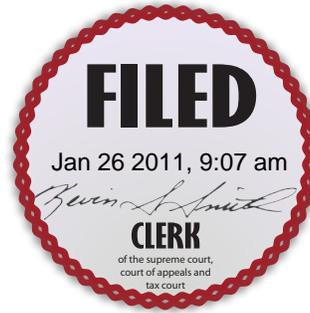


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JONATHAN R. DYE,
Appellant- Defendant,

vs.

STATE OF INDIANA,
Appellee- Plaintiff,

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No. 21A01-1004-CR-168

APPEAL FROM THE FAYETTE CIRCUIT COURT
The Honorable Daniel Lee Pflum, Judge
Cause No. 21C01-0904-FA-36

January 26, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issues

Jonathan Dye appeals his twelve and one-half year sentence following his guilty plea to two counts of dealing in a controlled substance, one a Class B and one a Class C felony. Dye presents two issues for our review: whether the trial court abused its discretion in sentencing him, and whether his sentence is inappropriate in light of the nature of his offenses and his character. Concluding the trial court abused its discretion by relying upon an improper aggravating factor and that the resulting sentence is inappropriate, we revise and remand for a sentence of ten years with two years suspended.

Facts and Procedural History

On November 19, 2008, Dye sold pills of Clonazepam, a controlled substance, to a confidential informant working with Connersville Police and the Fayette County Sheriff's Department. On December 10, 2008, Dye sold six capsules of Adderall, a controlled substance, to the same confidential informant. Both sales allegedly occurred at or outside Dye's residence in Connersville.

The State charged Dye with two counts of dealing in a controlled substance. As amended on April 15, 2009, the information charged Count I as a Class A felony, and Count II as a Class B felony, based on Dye allegedly delivering the drugs within 1,000 feet of a public park. Dye and the State entered into a verbal plea agreement. As summarized at the guilty plea hearing, Dye agreed to plead guilty to the lesser included offenses of Count I as a Class B felony and Count II as a Class C felony, based on the State removing the allegations that the sales occurred within 1,000 feet of a public park.

In addition, the State agreed to make no sentencing recommendation except that the sentences be concurrent. See Transcript at 9-10 (deputy prosecutor stating “the State will withhold any comment at sentencing uh that . . . Count I not to be sentenced outside the scope of a B Felony and Count II not to be . . . sentenced outside the scope of a C felony. Concurrent.”). On February 5, 2010, Dye pleaded guilty pursuant to this agreement.

A sentencing hearing was held on March 5 and 12, 2010, wherein the trial court made the following sentencing statement:

Ok . . . as [defense counsel] pointed out last week you have no prior felony record. And that’s good however, there were two separate charges of dealing in a controlled substance. One was an A felony, one was a B Felony that the State filed they clearly could have proved that that occurred within a thousand feet of a . . . park But the State amended that down to a B felony and a C felony . . . so with all that in mind . . . the State gave you a huge break

Id. at 27-28. Thus, the trial court sentenced Dye to twelve and one-half years on Count I and five years on Count II, to be served concurrently. The trial court’s written sentencing order provided that the reasons for the sentence were those stated in court. Dye now appeals his sentence.

Discussion and Decision

I. Abuse of Discretion

In imposing sentence for a felony, a trial court must enter a sentencing statement that includes “reasonably detailed reasons or circumstances for imposing a particular sentence.” Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007), clarified on reh’g, 875 N.E.2d 218. “The reasons given, and the omission of reasons arguably supported by the record, are reviewable on appeal for abuse of discretion.” Id. An abuse of discretion

occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. Id. at 490. The trial court may abuse its discretion if it (1) fails to enter a sentencing statement at all, (2) gives reasons for the sentence, including findings of aggravating and mitigating circumstances, that are not supported by the record, (3) enters a statement that omits reasons clearly supported by the record and advanced for consideration, or (4) gives reasons that are improper as a matter of law. Id. at 490-91. However, the weight assignable to mitigating or aggravating circumstances which were properly found or should have been found is not subject to review for abuse of discretion. Id. at 491.

Dye argues the trial court abused its discretion in two main ways: first, giving as a reason for the sentence its finding the State could have proven the more serious charges of Class A and Class B felonies, and second, failing to consider Dye's guilty plea as a mitigating circumstance or reason supporting leniency. As to Dye's second argument, the trial court was within its discretion to find Dye received a substantial benefit from his plea because the State in return amended the charges down to Class B and Class C felonies. "[A] guilty plea is not automatically a significant mitigating factor," particularly where the defendant received a substantial benefit in consideration for the plea or it was simply a pragmatic decision. Kinkead v. State, 791 N.E.2d 243, 247-48 (Ind. Ct. App. 2003) (quotation omitted), trans. denied. Thus, the trial court was not required to find Dye's guilty plea to be a significant mitigator.

Nonetheless, we agree with Dye that the trial court improperly gave as a reason for enhancing his sentence the fact the State had filed Class A and Class B felony charges

that in the trial court's view could have been proven. This court has held that when a defendant pleads guilty to a lesser included offense of that initially charged, "the element(s) distinguishing it from the greater offense . . . may not be used as an aggravating circumstance to enhance the sentence." Conwell v. State, 542 N.E.2d 1024, 1025 (Ind. Ct. App. 1989) (citing Hammons v. State, 493 N.E.2d 1250 (Ind. 1986)). In Carlson v. State, 716 N.E.2d 469 (Ind. Ct. App. 1999), we applied this principle to conclude that where the defendant was initially charged with dealing cocaine as a Class A felony based on the amount of the drugs, but pleaded guilty to the lesser included Class B felony, the trial court erred by using the amount of the drugs as an aggravating factor to enhance the sentence. Id. at 472-73.

Here, in part because the trial court gave only a verbal and no written sentencing statement, it is not easy to parse out what the trial court considered to be specifically aggravating circumstances as distinguished from other sentencing considerations. However, it is clear the trial court did not merely cite the fact Dye was initially charged with Class A and Class B felonies, but went on to give as a reason for the sentence its belief the State "clearly could have proved" those charges. Tr. at 28. While the trial court acted within its discretion to consider the initially more severe charges as a reason for not attributing mitigating weight to Dye's plea, it went too far by using the State's ability to prove those charges as a separate reason for enhancing Dye's sentence. We conclude this reason was improper as a matter of law, and because of the absence of other aggravating circumstances or stated reasons that clearly would have led the trial court to

impose the same sentence, conclude the trial court abused its discretion in sentencing Dye.

When, as here, we conclude the trial court abused its discretion in sentencing a defendant, we may remand for resentencing or exercise our review and revise authority under Appellate Rule 7(B). Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007). Because Dye argues his sentence is inappropriate, we elect the latter course.

II. Inappropriate Sentence

Article 7, sections 4 and 6 of the Indiana Constitution authorize independent appellate review of the appropriateness of a sentence, an authority implemented through Indiana Appellate Rule 7(B). Childress v. State, 848 N.E.2d 1073, 1079-80 (Ind. 2006). This court may 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.” App. R. 7(B). 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. The defendant bears the burden to persuade this court that his or her sentence is inappropriate. Childress, 848 N.E.2d at 1080. “[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).

With regard to the nature of the offenses, the advisory sentence is “the starting point the Legislature has selected as an appropriate sentence for the crime committed.”

Childress, 848 N.E.2d at 1081. For a Class B felony, the advisory sentence is ten years. Ind. Code § 35-50-2-5. Here, on each count, the trial court imposed concurrent sentences above the advisory, sentencing Dye to twelve and one-half years.

Looking at Dye's offenses, they strike us as typical instances of dealing in a controlled substance, and the record reflects nothing out of the ordinary as to their nature. As such, the nature of the offenses suggests an advisory sentence is most appropriate.

As for Dye's character, he has no prior history of drug or violent offenses, and the present offenses are the first time he has been charged or convicted of a felony. Of his five prior misdemeanor convictions, the only one since 2001 is a conviction for driving while suspended in 2007. The significance of a criminal history "varies based on the gravity, nature and number of prior offenses as they relate to the current offense." Wooley v. State, 716 N.E.2d 919, 929 n.4 (Ind. 1999). Thus, Dye's relatively minor criminal record is not significant in relation to the present case.

Other factors relevant to Dye's character suggest a sentence above the advisory is inappropriately harsh. Until 2008, Dye had a history of employment. He has a child support obligation for three of his four minor children, with whom he has regularly exercised visitation. Until his arrest on the present charges, Dye had custody of his other child, a ten-year-old son, and the record indicates a potential hardship to that son, who now must live in Tennessee with his grandfather.

Considering all of these factors together, particularly Dye's lack of a significant criminal history, we conclude his twelve and one-half year sentence is inappropriate. We therefore revise his sentence to the advisory ten years, with eight years executed at the

Department of Correction and two years suspended to probation. Specifically, Dye's sentence on the Class B felony conviction is revised to ten years with two years suspended to probation, and his sentence on the Class C felony conviction is revised to the advisory four years, to run concurrently. This cause is remanded to the trial court for modification of the judgment accordingly.

Conclusion

The trial court abused its discretion in sentencing Dye by relying upon an improper aggravating factor, and we further conclude a twelve and one-half year sentence is inappropriate. Dye's sentence is revised to ten years, with eight years executed and two years suspended to probation.

Revised and remanded.

RILEY, J., concurs.

BROWN, J., concurs in part with opinion.

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)	
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)	
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)	
Appellee-Plaintiff.)	

Brown, J., concurring in part

I concur with the majority in all respects except that I would revise Dye’s sentence to ten years, with six years executed and four years suspended, the remaining executed portion of the sentence to be served in a community corrections program such as house arrest.