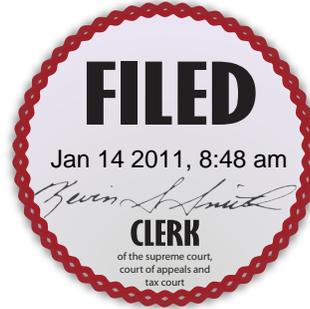


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

CHRISTOPHER BRIAN NEAL,

Appellant- Defendant,

vs.

STATE OF INDIANA,

Appellee- Plaintiff,

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No. 07A01-1007-CR-331

APPEAL FROM THE BROWN CIRCUIT COURT
The Honorable Judith A Stewart, Judge
Cause No. 07C01-0212-MR-654

January 14, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issues

Following a jury trial, Christopher Brian Neal appeals his aggregate sentence of sixty-five years for his convictions of murder, a felony, and robbery, a Class B felony.¹ Neal raises two issues for our review, which we restate as whether the trial court abused its discretion in sentencing, and whether his sentence is inappropriate. Concluding the trial court did not abuse its discretion in sentencing him and his sentence is not inappropriate, we affirm.

Facts and Procedural History

In 2002, Neal and a confederate intended to steal some money and needed a ride to their intended target. They asked a man for a ride and he agreed in exchange for some money, which they promised him. At some point Neal and his partner changed their plan – they would kidnap the man and take his car. Neal directed the man, who was already driving the three, down a road near a forest. The three exited the car, a confrontation ensued, Neal shot the man in the chest, his partner shot the man once more in the chest, and they emptied his pockets (which included about twenty dollars in cash), dragged him through some brush, and left him. The man’s dead body was found by a hiker.

Neal was arrested and charged and a jury found him guilty in 2003 of murder, voluntary manslaughter, attempted kidnapping, attempted carjacking, and robbery. Following a sentencing hearing, the trial court issued a sentencing order which detailed the following aggravating circumstances: 1) Neal has twice violated his juvenile probation; 2) Neal has a history of criminal or delinquent activity, including offenses that

¹ Neal was also found guilty of voluntary manslaughter, attempted kidnapping, and attempted carjacking. Because these offenses were lesser included offenses of his conviction for murder, they were not reduced to convictions and Neal was not sentenced for these crimes.

increased in severity despite rehabilitative efforts and counseling; 3) Neal “is in need of correctional or rehabilitative treatment that can best be provided by commitment to a penal facility”; and 4) “[i]mposition of a sentence below the statutory presumption would depreciate the seriousness of the crime.” Appellant’s Appendix at 406-07. The trial court also found the following mitigating circumstances:

1. The defendant’s relatively young age of 19 years, although this is not a strong mitigating factor. Unlike a juvenile who is waived into adult court, the defendant was of adult age when he committed the crime;
2. The family and mental health issues faced by the defendant as a child;
3. The defendant’s initial cooperation with police that greatly assisted law enforcement in solving the crime so quickly. However, the significance of this factor is lessened by the fact that the defendant previously testified he made the decision to cooperate with police because he thought it was in his own best interests and because, after his initial confession, he has told different stories about what happened including who else was or was not involved. There was no indication that he cooperated because of a sense of remorse or out of empathy with the victim’s family.

Id. at 407.

The trial court imposed concurrent sentences of sixty-five years for the murder charge and fifteen years for the robbery charge. We granted leave for Neal’s belated appeal, and he now appeals his sentence.

Discussion and Decision

I. Abuse of Discretion in Sentencing

A. Standard of Review

At the outset, we note that Neal’s offenses, trial, and sentencing occurred before the sentencing scheme was amended in 2005. As a result, the former sentencing scheme applies. See Roney v. State, 872 N.E.2d 192, 198 n.1 (Ind. Ct. App. 2007), trans. denied.

Sentencing decisions are within the trial court's discretion, and will be reversed only upon a showing of manifest abuse of discretion. Berry v. State, 819 N.E.2d 443, 452 (Ind. Ct. App. 2004), trans. denied. When a court exercises its discretion to enhance a presumptive sentence, the trial court must identify all significant aggravating and mitigating circumstances, give specific reasons why each circumstance is so identified, and balance them to determine whether the former outweigh the latter. Id. The existence of even one valid aggravator is sufficient to support an enhanced sentence. Id.

B. Aggravating and Mitigating Circumstances

Neal contends the trial court abused its discretion in failing to assign appropriate weight to certain mitigating circumstances, namely, his relatively young age of nineteen at the time of the offenses, his family and mental health issues as a child, and his cooperation with law enforcement.

In particular, Neal argues his age of nineteen is close enough to being a minor that it should have been a significant mitigating factor. We disagree. Neal was indeed an adult at the time of the offenses and had a history of at least two violent offenses, see, e.g., Appellant's App. at 406 (discussing battery of his sister as a juvenile and battery of another juvenile in a non-secure juvenile shelter), and two acts that would have been felonies if committed by an adult. See Pre-Sentence Investigation Report ("PSI") at 5 (noting his juvenile adjudications for burglary, a Class C felony if committed by an adult, and auto theft, a Class D felony if committed by an adult). Further, "youth is not automatically a significant mitigating circumstance." Smith v. State, 872 N.E.2d 169, 178 (Ind. Ct. App. 2007), trans. denied. "Whether a defendant's age constitutes a significant mitigating circumstance is a decision that lies within the discretion of the trial

court.” Id. Similar to Smith, the trial court acknowledged Neal’s youth and declined to find it to be a significant mitigating circumstance, and similar to Smith, we conclude that “[t]his was the trial court’s call.” Id. (citation omitted).

As to Neal’s family and mental health issues, Neal refers us to Prowell v. State, 787 N.E.2d 997, 1002 (Ind. Ct. App. 2003), trans. denied, in which we noted a trial court’s obligation to “carefully consider on the record what mitigating weight, if any, to allocate to any evidence of mental illness” The end of that same sentence reads: “even though the court is not obligated to give the evidence the same weight as does the defendant.” Id.; see Weeks v. State, 697 N.E.2d 28, 30 (Ind. 1998) (“emphasiz[ing]” that a guilty but mentally ill defendant “is not automatically entitled to any particular credit or deduction from his otherwise aggravated sentence simply by virtue of being mentally ill” (quotation and citation omitted)). The nature and extent of these problems were detailed in the PSI and further explored on the record at the sentencing hearing. While these problems are troubling in their own right, Neal’s family and mental health issues are unrelated to this offense. The trial court considered them to be mitigating circumstances, Appellant’s App. at 407, but concluded they were outweighed by the aggravating circumstances. The history of his family relationships is unrelated to this offense, which did not involve any of his family members. Although his mental health referrals indicate anger issues and note he was considered a threat to himself and others, we do not conclude the trial court abused its discretion in failing to find these to be significant mitigating circumstances.

As for his cooperation with law enforcement, we defer to the trial court’s judgment of credibility and weighing of evidence at the sentencing hearing. Neal invites

us to reconsider the genuineness of his expression of remorse and the degree to which his “not resist[ing] or attempt[ing] to escape arrest when he was spotted,” Brief of Appellant at 18, and confession were helpful to law enforcement. It is not the province of an appellate court to reweigh evidence or reassess the credibility of witnesses. Wilfong v. Cessna Corp., 838 N.E.2d 403, 406-07 (Ind. 2005). The trial court sits in the best position to do so, and we refuse to interfere with the trial court’s exercise of discretion in performing this role. See id.; see also Roney, 872 N.E.2d at 204 (“We will not remand for reconsideration of alleged mitigating factors that have debatable nature, weight, and significance.”).

Neal also takes issue with the trial court’s consideration of his juvenile incorrigibility referrals that were dismissed. Neal raises this under his “inappropriate sentence” argument, but we address it here as well. We agree that the trial court’s consideration of Neal’s dismissed referrals was improper because “they were not prior convictions which had been found by a jury or admitted to by the defendant.” Waldon v. State, 829 N.E.2d 168, 182 (Ind. Ct. App. 2005), trans. denied; Blakely v. Washington, 542 U.S. 296, 301 (2004) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (citation omitted)). However, the trial court’s proper consideration of Neal’s multiple batteries, violations of probation, and juvenile adjudications for burglary and auto theft as aggravating circumstances are sufficient to support his enhanced sentences. See Berry, 819 N.E.2d at 452 (stating a single aggravator is sufficient to support an enhanced sentence); Hawkins v. State, 748 N.E.2d 362, 364 (Ind. 2001) (stating an enhanced sentence may be

upheld when a trial court considers proper and improper aggravating circumstances). We therefore conclude the trial court did not abuse its discretion in sentencing Neal.

II. Inappropriate Sentence

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).² In making this determination, 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. Nevertheless, the defendant bears the burden to persuade this court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). “[W]hether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case.” Cardwell v. State, 895 N.E.2d 1219, 1224 (Ind. 2008).

Neal argues his lack of criminal convictions and the fact that his only recorded instance of violence is his battery of his sister makes the sentence inappropriate. This contention misstates his record in that it disregards his battery of another juvenile while in a juvenile non-secure shelter. PSI at 5. Neal’s subsequent burglary and auto theft adjudications also indicate Neal’s failure to reform and escalating criminal behavior. In addition, the mental health issues that Neal has emphasized apparently involve anger issues that make him a danger to others, as detailed in the PSI, PSI at 16, and in the trial court sentencing order. Neal makes no other argument in support of his character.

² In 2002, Appellate Rule 7(B) was amended, effective January 1, 2003. The rule sets forth the standard for the reviewing court. This amendment changed the applicable test, but this change is irrelevant here, where we are reviewing Neal’s sentence after January 1, 2003. See Flammer v. State, 786 N.E.2d 293, 294 n.1 (Ind. Ct. App. 2003), trans. denied.

Neal next explicitly concedes his offenses were “as serious an offense as one can commit,” but continues by stating that “there was nothing particularly heinous about this crime” Br. of Appellant at 20. Although, as Neal notes, he was not convicted of intentional murder, we find the trial court’s description of the offense to be apt:

[Neal] creat[ed] an extreme risk of loss of human life for personal gain, and, indeed, t[ook] a human life. He robbed, carjacked and attempted to kidnap [the victim] while armed with a handgun. And, in the process of carjacking and attempting to kidnap [the victim], he shot and killed him.

Appellant’s App. at 405. Given this description, we decline to find his sentence inappropriate as to the nature of the offenses.

Upon reviewing the nature of the offenses and Neal’s character, we conclude the sentence is not inappropriate.

Conclusion

The trial court did not abuse its discretion in weighing the mitigating circumstances, and the sentence is not inappropriate in light of the nature of Neal’s offenses or his character.

Affirmed.

RILEY, J., and BROWN, J., concur.