, as a Class A felony; possession of methamphetamine, as a Class C felony; maintaining an illegal drug lab, a Class C felony; maintaining a common nuisance, a Class D felony; and improper storage, handling, use, or transportation of anhydrous ammonia, a Class A misdemeanor. After executing a search warrant, police discovered a large amount of methamphetamine packaged for sale at Edens' residence, along with several loaded guns, a security camera system, and several methamphetamine precursors. Edens pleaded guilty to dealing in methamphetamine, as a Class A felony, and the State dismissed the remaining charges. Edens' plea agreement left sentencing open to the trial court's discretion. At sentencing, the trial court imposed a forty-year sentence, with five years suspended to probation. Edens filed a belated notice of appeal in July 2010.

DISCUSSION AND DECISION

Issue One: Blakely

Edens contends that under Blakely, his sentence violates his Sixth Amendment right to have the facts supporting the enhancement of his sentence tried to a jury. But the State, citing Gutermuth v. State, 868 N.E.2d 427, 435 (Ind. 2007), maintains that a defendant cannot raise a Blakely violation in a belated appeal under Post-Conviction Rule 2. Edens was sentenced on June 3, 2004, and the United States Supreme Court's opinion in Blakely was issued on June 24, 2004. Accordingly, had Edens brought a direct appeal within thirty days of sentencing,¹ his Blakely argument would have been available to him.

In Rogers v. State, 878 N.E.2d 269, 274-75 (Ind. Ct. App. 2007), trans. denied, we addressed a similar procedural circumstance and held as follows:

Rogers next challenges the trial court's use of the aggravator regarding Rogers's attempt to kidnap a material witness. Rogers suggests that the record did not support this aggravator and argues that it violates the rule announced in Blakely v. Washington, 542 U.S. 296 (2004). Rogers cites to the Indiana Supreme Court's holding in Gutermuth and appears to suggest that Gutermuth forecloses review of his sentence under Blakely, yet, at the same time, he argues that Blakely should apply to his resentencing. The State does not contest the application of Blakely and instead argues that Rogers admitted to the planned kidnapping in the PSI.

Rogers was originally sentenced in 1995, which was nine years before Blakely, but he was resentenced in 2005, which was one year after Blakely. Recently, we suggested that when a trial court resentences a defendant on a "pre-Blakely conviction" in a "post-Blakely world," that the trial court should comply with the requirements of Blakely. See Kline v. State, 875 N.E.2d 435, 438 (Ind. Ct. App. 2007). Rogers is currently appealing his "post-Blakely world" resentencing; however, he is before us on appeal after we granted him permission to file a belated appeal under Indiana Post-Conviction Rule 2(3). In Gutermuth, our Indiana Supreme

¹ The trial court granted Edens' motion for leave to file a belated appeal on the grounds that he had not been adequately advised of his right to appeal his sentence.

Court held that Blakely is “not retroactive for Post-Conviction Rule 2 belated appeals.” Gutermuth, 868 N.E.2d at 432.

Admittedly, Gutermuth, dealt with Indiana Post-Conviction Rule 2(1) and the belated appeal of a sentence entered prior to Blakely, and here, we are dealing with Indiana Post-Conviction Rule 2(3) and a belated appeal of a sentence entered after Blakely. We need not, however, resolve this question of whether Blakely applies to Rogers’s resentencing under these facts. Even if Blakely applied, and the trial court’s use of the kidnapping aggravator was improper, we will affirm the sentence when we can say with confidence that the trial court would have imposed the same sentence if it had considered the proper aggravating circumstances. See Robertson v. State, 871 N.E.2d 280, 287 (Ind. 2007).

Likewise, here, even assuming that Edens’ Blakely claim were available to him in this belated appeal, Blakely would not require a revision of his sentence. The trial court’s sentencing statement provided in relevant part as follows:

In sentencing the defendant, the Court has considered the factors made mandatory by statute as follows:

1. The risk that the defendant will commit another crime:

The Court finds that there is a substantial risk that the defendant will commit future crimes based upon his extensive criminal history (sixteen (16) criminal entries as an adult), and based upon the extensive planning and preparation used by the defendant in carrying out his dealing activities including the use of closed circuit TV surveillance, possession of night vision goggles, possession of weapons in close proximity to methamphetamine and also possession of a substantial quantity of methamphetamine, to-wit: two (2) ten[-] (10[-]) gram bags plus eleven (11) smaller packets of methamphetamine.

2. The nature and the circumstances of the crime committed:

The Court finds the current offense to be particularly heinous based upon the factors outlined above.

3. The defendant’s prior criminal record, character and condition:

The Court finds[,] although defendant’s criminal history does not include major felony offenses, that it is substantial and aggravating based upon the

sheer number of offenses for which he has been convicted from 1985 through 2001 (sixteen (16) convictions). The Court also considers the fact that the defendant[,] while professing the need to support his children, is several thousands of dollars behind in his child support obligation (Nine Thousand (\$9,000.00) Dollars).

* * *

The Court also considers the following aggravating factors:

1. The Court considers the nature and circumstances of the crime as outlined above and also the factors cited [and] his risk to commit future crimes including a substantial criminal history as aggravating factors showing his substantial risk to commit future crimes and danger to the community.

The Court finds the following mitigating factors:

1. The Court takes into consideration the fact that the defendant has entered a plea of guilty [to] this offense as a mitigating factor. The Court has considered the evidence presented, but finds no other possible mitigating factors.

The Court considers the balance between the aggravating and mitigating factors to be that the aggravating factors outweigh the mitigating factors. The Court further finds that the factors cited as aggravating are each sufficient to aggravate the sentence.

Appellant's App. at 109-10 (emphasis added).

The fact of a prior conviction is an exception to Blakely. And this court has held that where an enhanced sentence is based upon a defendant's prior criminal history and aggravators derived from that history, the Blakely analysis is not implicated. See Carson v. State, 813 N.E.2d 1187, 1189 (Ind. Ct. App. 2004). In this case, the aggravators listed by the trial court, other than Edens' criminal history, and the nature and circumstances of the offense are clearly derivative of his criminal history. Moreover, there is no indication that Edens objected to the contents of the presentence investigation report. And at

sentencing, Edens admitted to some of the nature and circumstances of the crime relied upon by the trial court as aggravating. See McGinity v. State, 824 N.E.2d 784, 789 (Ind. Ct. App. 2005) (finding no Blakely violation when trial court considered facts underlying “nature and circumstances” aggravator which defendant had admitted to as part of factual basis of guilty plea and during sentencing hearing), trans. denied.

As such, we need not engage in the Blakely analysis. See Carson, 813 N.E.2d at 1189. Regardless, even if one or more of the challenged aggravators were invalid, the trial court expressly stated that each aggravator was sufficient to justify the enhanced sentence. Accordingly, we can say with confidence that the trial court would have imposed the same sentence with or without any improperly considered aggravators. See Robertson, 871 N.E.2d at 287. Edens’ Blakely contention is without merit.

Issue Two: Inappropriate Sentence

Edens next contends that his sentence is inappropriate in light of the nature of the offense and his character. Revision of a sentence under Appellate Rule 7(B) requires the defendant to demonstrate that his sentence is inappropriate in light of the nature of his offenses and his character. See Ind. Appellate Rule 7(B); Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). In reviewing a defendant’s sentence under Appellate Rule 7(B), we give due consideration to the trial court’s decision. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade this court that his sentence is inappropriate. Id.

Here, the trial court imposed an enhanced sentence of forty years,² with five years suspended to probation. Edens' sole contention regarding the nature of the offense is that he "committed his crime in no way more egregious[ly] than would be contemplated by this level of a crime." Brief of Appellant at 11. But conviction of dealing in methamphetamine, as a Class A felony, requires only that the defendant deal a minimum of three grams of the drug. Here, according to the amended probable cause affidavit, which was incorporated by reference in the presentence investigation report and was, in turn, approved by Edens, Edens possessed more than thirty grams of methamphetamine at the time of his arrest. In addition, at sentencing, Edens admitted to possessing loaded firearms, a security camera, and approximately 180 pseudoephedrine tablets, which is a methamphetamine precursor. We hold that Edens' sentence is not inappropriate in light of the nature of the offense.

Next, Edens contends that his character warrants a reduced sentence. He maintains that his guilty plea shows his acceptance of responsibility for his crime. And he blames his criminal history on drug and alcohol dependency. Finally, Edens contends that his sentence should be reduced in light of prison overcrowding. But Edens' guilty plea reflects a pragmatic decision more than his acceptance of responsibility given the abundance of evidence against him and the dismissal of multiple other charges.³ And

² Edens was sentenced in 2004, when the presumptive sentencing scheme was in effect. The presumptive sentence for a Class A felony was thirty years, with up to twenty years added for aggravating circumstances. See Ind. Code § 35-50-2-4 (2004).

³ Edens couches his argument in terms of Appellate Rule 7(B). To the extent he asserts that the trial court should have given his guilty plea more mitigating weight, we reject that contention also on the basis that his plea was the result of a pragmatic decision. See Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999).

Edens' admitted longtime methamphetamine abuse and dealing without seeking treatment shows poor character. Finally, whether prisons are overcrowded is irrelevant with respect to Edens' character, and we will not consider that argument. In light of Edens' extensive criminal history, which spans approximately eighteen years, we cannot say that his character warrants a reduced sentence.

Affirmed.

DARDEN, J., and BAILEY, J., concur.