

Case Summary

Ezekiel Jones¹ appeals his conviction for murder and his sentence of sixty years.

We affirm.

Issues

Jones raises two issues for our review:

- I. whether the trial court erred in not instructing the jury on the lesser-included offense of reckless homicide; and
- II. whether his sentence is inappropriate.

Facts

In the early morning of February 18, 2006, Jones and several acquaintances gathered at the home of Nori Shepherd. Everyone was talking and drinking beer. Richard Martin had a firearm that was passed around the group, and eventually Jones gained possession of it. Jones and Antwan Latham began shooting dice, and Latham lost about \$400 to Jones. Jones and Latham had a disagreement during the game, but they continued to play. A few minutes later, they had another disagreement about the game, and they started to argue loudly. Shepherd asked everyone to leave her home because a neighbor had complained about the noise.

Jones and Latham continued to argue outside. Martin grabbed Jones and pulled him away, and Tyler Green grabbed Latham. Everyone began to walk to his or her car to leave. Jones and Martin left together in Jones's black SUV. Jones drove down the street

¹ Both parties spell the defendant's name Ezekial, but when testifying, Jones spelled his name Ezekiel.

and then turned around. Green and Latham were talking in the street when Jones drove back toward them. Latham raised either one or both arms in the air and was talking to Jones, but Latham was empty-handed. Jones pulled the car to a stop, opened the door, and fatally shot Latham in the head.

Two officers of the Fort Wayne Police Department, after hearing about the homicide from dispatch, observed a black SUV driving in the area without its headlights on. The officers pulled over Jones, and Jones identified himself as Antonio Gates. An officer observed that a firearm was in the backseat, stuffed under the back of the driver's seat. The officers arrested Jones.

Jones was charged with murder and Class A misdemeanor carrying a handgun without a license. The State also filed an application for an additional fixed term of imprisonment for Jones's use of a firearm in the commission of a murder, pursuant to Indiana Code Section 35-50-2-11.

A jury found Jones guilty of both counts. The trial court sentenced Jones to fifty-five years for murder and five years for the use of a firearm in the commission of murder. The court found that the Class A misdemeanor carrying a handgun without a license count merged with the additional fixed term for use of a firearm in the commission of murder. At the sentencing hearing, Jones also was sentenced for two unrelated offenses of Class B felony robbery, for which he received six years consecutive for each count. Jones now appeals his conviction and sentence for murder.

Analysis

I. Jury Instructions

Jones contends that the trial court erred in not instructing the jury on the lesser-included offense of reckless homicide. In Brown v. State, 770 N.E.2d 275, 280 (Ind. 2002), our supreme court noted that reckless homicide is a lesser-included offense of murder. To determine whether a trial court should instruct the jury on the lesser-included offense, the court should evaluate the evidence. Id. The court should not give the lesser-included instruction if there is “no meaningful evidence from which the jury could properly find the lesser offense was committed.” Id. However, if “a jury could conclude that the lesser offense was committed but not the greater, then it is reversible error for a trial court not to give an instruction, when requested, on the inherently or factually included lesser offense.” Id. (emphasis added).

After reviewing the record, we conclude that Jones did not request the reckless homicide instruction. We quote the relevant portion of the transcript:

COURT: Before we bring the jury back in, Mr. Hicks [defense counsel], it's come to my attention that Mr. Jones has inquired about a lesser included instruction of reckless [homicide].

MR. HICKS: That's correct, Your Honor.

COURT: That you have discussed that with him.

MR. HICKS: Yes sir, we have.

COURT: And determined not to request such a lesser included instruction.

MR. HICKS: Yes sir. My understanding from talking to the prosecutors and reviewing some case law, the Court of Appeals, several courts have held decisions that . . . you can't have, you've got to have one or the other [reckless homicide or self-defense].

COURT: Um-hum. (indicating affirmative response.)

MR. HICKS: I explained that to Mr. Jones. Mr. Jones and I opt to proceed with the self defense instruction.

COURT: Is that right Mr. Jones?

DEFENDANT: Yes sir.

Tr. p. 381-382.

Jones asserts that the trial court “[c]learly . . . indicated that the Defendant couldn’t request a jury instruction of a lesser included offense” and that the error was fundamental. Reply Br. p. 3. However, Jones did not tender an instruction for reckless homicide, and he plainly told the court that he was making a strategic decision to have the jury instructed on self-defense rather than reckless homicide. Fundamental error results from “a blatant violation of basic principles rendering the trial unfair to the defendant and thereby depriving the defendant of fundamental due process.” Ortiz v. State, 766 N.E.2d 370, 375 (Ind. 2002). We conclude that the court’s response of “Um-hum” did not amount to fundamental error. Our supreme court has explicitly held that “failure to give instructions on lesser-included offenses does not constitute fundamental error.” Metcalf v. State, 451 N.E.2d 321, 326 (Ind. 1983). Accordingly, the trial court did not commit fundamental error by failing to give the jury a reckless homicide instruction.

II. Sentence

Jones contends that in imposing his sentence, the trial court did not articulate a balancing of the aggravators and mitigators and failed to find proper mitigators supported

by the record. Jones committed this offense after our legislature replaced the “presumptive” sentencing scheme with the present “advisory” sentencing scheme. Under the advisory scheme, the court “may impose any sentence that is: (1) authorized by statute; and (2) permissible under the Constitution of the State of Indiana; regardless of the presence or absence of aggravating circumstances or mitigating circumstances.” Ind. Code § 35-38-1-7.1. Our supreme court recently resolved several questions as to whether a trial court was still required to issue a sentencing statement and how we should address sentencing appeals in light of the revised statute. See Anglemyer v. State, No. 43S05-0606-CR-230 (Ind. June 26, 2007).

The court determined that the legislature modified the sentencing statute from a “presumptive” to an “advisory” scheme in order to “rectify the Sixth Amendment problem that Blakely [v. Washington], 542 U.S. 296, 124 S. Ct. 2531 (2004) presented,” but the legislature still intended “to retain the traditional significance of sentencing statements. . . .” Id. at 9. Therefore, the court concluded that the trial court must still enter sentencing statements when imposing a sentence for a felony offense. Id. The sentencing statement must include “a reasonably detailed recitation of the trial court’s reasons for imposing a particular sentence. If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating.” Id.

We agree with Jones that the trial court here failed to make a sentencing statement. The court stated that it had “heard and considered all the evidence presented by the State

of Indiana and by the Defendant.” Sentencing Tr. p. 35. The court then sentenced Jones to fifty-five years for the murder conviction and five years for use of a firearm in commission of the murder. The court spoke to the defendant about the prevalence and danger of firearms in our society but did not give “a reasonably detailed recitation of [its] reasons for imposing a particular sentence.” Anglemyer, slip op. at 9.

We review sentencing decisions for abuse of discretion, which 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 10 (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)). The court in Anglemyer named as an example of an abuse of discretion a trial court’s “fail[ure] to enter a sentencing statement at all.” Id. In another recent case, Windhorst v. State, No. 49S04-0701-CR-32, slip op. at 5 (Ind. June 26, 2007), our supreme court addressed a trial court’s failure to issue a sentencing statement prior to Anglemyer and clarified our authority of appellate review.

Here, even if the trial court were on notice of its obligation to enter a sentencing statement – which it was not – and simply failed to do so, we nonetheless would not be inclined to remand this cause for further consideration. And this is so because we have long held that where the trial court erred in sentencing a defendant, there are several options for the appellate court. “Without a trial court sentencing order that meets the requirements of the law,” we have the option to remand to the trial court for a clarification or new sentencing determination. Additionally we may exercise our authority to review and revise the sentence.

Windhorst, slip. op. at 4-5 (internal citations omitted). Our appellate authority to review and revise sentences is pursuant to Indiana Appellate Rule 7(B). We will exercise this option to review Jones's sentence.

Rule 7(B) provides that we may revise a sentence if we find that "the sentence is inappropriate in light of the nature of the offense and the character of the offender." Although Jones's brief does not specifically address the nature of the offense or his character, we will use his arguments regarding the aggravating and mitigating circumstances to inform our analysis as to the appropriateness of his sentence under Rule 7(B).

The sentencing range for murder is between forty-five and sixty-five years, with an advisory sentence of fifty-five years. See I.C. § 35-50-2-3. Indiana Code Section 35-50-2-11 provides that if the State has proven beyond a reasonable doubt that the person knowingly or intentionally used a firearm in the commission of the offense, the court may sentence the person to an additional fixed term of imprisonment of five years. Here, the trial court sentenced Jones to fifty-five years for the murder conviction and five additional years for using a firearm in commission of the offense.

Jones argues that we should consider his youth, his remorse, and his criminal history as mitigating factors. Our supreme court has noted that a defendant's youth can be an important factor to consider when conducting appellate review of a sentence. See Brown v. State, 720 N.E.2d 1157, 1159 (Ind. 1999). We will therefore consider that Jones was only nineteen when he committed this offense. The expression of remorse can also be a valid mitigating circumstance. See Frey v. State, 841 N.E.2d 231, 235 (Ind. Ct.

App. 2006). We acknowledge that Jones expressed remorse at his sentencing hearing and apologized to the victim's family.

Finally, Jones contends that his lack of criminal history should be recognized as a mitigating circumstance. As a juvenile, Jones received informal adjustments for false informing, possession of a vehicle without an ID number, leaving home, and disorderly conduct. As an adult, Jones was convicted for misdemeanor resisting law enforcement. In addition to the murder conviction, Jones was sentenced at the same hearing for two unrelated convictions for Class B felony robbery. Although we consider Jones's youth and remorse as positive factors in assessing his character, we cannot ignore his criminal history, which at the very least, is not a mitigating circumstance.

We also consider the nature of the offense in evaluating Jones's sentence. Jones described Latham as someone who he frequently "[hung] out with." Tr. p. 334. Jones testified that when the group was passing around the gun inside Shepherd's house, he said "give me that gun before somebody gets shot" because he was concerned that people were being careless with it. *Id.* at 342. Yet, within about an hour, Jones himself used the gun to fatally shoot Latham in the head. We conclude that Jones's sentence of fifty-five years for murder, which is the advisory sentence, is not inappropriate. The imposition of an additional five years for use of a firearm in the commission of the murder is also not inappropriate. Jones was appropriately sentenced.

Conclusion

The trial court did not err in failing to instruct the jury on the lesser-included offense of reckless homicide. Jones's sentence of sixty years was not inappropriate. We affirm.

Affirmed.

NAJAM, J., and RILEY, J., concur.