

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.

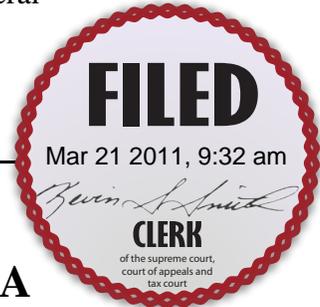
ATTORNEY FOR APPELLANT:

MARK EVERETT WATSON
Terre Haute, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

EVAN SAPP,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 84A01-1006-CR-330

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable Michael H. Eldred, Judge
Cause No. 84D01-0907-FB-2294

March 21, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Evan Sapp appeals the two-year prison sentence he received after he committed class D felony theft. He argues that the trial court abused its discretion during sentencing by failing to consider his substance abuse history as a mitigating factor. He also argues that his sentence is inappropriate in light of the nature of the offense and his character. Finding no abuse of discretion and concluding that Sapp has not met his burden to demonstrate that his sentence is inappropriate, we affirm.

Facts and Procedural History

On July 15, 2009, Michael Schoiber was working as a server at Steak ‘n Shake in Terre Haute. In the early morning hours on that date, when Schoiber was nearing the end of his all-night shift, Sapp and a man named Jacob Crew entered the restaurant. Schoiber recognized Crew as an individual he had seen before, but Schoiber was not familiar with Sapp. The two men talked to Schoiber about wanting to buy some stereo equipment, and Schoiber informed them that his cousin could probably sell them what they wanted. The men discussed meeting at a later time. The two men had only ten dollars, which was not enough money to pay for their meals, so Schoiber told them not to “worry about it” and paid the balance for their meals. Tr. at 27, 65. Crew gave Schoiber his cell phone number, and then Crew and Sapp left the restaurant.

A little while later, Schoiber went outside to smoke a cigarette and he noticed Sapp and Crew sitting in the Steak ‘n Shake parking lot in a red Chevrolet Cavalier. Schoiber approached the vehicle, and Crew, who was in the driver’s seat, exited the vehicle. Sapp

then pointed a handgun at Schoiber and demanded money. Schoiber gave the men the seventy-five dollars in tip money that he had on his person. Sapp and Crew took the money and drove away. Schoiber reported the incident to his manager and promptly called 911.

The State charged Sapp with class B felony robbery. A jury trial was held on April 27, 2010. The jury found Sapp guilty of the lesser included offense of class D felony theft. A sentencing hearing was held on May 18, 2010. The trial court sentenced Sapp to two years' imprisonment to be served consecutive to a six-year sentence imposed for an unrelated class B felony burglary conviction to which Sapp had previously pled guilty. Sapp appeals his two-year sentence for theft.

Discussion and Decision

We first address Sapp's contention that the trial court abused its discretion when it failed to identify his substance abuse history as a mitigating factor during sentencing.¹ 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. When imposing a sentence for a felony, the trial court must enter "a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing a particular sentence." *Id.* at 491. A trial court abuses its discretion if its reasons and circumstances for imposing a particular sentence are clearly against the logic and effect of the facts and circumstances before the

¹ Sapp also mentions his young age of twenty-two and the alleged hardship that his incarceration will cause to his dependants as improperly overlooked mitigating factors. However, Sapp did not advance these mitigating factors during sentencing. Accordingly, his arguments are waived. *Georgopoulos v. State*, 735 N.E.2d 1138, 1145 (Ind. 2000) (trial court does not abuse discretion in failing to consider a mitigating factor that was not raised at sentencing).

court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Hollin v. State*, 877 N.E.2d 462, 464 (Ind. 2007).

When a defendant alleges that the trial court failed to identify or find a mitigating factor, the defendant must establish that the mitigating evidence is not only supported by the record but also that the mitigating evidence is significant. *Anglemeyer*, 868 N.E.2d at 493. The trial court is not required to find mitigating factors or give them the same weight the defendant does. *Rascoe v. State*, 736 N.E.2d 246, 248-49 (Ind. 2000). Indeed, a trial court is free to disregard mitigating factors it does not find to be significant. *Carter v. State*, 711 N.E.2d 835, 838 (Ind. 1999).

During sentencing, the trial court considered Sapp's criminal history as an aggravating factor but found no mitigating factors. Sapp argues that his "long history of substance abuse and addiction" was entitled to significant mitigating weight. Appellant's Br. at 16. "While we have recognized that a history of substance abuse may be a mitigating circumstance, we have held that when a defendant is aware of a substance abuse problem but has not taken appropriate steps to treat it, the trial court does not abuse its discretion by rejecting the addiction as a mitigating circumstance." *Hape v. State*, 903 N.E.2d 977, 1002 (Ind. Ct. App. 2009) (citations omitted), *trans. denied*. The record indicates that Sapp has abused alcohol and other drugs since he was fifteen years old. He has had many encounters with law enforcement as a result of his substance abuse and has received lenient punishment in the past. It is evident from the record that Sapp has known for some time that he has a substance abuse problem and that he has done little or nothing to treat his problem. The trial court did

not abuse its discretion in failing to recognize Sapp's substance abuse as a significant mitigating factor.²

Sapp maintains that his two-year sentence is inappropriate in light of the nature of the offense and his character and urges this Court to revise his sentence. The sentencing range for a class D felony is between six months and three years, with the advisory sentence being one and one-half years. Ind. Code § 35-50-2-7. Pursuant to Indiana Appellate Rule 7(B), 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." The defendant bears the burden to persuade this Court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). "[W]hether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008).

Regarding the nature of the offense, the record indicates that Sapp stole money from Schoiber shortly after Schoiber had shown Sapp kindness. Sapp and Crew did not have enough money to pay for their meal, and Schoiber graciously paid the remainder of the bill. Nevertheless, shortly thereafter, Sapp stole the tip money Schoiber had just worked all night

² Although the trial court did not find Sapp's substance abuse as a significant mitigating factor, the court did acknowledge Sapp's need for treatment and specifically recommended that Sapp receive such treatment while in prison. Sentencing Tr. at 13.

to earn. The circumstances surrounding the theft hardly suggest that a sentence just six months above the advisory sentence, but well below the maximum sentence, is unwarranted.

More significantly, regarding Sapp's character, Sapp has an extensive juvenile criminal history as well as an extensive adult criminal history, including a felony burglary conviction. Indeed, Sapp committed the present offense while released on his own recognizance during the pending burglary case. Sapp has an admitted history of substance abuse yet has shown an unwillingness to rehabilitate himself. Finally, Sapp exhibited poor character by violating rules of conduct while in jail awaiting trial in the instant case. In short, Sapp has not persuaded us that his two-year sentence is inappropriate in light of his character. Accordingly, we decline Sapp's invitation to revise his sentence.

Affirmed.

KIRSCH, J., and BRADFORD, J., concur.