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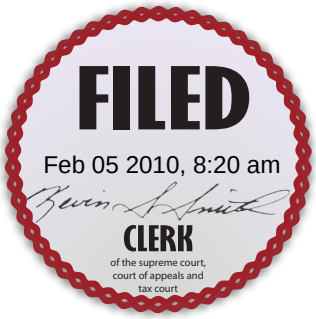

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IN THE
COURT OF APPEALS OF INDIANA

MARK ERLER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A05-0907-CR-373
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane Ross Boswell, Judge
Cause No. 45G03-0806-MR-4

February 5, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Mark Erler appeals his sentence for murder in the perpetration of a rape.[1] Erler raises one issue, which we revise and restate as whether the trial court abused its discretion in sentencing Erler.[2] We affirm.

The relevant facts follow. On May 4, 1984, Erler passed the Tiberon Apartments in Lake County, Indiana. Erler saw Linda Bennitt on a couch in one of the apartments. Erler entered Bennitt's apartment, woke up Bennitt, left the apartment with her, and took her to his home. He then raped, stabbed, and killed Bennitt.

In 1986, Erler moved to California. In 2008, the investigation into Bennitt's murder was reopened, and Erler was linked to the crime through fingerprint and DNA analysis.

On June 9, 2008, the State charged Erler with: Count I, murder; Count II, murder in the perpetration of a rape; and Count III, murder in the perpetration of criminal deviate conduct. At that time Erler was a resident in the Coalinga Tates Mental Hospital in Coalinga, California due to eleven convictions, including forcible rape. Erler was extradited to Indiana.

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[1] Ind. Code § 35-42-1-1 (1980) (subsequently amended by Pub. L. No. 326-1987, § 2 (eff. July 1, 1987); Pub. L. No. 296-1989, § 1 (eff. July 1, 1989); Pub. L. No. 230-1993, § 2 (eff. July 1, 1993); Pub. L. No. 261-1997, § 3 (eff. July 1, 1997); Pub. L. No. 17-2001, § 15 (eff. July 1, 2001); Pub. L. No. 151-2006, § 16 (eff. July 1, 2006); Pub. L. No. 173-2006, § 51 (eff. July 1, 2006); Pub. L. No. 1-2007, § 230 (eff. March 30, 2007)).

[2] Erler mentions Ind. Appellate Rule 7(B), which provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." However, Erler makes no argument as to why his sentence is inappropriate in light of the nature of the offense and the character of the offender. Therefore, the issue is waived for failure to make a cogent argument. See Ind. Appellate Rule 46(A)(8)(a); Ford v. State, 718 N.E.2d 1104, 1107 n.1 (Ind.1999).

On February 12, 2009, Erler pled guilty to Count I, murder, and Count II, murder in the perpetration of a rape. The trial court entered judgment of conviction for Counts I and II, but later vacated the conviction for Count I, murder. The trial court found Erler's admission of guilt and expression of remorse as mitigators. The trial court also stated that "[t]he admission of guilt is mitigated in itself by the fact that it only came after you were arrested and incarcerated for this matter . . . ." Sentencing Transcript at 80-81. The trial court found the following aggravators: (1) the nature and circumstances of the offense; (2) the fact that Erler took Bennitt out of her home which caused the victim a "heightened sense of terror;" (3) the fact that Erler was at "high risk to commit another crime of this same nature due to [his] illness, [his] diagnosis;" and (4) Erler's criminal history. Id. at 82. The trial court sentenced Erler to sixty years in the Department of Correction, and it recommended that the Department of Correction evaluate Erler and place him in an appropriate facility where he could receive treatment.[3]

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[3] Ind. Code § 35-50-2-3 (1982) provided:

> (a) A person who commits murder shall be imprisoned for a fixed term of forty (40) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances; in addition, he may be fined not more than ten thousand dollars ($10,000).
>
> (b) Notwithstanding subsection (a) of this section, a person who commits murder may be sentenced to death under section 9 of this chapter.

Subsequently amended by Pub. L. No. 332-1987, § 1 (eff. July 1, 1987); Pub. L. No. 250-1993, § 1 (eff. July 1, 1993); Pub. L. No. 164-1994, § 2 (eff. July 1, 1994); Pub. L. No. 158-1994, § 5 (eff. July 1, 1994); Pub. L. No. 2-1995, § 128 (eff. July 1, 1995); Pub. L. No. 148-1995, § 4 (eff. July 1, 1995); Pub. L. No. 117-2002, § 1 (eff. July 1, 2002); Pub. L. No. 71-2005, § 6 (eff. April 25, 2005); Pub. L. No. 99-2007, § 212 (eff. May 2, 2007).

The sole issue is whether the trial court abused its discretion in sentencing Erler.[4] 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). If we find an irregularity in a trial court's sentencing decision, we have the option to remand to the trial court for a clarification or new sentencing determination, to affirm the sentence if the error is harmless, or to reweigh the proper aggravating and mitigating circumstances independently at the appellate level. Hope v. State, 834 N.E.2d 713, 717 (Ind. Ct. App. 2005) (citing Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005)).

[4] Indiana's sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences. See Ind. Code §§ 35-38-1-7.1, 35-50-2-1.3. Erler committed his offense prior to the effective date and was sentenced after April 25, 2005. We apply the version of the sentencing statutes in effect at the time Erler committed his offense. See Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007) (noting that "[h]ad the new [sentencing] statute become effective between the date of [a defendant]'s crime and his sentencing, the version of the statute in effect at the time of [a defendant]'s crime would have applied"); see also Padgett v. State, 875 N.E.2d 310, 316 (Ind. Ct. App. 2007) (reviewing the defendant's sentencing under the presumptive sentencing scheme when defendant committed his crime before the effective date of the new sentencing scheme, but was sentenced after this date), trans. denied.

Erler argues that the trial court abused its discretion by "failing to consider [his] mental illness as a mitigating factor" and by "failing to properly weigh the aggravating and mitigating factors." Appellant's Brief at 9. Initially, we note that Ind. Code § 35-36-2-5 (Supp. 1983)[5] provided that "[w]henever a defendant is found guilty but mentally ill at the time of the crime, or enters a plea to that effect that is accepted by the court, the court shall sentence him in the same manner as a defendant found guilty of the offense." The Indiana Supreme Court has also emphasized 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." Weeks v. State, 697 N.E.2d 28, 30 (Ind. 1998) (quoting Archer v. State, 689 N.E.2d 678, 684 (Ind. 1997), reh'g denied).

"The finding of mitigating factors is not mandatory and rests within the discretion of the trial court." Ellis v. State, 736 N.E.2d 731, 736 (Ind. 2000). The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. Gross v. State, 769 N.E.2d 1136, 1140 (Ind. 2002), trans. denied. "Nor is the court required to give the same weight to proffered mitigating factors as the defendant does." Id. Further, the trial court is not obligated to explain why it did not find a factor to be

[5] Subsequently amended by Pub. L. No. 1-1991, § 191 (eff. July 1, 1991); Pub. L. No. 2-1992, § 870 (eff. July 1, 1992); Pub. L. No. 1-1993, § 239 (eff. July 1, 1993); Pub. L. No. 158-1994, § 2 (eff. July 1, 1994); Pub. L. No. 121-1996, § 3 (eff. July 1, 1996); Pub. L. No. 215-2001, § 108 (eff. July 1, 2001); Pub. L. No. 99-2007, § 200 (eff. May 2, 2007).

significantly mitigating. Sherwood v. State, 749 N.E.2d 36, 38 (Ind. 2001). However, the trial court may "not ignore facts in the record that would mitigate an offense, and a failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them." Id. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999).

"[M]ental illness at the time of the crime may be considered a significant mitigating factor." Castor v. State, 754 N.E.2d 506, 509 (Ind. 2001). The Indiana Supreme Court has held that there is a need for "a high level of discernment when assessing a claim that mental illness warrants mitigating weight." Covington v. State, 842 N.E.2d 345, 349 (Ind. 2006). The following considerations are relevant when the trial court determines the significance of a defendant's mental illness for sentencing: (1) the extent of the defendant's inability to control his or her behavior due to the disorder or impairment; (2) overall limitations on functioning; (3) the duration of the mental illness; and (4) the extent of any nexus between the disorder or impairment and the commission of the crime. Weeks, 697 N.E.2d at 30. A trial court is not required to consider allegations of mental illness as a mitigator. James v. State, 643 N.E.2d 321, 323 (Ind. 1994).

The record reveals that Erler's mother testified that she took Erler to a mental health clinic when he was seven years old. Erler's mother also testified that Erler had

been molested and raped by a series of men. Erler has been diagnosed with paraphilia,[6] sexual sadism, an antisocial personality disorder, and a depressive disorder. A January 2003 report by Dennis Sheppard, a licensed psychologist, stated that Erler had "a diagnosed mental disorder which predisposes him to the commission of criminal sexual acts." Defendant's Exhibit 3. A 2009 letter from Douglas Caruana, a clinical psychologist, stated:

> Data generated and reviewed in this case indicate that Mr. Erler has a long history of mental illness of most [sic] dangerous type. He experiences intense sexual urges that are aggressive in nature, uses substances for self-medication and enhancement of his impulses, and lacks socially appropriate self-governing. His thinking and behaving are long impaired, and he remains a danger to society.

Defendant's Exhibit 1.

While the record supports the foregoing diagnoses, the record also reveals that Erler has "manipulated the system." Defendant's Exhibit 2. Specifically, a 2001 report by Christopher North, a licensed psychologist, stated that Erler "claims to have manipulated the system and may be attempting to manipulate it again to be granted out of state parole." Id. The report also stated that "[s]ince his commitment offenses, he claims to have perpetrated a fraud against the probation officer and CDC by enlisting the support of his mother and ex-girlfriend to exaggerate his past personal problems in an effort to be removed from the general prison population." Id. The report also stated:

[6] A report defined paraphilia as follows: "an individual must report or exhibit recurrent, intense, sexually arousing fantasies, urges or behaviors generally involving 1) nonhuman objects, 2) the suffering or humiliation of oneself or one's partner, or 3) children or other nonconsenting persons, that occur over a period of at least six months." Defendant's Exhibit 2.

> I wanted to talk with [Erler's mother] because Erler told me he had convinced her years earlier to provide the Los Angeles County probation officer (who prepared a report in reference to his commitment offenses) fake or exaggerated information about past mental and behavioral problems so that he could obtain a mental health placement within CDC. He feared assault from other inmates in the general population and felt he would be safer in a mental health population. He indicated much of the information about his past contained in this report is false. When I called his mother about a week after interviewing her son, she told me she had just received a call from her son's attorney advising her not to speak with me and to refer me on to him. She did state, spontaneously, "there's not a thing wrong with him!" (referring to her son) . . . .

Id.

The record also reveals that Erler failed to avail himself of treatment. Specifically, the 2001 report by North stated that "[a]lthough Erler indicated a strong preference/need for treatment prior to his incarceration, he did not avail himself of such treatment when it was offered him." Id. The 2003 report stated that Erler was admitted to Atascadero State Hospital in July 2002, but had not "availed himself to [sic] any phases of the comprehensive treatment program." Defendant's Exhibit 3. A 2008 recovery plan from the California Department of Mental Health stated that Erler volunteered for a prison program called "Vital Issues" but listed a "[b]arrier to [d]ischarge" as the fact that he did not complete "SOCP treatment." Defendant's Exhibit 4.

While Erler has been diagnosed with paraphilia, sexual sadism, an antisocial personality disorder, and a depressive disorder, we note that Erler has manipulated the system in the past and "fake[d] or exaggerated" information about his mental problems and has failed to avail himself of treatment. Defendant's Exhibit 2. Moreover, the record

does not reveal evidence regarding the overall limitations on Erler due to his mental health issues. The record also does not reveal how Erler's sexual urges compelled him to commit murder. We cannot say that the trial court abused its discretion by failing to recognize Erler's mental health as a mitigator. See, e.g., Wooley v. State, 716 N.E.2d 919, 931 (Ind. 1999) (holding that the trial court did not abuse its discretion by determining that the defendant's mental illness was not a mitigating factor), reh'g denied.

To the extent that Erler argues that the trial court abused its discretion by failing to properly weigh the aggravating and mitigating factors, we observe that the trial court found Erler's admission of guilt and expression of remorse as mitigators but stated that "[t]he admission of guilt is mitigated in itself by the fact that it only came after you were arrested and incarcerated for this matter . . . ." Sentencing Transcript at 80-81. The trial court also found four aggravating factors, not challenged by Erler: (1) the nature and circumstances of the offense; (2) the fact that Erler took Bennitt out of her home which caused the victim a "heightened sense of terror;" (3) the fact that Erler was at "high risk to commit another crime of this same nature due to [his] illness, [his] diagnosis;" and (4) Erler's criminal history. Sentencing Transcript at 82.

With respect to Erler's criminal history, the presentence investigation report reveals that Erler has a conviction for trespass as a misdemeanor in 1985 and has the following convictions in 1986: burglary causing great bodily harm as a felony, three counts of burglary as first degree felonies, assault with a deadly weapon as a felony, two counts of rape by force as felonies, three counts of oral copulation as felonies, and

robbery as a felony. During the interview portion of the presentence investigation, Erler also admitted to additional criminal acts that did not appear in his criminal records. Specifically, when Erler was fourteen years old, he broke into a woman's house in Gary, Indiana while the woman was sleeping and raped her. Erler raped another woman when he was twenty years old in the same manner, and also admitted to another rape that took place "a little bit before the incident in the current case." Appellee's Appendix at 5.

Given the aggravators and mitigators, we cannot say that the trial court abused its discretion by concluding that the aggravators outweighed the mitigators and enhancing Erler's sentence. See Barnes v. State, 634 N.E.2d 46, 50 (Ind. 1994) (holding that the trial court did not err by failing to consider the defendant's mental illness as a mitigator and by giving him the maximum sentence of sixty years after the defendant was found guilty of murder but mentally ill); Whitt v. State, 497 N.E.2d 1059, 1059-1061 (Ind. 1986) (rejecting the defendant's argument that the trial court erred in rendering the maximum sentence of sixty years after a jury found defendant guilty but mentally ill of murder and three doctors testified that defendant had a mental illness); cf. Christopher v. State, 511 N.E.2d 1019, 1023 (Ind. 1987) (remanding the case for the trial court to reduce the defendant's sentence from sixty years to fifty years when there was a plethora of evidence of the destructive role that appellant's mental illness played in his life, the defendant made repeated efforts to deal effectively with his problem, and the defendant manifested no scheming or devious frame of mind and did not attempt to conceal his crime).

For the foregoing reasons, we affirm Erler's sentence for murder in the perpetration of a rape.

Affirmed.

MATHIAS, J., and BARNES, J., concur.