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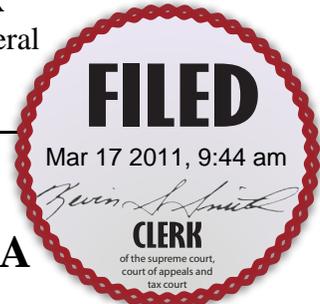
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**IN THE  
COURT OF APPEALS OF INDIANA**

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JONATHON GARRETT,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 49A02-1007-CR-798

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Clark H. Rogers, Judge  
The Honorable Melissa H. Kramer, Master Commissioner  
Cause No. 49G17-1005-FD-35200

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**March 17, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Following a bench trial, Jonathon Garrett was convicted of criminal confinement<sup>1</sup> as a Class D felony, and domestic battery<sup>2</sup> as a Class A misdemeanor. The trial court sentenced Garrett to 545 days of incarceration in the Department of Correction (“DOC”) for the Class D felony conviction and a concurrent 180-day term for the Class A misdemeanor conviction. Garrett now appeals the propriety of his Class D felony sentence, raising the following restated issue: whether the trial court’s sentencing determination was based on facts not in the record and constituted an abuse of discretion.

We vacate and remand with instructions to issue a new sentencing statement.

### **FACTS AND PROCEDURAL HISTORY**

Garrett committed certain felony criminal offenses in October 2004, for which he was convicted in February 2005; he was discharged from parole for those convictions on October 12, 2006.

Over three years later, on May 1, 2010, Garrett was involved in a domestic altercation with his then-girlfriend of four years, Donita Jordan. They had consumed alcohol that day and argued about various things. During the course of the day, Garrett shoved Jordan to the ground, sat on her so she could not get up, and struck her in the face causing abrasions. Indianapolis Metropolitan Police Officers were dispatched to the couple’s shared residence twice that day, and they arrested Garrett on their second visit.

The State charged Garrett with Class D felony criminal confinement, Class A

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<sup>1</sup> See Ind. Code § 35-42-3-3(a).

<sup>2</sup> See Ind. Code § 35-42-2-1.3(a).

misdemeanor domestic battery, and Class A misdemeanor interference with reporting a crime, which charge the State eventually dismissed. Following a bench trial, the trial court found Garrett guilty of criminal confinement and domestic battery.<sup>3</sup> A presentence report was requested, prepared, and sent to the trial court. At the sentencing hearing, the trial court engaged in the following discussion with the parties:

Court: And we all agree that he is non-suspendable? Based on the previous . . . I think it was the stalking case that ended up being a conviction for the . . .

State: Yes, Your Honor. The State feels that because of that he is non-suspendable.

Court: Battery. It looks like he had a sentence to serve and then that release has been within the last three years of the date of this offense. When did you get off of parole, sir? Do you recall?

Mr. Garrett: I'm not sure, Your Honor. I'm not sure. But I know I finished it.

*Tr.* at 55. Counsel for Garrett did not comment on the matter.

Thereafter, the trial court received argument from both counsel regarding sentencing. Garrett proposed 180 days on home detention, perhaps with probation and alcohol evaluation; the State requested 730 days (i.e., two years) at the DOC, with one year suspended and one year executed, and one year of probation after Garrett completed the executed portion of his sentence. Thereafter, the trial court imposed a sentence of 545 days executed in the DOC on the criminal confinement conviction and 180 days executed in the

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<sup>3</sup> The trial court also found that the State had proven Count III, Class A misdemeanor battery, but did not enter judgment for that offense. *Tr.* at 45.

DOC on the domestic battery conviction, giving Garrett credit for time served and ordering that the two sentences run concurrently. The trial court did not issue a separate written sentencing statement. Garrett now appeals his sentence on the Class D felony criminal confinement conviction.

## **DISCUSSION AND DECISION**

Garrett argues on appeal that the trial court abused its discretion when it sentenced him. 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. Abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Bailey v. State*, 923 N.E.2d 434, 438 (Ind. Ct. App. 2010), *trans. denied, cert. denied*, 131 S. Ct. 1009 (2011).

### **I. Suspendability of Class D Felony Sentence**

Garrett asserts that the trial court erred when it concluded that his felony offense was non-suspendable. Indiana Code section 35-50-2-2 states that the trial court may suspend any part of a sentence for a felony. However, subsection (b)(3) provides, in pertinent part, that a trial court may suspend only that portion of the sentence that is in excess of the minimum where

[t]he crime committed was a Class D felony and less than three (3) years have elapsed between the date the person was discharged from probation, imprisonment, or parole, whichever is later, for a prior unrelated felony conviction and the date the person committed the Class D felony for which the person is being sentenced.

Ind. Code § 35-50-2-2(b)(3).

In this case, the trial court's statements during sentencing, seeking confirmation of everyone's agreement that the sentence was not suspendable under that statute, reflect its belief that Garrett had a prior felony conviction within the statute's three-year window. This conclusion was in error, however, as Garrett was released from parole in October 2006, more than three years before the May 1, 2010 incident giving rise to the current convictions. The trial court's statement also indicated that the prior felony was battery, when in fact the presentence report reflects that the prior felony conviction in question was invasion of privacy. Garrett argues that because the trial court imposed his sentence based on erroneous facts, we should remand his case to the trial court for resentencing. The State concedes that the trial court's statement about the non-suspendability of the sentence was in error, but nevertheless urges us to find that, because defense counsel did not object or otherwise correct the mistake about when Garrett was released from parole, the suspendability issue is waived. Garrett responds that waiver is not applicable because the trial court's mistakes of fact affected its sentencing of Garrett and constituted fundamental error, namely a blatant violation of basic principles of due process, presenting substantial potential for harm. *Appellant's Br.* at 13 (citing *Cooper v. Indiana*, 854 N.E.2d 831, 835 (Ind. 2006) and *Brown v. State*, 799 N.E.2d 1064, 1067 (Ind. 2003)). Rather than determine the merit of the parties' waiver/fundamental error claims, we find that in view of the record before us, in particular the sentencing statement as discussed below, a remand for resentencing is warranted.

## II. Sentencing Statement

Whenever imposing a sentence for a felony offense, a trial court is required to issue a sentencing statement.<sup>4</sup> *Windhorst v. State*, 868 N.E.2d 504, 506 (Ind. 2007) (quoting *Anglemyer*, 868 N.E.2d at 490)). The statement must include a reasonably detailed recitation of the trial court's reasons for the sentence imposed. *Id.* If the recitation includes a finding of aggravating and mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating and aggravating. *Id.* However, under the advisory sentencing scheme, trial courts no longer have any obligation to weigh aggravating and mitigating factors against each other when imposing a sentence. *Richardson v. State*, 906 N.E.2d 241, 243 (Ind. Ct. App. 2009). 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. *Ramos v. State*, 869 N.E.2d 1262, 1263 (Ind. Ct. App. 2007) (citing *Anglemyer*, 868 N.E.2d at 489). Failure to enter a sentencing statement is an abuse of discretion. *Id.*

“[O]nce the trial court has entered a sentencing statement, which may or may not include the existence of aggravating and mitigating factors, it may then ‘impose any sentence that is ... authorized by statute; and ... permissible under the Constitution of the State of Indiana.’” *Richardson*, 906 N.E.2d at 243 (quoting *Anglemyer*, 868 N.E.2d at 491). “So

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<sup>4</sup> Prior to the new sentencing rules, a sentencing statement was required only when a trial court deviated from the statutory presumptive sentence. See *Jones v. State*, 698 N.E.2d 289, 290 (Ind. 1998). However, now a sentencing statement is required even if the trial court is imposing the advisory sentence. *Windhorst v. State*, 868 N.E.2d 504, 506 (Ind. 2007).

long as the sentence is within the statutory range, it is subject to review only for abuse of discretion.” *Anglemyer*, 868 N.E.2d at 490. That said, in order for the appellate court to carry out our function of reviewing the trial court’s exercise of its discretion, we must be told of the trial court’s reasons for imposing the sentence, and this necessarily requires a statement of facts, in some detail, which are peculiar to the particular defendant and the crime, as opposed to general impressions or conclusions.<sup>5</sup> *Ramos*, 869 N.E.2d at 1264 (citing *Anglemyer*, 868 N.E.2d at 490).

Here, at the sentencing hearing, the trial court issued the following verbal sentencing statement, in relevant part:

Alright. The Court having reviewed the Pre-Sentence Investigation, heard testimony and argument of both Defense and the State, I’ll sentence you, sir, on Count 1, to five hundred and forty five days executed at the Department of Corrections. Credit for the fifty-eight days you’ve served. As to Count 2, a hundred and eighty-days executed Department of Corrections. Same credit time. Count1 and Count 2 run concurrent to each other. Show the Defendant does not receive the benefit of A.M.S. So no A.M.S.

*Tr.* at 57.

We find that the trial court’s oral sentencing statement fails to provide us with an adequate basis for meaningful appellate review. First, the statement does not identify specific reasons for imposing its particular sentence and does not include detail or facts that are peculiar to the particular defendant. Although the trial court, prior to imposing its

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<sup>5</sup> We note that a written sentencing statement is not required. *See Coates v. State*, 534 N.E.2d 1087, 1098 (Ind. 1989) (trial court’s sentencing statement need not be in separate entry but may be provided by transcript of sentencing hearing); *Mundt v. State*, 612 N.E.2d 566, 568 (Ind. Ct. App. 1993) (noting that although better practice would be to set out written statement of its reasons in sentencing order, it is sufficient in non-death penalty cases if trial court’s reasons are clear from review of sentencing transcript), *trans. denied*.

sentence, did engage in some dialogue with Garrett concerning his criminal history and the fact that for the period of time from 1992 to about 2001 he had no arrests or offenses, the trial court never mentioned Garrett's criminal history in its sentencing statement, and we will not presume the history did or did not drive the advisory sentence imposed. Second, the trial court's statement that "A.M.S." (alternative minimum sentencing) is not available to Garrett presupposes, or at least suggests, that the trial court believed that his prior felony conviction was within the last three years. *See* Ind. Code § 35-50-2-7 (allowing trial court to enter judgment of conviction as Class A misdemeanor for Class D felony offense under certain circumstances, including if defendant committed prior Class D felony less than three years before second felony was committed). Finally, as an aside, we observe that while the trial court's 545-day sentence constitutes the advisory sentence for the Class D felony, *see* Indiana Code section 35-50-2-7, it exceeded the amount of executed time requested by the State, which had recommended that Garrett be sentenced to two years, with one year suspended and one year executed, and the trial court's sentence does not include alcohol evaluation and treatment, as recommended by both the State and Garrett's counsel.

In some cases, when the trial court has issued an insufficient sentencing statement, it may be prudent to analyze the sentence under Indiana Appellate Rule 7(B). *See Windhorst*, 868 N.E.2d at 507. However, in other circumstances, we have concluded that the better option is to remand and allow the trial court to exercise its discretion by issuing a new sentencing statement, indicating the specific reasons for imposing its sentence. *See Smith v. State*, 872 N.E.2d 169, 179 (Ind. Ct. App. 2007) (remanding with instructions that trial court

enter “sufficiently detailed sentencing statement”), *trans. denied; Ramos*, 869 N.E.2d at 1264 (noting that trial court’s sentencing statement did not facilitate meaningful appellate review and remanding for sentencing statement including reasonably detailed reasons or circumstances for imposing sentence). In this case, we find that the aforementioned issues with the trial court’s sentencing and statement persuade us that the better option is to remand. Finding as we do that the trial court abused its discretion in sentencing Garrett, we remand to the trial court with an instruction to issue a new sentencing statement, which shall include reasonably detailed reasons or circumstances for imposing the sentence given.<sup>6</sup> *Ramos*, 869 N.E.2d at 1264.

Vacated and remanded for resentencing.

CRONE, J., and BRADFORD, J., concur.

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<sup>6</sup> When a case is remanded for a new sentencing order, the trial court can: (1) issue a new sentencing order without taking any further action; (2) order additional briefing on the sentencing issue and then issue a new order without holding a new sentencing hearing; or (3) order a new sentencing hearing at which additional factual submissions are either allowed or disallowed and then issue a new order based on the presentations of the parties. *O’Connell v. State*, 742 N.E.2d 943, 952-53 (Ind. 2001).