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**IN THE
COURT OF APPEALS OF INDIANA**

CASEY COMAI,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 18A04-0707-CR-382

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable John M. Feick, Judge
Cause No. 18C04-0607-FD-81

December 18, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

After being sentenced to five years in the Indiana Department of Correction for three operating a vehicle while intoxicated convictions, Casey Comai (“Comai”) appeals the trial court’s denial of his motion to correct error. Specifically, he contends that he has the right to have the trial court, and not the prosecutor, determine whether he is eligible for the Forensic Diversion Program. Because the trial court did, indeed, rule on Comai’s eligibility for that program, we affirm the trial court.

Facts and Procedural History

On January 24, 2007, Comai and the State entered into a plea agreement whereby Comai pled guilty to one count of operating a vehicle while intoxicated as a Class D felony (2002 incident) and two counts of operating a vehicle while intoxicated as a Class A misdemeanor (2005 and 2006 incidents). In exchange, the State dismissed one count of operating a vehicle while intoxicated as a Class A misdemeanor (2002 incident). Sentencing was left to the discretion of the trial court.

At the March 7, 2007, sentencing hearing, defense counsel asked the trial court to place Comai in the local Forensic Diversion Program, which is created under the authority of Indiana Code chapter 11-12-3.7, even though the program had earlier rejected him. Specifically, Forensic Diversion adds to the range of misdemeanor and felony dispositions by authorizing suspended sentences conditioned upon treatment for mental illness or addictive disorders. *See Ruble v. State*, 859 N.E.2d 338, 339 (Ind. 2007). Defense counsel introduced an April 25, 2005, letter from June Kramer of Delaware County Community Corrections, which provided, “The Prosecuting Attorney is

not in agreement that M[r]. Comai . . . be accepted, and we therefore cannot accept [him] [into the Forensic Diversion Drug Court].” Appellant’s App. p. 33. The deputy prosecutor testified at the sentencing hearing that pursuant to the Delaware County Forensic Diversion Drug Court, prosecutors are

allowed to, in essence, veto a Defendant’s request to enter the program. And I think that makes sense, Judge, because when you consider the mechanism by which the Defendant comes into Drug Court, it’s through a Plea Agreement. It’s an agreement between the parties. So, by virtue of that fact, the Prosecutor would have a right to object to the Defendant’s request for Drug Court. So, it’s my position that he doesn’t have a right and he is definitely not an appropriate candidate for our program.

Tr. p. 45-46. After this discussion, the trial court identified several aggravators: (1) Comai has a history of adult criminal activity; (2) he was released on bond or on his own recognizance prior to the commission of several new offenses; (3) he is in need of correctional or rehabilitative treatment that can best be provided by commitment to a penal facility; (4) prior attempts at treatment in lieu of prosecution were not successful enough to stop him from drug use; (5) there is a distinct pattern or similarity indicated by his past criminal history; (6) imposition of a reduced sentence would depreciate the seriousness of the crime; and (7) the length of time he has continued to be arrested for alcohol and drug-related offenses even after he completed a treatment in lieu of prosecution program. The court identified two mitigators: (1) Comai is only twenty-eight years old and (2) he pled guilty but benefited from the dismissal of one count. The trial court then sentenced Comai to three years for Class D felony operating a vehicle while intoxicated and one year for each count of Class A misdemeanor operating a vehicle while intoxicated, with all sentences to be served consecutively for an aggregate

term of five years. The court added, “Had it been my sole decision whether or not to put you in forensic diversion, I don’t think I would have, either. I think you need a wake-up call. I don’t think that would have done it.” *Id.* at 54-55.

On March 14, 2007, Comai filed a Petition to Correct Errors Regarding Sentencing, which he amended on March 20, in which he alleged, in pertinent part:

2. That prior to sentencing, the Defendant was denied his right to have the trial court determine his suitability for placement in the forensic diversion program based on an evaluation of suitability for said diversion.
3. Said denial was as a result of the Prosecuting Attorney’s refusal to allow the defendant to be admitted into the program.
4. Said refusal on the part of the prosecuting attorney denied the Defendant the right to have the Court determine the defendant’s suitability for the forensic diversion program and denied the Court the exercise of it’s [sic] discretion in making said determination.

Appellant’s App. p. 32. Following a hearing, the trial court denied Comai’s motion to correct error on May 2, 2007. That order provides, in pertinent part:

4. That the Defendant did request to be placed in Forensic Diversion, but the request was denied.
5. That the Forensic Diversion committee denied the admission into Drug Court.
6. That while the Prosecutor may not have desired to admit the Defendant into Drug Court, the ultimate decision, per statute, is left with the sitting Judge to decide whether or not a person is admitted into Drug Court.
7. That the Defendant is not an appropriate candidate for the Forensic Drug Court.

Id. at 25-26. Comai now appeals.

Discussion and Decision

Comai contends that the trial court erred in denying his motion to correct error.

The gist of his argument is as follows:

The Defendant is not asserting that he has a right to be placed in Forensic Diversion, he is asserting that he has a right to have his eligibility to enter

the program determined according to the criteria set out in I.C. 11-12-3.7-1[2] and, that if he qualifies under that criteria, has a right to have the Court supplied with the necessary information to exercise its reasonable, informed, discretion in the matter of Forensic Diversion.

Appellant's Br. p. 23. Indiana Code § 11-12-3.7-12 governs a person's eligibility for post-conviction Forensic Diversion and provides, in pertinent part:

- (a) A person is eligible to participate in a post-conviction forensic diversion program only if the person meets the following criteria:
 - (1) The person has a mental illness, an addictive disorder, or both a mental illness and an addictive disorder.
 - (2) The person has been convicted of an offense that is:
 - (A) not a violent offense; and
 - (B) not a drug dealing offense.
 - (3) The person does not have a conviction for a violent offense in the previous ten (10) years.
 - (4) The court has determined that the person is an appropriate candidate to participate in a post-conviction forensic diversion program.
 - (5) The person has been accepted into a post-conviction forensic diversion program.

Ind. Code § 11-12-3.7-12(a). The Indiana Supreme Court recently clarified in *Ruble* that a trial court has the authority to determine, "based on an evaluation of [a defendant's] suitability for diversion, as well as the nature of the offense and the nature of the offender," whether to order the defendant placed on Forensic Diversion. 859 N.E.2d at 341. Therefore, contrary to the discussion at Comai's sentencing hearing regarding whether the prosecutor had the final say-so regarding Comai's eligibility for Forensic Diversion, the ultimate decision lies with the trial court. Even the trial court recognized this in its order denying Comai's motion to correct error. Specifically, the trial court ruled, "[T]he Defendant is not an appropriate candidate for the Forensic Drug Court."

Appellant's App. p. 26. Because Comai received the relief he requested, Comai's appeal fails.

Nevertheless, Comai argues that the trial court found that he was not an appropriate candidate for Forensic Diversion without "having been supplied with information as to whether or not the Defendant suffered from a mental disease or defect, or any analysis as to his suitability to be placed in the program." Appellant's Br. p. 22. However, the fault lies at Comai's doorstep. He could have admitted such evidence at either of the hearings but did not. In any event, Comai testified in great depth at his sentencing hearing about his alcohol and drug problems and past treatment, including inpatient and outpatient programs and AA meetings. In addition, the record before the trial court reflected that Comai has an extensive history of alcohol and drug-related arrests and convictions. Defense counsel himself described Comai's criminal history as "extensive," including "an enormous number of OWI's" in just "the past two years." Tr. p. 42. Defense counsel estimated that Comai had been arrested ten times in the past two years for operating while intoxicated. *Id.* at 42-43. The evidence also showed that Comai had previously received treatment in lieu of prosecution, but even that did not change his ways. Given this evidence, it was within the trial court's "range of responsible discretion" to determine that Comai was not a suitable candidate for Forensic Diversion. *See Ruble*, 859 N.E.2d at 341. Accordingly, we affirm the trial court's denial of Comai's motion to correct error.

Affirmed.

BAKER, C.J., and BAILEY, J., concur.