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ATTORNEY FOR APPELLANT:

**DANIEL M. GROVE**  
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**  
Attorney General of Indiana

**MARA McCABE**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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DEAN BLANCK,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 06A01-0509-CR-405

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APPEAL FROM THE BOONE SUPERIOR COURT  
The Honorable Kathy Smith, Special Judge  
Cause No. 06D01-9511-CF-62

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**January 30, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Judge**

Appellant-defendant Dean Blanck belatedly appeals from the twenty-year sentence imposed by the trial court following his guilty plea to Robbery,<sup>1</sup> a class B felony. Specifically, Blanck argues that the trial court considered an improper aggravating circumstance, failed to consider three mitigating circumstances, and imposed a sentence that is inappropriate in light of the nature of the offense and his character. Finding that the trial court properly sentenced Blanck, we affirm the judgment of the trial court.

### FACTS

On November 4, 1995, Blanck and Joseph Majko robbed the Parkside Pharmacy in Lebanon. Blanck, who was armed with a gun, and Majko stole drugs from the pharmacy and, during the course of the robbery, placed two pharmacy employees in fear. Thereafter, the State charged Blanck with class B felony armed robbery, class D felony theft, and class B felony criminal confinement.

On January 29, 1996, Blanck entered into a written plea agreement, in which he agreed to plead guilty to the class B felony robbery charge in exchange for the State's dismissal of the theft and criminal confinement charges. The plea agreement left sentencing open to the trial court's discretion. That same day, Blanck pleaded guilty to the robbery charge.

On August 29, 1996, the trial court held a sentencing hearing. During the hearing, Blanck presented testimony from Marion County Sheriff Department Sergeant Michael Hornbrook, who testified that after Blanck was already incarcerated on the current

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<sup>1</sup> Ind. Code § 35-42-5-1.

robbery charge, he contacted Sergeant Hornbrook and provided him with information regarding some prior robberies and burglaries that Majko had committed in Marion County. Blanck testified that he had previously spent “a couple of years” in prison for several DWIs, that he was on probation at the time he committed this offense, that he had longstanding drug and alcohol problems, and that he had failed to follow through on his attempts at treatment. Appellant’s App. p. 218. He also testified that he had lost custody of his son to the county welfare department following the filing of a CHINS petition and that he committed the robbery because Majko told him, “You owe that county one for taking your son!” Id. at 222. When sentencing Blanck, the trial court stated:

I’m going to sentence you to 20 years at the Department of Corrections. I’m going to find the following circumstances in support of that.

Firstly, there really are no mitigating circumstances here as pertained to the robbery itself. A lot of the things you’ve told about your personal life -- and I’ve, I’m sorry about all of those things -- but that doesn’t, it’s not a mitigator with regard to this particular offense.

I’d just like to make one comment. You alluded to the case that you filed in my Court. This Court didn’t have anything to do with the custody of your son, as you know. That was the Juvenile Court. And what you did, you sued everybody that I can think of that had anything to do with it in my court -- the State of Indiana, the, the uh, Probation Departments, and whatnot. And you sued those people civilly in my court while you were incarcerated. And this Court entertained that suit throughout. There were numerous motions filed to try to get it dismissed. I, I deferred the hearings and whatnot. And finally, you were out of jail. I set the matter for hearing on those Motions to Dismiss -- and you don’t show! So it gets dismissed! So I, you know, I, I can’t, uh, I can’t come to a conclusion that you were all that serious or outraged against these people because, when the time came to put up on that case, you were nowhere to be found! So it got dismissed. You litigated that case as long as you were incarcerated. But once you were out, all of [a] sudden, there was no effort to pursue that case. So that’s all I can say about it. It certainly, I mean, it falls flat as a mitigator.

There are aggravating circumstances in this case. The imposition of a reduced sentence and the suspension of the sentence and imposition of probation would depreciate the seriousness of the crime. Secondly, you were on probation at the time of the offense. And thirdly, you have an extensive criminal history.

Now, one of the things I've noticed about your criminal history, Mr. Blanck, is that there's no hiatus in it -- going back all the way to '79. It's almost every year -- something new.

Now, any one of these individual cases is not earth-shattering in and of itself. I mean, you've got Operating While Intoxicated several times here. And you've got that Battery. You've got a drug conviction, uh, Possession of a Narcotic Drug over 30 grams on 11-1-83. Uh, but when you add it all up, it's like, Reckless Driving 1979; Drunk 1980; Public Intoxication 1981; Driving While Intoxicated 1982[;] 1983, you had Reckless Driving, Battery with Injury, Operating While Intoxicated, Public Intoxication, Possession of Narcotic Drug over 30 Grams[;] 1984, Criminal Trespass. I guess there was a hiatus from '84 to '89.<sup>[2]</sup> Operating While Intoxicated is the next hit in 1989. Public Intoxication in 1992. And then two Operating While Intoxicated in 1993. So it's just a constant, uh, uh, series of contacts with the Criminal Justice System.

I don't, there are several indications -- and this case itself is an indication -- of, of what happened in a lot of those cases. A lot of those cases were Plea Bargained and you pled guilty to certain things; and other things were dismissed. When you look at the record, there's [sic] all kinds of other things that were dismissed, which the Court does not consider.

In this particular case though, this Court sat and listened to a trial where Mr. Majko was convicted. And incidentally, Mr. Majko got 50 years, which I'm sure you know about. But here again, you were charged with Confinement and Robbery. And you pled to Robbery. And that's what the Court is sentencing you on. But uh, uh, as bad as your criminal record is, it's really worse!

So there are three aggravators. There's no mitigators. And that forms the basis of the sentence of 20 years.

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<sup>2</sup> The presentence investigation report indicates that in 1984 Blanck was sentenced to the Indiana Department of Correction following a probation revocation violation, that he was released on parole in 1988, and that he successfully completed parole in 1989. Thus, the "hiatus" of no criminal activity was due to the fact that Blanck was incarcerated.

Id. at 262–67. The trial court then informed Blanck that he had the right to file a direct appeal of his sentence. Blanck filed a praecipe within thirty days of sentencing, but he did not otherwise complete a direct appeal of his sentencing.

On February 28, 1997, Blanck filed a pro se petition for post-conviction relief, which he later amended on July 31, 2000. In his amended petition, Blanck raised the following issues: (1) ineffective assistance of trial counsel; (2) unknowing, unintelligent, involuntary guilty plea; (3) denial of the right to have probable cause determined by a neutral and detached magistrate; (4) denial of the right to have an impartial hearing body and judge; and (5) denial of the right to counsel at the most critical stages of the case. Before his post-conviction hearing, Blanck requested that the post-conviction court issue subpoenas pursuant to Post-Conviction Rule 1(9)(b). At his post-conviction hearing, the post-conviction court informed Blanck that he had to issue the subpoenas himself, and the court denied his request to continue the hearing until the subpoenas were issued. Following the hearing, the post-conviction court denied Blanck’s petition for post-conviction relief.

Blanck appealed the post-conviction court’s denial of relief, and in a memorandum decision, a panel of this court affirmed the post-conviction court’s ruling on issues (2) through (5) but found that the post-conviction court had erred in refusing to issue subpoenas for Blanck’s post-conviction hearing and reversed and remanded for a new hearing on his ineffective assistance of counsel claim. Blanck v. State, No. 06A05-0011-PC-483, slip op. at 10 (Ind. Ct. App. Nov. 16, 2001). On remand, the post-conviction

court denied relief on the ineffectiveness claim. Blanck appealed, and another panel of this court affirmed the denial of post-conviction relief. Blanck v. State, No. 06A01-0207-PC-279, slip op. at 7 (Ind. Ct. App. Apr. 22, 2003).

On September 7, 2005, Blanck filed a petition with this court seeking permission to file a belated appeal under Indiana Post-Conviction Rule 2(3).<sup>3</sup> Blanck also filed a petition to incorporate the clerk's record and transcripts from his prior post-conviction appeals—appellate cause numbers 06A05-0011-PC-483 and 06A01-0207-PC-279. On October 7, 2005, this court granted Blanck leave to file a belated appeal, and we ordered that the records from Blanck's two prior appeals be transferred and made part of the record in this current appeal. Blanck now appeals his 1996 robbery sentence.

### DISCUSSION AND DECISION

Blanck argues that the trial court erred in imposing his sentence. Specifically, he contends that the trial court failed to consider three mitigators, considered an improper aggravator, and imposed a sentence that is inappropriate in light of the nature of the offense and his character.

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<sup>3</sup> Indiana Post-Conviction Rule 2, Section 3 provides:

Any eligible defendant convicted after a trial or plea of guilty may petition the appellate tribunal having jurisdiction by reason of the sentence imposed for permission to pursue a belated appeal of the conviction where he filed a timely notice of appeal, but:

- (a) no appeal was perfected for the defendant or the appeal was dismissed for failing to take a necessary step to pursue the appeal;
- (b) the failure to perfect the appeal or take the necessary step was not due to the fault of the defendant; and
- (c) the defendant has been diligent in requesting permission to pursue a belated appeal.

We initially note that at the time Blanck was sentenced in 1996, Indiana Code section 35-50-2-5, the sentencing statute for a class B felony, provided that “[a] person who commits a Class B felony shall be imprisoned for a fixed term of ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances.” The trial court found three aggravators and no mitigators and sentenced Blanck to an enhanced term of twenty years for his class B felony robbery conviction.

Sentencing decisions rest within the discretion of the trial court and are reviewed on appeal only for an abuse of discretion. Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002). An abuse of discretion occurs if “the decision is clearly against the logic and effect of the facts and circumstances.” Pierce v. State, 705 N.E.2d 173, 175 (Ind. 1998). In order for a trial court to impose an enhanced sentence, it must: (1) identify the significant aggravating factors and mitigating factors; (2) relate the specific facts and reasons that the court found to those aggravators and mitigators; and (3) demonstrate that the court has balanced the aggravators with the mitigators. Veal v. State, 784 N.E.2d 490, 494 (Ind. 2003).

#### A. Mitigators

Blanck first contends that the trial court erred by failing to consider the following as mitigating circumstances: (1) his guilty plea; (2) his expressed remorse; and (3) his assistance to police regarding prior crimes committed.

The finding of mitigating factors rests within the discretion of the trial court, and the trial court is not required to give the same weight to proffered mitigating factors as

the defendant does. Gross v. State, 769 N.E.2d 1136, 1140 (Ind. 2002). Moreover, a guilty plea is not automatically a significant mitigating factor. Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999). “[A] guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one.” Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied.

Here, Blanck received a substantial benefit for his guilty plea in light of the State’s dismissal of a class B felony criminal confinement charge and a class D felony theft charge. Thus, Blanck’s potential prison time was substantially reduced by his entry of a guilty plea. Accordingly, the trial court did not err by not giving Blanck’s guilty plea significant mitigating weight. See, e.g., Sensback, 720 N.E.2d at 1164-1165 (holding that the defendant had “received benefits for her plea adequate to permit the trial court to conclude that her plea did not constitute a significant mitigating factor”); Field v. State, 843 N.E.2d 1008, 1012 (Ind. Ct. App. 2006) (holding that the trial court properly considered the defendant’s guilty plea to be a minimally mitigating factor where the defendant had pleaded guilty in exchange for the dismissal of other charges), trans. denied.

Blanck also contends that the trial court erred by failing to consider his remorse as a mitigator. During the sentencing hearing, Blanck apologized to the victims but blamed his commission of the robbery on the fact that the county took custody of his son, the influence of Majko, and his drug and alcohol addiction.

A trial court’s determination of a defendant’s remorse is similar to a determination

of credibility. Pickens v. State, 767 N.E.2d 530, 534-35 (Ind. 2002). Without evidence of some impermissible consideration by the court, we accept its determination of credibility. Id. The trial court is in the best position to judge the sincerity of a defendant's remorseful statements. Stout v. State, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005), trans. denied.

Blanck does not allege any impermissible considerations. Furthermore, Blanck's alleged remorse was tempered by the fact that he blamed his actions on the county, Majko, and his drug and alcohol problems. Thus, the trial court did not abuse its discretion by failing to consider Blanck's alleged remorse to be a significant mitigating factor. See, e.g., id. (holding that the trial court did not err in refusing to find defendant's alleged remorse to be a mitigating factor, especially where he blamed his conduct on a drug problem).

Blanck argues that the trial court should have considered the information that he provided to police regarding prior robberies and burglaries committed by Majko as a mitigating factor. Under some circumstances, a defendant's cooperation with police on the investigation of a current offense may be considered as a mitigating factor. See Cloum v. State, 779 N.E.2d 84, 89 (Ind. Ct. App. 2002) (citing Edgecomb v. State, 673 N.E.2d 1185, 1199 (Ind. 1996)). Here, however, Blanck offered information to the police regarding prior crimes that had occurred only after he was already incarcerated on the current robbery charge. Indeed, the record on appeal indicates that Blanck did not cooperate with the police on their investigation of the robbery crime and, instead, he was a fugitive following the filing of the robbery, theft, and criminal confinement charges

against him. Appellant's App. p. 53, 58-60. Thus, we cannot say that the trial court erred by not considering Blanck's post-arrest assistance to police as a mitigating circumstance. See, e.g., Shields v. State, 699 N.E.2d 636, 640 (Ind. 1998) (finding no abuse of discretion in failing to assign mitigating weight to the fact that the defendant gave a statement to police after he had already been apprehended); Cloum, 779 N.E.2d at 89 (holding that the defendant's cooperation with police was not entitled to mitigating weight despite the fact that the defendant made no attempt to flee the scene of the crime, immediately reported the shooting, and was generally cooperative and non-combative with the police because his statement to police was less than forthcoming).

#### B. Aggravator

Blanck also argues that the trial court's use of the "depreciates the seriousness" aggravator was improper. "This factor serves only to support a refusal to impose less than the presumptive sentence and does not serve as a valid aggravating factor supporting an enhanced sentence." Cotto v. State, 829 N.E.2d 520, 524 (Ind. 2005). The State concedes that the trial court's use of this aggravator was improper because there is no indication that the trial court was considering imposing anything less than the presumptive sentence. See Appellee's Br. p. 6-7. Thus, the trial court's consideration of the depreciates the seriousness aggravator was improper. See, e.g., Bacher v. State, 686 N.E.2d 791, 801 (Ind. 1997) (holding that the trial court improperly used the depreciates the seriousness aggravator because there was nothing in the record indicating that the trial court was considering a reduced sentence).

Notwithstanding this error, the trial court found two other valid aggravating

circumstances: (1) Blanck's criminal history; and (2) the fact that Blanck was on probation at the time he committed the robbery. A single aggravating circumstance is adequate to justify a sentence enhancement. Bacher v. State, 722 N.E.2d 799, 803 (Ind. 2000). When a sentencing court improperly applies an aggravating circumstance but other valid aggravating circumstances do exist, a sentence enhancement may still be upheld. Id. "Where a trial court has used an erroneous aggravator, . . . the court on appeal can nevertheless affirm the sentence if it can say with confidence that the same sentence is appropriate without it." Witmer v. State, 800 N.E.2d 571, 572-73 (Ind. 2003). As the trial court noted during sentencing, Blanck had an "extensive" criminal history with a "constant . . . series of contacts with the Criminal Justice System." Appellant's App. p. 264-65. Indeed, the majority of Blanck's prior convictions involved drunk driving and drug possession, and Blanck's current offense involved robbing a pharmacy of drugs. Because we conclude that the same twenty-year sentence is appropriate even without the improperly found aggravator, we affirm the sentence imposed.

### C. Appropriateness

Finally, Blanck suggests that his twenty-year sentence was inappropriate. Indiana Appellate Rule 7(B) provides, "The Court may revise a sentence authorized by statute 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." However, sentence review under Appellate Rule 7(B) is very deferential to the trial court's decision, Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003), and we refrain from merely substituting our judgment for that of the trial court, Foster v. State,

795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

As to the nature of the offense, the factual basis provided during the guilty plea hearing indicates that Blanck, while armed with a gun, went with Majko to a pharmacy, stole drugs from the pharmacy, and placed two pharmacy employees in fear. Appellant's App. p. 147. One of the pharmacy employees was a sixteen-year-old girl and, during the sentencing hearing, her father testified that during the crime his daughter "feared [Blanck] the man with the gun" because "even though the situation was under hand, they were getting what they wanted -- the man with the gun kept tapping her, saying, 'Shut up!' [and] [i]ncreasing the terror [and] [i]ncreasing the level of violence!" Id. at 175. Therefore, we do not find the nature of the offense aids Blanck's argument.

As to Blanck's character, he is a self-professed long-time drug abuser and alcoholic who went to a pharmacy to steal drugs. Id. at 139, 147. The PSI indicates that Blanck's son was removed from his care because of Blanck's alcohol problems. Id. at 276-77. In addition, Blanck stated that he robbed the pharmacy, in part, as a means of retaliation against the county for taking custody of his son. Id. at 222. Furthermore, Blanck had a lengthy criminal history and was on probation at the time he robbed the pharmacy, which demonstrates his long-standing disregard for the law even after he had received criminal punishment.

Based on the nature of the offense and Blanck's character, we conclude that the trial court's imposition of a twenty-year sentence for the commission of class B felony

robbery is not inappropriate.

The judgment of the trial court is affirmed.

DARDEN, J., and ROBB, J., concur.