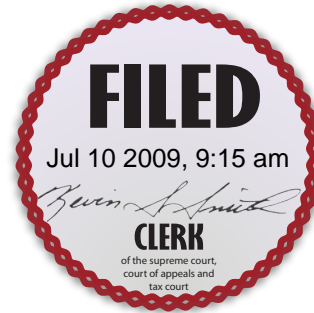


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

BRENT FRANCIS,

Appellant- Defendant,

vs.

STATE OF INDIANA,

Appellee- Plaintiff,

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No. 34A04-0904-CR-189

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable Stephen Jessup, Judge
Cause No. 34D02-0803-FD-46

July 10, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a guilty plea, Brent Francis appeals his statutory maximum sentence of three years, with one-half year suspended, for Class D felony receiving stolen property. On appeal, Francis raises one issue, which we restate as whether his sentence is inappropriate in light of the nature of the offense and his character. Concluding Francis's sentence is not inappropriate, we affirm.

Facts and Procedural History

On June 26, 2007, the State charged Francis with Class D felony theft based on an incident two days earlier where he allegedly stole beer from a Howard County convenience store. Francis offered to plead guilty to the theft charge, but the State rejected the offer when he was charged with Class A misdemeanor operating a vehicle while intoxicated several months later. This was not the end of Francis's run-ins with the law; on March 5, 2008, the State charged him with Class D felony receiving stolen property for driving a stolen vehicle.

On October 8, 2008, the parties entered into a plea agreement whereby Francis agreed to plead guilty to Class D felony receiving stolen property, and the State agreed to dismiss the Class D felony theft charge and leave sentencing to the trial court's discretion.¹ The plea agreement did not include the Class A misdemeanor operating a vehicle while intoxicated charge, and the record does not indicate how that charge was resolved. On November 13, 2008, the trial court conducted a sentencing hearing, at

¹ Several months earlier, the trial court rejected a plea agreement that was the same in all respects except that it required the trial court to sentence Francis to three years, with one and one-half years suspended. Had the trial court accepted this plea agreement, Francis's sentence would not have been reviewable on direct appeal. See St. Clair v. State, 901 N.E.2d 490, 491-92 (Ind. 2009).

which it heard testimony from Francis and a probation officer and heard argument from counsel. Although the trial court did not explicitly state that it found any aggravating or mitigating circumstances, it did credit the State's argument that Francis's criminal history and "poor performance when on probation" warranted a sentence above the advisory term. Transcript at 12. Based on these points, the trial court sentenced Francis to the statutory maximum term of three years, with one-half year suspended. Francis now appeals.

Discussion and Decision

Francis argues his sentence is inappropriate.² This court has authority to revise a sentence "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." Ind. Appellate Rule 7(B). We may "revise sentences when certain broad conditions are satisfied," Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005), and recognize the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed," Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). In determining whether a sentence is inappropriate, we examine both the nature of the

² Portions of Francis's argument intersperse claims that the trial court did not issue a reasonably detailed sentencing statement and that the presentence investigation report (the "PSI") is somehow invalid because it was prepared in response to his earlier rejected guilty plea to the theft charge. Regarding Francis's first claim, it is well-established that when sentencing a defendant for a felony, the trial court must explain the reasons for the sentence it imposes. Ind. Code § 35-38-1-1.3; Anglemyer v. State, 868 N.E.2d 482, 484-85 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218. Here, the trial court's remarks toward the end of the sentencing hearing indicate it was crediting the State's argument that Francis's criminal history and probation violations warranted a sentence in excess of the advisory. Although elaborating on these points would have aided our review, we cannot say the trial court's explanation was insufficient. Regarding Francis's second claim that the PSI is invalid because it was prepared in response to his earlier guilty plea, Francis has not directed us to any authority to support this claim. More to the point, Francis never objected to the trial court's reliance on the PSI during the sentencing hearing (for its part, the trial court noted it was "somewhat stale," tr. at 10), which means his claim is waived. See Robeson v. State, 834 N.E.2d 723, 725 (Ind. Ct. App. 2005) ("The information in the PSI is presumed to be accurate unless the defendant registers an objection to the information contained therein, and the failure to so object waives appellate review of this issue."), trans. denied.

offenses and the character of the offender. Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When making this examination, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. In conducting this review, however, the burden is on the defendant to demonstrate that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).³

The trial court sentenced Francis to three years for Class D felony receiving stolen property, with one-half year suspended. Francis therefore received the statutory maximum sentence for a Class D felony. See Ind. Code § 35-50-2-7(a) (“A person who commits a Class D felony shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 1/2) years.”); Weaver v. State, 845 N.E.2d 1066, 1072 n.4 (Ind. Ct. App. 2006) (explaining that a defendant’s total sentence includes both the executed and suspended portion of a sentence). As a corollary to our supreme court’s observation that the advisory sentence “is the starting point the Legislature has selected as an appropriate sentence for the crime committed,” Weiss, 848 N.E.2d at 1072, this court has observed repeatedly that maximum sentences should be reserved for the worst offenses and offenders, see Roney,

³ Citing Bennett v. State, 787 N.E.2d 938, 949 (Ind. Ct. App. 2007), trans. denied, and Golden v. State, 862 N.E.2d 1212, 1218 (Ind. Ct. App. 2007), trans. denied, the State contends a reviewing court should exercise “great restraint” when reviewing a sentence pursuant to Rule 7(B). The State’s contention overlooks our admonition in Stewart v. State, 866 N.E.2d 858, 865 (Ind. Ct. App. 2007), that the State should “discontinue citing earlier cases from this court stating that our review of sentences under Rule 7(B) is ‘very deferential’ to the trial court and that we exercise our authority to revise sentences ‘with great restraint.’” But see Hollin v. State, 877 N.E.2d 462, 466 (Ind. 2007) (Dickson, J., concurring and dissenting) (“Appellate sentence modifications [under Rule 7(B)] should be extraordinary events that almost never occur.”). Still, we recognize the State is not entirely at fault for describing our standard of review as one of great restraint, as several recent unpublished decisions from this court have described the standard as such. See, e.g., Pickett v. State, 2009 WL 1025379, at *3 (Ind. Ct. App., Apr. 15, 2009); O’Neal v. State, 2009 WL 606398, at *1 (Ind. Ct. App., Mar. 9, 2009), trans. denied; Groft v. State, 2009 WL 498613, at *5 (Ind. Ct. App., Feb. 26, 2009).

872 N.E.2d at 802; Haddock v. State, 800 N.E.2d 242, 248 (Ind. Ct. App. 2003). At the same time, however, reading this observation narrowly “would reserve the maximum punishment for only the single most heinous offense.” Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), trans. denied. Instead, a reviewing court “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.” Id. With these principles in mind, we turn to the nature of the offense and Francis’s character.

As often occurs where cases are disposed of pursuant to a guilty plea, there is little information in the record describing the nature of the offense. The probable cause affidavit, which Francis admitted was accurate for purposes of establishing a factual basis for his plea, merely states that a Kokomo police officer observed him driving a stolen vehicle. We therefore conclude that the nature of the offense was a typical instance of receiving stolen property.

Francis’s character, however, is a different story. The PSI states Francis has seventeen misdemeanor convictions dating back to 1991. For Francis, who was thirty-five years old when he committed the instant offense, such a lengthy criminal history equates to one conviction for each of the seventeen years he has been an adult. And although the sheer number of convictions certainly comments negatively on Francis’s character, worse still is that four of them are for property-related offenses – convictions in May 1994 and April 1997 for criminal mischief, in April 2006 for trespass, and October 2006 for conversion. Our supreme court has observed that the weight assigned

to a defendant's criminal history "varies based on the gravity, nature and number of prior offenses as they relate to the current offense." See Wooley v. State, 716 N.E.2d 919, 929 n.4 (Ind. 1999). Having four convictions for property-related offenses, including two as recently as 2006, is very aggravating in light of the fact that the instant offense is also a property-related crime. Finally, the PSI states that Francis has eight probation violations. In short, the record discloses that Francis has very little regard for the law or for the property of others, and has failed to take advantage of past instances of leniency.

The burden was on Francis to demonstrate that his statutory maximum sentence was inappropriate in light of the nature of the offense and his character. After due consideration of the record, particularly Francis's lengthy criminal history and probation violations, we are not convinced Francis has carried his burden. Accordingly, we conclude Francis's sentence is not inappropriate.

Conclusion

Francis's sentence is not inappropriate in light of the nature of the offense and his character.

Affirmed.

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