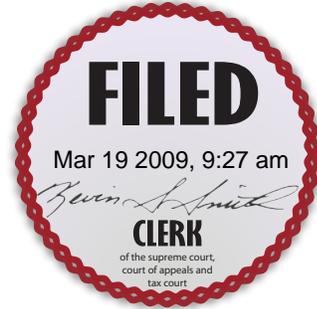


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

ROBERT DUNCAN
Greencastle, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

IAN McLEAN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ROBERT DUNCAN,)
)
 Appellant-Defendant,)
)
 vs.) No. 49A05-0807-CR-439
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jeffrey Marchal, Judge
Cause No. 49G06-0712-FC-256915

March 19, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Robert Duncan (“Duncan”) pleaded guilty in Marion Superior Court to Class C felony operating a motor vehicle while privileges are forfeited for life and was sentenced to eight years. Duncan appeals and claims that the trial court abused its discretion when it failed to consider certain mitigating circumstances and that his sentence is inappropriate in light of the nature of the offense and the character of the offender. We affirm.

Facts and Procedural History

On December 3, 2007, the State charged Duncan with Class C felony operating a motor vehicle while privileges are forfeited for life. Duncan’s trial was scheduled to begin on April 9, 2008. Initially, Duncan rejected a plea agreement which provided that he would be sentenced to six years executed.¹ On April 8, 2008, however, Duncan agreed to plead guilty with the condition that his sentence be determined by the trial court. Additionally, the plea agreement called for the dismissal of another D felony charge under another case that was pending against Duncan.

Duncan’s sentencing hearing was held on April 23, 2008. At the hearing, the presentence report revealed that Duncan had a significant criminal history. The trial court found his previous offenses as aggravators. The trial court considered Duncan’s guilty plea as mitigating. However, the court concluded that the aggravating circumstances outweighed the mitigating circumstances and sentenced Duncan to the maximum statutory sentence of eight executed years. Duncan now appeals.

¹ Duncan claims that his counsel did not inform him of the State’s offer to allow him to plead guilty to be sentenced to six years executed. However, Duncan cannot challenge the validity of his guilty plea on direct appeal. Tumulty v. State, 666 N.E.2d 394, 396 (Ind. 1996).

I. Mitigators

Duncan first argues that the trial court abused its discretion when it failed to consider certain mitigating circumstances in imposing his sentence. “[S]entencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion.” Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007). “An abuse of discretion occurs if the 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.’” Id. (citation omitted). Moreover,

[t]he finding of mitigating factors is within the discretion of the trial court “The allegation that the trial court failed to find a mitigating circumstance requires [the defendant] to establish that the mitigating evidence is both significant and clearly supported by the record.”

McKinney v. State, 873 N.E.2d 630, 645 (Ind. Ct. App. 2007), trans. denied (citations omitted).

Duncan argues that the trial court should have considered the following mitigating circumstances: 1) the fact that he pleaded guilty, 2) that the last year of his life has been “very positive and constructive” because he has displayed a “significant change in his behavior and showed stability by the purchase of a home, care of his children and operating his own business,” and 3) that he needs to continue to care for his children. Appellant’s Br. pp. 11-12.

First, Duncan asserts that the trial court did not give enough weight to his decision to plead guilty. We no longer review this claim on appeal. Anglemyer, 868 N.E.2d at 493-94.

Next, with regard to the changes Duncan has made in his life, he has not demonstrated that this proffered mitigator is significant and deserving of mitigating weight. Facts are not mitigating merely because a defendant claims them to be so. Spears v. State, 735 N.E.2d 1161, 1167 (Ind. 2000). In fact, Duncan's forklift repair business required his continued operation of motor vehicles in violation of his status as operating a vehicle while suspended as a habitual traffic violator. Duncan has not established that this proposed mitigating circumstance was significant and clearly supported by the record.

Finally, by his own admission, Duncan has been in and out of the Department of Correction for the majority of his children's lives. Tr. p. 16. Absent special circumstances, the trial court is not required to find that a defendant's incarceration will result in undue hardship on his dependents. Davis v. State, 835 N.E.2d 1102, 1116 (Ind. Ct. App. 2005), trans denied.

II. Inappropriateness of Sentence

Next, Duncan argues that his eight year sentence is inappropriate in light of the nature of the offense and the character of the offender. Pursuant to Indiana Appellate Rule 7(B), this court may revise a sentence otherwise 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.

On appeal, it is the defendant's burden to persuade us that the sentence imposed by the trial court is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

A Class C felony conviction subjects the offender to a sentence in the range of two and eight years, with the advisory sentence being four years. Ind. Code § 35-50-2-6 (2004 & Supp. 2007).

There is nothing particularly aggravating about the nature of Duncan's offense, yet this is not conclusive to our analysis. Rather, we consider both the nature of the offense and the defendant's character.

Duncan has not demonstrated good character. Duncan's first felony conviction was a 1987 conviction for Class B felony burglary. The conviction under review is his tenth felony conviction and his fifth conviction for Class C felony operating a motor vehicle while license forfeited for life. Duncan has also accumulated fourteen misdemeanor convictions over the past twenty three years. At the time he was arrested on the instant offense, Duncan admitted that there was someone else in the car that could have driven the vehicle. Tr. pp. 13-14. Duncan has clearly demonstrated that he is unable to lead a law-abiding life.

For all of these reasons, we conclude that Duncan's eight-year sentence is not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

BAILEY, J., and BARNES, J., concur.