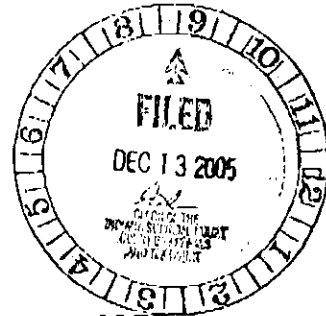


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

OBADYAH BEN-YISRAYL,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 45A05-0501-CR-22

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas P. Stefaniak, Jr., Judge
Cause No. 45G04-9103-CF-00042

DECEMBER 13, 2005

MEMORANDUM DECISION - NOT FOR PUBLICATION

RATLIFF, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Obadyah Ben-Yisrayl f/k/a Christopher Peterson (Ben-Yisrayl) appeals the sentences he received upon re-sentencing for his 1992 convictions of two counts of murder.

We affirm.

ISSUES

Ben-Yisrayl presents two issues for our review which we restate as:

- I. Whether the court properly re-sentenced Ben-Yisrayl without further proceedings.
- II. Whether the court properly relied on Ben-Yisrayl's prior murder convictions as aggravating factors in re-sentencing.

FACTS AND PROCEDURAL HISTORY

In 1990, Ben-Yisrayl murdered two brothers in the tailor shop they operated in Gary, Indiana. He was charged with two counts of murder, and the State requested the death penalty. Following a jury trial, Ben-Yisrayl was found guilty of both counts of murder, but the jury recommended against the death penalty. At sentencing, despite the jury's recommendation, the trial court imposed the death sentence. Although Ben-Yisrayl's convictions and sentence were affirmed by our supreme court in *Peterson v. State*, 674 N.E.2d 528 (Ind. 1996), *reh'g denied, cert. denied*, 522 U.S. 1078, 118 S.Ct. 858, 139 L.Ed.2d 757 (1998), the supreme court granted Ben-Yisrayl's petition seeking authorization to file a successive petition for post-conviction relief based upon *Saylor v. Indiana*, 808 N.E.2d 646 (Ind. 2004), which held that it was no longer appropriate for the

trial court to impose a sentence of death when the jury in the case has recommended against imposing the death sentence. The trial court granted Ben-Yisrayl's successive petition for post-conviction relief, and on December 13, 2004, the trial court re-sentenced Ben-Yisrayl to consecutive terms of sixty years. It is from the imposition of these sentences that Ben-Yisrayl now appeals.

DISCUSSION AND DECISION

I. SENTENCING WITHOUT FURTHER PROCEEDINGS

Ben-Yisrayl contends that the trial court improperly imposed his new sentences when it did so without a hearing. He begins his argument by citing three sentencing statutes, which he claims the trial court violated. Ind. Code § 35-38-1-3 requires that a court must conduct a hearing before sentencing a defendant for a felony. Ind. Code § 35-38-1-4 states that the defendant must be present at the time sentence is pronounced, and Ind. Code § 35-38-1-8 mandates that a defendant may not be sentenced for a felony before a presentence report is prepared by the probation department and considered by the court. Ben-Yisrayl claims that by issuing an order re-sentencing him without holding a hearing, the trial court violated these sentencing statutes.

We acknowledge these statutory requirements, and we note that these statutes were complied with during Ben-Yisrayl's original sentencing hearing held on June 5, 1992 at which he was present and for which a pre-sentence report was prepared and

reviewed by the judge.¹ However, at this time, we are not concerned with an original sentencing but rather a re-sentencing. In such a case, the trial court can issue a new sentencing order without holding a further sentencing hearing. See *Chism v. State*, 807 N.E.2d 798, 803 (Ind. Ct. App. 2004).

In 2001, our supreme court decided *O'Connell v. State*, 742 N.E.2d 943 (Ind. 2001). In *O'Connell*, the court affirmed the defendant's convictions but remanded the case to the trial court for a new sentencing order. The court explained that when it orders such action, the trial court's responsibility to produce a new sentencing order that responds to the appellate court's concerns may be discharged by either: (1) issuing a new sentencing order without taking any further action; (2) ordering additional briefing on the sentencing issue and then issuing a new order without holding a new sentencing hearing; or (3) ordering a new sentencing hearing at which additional factual submissions are either allowed or disallowed and then issuing a new order based on the presentations of the parties. *Id.* at 952-53. In 2004, this Court decided *Chism*, and cited this rule from *O'Connell*. In *Chism*, the defendant filed a motion to correct erroneous sentence, and the trial court modified his sentence. The defendant appealed the modification to this Court and we affirmed the sentence modification, noting that "[w]e see no reason why a trial court correcting an erroneous sentence on its own, and not at the behest of an appellate

¹ Although the pre-sentence report could not be located at the time the Appellant's Appendix was prepared for appeal, it is undisputed that such existed and was reviewed and considered at the time of original sentencing. See Appellant's Appendix at 35 (Sentencing Order of June 5, 1992) and 45 (affirmation dated January 25, 2005 regarding missing pre-sentence report).

court, also cannot 'issue a new sentencing order without taking any further action . . .'" *Id.* at 803. We agree and thus apply the same rationale here.

In addition, Ben-Yisrayl argues that a new sentencing hearing should have been conducted because the original sentencing judge is now deceased. In support of this contention, Ben-Yisrayl cites *Abercrombie v. State*, 275 Ind. 407, 417 N.E.2d 316 (1981) and *Pearson v. State*, 543 N.E.2d 1141 (Ind. Ct. App. 1989). In both of these cases, there were no statements of reasons to support the imposition of either consecutive or enhanced sentences. Therefore, the appellate court remanded the cases for more specific sentencing statements. However, more specific statements could not be obtained because the original sentencing judges were deceased, so the trial courts held new sentencing hearings. Thus, the trial courts did not hold new sentencing hearings merely because the original sentencing judges were deceased, as Ben-Yisrayl would have us believe. Rather, the appellate court wanted the trial courts to provide specific information which was not documented by the sentencing judge. Ordinarily, the appellate court would remand the case to the trial court, and the original judge would provide the specifics needed. However, without the original judge and without the documentation by him or her, new sentencing hearings were in order.

In contrast in the present case, the original sentencing judge set forth, very specifically, the aggravating and mitigating circumstances and stated his reasons for Ben-Yisrayl's sentences. Thus, there is no need for a more specific sentencing statement, and the fact that the original sentencing judge is now deceased is of no moment. Further, a review of the materials provided for appeal in this case show that the judge who re-

sentenced Ben-Yisrayl was amply supplied from the record with the evidence needed to render a proper sentence. Additionally, Ben-Yisrayl was re-sentenced due to a change in Indiana's death penalty sentencing scheme, not due to a change in the circumstances of his case or to some error that occurred during sentencing. Under these circumstances, there was no need for the court, on re-sentencing, to hear further evidence.

Moreover, Ben-Yisrayl asserts that the sentencing statutes are different depending on whether the case is a capital case or a non-capital case. He claims that although the differences in the statutes are slight, he should have had a new sentencing hearing now that he is being sentenced as a non-capital defendant. We disagree. We presume the judge is aware of the sentencing statute and its factors for non-capital cases. *See Dumas v. State*, 803 N.E.2d 1113, 1121 (Ind. 2004) (stating that appellate courts presume trial judges are aware of and know the law). In applying the circumstances to the law, the re-sentencing judge had at his disposal the transcript from the original sentencing hearing, as well as the original sentencing judge's findings and sentencing statement with which to make his decision upon re-sentencing Ben-Yisrayl. We find no error.

Finally, Ben-Yisrayl claims that his right of allocution was denied by the trial court's failure to hold a hearing in order to re-sentence him. The right of allocution is embodied in Ind. Code § 35-38-1-5(a). This statutory section affords defendants an opportunity to make a statement to the court prior to the pronouncement of sentence and requires the court to ask the defendant whether he or she wishes to make such a statement. Ben-Yisrayl also asserts that the denial of his right of allocution amounts to a violation of his constitutional rights under Article 1, section 13 of our state constitution.

"A defendant who suggests that he was denied his right to allocution bears a heavy burden in establishing his claim." *Minton v. State*, 400 N.E.2d 1177, 1178 (Ind. Ct. App. 1980). In the present case, Ben-Yisrayl exercised his right of allocution at his original sentencing hearing in June 1992. He concedes this fact in his brief. See Appellant's Brief at 16 n.8. As we stated previously, the statutory requirements for sentencing were complied with in the original sentencing hearing. We are now addressing the re-sentencing of Ben-Yisrayl for which we have determined no hearing was required. Thus, Ben-Yisrayl's right of allocution was neither involved nor violated. He has failed to meet his burden to show error.

II. AGGRAVATING CIRCUMSTANCES

Next, Ben-Yisrayl asserts that the trial court erroneously relied on his criminal history as an aggravating circumstance to support the imposition of enhanced sentences upon re-sentencing.

Sentencing is a determination within the sound discretion of the trial court, and we will not reverse the trial court's decision absent an abuse of discretion. *Allen v. State*, 722 N.E.2d 1246, 1250 (Ind. Ct. App. 2000). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances of the case. *Groves v. State*, 823 N.E.2d 1229, 1231 (Ind. Ct. App. 2005). The broad discretion of the trial court includes whether to increase the presumptive sentence, to impose consecutive sentences, or both. *Jones v. State*, 807 N.E.2d 58, 68-69 (Ind. Ct. App. 2004), *trans. denied*, 822 N.E.2d 969.

Ben-Yisrayl was convicted of two counts of murder in Porter County in March 1992 prior to his convictions in the instant case in May 1992. At his original sentencing in the instant case, the trial court used the two murder convictions in Porter County as aggravating circumstances. Ben-Yisrayl later filed a petition for writ of habeas corpus with regard to the murder convictions in Porter County. The United States District Court for the Northern District of Indiana granted Ben-Yisrayl's petition, and his current argument is based upon the granting of that petition. He claims that the granting of his petition vacated the Porter County convictions such that they can no longer be relied upon in this case as criminal history aggravators. However, that is not the complete story. Once Ben-Yisrayl's petition was granted, the State appealed that decision to the Seventh Circuit Court of Appeals where both parties now await a decision. Therefore, the convictions from Porter County remain valid convictions pending the outcome of the case in the Seventh Circuit. Because the convictions remain valid, the court properly relied on them when re-sentencing Ben-Yisrayl.

Nevertheless, even assuming, *arguendo*, that the Porter County murder convictions are invalid, Ben-Yisrayl's enhanced sentences are proper. When a trial court improperly applies an aggravator but other valid aggravating circumstances exist, a sentence enhancement may still be upheld. *Hatchett v. State*, 740 N.E.2d 920, 929 (Ind. Ct. App. 2000), *trans. denied*, 753 N.E.2d 8 (2001). We further note that a single aggravating circumstance may serve to enhance a sentence. *Allen*, 722 N.E.2d at 1253. The Porter County convictions were only two of three aggravating circumstances found by the trial court, and the third aggravator was clearly set forth in the court's sentencing

statement. The court properly found that the fact that Ben-Yisrayl murdered not one but two people in this case, served to aggravate this crime.

The nature and circumstances of the offense, as well as the court's discretion to consider other matters, support the enhanced, consecutive sentences in this case. See Ind. Code § 35-38-1-7.1(a)(2) and (d). Here, Ben-Yisrayl, without provocation, murdered two unarmed brothers by shooting them in the back of the head with a sawed-off shotgun at close range in their place of business. Our supreme court has stated that in cases involving multiple killings, the imposition of consecutive sentences is appropriate. *Scruggs v. State*, 737 N.E.2d 385, 387 (Ind. 2000); see also *Tobar v. State*, 740 N.E.2d 109, 113 (Ind. 2000) (stating that "[a]s a general rule, multiple killings warrant the imposition of consecutive sentences"). Moreover, a single aggravating circumstance may be used both to enhance a sentence and to impose consecutive sentences. *Allen*, 722 N.E.2d at 1253. Thus, Ben-Yisrayl's enhanced, consecutive sentences for the double murder of two brothers are proper.

CONCLUSION

Based upon the foregoing discussion and authorities, we conclude that the court properly re-sentenced Ben-Yisrayl without further proceedings and that the court correctly relied on his prior murder convictions as aggravating factors for re-sentencing. Moreover, Ben-Yisrayl's enhanced, consecutive sentences are supported by an appropriate aggravating factor in addition to the two prior murder convictions.

Affirmed.

MAY, J., and DARDEN, J., concur.