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.

FILED
Nov 18 2009, 8:50 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

CHRISTOPHER A. CAGE
Anderson, 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

ROBERT MICHAEL WEBB,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0905-CR-488
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-0808-FA-214

November 18, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Robert Michael Webb was convicted of robbery[1] as a Class C felony and was sentenced to seven-and-a-half years with two years suspended for a total of five-and-a-half years executed. He appeals, raising the following issues:

I. Whether the trial court abused its discretion when it found as an aggravating circumstance that Webb committed multiple offenses;

II. Whether Webb's sentence was inappropriate in light of the nature of the offense and character of the offender.

We affirm.

FACTS AND PROCEDURAL HISTORY

On the night of July 18, 2008, Brandi Fritz, Jerri Nesselrotte, and Stacy Dollard went to Jimbo's, a bar in Anderson, Indiana. At the bar, Fritz met Franklin Florence. All four of them were drinking, and the three girls each took Xanax pills. Florence later left with the girls to go to another bar, where they continued to drink, and eventually went to Fritz's apartment.

At approximately 4:30 or 5:00 a.m., Webb (known as Neiko) and Hayward Ford (known as BJ) arrived at Fritz's apartment. Fritz and Florence were in Fritz's bedroom, and Nesselrotte and Dollard were in the living room. Prior to this night, Fritz and Ford had been involved in a sexual relationship as had Nesselrotte and Webb. When the men arrived, Fritz came out of her bedroom and told Ford that Florence had followed them home from the bar and would not leave. She asked Ford to remove Florence from the

[1] *See* Ind. Code § 35-42-5-1.

apartment. Ford went into the bedroom and told Florence to leave; he and Nesselrotte then escorted Florence outside.

Ford claimed that Florence had made some rude remarks to him and asked Nesselrotte to persuade Florence to accompany her to the back of the apartment building. Ford went to the back of the building, and Webb walked to the corner of the building to watch. When Nesselrotte and Florence got to the back of the building, Ford punched Florence twice in the face, which caused him to fall to the ground. Florence attempted to stand, and as he did, Ford kicked him while Nesselrotte held him down. Ford then pulled off Florence's pants, checking the pockets for money. When Florence started to come around, Ford began to hit and kick him again. Webb joined in by kicking Florence in the upper body. Eventually, Florence was able to stand and run, wearing nothing but his shirt and underwear. He ran to nearby apartments and was able to awaken a neighbor, who called the police.

After Florence escaped, Ford, Webb, and Nesselrotte fled back to Fritz's apartment, and later, Webb, Fritz, and Nesselrotte drove to Nesselrotte's home. After the attack, Webb had Florence's shoes, hat, and cell phone. Webb used the cell phone for several days after the attack, which eventually led to his apprehension by the police. As a result of the attack, Florence suffered several injuries including a fractured orbital bone around his left eye.

On August 8, 2008, the State charged Webb with robbery as a Class A felony, battery as a Class C felony, and criminal confinement as a Class B felony. A jury trial was held on March 4 and 5, 2009. The State dismissed the criminal confinement count at

the close of its case-in-chief. At the conclusion of the trial, the jury found Webb guilty of lesser included offenses of robbery as a Class C felony and battery as a Class A misdemeanor. At the sentencing hearing, the trial court concluded that Webb's two convictions violated the principles against double jeopardy and only entered judgment on the robbery conviction. The trial court then sentenced Webb to seven-and-a-half years, with two years to be suspended, for a total of five-and-a-half years executed. Webb now appeals.

DISCUSSION AND DECISION

I. Abuse of Discretion

Although Webb initially frames his argument as whether his sentence was inappropriate in light of the nature of the offense and the character of the offender, he also appears to argue that the trial court abused its discretion in finding one of the aggravating circumstances. As our Supreme Court has previously made clear, "inappropriate sentence and abuse of discretion claims are to be analyzed separately." *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008). We therefore address each of these arguments separately.

Trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Id*. 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*. Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal 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*.

Webb argues that the trial court abused its discretion when it identified as an aggravating circumstance the fact that there were multiple offenses involved. He contends that because, based on double jeopardy concerns, judgment was not entered for both of his convictions, it was improper for the trial court to consider this factor as an aggravator, and the consideration of this as an aggravating factor subjected him to greater punishment.

Here, in its written sentencing order, the trial court listed three aggravating circumstances: (1) Webb's criminal history; (2) Webb violated his probation in committing the instant offenses; and (3) that there were multiple offenses. *Appellant's App*. at 53. At the sentencing hearing, the trial court initially stated that the fact that there were multiple offenses committed by Webb was an aggravating factor. *Tr*. at 387. It then proceeded to conclude that the robbery and battery convictions constituted a single offense and that they should be merged for sentencing. *Id*. at 387-88. Because of this, the trial court went on to state, "that being the case, there really isn't a separate offense, so we strike that, I was thinking about that and talking at the same time." *Id*. at 388. It further clarified that, "it's the criminal history and the various components of that, . . . the violation of probation . . . . [t]hat's the substantial aggravator here." *Id*. Therefore, it

appears that the inclusion of the "multiple offenses" aggravator in the written sentencing order was merely a clerical error, and the trial court did not actually rely upon it when it determine Webb's sentence. We conclude that the trial court did not abuse its discretion in sentencing Webb.

II. Inappropriate Sentence

Appellate courts may revise a sentence after careful review of the trial court's decision if they conclude that the sentence is inappropriate based on the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). Even if the trial court followed the appropriate procedure in arriving at its sentence, the appellate court still maintains a constitutional power to revise a sentence it finds inappropriate. *Hope v. State*, 834 N.E.2d 713, 718 (Ind. Ct. App. 2005).

Webb argues that his seven-and-a-half year sentence was inappropriate in light of the nature of the offense and the character of the offender. He specifically contends that circumstances of the offense did not support the sentence given because his participation and culpability in the offenses were "much more minimal than the other defendants." *Appellant's Br***.** at 13. He also claims that his character did not support his enhanced sentence because his criminal history consisted of mostly victimless offenses with only one crime against a person and he was on probation for only a Class C misdemeanor at the time the instant offenses were committed.

As for the nature of the offense, Webb initially watched, and then participated in an unprovoked attack on Florence. After kicking Florence in the upper body area while he was lying on the ground, Webb took Florence's hat, shoes, and cell phone and

proceeded to use the cell phone for several days. As a result of this attack by Webb and the others, Florence suffered several injuries including a fractured orbital bone.

As to the character of the offender, Webb had a lengthy criminal history, which consisted of three convictions for possession of cannabis, two convictions for unlawful possession of a controlled substance, one conviction for aggravated criminal sexual abuse, one conviction for failing to register as a sex offender, and one conviction for operating a vehicle while never having received a license. He was also charged with criminal trespass to land, but failed to appear in court. He had previously violated his probation and was on probation at the time the instant offenses were committed, thus violating his probation again. We therefore conclude that Webb's seven-and-a half year sentence was not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

NAJAM, J., and BARNES, J., concur.