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IN THE
COURT OF APPEALS OF INDIANA

LEONARD THOMAS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0708-CR-410
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
Cause No. 71D03-0507-MR-0009

DECEMBER 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Leonard Thomas appeals the imposition of a forty-year sentence after he pled guilty to voluntary manslaughter, a Class A felony. We affirm.

ISSUE

Thomas raises one issue for our review, which we restate as: Whether the sentence imposed was inappropriate in light of the nature of the offense and the character of the offender.

FACTS AND PROCEDURAL HISTORY

On July 3, 2005, Thomas argued with his severely intoxicated uncle, Milton Brown, Sr., in a South Bend alley. Brown pulled out a handgun and accused Thomas of stealing Brown's van. At some point during the argument, Brown dropped his gun, and Thomas picked it up and pointed it at Brown's head. Thomas then shot Brown in the head when Brown attempted to backhand him. Thomas dropped the gun and ran home.

Thomas was subsequently charged with murder and two counts as a serious violent felon in possession of a firearm for possession of two shotguns. On the day of his jury trial, after the jury had been selected, Thomas pled guilty to a lesser included offense of voluntary manslaughter in exchange for the State dismissing the remaining charges and capping the sentence at forty-five years. The trial court imposed a forty-year sentence, and Thomas now appeals.

DISCUSSION AND DECISION

Thomas contends that the forty-year sentence is inappropriate given the nature of the offense and the character of the offender. See Indiana Rule of Appellate Procedure

7(B). More specifically, he asserts that the trial court ignored certain mitigating circumstances supported by the record and argued to the trial court. He also asserts that the trial court improperly considered the sentencing range for murder as opposed to a proper sentence for voluntary manslaughter.

In Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on rehearing, 875 N.E.2d 218 (2007), our supreme court held that trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. Id. If the recitation includes the 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 are subject to review on appeal for an abuse of discretion. Id. One way in which a trial court may abuse its discretion is to fail to enter a sentencing statement at all. Id. Another, is to enter a sentencing statement that explains reasons for imposing a sentence and the record does not support the reasons, the statement omits reasons clearly supported by the record, or the reasons given are improper as a matter of law. Id. at 490-91.

In Anglemyer, our supreme court noted that identification of aggravators and mitigators remains "an integral part of the trial court's sentencing procedure." Id. at 490. Coupled with the present requirement that a sentencing statement be given in every felony case, one might appropriately conclude that there is no better or more explanatory manner by which to articulate the reasons for imposing the particular sentence than to

recite the aggravators and mitigators found to exist. Indeed, in Anglemyer, the court stated that appellate review of sentences dictates that the reviewing forum "be told of [the trial court's] reasons for imposing the sentence," notification that "necessarily requires a statement of facts, in some detail, which are peculiar to the particular defendant and the crime . . . ." Id. Again, what better way to accomplish this than enumeration of the various aggravating and mitigating circumstances considered? See McMahon v. State, 856 N.E.2d 743 (Ind. Ct. App. 2006).

Here, the trial court made an extensive oral statement from the bench, in which it articulated the reasons for the sentence imposed. This statement satisfies the general requirement of Anglemyer that a trial court make a reasonably detailed recitation of its reasons for imposing a sentence.

Our rules permit revision of 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." App.R. 7(B). In determining whether a sentence is inappropriate, 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). However, an appellant "must persuade the appellate court that his or her sentence has met this inappropriateness standard of review." Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

We now address the specific assertions made in this appeal. Thomas claims that the court failed to consider various mitigating circumstances, including (1) testimony and letters from friends and family members to the effect that Thomas had turned his life

around and had rehabilitated his character; (2) Thomas's strong provocation in circumstances that were not likely to recur; and (3) Thomas's expression of remorse and entry of a guilty plea. To the extent that Thomas's claims urge us to review the trial court's weighing of aggravating and mitigating factors for an abuse of discretion, we note that Anglemyer precludes us from doing so. 848 N.E.2d at 491.

Character

Family and friends testified or communicated to the court that Thomas's character showed significant improvement, and more particularly, that he attended to the daily living needs of his grandfather, including dressing, shaving, feeding etc.[1] Thomas asserts that this turnaround is a dramatic offset to his prior criminal record wherein the most serious offenses took place years previously.

The sentencing court did not, as alleged, ignore the evidence of Thomas's character as vouched for by the relatives and friends. To the contrary, the court specifically alluded to "background information" but stated that such did not excuse or justify the crime and that although he was giving weight to the "understanding of some family members and the remorse of the defendant" as to the crime committed, the asserted change of character was not afforded substantial weight when balanced against the criminal history. (Tr. at 30-33).

[1] At the time of this crime, Thomas was forty-five years old. A character reference letter from a friend and neighbor recited that she has known Thomas from his "early teens." She stated that Thomas had in previous years been of great help to her and her husband and was meticulous in caring for the needs of his grandfather including bathing, shaving, cooking meals and doing laundry. (Appellant's App. at 10). The letter does not set forth at what stage in Thomas's life these events took place.

Provocation and Likelihood of Recurrence

It is Thomas's position that the extreme provocation which culminated in the shooting was such a circumstance as to mitigate the seriousness of the offense. However, we note that sudden heat is essential to the voluntary manslaughter conviction. The provocation and the victim's hostile and threatening conduct are all factors which bear upon the sudden heat. It is not at all likely that the trial court failed to consider the matter of provocation. As a matter of fact, the court observed that the friends and relatives of the victim, as well as of the defendant, understood and were sympathetic to the circumstances under which the crime occurred.

Thomas claims that the court ignored his contention that the circumstances of this crime were unlikely to recur. The State accurately observes that because this victim is deceased the circumstances cannot recur. However, the court, in discussing the criminal record, noted that although many of the crimes committed by Thomas "go back a long way," many of them, and the most egregious, were crimes of violence. (Tr. at 30).

The court was not compelled to conclude that Thomas was no longer capable of or likely to commit a crime or crimes of violence.

Remorse and Guilty Plea

Thomas argues that his guilty plea reflects his acceptance of responsibility. It is true that a guilty plea is to be considered as a mitigator. However, when as here, the defendant realizes a demonstrable benefit from the plea, the trial court need not afford the

plea such import as the defendant would like.[2] Here, the defendant did receive a substantial benefit. He pleaded to voluntary manslaughter and avoided the risk of a murder conviction. Although one might have perceived that under the circumstances a jury was not as likely to convict of murder rather than the lesser offense of voluntary manslaughter, there was certainly a risk of the greater conviction.[3] In such event, the advisory sentence would have been 55 years.

In addition to the aforementioned benefit, the other charges were dismissed. The dismissal of the two B felony charges for possession of a firearm by a serious violent felon involved two distinct shotguns and not the weapon with which Thomas shot and killed his uncle. It is apparent that the State did not overcharge the serious violent felon counts, and there was no risk that a jury would look to the same evidence to convict on all counts concerning the possession and use of a weapon. Dismissal of the two B felony charges was clearly of substantial benefit to Thomas.

Furthermore, the projected sentence was capped at forty-five years rather than the permissible fifty-year maximum for voluntary manslaughter. Additionally, Thomas's sentence was less than the agreed cap. We conclude that although Thomas was free to argue for a more lenient sentence he did in fact agree that the trial court, in its discretion,

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[2] It may also be noted that the jury had already been selected and would have begun to try the case forty-five minutes after the guilty plea was entered. (Tr. 7).

[3] The trial court specifically found that in light of the affidavit of probable cause, the information charging murder was not "overreaching" by the State. (Tr. 30). As observed by the State, although being confronted by the victim, Thomas did pick up the gun from the ground, and with his finger on the trigger, pointed it at the victim. Although perhaps not likely Thomas could not be assured that the jury would find the requisite sudden heat for a voluntary manslaughter conviction. However, as the court stated, speculation as to what a jury might or might not have done serves no useful purpose. (Tr. 29). Nevertheless, reduction of the murder charge to voluntary manslaughter was of some benefit to Thomas.

could permissibly sentence him to a forty-five year term. He should not be permitted to now claim that a sentence five years less than the agreed cap is inappropriate.

Here, the sentence cap was a permissible sentence for the crime to which Thomas pleaded. The agreed to sentence was not therefore "illegal" as discussed in Stites v. State, 829 N.E.2d 527 (Ind. 2005). In Stites, the defendant agreed to consecutive sentences which the court was not authorized to impose. But even in the instance of an agreed "illegal" sentence, that case held:

> Stites received a significant benefit from her plea agreement. In particular she received less than the maximum possible sentence of sixty years, and the State agreed not to seek the death penalty. After striking this favorable bargain, Stites cannot now be heard to complain.

Id. at 529.[4] The case before us is even stronger than the situation presented in Stites. Here the sentence imposed was less than the permissible sentence to which Thomas agreed. That sentence was a statutorily authorized sentence for the crime of voluntary manslaughter.

Improper Consideration of Sentence for Murder

Finally, Thomas argues that the court was improperly influenced by the dismissed murder charge and the sentence range for that crime. The essence of the argument is that by specifically referencing the sentence which could be imposed for a murder conviction,

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[4] But see Bennett v. State, 802 N.E.2d 919, 922 (which in dictum said that "even if a product of a plea agreement, a sentence imposed contrary to statutory authority would render a plea agreement void and unenforceable"). The authority cited for this proposition by the Bennett court, Sinn v. State, 609 N.E.2d 434 (Ind. Ct. App. 1993), however, was overruled by Lee v. State, 816 N.E.2d 35 (Ind. 2004).

the trial court was diverting its focus from the crime for which Thomas was to be sentenced to a crime no longer germane to the matter at hand.

The court did in fact allude to the murder charge but stated that it "is fruitless and useless" to speculate upon what a jury might have done under a murder charge." (Tr. at 29). "[It] just doesn't go anywhere to think of that as what might have been." Id. This comment undercuts the suggestion that the court was considering the sentence for a murder conviction in imposing the voluntary manslaughter sentence. The sentence for murder was very much a valid consideration in assessing the benefit which inured to Thomas as a result of his guilty plea to a lesser crime.

Appropriateness of Sentence

As to appropriateness, the argument on appeal may be construed to be that because of the proffered mitigators and the remoteness of the more egregious offenses in his criminal record, the sentence exceeded what was appropriate under the circumstances. In light of our foregoing discussion, we conclude otherwise.

CONCLUSION

For the reasons herein set forth, the trial court's imposition of a forty-five year sentence is not inappropriate.

Affirmed.

ROBB, J., and CRONE, J., concur.