

STATEMENT OF THE CASE

Tory L. Brawner¹ appeals from the sentence imposed following his conviction for Operating a Vehicle After a Lifetime Suspension, a Class C felony, pursuant to a guilty plea. Brawner presents a single issue for review: whether his sentence is inappropriate under Appellate Rule 7(B) in light of the nature of the offense and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

At 12:07 on the morning of March 11, 2001, Indiana State Trooper D. Howard observed traffic ahead of him on Interstate 65 in Boone County repeatedly braking while attempting to pass a vehicle. Trooper Howard caught up with the vehicle and observed it weave within its lane and cross the center and right side lane lines. The truck's rear window was missing, the driver's side tires were almost flat, and the passenger's side door was not secure. Trooper Howard initiated a traffic stop.

Brawner was operating the vehicle, but he told Trooper Howard that his name was Adrian Gault and that he did not have his license with him.² After Brawner failed four of five field sobriety tests, Trooper Howard transported Brawner to the Boone County Jail. There Brawner submitted to a chemical breath alcohol test, which showed an "alcohol concentration equivalent to .15 gram." Appellant's App. at 34. Trooper Howard also

¹ The Indiana State Police case report, one charging information, and typewritten probable cause affidavit list the defendant as Tony L. Brawner. The remaining documents reviewed in the appendix, including the Chronological Case Summary, the Presentence Investigation Report, a separate charging information, the handwritten Affidavit for Probable Cause, and the sentencing order list the appellant's first name as Tory, and we will do likewise.

² Adrian Gault is the name of Brawner's brother.

confronted Brawner with evidence showing that his name was not Gault, at which point Brawner admitted his identity and that he had given a false name.

On March 12, 2001, the State charged Brawner with operating a vehicle while intoxicated while endangering a person, a Class A misdemeanor; operating a vehicle while intoxicated, a Class C misdemeanor; failure to identify, as a Class C misdemeanor; public intoxication, as a Class B misdemeanor; and operating a vehicle after a lifetime suspension, a Class C felony. On March 13, Brawner was released on bond, but he failed to appear for his September 18 jury trial. On February 15, 2007, Brawner was arrested on an outstanding warrant. On February 22, Brawner was released on bond, but he again failed to appear for his jury trial, which had been set for June 12.

On February 6, 2008, Brawner was again arrested on a warrant and was incarcerated. On October 15, Brawner and the State filed a plea agreement, and the court held a plea hearing.³ Upon reviewing the agreement, which included charges filed in another case, the court continued the plea hearing to determine whether the concurrent sentencing requested by Brawner was illegal. The court did not approve the plea agreement, and the parties proceeded to prepare for trial.

On March 3, 2009, the first day of the jury trial, Brawner orally pleaded guilty to operating while intoxicated, a Class A misdemeanor; failure to identify; and operating a vehicle after a lifetime suspension. The State agreed to dismiss the remaining charges, and sentencing was left to the trial court's discretion. At the sentencing hearing on April 30, the State argued in favor of the maximum eight-year sentence for operating a vehicle

³ The plea agreement also involved a burglary charge from another case. The court did not ultimately accept that plea agreement, and the burglary charge was not included in further proceedings in this case.

after a lifetime suspension. Brawner presented no evidence aside from a show of support by the attendance of his family, and he argued for a six-year sentence for the same charge. The court acknowledged that the delay in resolution of the case was due in part to Brawner's incarcerations for other offenses. The court then found the following aggravators:

The Court doesn't have any faith Mr. Brawner that if I don't sentence you to a substantial period at the Department of Correction that you're not gonna [sic] continue to drive. And the Court believes that you are not a candidate for probation. So the criminal history, the character of the offender given this long history of driving offenses, and disrespect and disregard for the authority of the Court, and the law, and the strong likelihood that you will re-offend, are the aggravating factors the Court is considering in imposing sentence in this case. I have not heard any mitigating circumstances, and of course settlement negotiations are not admissible. I didn't know what had been offered or what hadn't been offered and I'm not making my decision based upon something that may or may not have been offered or something that was rejected or not rejected. The job of the Court is to look at the facts and determine, based on the law, the case law and the statute, what sentence is appropriate in this case. . . . So there being no mitigators and very strong aggravators in this case, the Court is hereby sentencing you Tory Brawner to eight years at the Department of Correction. That will be on the Class C Felony Operating After License Suspension for Life.

Appellant's App. at 141-42. The court also sentenced Brawner to one year for operating a vehicle while intoxicated endangering a person, a Class A misdemeanor, and sixty days for failure to identify, with all sentences to run concurrently. Brawner now appeals only the eight-year sentence for operating a vehicle after a lifetime suspension.

DISCUSSION AND DECISION

Brawner contends that the sentence imposed by the trial court for operating a vehicle after a lifetime suspension is inappropriate.⁴ We initially note that the court sentenced Brawner in 2009 for an offense committed in 2001. As a general rule, a court must sentence a defendant under the statute in effect on the date the defendant committed the offense. Biddinger v. State, 868 N.E.2d 407, 411 n.6 (Ind. 2007).⁵ Thus, we consider Brawner's challenge under the sentencing statutes and related case law that were in effect in 2001.

Former Indiana Code Section 35-50-2-6 (2001) defined the sentence to be imposed for a Class C felony under the presumptive sentencing scheme:

A person who commits a Class C felony shall be imprisoned for a fixed term of four (4) years, with not more than four (4) years added for aggravating circumstances or not more than two (2) years subtracted for mitigating circumstances. In addition, he may be fined not more than ten thousand dollars (\$10,000).

On appeal, we exercise with great restraint our responsibility to review and revise sentences, recognizing the special expertise of the trial bench in making sentencing

⁴ Brawner requests that we review his sentence under the former "manifestly unreasonable" standard. Appellant's Brief at 9. Although we consider the sentencing statutes as they were written at the time of the offense, our standard of review is not similarly limited. Before January 1, 2003, an appellate court needed to find that a trial court's sentence was "manifestly unreasonable" before it could revise the sentence. Effective January 1, 2003, the rule was amended to authorize an appellate court to revise a sentence if it finds "after due consideration of the trial court's decision," that a sentence is "inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We apply this current standard to review Brawner's sentence. See Serino v. State, 798 N.E.2d 852, 856-58 (Ind. 2003).

⁵ There are two exceptions to this rule, neither of which is applicable here. See Palmer v. State, 679 N.E.2d 887, 892 (Ind. 1997) (concerning ameliorative statutes, which are statutes that decrease the maximum penalty); Martin v. State, 774 N.E.2d 43, 44 (Ind. 2002) (discussing remedial statutes, and noting "remedial statutes will be applied retroactively to carry out their legislative purposes unless to do so violates a vested right or constitutional guarant[ee].").

decisions. Bennett v. State, 787 N.E.2d 938, 949 (Ind. Ct. App. 2003), trans. denied. If the sentence imposed is authorized by statute, we will not revise or set aside the sentence unless it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B).

We first consider whether Brawner's eight-year sentence is inappropriate in light of the nature of the offense. Despite a lifetime suspension of his driving privileges, Brawner was driving while intoxicated on an interstate highway in the middle of the night. He was weaving between lanes, both driver-side tires were nearly flat, and the passenger door was not secure. Further, when the state trooper pulled Brawner over, Brawner gave a false name, birthdate, and social security number. And he continued to use the false name, that of his brother, until the state trooper showed him clear evidence contradicting that identification. Only then did Brawner admit his true identity.

We also consider whether the maximum sentence is inappropriate in light of Brawner's character. As the trial court pointed out, Brawner has a "significant" criminal history, including felony driving offenses. Appellant's App. at 139. He had a conviction for driving while suspended in 1994; an adjudication of being an habitual traffic violator in 1995 and again in 1998; and convictions for operating a vehicle after a lifetime suspension, a Class C felony, in 2001, 2003, and 2007. The trial court noted that prior courts had given Brawner the opportunity to show he could obey the law by reducing or modifying his sentence, but that despite increasingly longer sentences, Brawner continued to drive. The court found that Brawner's "repeated serious felony driving offenses . . . indicat[ed] that [he] really doesn't have a respect for the law." Id. The court

further found a “strong likelihood that he will re-offend, if in fact he is not incarcerated” and expressed a lack of faith that he would not drive unless given a substantial sentence. Id. at 141. Considering the nature of the offense along with Brawner’s character, we cannot say that the maximum sentence for a Class C felony.

Nevertheless, Brawner argues that his was not the worst offense and that he is not the worst offender. We addressed such arguments generally in Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), trans. denied:

There is a danger in applying this principle If we were to take this language literally, we would reserve the maximum punishment for only the single most heinous offense. . . . This leads us to conclude the following with respect to deciding whether a case is among the very worst offenses and a defendant among the very worst offenders, thus justifying the maximum sentence: We should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant’s character.

Here, again, Brawner was driving, while intoxicated and despite a lifetime suspension of his driving privileges, on an interstate highway in the middle of the night. He was weaving between lanes, both driver’s side tires were nearly flat, and the passenger door was not secure. Moreover, Brawner has accumulated two convictions for operating a vehicle after a lifetime suspension after his 2001 arrest for the same offense. In light of these facts, again, we cannot say that that the maximum sentence is inappropriate in light of the nature of the offense and his character.

Affirmed.

FRIEDLANDER, J., and BRADFORD, J., concur.