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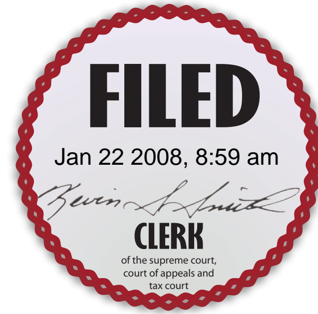

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IN THE
COURT OF APPEALS OF INDIANA

JOHN CARL FULTZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A05-0708-CR-489
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0610-FB-52

January 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

John Fultz appeals his sentence for Class D felony theft and Class D felony residential entry and his sentence following the revocation of his probation. We affirm in part and remand in part.

Issues

Fultz raises one issue, which we restate as:

I. whether he was properly sentenced on the theft and residential entry convictions; and

II. whether he was properly sentenced following the revocation of his probation.

Facts

On October 4, 2006, Fultz broke into the house of his ex-wife, used cocaine, viewed pornography, tried on clothing, and took some items from the house. When his former stepdaughter came home, Fultz fled the house. Fultz was found hiding behind the house.

On October 6, 2006, the State charged Fultz with Class B felony burglary, Class D felony theft, Class D felony residential entry, Class D felony possession of cocaine, and Class A misdemeanor possession of paraphernalia. The State also filed a petition to revoke Fultz's probation for his 2002 Class C felony possession of cocaine charge.

On February 16, 2007, Fultz pled guilty to the Class D felony theft charge and the Class D felony residential entry charge. Pursuant to the plea agreement, the State dismissed the remaining charges. Fultz also pled guilty to violating his probation.

On May 17, 2007, the trial court held a sentencing hearing. At the sentencing hearing, the trial court stated, "I'm thinking of giving him six (6) years . . . ." Tr. p. 24. Further, the prosecutor asked, "So we're talking about six (6) years plus the five hundred and twenty-six (526) days." The trial court responded, "Yes, I've already decided that one, yeah. It's consecutive you know. I don't know what else to do." Id. at 25.

In its written sentencing statement, the trial court sentenced Fultz to two years on the theft conviction and two years on the residential entry. The trial court ordered these sentences to be served consecutively for a total sentence of four years. As to the probation revocation, the trial court sentenced Fultz to 526 days in the Department of Correction and ordered this sentence to be served consecutive to the four-year sentence. Fultz now appeals.

Analysis

I. Theft and Residential Entry Sentence

Fultz argues that he was improperly sentenced. We apply a four-part test when reviewing sentences imposed under the 2005 amendments to Indiana's sentencing statutes. See Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). First, a trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e. to particular aggravators or mitigators, is not subject to appellate review. Id. Fourth, the merits of a particular

sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id.

Fultz argues that the trial court did not enter a sufficiently detailed sentencing order pursuant to Anglemyer. In support of his argument, Fultz contends that because the sentencing hearing was a "somewhat disjointed discussion" with counsel and Fultz, review of the sentencing decision is very difficult. Appellant's Br. p. 8. Fultz also argues that the maximum sentence is inappropriate.

Fultz points out that at the sentencing hearing, the trial court stated, "I'm thinking of giving him six (6) years . . . ." Tr. p. 24. The chronological case summary ("CCS") provides, "defendant is convicted of Count II, Theft, a Class D felony, and Count III, Residential Entry, a Class D felony, and sentenced to the Indiana Department of Correction for a period of 6 years; the defendant shall execute 6 years of said sentence . . . ." App. p. 4.

Not in keeping with the oral sentencing statement and the CCS, however, the trial court's written sentencing statement provides:

> The Court now sentences the defendant to the Indiana Department of Correction for classification and confinement for a period of two (2) years on Count II, Theft, a Class D felony, and two (2) years on Count III, Residential Entry, a Class D felony. The sentence imposed for Count III shall be served consecutively to the sentence imposed for Count II, for a total sentence of four (4) years.

App. pp. 11-12.[1]

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[1] Fultz did not include a copy of the abstract of judgment in his appendix.

Although the trial court's written sentencing statement is sufficiently detailed so as not to amount to an abuse of discretion pursuant to Anglemyer, the discrepancy between the oral sentencing statement and written sentencing statement requires us to remand for clarification. Our supreme court recently explained, "The approach employed by Indiana appellate courts in reviewing sentences in non-capital cases is to examine both the written and oral sentencing statements to discern the findings of the trial court." McElroy v. State, 865 N.E.2d 584, 589 (Ind. 2007). "Rather than presuming the superior accuracy of the oral statement, we examine it alongside the written sentencing statement to assess the conclusions of the trial court. This Court has the option of crediting the statement that accurately pronounces the sentence or remanding for resentencing." Id.

Here, it is simply unclear which sentence is controlling or whether the trial court intended to sentence Fultz to four or six years in the Department of Correction. Cf. Dowell v. State, 873 N.E.2d 59, 60-61 (Ind. 2007) (observing that the oral sentencing statement was not controlling and the trial court's intent to follow the recommendation in the pre-sentence investigation report was clear). Given the contradictory sentencing statements and the absence of a clear intent from the trial court to impose a specific sentence, we remand for the trial court to clarify its sentencing decision.

II. Probation Revocation Sentence

Fultz also argues that the trial court improperly sentenced him to 526 days in the Department of Correction based on the revocation of probation for his 2002 possession of cocaine conviction. Although there was confusion regarding the amount of time that

remained to be served on Fultz's sentence, the trial court did not err in sentencing him to 526 days.

Fultz's presentence investigation report indicates that he was originally sentenced to six years in the Department of Correction with 442 days executed. The petition to revoke stated that Fultz had been placed on probation for a term of 442 days and that a sentence of 442 days was suspended upon the condition that Fultz obey the conditions of his probation. At the guilty plea hearing, the prosecutor referenced the petition to revoke probation and asserted that Fultz should serve the 442 days that had previously been suspended. At the sentencing hearing, however, the prosecutor argued that 526 days remained to be served. Fultz did not object to this calculation.

As the State points out, however, Fultz asserts that he accumulated 781 days of credit time on his original sentence. This credit time added to the 526-day sentence on the probation revocation totals only 1307 days, far fewer that the 2190 days (or six years) to which Fultz was originally sentenced on the 2002 Class C felony conviction. Without more, Fultz has not established that the trial court improperly sentenced him to 526 days on the probation revocation.[2]

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[2] Fultz summarily asserts that he was entitled to know how many days he could be ordered to serve, that he was entitled to present mitigating evidence regarding his sentence on revocation of his probation, and that he did not receive "any credit time." Appellant's Br. p. 13. However, these assertions are not supported by cogent argument or citation to authority and are waived. See Ind. Appellate Rule 46(A)(a); Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006) ("In any event, because Cooper's contention is supported neither by cogent argument nor citation to authority, it is waived.")

Conclusion

As to the theft and residential entry sentence, the trial court's oral and written sentencing statements are contradictory and remand for clarification is required. Regarding the sentence on the probation revocation, Fultz has not established that the trial court improperly sentenced him to 526 days for violating his probation. We affirm in part and remand in part.

Affirmed in part and remanded in part.

SHARPNACK, J., and VAIDIK, J., concur.