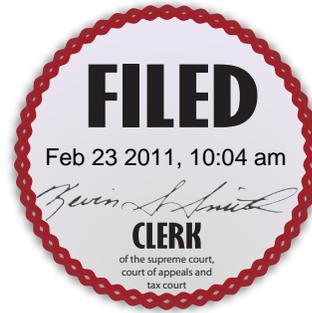


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ROY J. KRESEL,)
)
Appellant-Defendant,)
)
vs.) No. 52A02-1010-CR-1190
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MIAMI CIRCUIT COURT
The Honorable Robert A. Spahr, Judge
Cause No. 52C01-0910-FB-51

February 23, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Roy J. Kresel appeals the eighteen-year sentence that was imposed following his conviction for Aggravated Battery,¹ a class B felony. Specifically, Kresel argues that the trial court abused its discretion in sentencing him because it erred in identifying several aggravating circumstances and overlooked a number of mitigating factors that were supported by the record. Kresel also maintains that the sentence is inappropriate in light of the nature of the offense and his character. Concluding that Kresel was properly sentenced, we affirm the judgment of the trial court.

FACTS

In June 2009, Kresel was incarcerated at the Miami Correctional Facility, where he was serving a ten-year sentence for violating probation on a child molesting conviction and an additional term for escape.

Although the authorities placed Kresel in a cell with fellow inmate Wayne Springer, both had requested placement in different locations. However, correctional facility personnel refused those requests.

On July 7, 2009, Kresel walked to a common area of the cell and heated a twenty-four ounce insulated cup of water in the microwave oven for approximately five minutes. Kresel then approached Springer and tossed the cup of hot water into his face. Springer suffered burns to his face and chest. Springer, who was blind from birth in his right eye, also suffered permanent blindness in the left eye as a result of the incident.

¹ Ind. Code § 35-42-2-1.5(2).

Kresel initially told investigators that Springer had spilled the scalding water on himself. However, the surveillance tape revealed that Kresel had thrown the water at Springer. Thereafter, Kresel claimed that he tossed the cup of water at Springer because Springer had hit him with a padlock on a prior occasion.

Following the incident, the State charged Kresel with aggravated battery, a class B felony, and with being a habitual offender. On July 15, 2010, Kresel pleaded guilty to the aggravated battery charge in exchange for dismissal of the habitual offender count.

At the sentencing hearing that commenced on October 7, 2010, the trial court identified the following aggravating circumstances: (1) Kresel's extensive criminal history; (2) the fact that Kresel is in need of correctional or rehabilitative treatment that can best be provided by his commitment to a penal facility; (3) the imposition of a reduced or suspended sentence and placement on probation would depreciate the seriousness of the offense; (4) Kresel accepts little responsibility for his actions; and (5) Kresel has shown little remorse for his actions. The only mitigating circumstance that the trial court identified was that Kresel pleaded guilty and saved the county the expense of a jury trial.

The trial court then sentenced Kresel to eighteen years of incarceration and he now appeals.

DISCUSSION AND DECISION

I. Abuse of Discretion

Kresel first contends that the trial court abused its discretion when sentencing him. Specifically, Kresel argues that certain aggravating factors were improperly identified and the trial court overlooked several mitigating circumstances that were supported by the record.

Sentencing decisions rest within the sound discretion of the trial court. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218. Where a trial court imposes a sentence for a felony offense, it is required to issue a sentencing statement that includes a reasonably detailed recitation of the trial court's reasons for the sentence imposed. Id. A trial court's sentencing statement must: (1) identify significant aggravating and mitigating circumstances; (2) state the specific reason why each circumstance is aggravating or mitigating; and (3) demonstrate that the aggravating and mitigating circumstances have been weighed to determine that the aggravators outweigh the mitigators. Shaw v. State, 771 N.E.2d 85, 88 (Ind. Ct. App. 2002). A sentencing statement serves two primary purposes: (1) it guards against arbitrary and capricious sentencing, and (2) it provides an adequate basis for appellate review. Anglemyer, 868 N.E.2d at 490. The trial court's failure to enter a sentencing statement is an abuse of discretion. Id. On appeal, we will review both the written and oral sentencing statements to discern the findings of the trial court. Corbett v. State, 764 N.E.2d 622, 631 (Ind. 2002).

A. Aggravating Factors

Kresel argues that he must be resentenced because the record does not support the trial court's findings that he accepted "little responsibility" for his crime and showed "little remorse" for his actions. Appellant's Br. p. 6. Kresel also maintains that the trial court's statement that the imposition of a reduced or suspended sentence would depreciate the seriousness of the crime was an improper aggravating factor.

In addressing Kresel's claims, we note that pleading guilty to an offense is an acceptance of responsibility that is generally worthy of mitigating weight. Scheckel v. State, 655 N.E.2d 506, 511 (Ind. 1995). However, a guilty plea may not rise to the level of significant mitigation where the evidence against the defendant is such that the decision to plead guilty is merely a pragmatic one. Felder v. State, 870 N.E.2d 554, 558 (Ind. Ct. App. 2007). Moreover, where a defendant receives a substantial benefit in return for his guilty plea, further mitigation may not be appropriate. Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999).

As noted above, the trial court determined that Kresel's refusal to accept responsibility for his actions constituted an aggravating factor, despite his plea of guilty. The record discloses that Kresel initially told investigators that Springer had knocked the cup from hand and blinded himself. Tr. p. 42. However, even after pleading guilty to the offense, Kresel continued to blame Springer, claiming that "due to . . . Springer's last attack on me I had acted in a manner I felt was appropriate at the time of the incident." Appellant's App. p. 111.

Although Kresel contends that his decision to plead guilty demonstrated that he took responsibility for his actions, it is apparent that he decided to plead guilty only because the surveillance tape established that he, in fact, had thrown the scalding water on Springer. Moreover, his guilty plea resulted in the avoidance of the habitual offender finding that would have added a minimum of ten years to his executed sentence.

Even more compelling, while it might appear at first blush that Kresel has accepted responsibility for his actions in light of his decision to plead guilty, he nonetheless continued to blame the incident on Springer in light of the prior alleged battery. When Kresel stated that “he [wished] this would [have] never happened the way it did,” tr. p. 40, the trial court likely viewed the statement as a lament that Springer had driven him to the action he took. Given these circumstances, and Kresel’s continued propensity to blame Springer for the incident, it was reasonable for the trial court to conclude that Kresel was not remorseful and that he accepted little responsibility for his actions. See Stout v. State, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005) (observing that the trial court is in the best position to make the determination as to whether an expression of remorse is genuine). Thus, the trial court did not err in identifying Kresel’s lack of remorse and his refusal to accept responsibility for his actions as aggravating factors.

Next, we note that a trial court’s statement that the imposition of a reduced sentence would depreciate the seriousness of the offense as an aggravating circumstance is generally improper where the record does not suggest that a term less than the advisory sentence is being considered. Davidson v. State, 849 N.E.2d 591, 595 (Ind. 2006). Here,

there is no indication that the trial court was considering a sentence less than the advisory term. Therefore, this aggravating circumstance is improper.

However, as noted above, the trial court found several other valid aggravating circumstances in support of the sentence. When one or more aggravating circumstances cited by the trial court are invalid, we must decide whether the remaining circumstance or circumstances are sufficient to support the sentence imposed. Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005). And we have held that one aggravating factor can be a sufficient basis to enhance a sentence. Peoples v. State, 649 N.E.2d 638, 640 (Ind. Ct. App. 1995).

As the trial court noted, Kresel's extensive criminal history includes prior convictions for theft, aggravated criminal sexual abuse, child molesting, and escape. Moreover, Kresel's probation has been revoked on several occasions. Appellant's App. p. 109-10. In light of Kresel's criminal history, we are convinced that the remaining aggravating circumstances that the trial court identified are sufficient to warrant the imposition of an eighteen-year executed sentence. Therefore, the trial court's recitation that the imposition of a reduced sentence would depreciate the seriousness of the offense as an aggravating circumstance amounted to harmless error. As a result, Kresel's claim that his sentence must be set aside because the trial court erroneously identified several aggravating circumstances fails.

B. Mitigating Circumstances

Kresel also argues that his sentence must be set aside because the trial court erred in failing to identify the following alleged mitigating factors: (1) Springer facilitated the

offense; (2) Kresel acted under strong provocation; and (3) Kresel suffers from the past effects of Springer's alleged prior incidents of battery. Appellant's Br. p. 10.

Notwithstanding Kresel's arguments, he has waived this issue because he failed to raise them at the trial court level. See Pennington v. State, 821 N.E.2d 899, 905 (Ind. Ct. App. 2005) (holding that a defendant who fails to raise proposed mitigators at the trial court level is precluded from advancing them for the first time on appeal).

In sum, Kresel cannot prevail on his claims, and we conclude that the trial court did not abuse its discretion in sentencing him.

II. Inappropriate Sentence

Kresel also claims that his sentence is inappropriate in light of the nature of the offense and his character. In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). 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). Kresel pleaded guilty to aggravated battery, a class B felony, meaning that he faced a sentence of between six and twenty years, with the advisory sentence being ten years. Ind. Code § 35-50-2-5.

As for the nature of the offense, Kresel cited one instance where Springer allegedly struck him with a padlock. In response, Kresel permanently blinded Springer, which caused an injury far exceeding the one that Springer inflicted upon him. Moreover, Kresel accomplished this deed by heating water in a microwave oven for more than five minutes and throwing it into Springer's face. Springer suffered permanent

blindness as well as painful burns to his face and chest. Appellant's App. p. 116. Although Kresel initially told investigators that Springer "scalded himself" with the hot water, appellant's app. p. 116, the video surveillance tape of the incident demonstrated that Kresel intentionally threw the water in Springer's face as other inmates watched.

With regard to Kresel's character, the record demonstrates that he has spent most of his adult life either on probation, parole, or incarcerated. And Kresel was first waived to adult court when he was seventeen years old after being adjudicated delinquent numerous times as a juvenile from the time he was eleven years old. Appellant's App. p. 107-08. As an adult, Kresel has been convicted of theft, battery, sexual abuse, and child molesting. Id. at 107-09.

Kresel has been placed on probation several times, which have resulted in petitions to revoke, charges of escape, or both. Id. at 108-09. Kresel's probation violations demonstrate disrespect for the trial court's orders and an unwillingness to conform to such orders. In other words, Kresel's violations demonstrate that prior attempts at rehabilitation have been unsuccessful. Finally, Kresel admitted at the sentencing hearing that he has regularly used alcohol, marijuana, and cocaine in "whatever amount it took to keep [him] high." Id. at 115.

When considering the nature of Kresel's offense and his character, we conclude that he has failed to persuade us that the eighteen-year executed sentence was inappropriate. Thus, we decline to set aside Kresel's sentence.

The judgment of the trial court is affirmed.

VAIDIK, J., and BARNES, J., concur.