



## STATEMENT OF THE CASE

Rario Clemons appeals the sentence imposed by the trial court after his plea of guilty to resisting law enforcement, as a class A misdemeanor, and failure to register as a sex offender, a class D felony.

We affirm.

### ISSUES

1. Whether the trial court abused its discretion in sentencing Clemons.
2. Whether Clemons' sentence is inappropriate.

### FACTS

On November 17, 2007, Anderson Police Department officers were dispatched to a disturbance at a bar. Witnesses reported a fight, and identified the fighter's fleeing vehicle. Officers pursued the vehicle and attempted to stop it. Clemons "fle[d] from the passenger side of that vehicle," and a foot-chase of Clemons ensued. (Tr. 7). He was subsequently found on the porch of an abandoned house. On November 19, 2007, in cause number 48D01-0711-FD-0373 ("#373"), the State charged Clemons with Count I, battery by means of a deadly weapon, as a class C felony; and resisting law enforcement, as a class A misdemeanor.

Previously, on February 20, 2002, Clemons had been convicted of child molesting as a class C felony; subsequently registered with the Sheriff's Department as a sex offender; and was to remain registered until November 12, 2017. In August of 2008, his listed address was 1314 Central Avenue in Anderson. On February 16, 2009, when

officers went to that address to verify his residence, they found all of the mail in the mailbox there that was addressed to Clemons had “return to sender” written on it. (Tr. 8). Officers learned that “an active warrant for Mr. Clemons for failure to appear in another matter . . . had an address of 1325 Pearl Street.” *Id.* However, Clemons was found not to reside at that address either. The registration form signed by Clemons stated that any change of address was required to be reported to the Sheriff’s Department within seven days. Thus, on April 21, 2009, the State charged Clemons with failure to register as a sex offender, a class D felony, in cause number 48D03-0904-FD-130 (#130).

On June 29, 2009, Clemons tendered to the trial court a plea agreement.<sup>1</sup> At the hearing on that date, Clemons admitted to the trial court that the foregoing facts were true.<sup>2</sup> The trial court accepted Clemons’ plea of guilty on the resisting law enforcement (#373) and failure to register (#130) offenses, found him guilty thereof, and dismissed the battery charge.

On July 27, 2009, Clemons appeared before the trial court for sentencing. The State noted Clemons’ extensive criminal history, starting in 1996 when he was thirteen with a theft adjudication followed by subsequent adjudications for theft, kidnapping/confinement, and battery as well as several violations of probation; and his adult convictions for driving without a license; child molesting as a C felony; possession

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<sup>1</sup> According to the CCS, a plea agreement was “filed” in both #373 and #130, (app. 5, 8); however, no plea agreement is included in the Appendix.

<sup>2</sup> The recitation of facts included that the person “later identified” as the actual participant “in that fight at the bar” was Clemons’ brother. (Tr. 6).

of marijuana; resisting law enforcement; disorderly conduct; failure to return to law detention; another resisting law enforcement; the current resisting offense; and a subsequent March 2009 resisting law enforcement offense. It further noted Clemons' history of probation and community correction violations, including one probation violation for failing to register, as well as that he was on bond when he committed an offense for which he was being sentenced.

Clemons testified that he should have "notified" the Sheriff's Department "as soon as [he] moved," and "apologized" for not doing so. (Tr. 26). He further testified that he was "trying to change now." *Id.* Clemons' counsel asserted that the trial court should find as mitigating circumstances his guilty plea, remorse, the fact that harm was "neither caused nor threaten[ed]" by his crimes, that his failure to register was "unlikely to reoccur," that Clemons was "likely to respond affirmatively to probation or short term imprisonment," and that he was "unlikely to commit another crime[]." (Tr. 30).

The trial court considered Clemons' extensive criminal history, enumerating the juvenile adjudications, adult convictions, and probation violations that it said evidenced his "continued criminal . . . conduct, which just doesn't seem to stop" and "indicate that it's likely that he's gonna [sic] continue to commit crimes." (Tr. 34). With respect to Clemons' assertion that he would "likely . . . respond affirmatively to probation or short term imprisonment," the trial court noted that he had "never responded in the past affirmatively to probation or short terms of imprisonment," which had "[i]n fact, . . . meant nothing to him," inasmuch as "he was on bond" when he committed one of the

instant crimes. *Id.* With respect to Clemons' assertion that the circumstances of his offenses were "unlikely to recur," the trial court found that "if given an opportunity," Clemons might well "resist again because [it] seems to be . . . one of the things that he likes to do." (Tr. 35). As to the assertion that "the crime neither caused nor threaten[ed] serious harm to person or property," the trial court found that the resisting offense posed a threat of harm to law enforcement as well as to Clemons himself. *Id.* It then found that the "aggravating circumstances greatly outweigh[ed] mitigating." *Id.*

The trial court sentenced Clemons to one year for resisting law enforcement as a class A misdemeanor (#373), with credit for 268 days served; and a sentence of three years executed for the offense of failure to register as a sex offender, a class D felony (#130). The sentences were ordered to be served consecutively.

## DECISION

### 1. Trial Court Discretion

Our Supreme Court has provided the considerations to be applied in appellate review of the sentence imposed by the trial court pursuant to Indiana statutes. *See Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g. on other grounds*, 875 N.E.2d 218 (Ind. 2007). The trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." *Id.* The reasons or omission of reasons given for choosing a sentence are reviewable for an abuse of discretion. *Id.* However, the weight given to those reasons, *i.e.*, to particular aggravators or mitigators, is not subject to appellate review. *Id.* The

lack of a sentencing statement, or a defect as to the trial court's findings or non-findings of aggravators, is an abuse of discretion. *Id.*

The trial court's sentencing statement clearly identified as aggravating circumstances Clemons' history – a continuing saga of crimes committed during the half of his lifetime since he was age thirteen, and probation violations; and that he was likely to not change his ways but to continue to commit crimes. That the record amply supports these aggravators cannot be disputed.

Clemons argues that the trial court “failed to properly consider his guilty plea, remorse, and circumstances of the offense.” Clemons' Br. at 8. We cannot agree.

Clemons acknowledges that “not every plea of guilty is a significant mitigating circumstance that must be credited by the trial court.” *Id.* (citing *Trueblood v. State*, 715 N.E.2d 1242, 1257 (Ind. 1999), *cert. denied*, 531 U.S. 858 (2000)). He asserts that his guilty pleas “relieved the State of the time required to bring these cases before a jury and relieved the taxpayers of the associated costs.” *Id.* Given that the failure to register offense required only the presentation of documentation, we find Clemons' plea to represent a pragmatic decision. *See Mull v. State*, 770 N.E.2d 308, 314 (Ind. 2002). Hence, we conclude that it was within the trial court's discretion to not find it “a significant mitigating circumstance.” *Trueblood*, 715 N.E.2d at 1257. Nevertheless, as Clemons correctly notes, his pleas “saved the State the time and expense of not one (1), but two (2) trials.” Clemons' Br. at 11. We find that this contention warrants our conclusion that the trial court did abuse its discretion when it did not consider Clemons'

guilty plea to two offenses as a mitigating circumstance. Nevertheless, we would not find such to warrant remand for resentencing because given the overwhelming weight properly accorded by the trial court to Clemons' criminal history, we can say with confidence that the trial court would have imposed the same sentence had it properly considered this mitigating circumstance. *Anglemyer*, 868 N.E.2d at 491.

Clemons stated at sentencing that he "apologized" for not having maintained his sex offender registration. (Tr. 26). A defendant's remorse is akin to a credibility finding, and is a determination made by the trial court. *Cardwell v. State*, 895 N.E.2d 1219, 1226 (Ind. 2008). Based on the record before us, we do not find that the trial court abused its discretion when it did not find remorse by Clemons to be a significant mitigating circumstance.

Finally, Clemons argues that his offenses neither caused nor threatened serious harm to persons or property, and the trial court abused its discretion in not recognizing such as a significant mitigating factor. As the trial court properly found, his offense of resisting law enforcement posed a threat of harm to law enforcement as well as to Clemons himself. Further, the sex offender registration statutes were enacted "to protect children from sex offenders," *Wallace v. State*, 905 N.E.2d 371, 375 (Ind. 2009), by providing for the means to "monitor the whereabouts of the offender." *Spencer v. O'Connor*, 707 N.E.2d 1039, 1043 (Ind. Ct. App. 1999), *trans. denied*. Although apparently there is no evidence that any child was harmed as a result of Clemons' failure to register, the inability of parents or authorities to monitor Clemons' whereabouts can be

reasonably found to threaten such harm. Accordingly, we do not find that the trial court abused its discretion in this regard.

## 2. Appropriate Sentence

The Indiana Constitution authorizes independent appellate review and revision of a sentence, authority implemented through Appellate Rule 7(B). *Anglemyer*, 868 N.E.2d at 491. The Rule provides that a court “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” *Id.* (quoting Ind. Appellate Rule 7(B)). “The burden is on the defendant to persuade” the appellate court that his or her sentence is inappropriate. *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006)).

Clemons “acknowledges that the Court properly ordered the sentences to run consecutively due to the fact that Clemons had been released on bond under the 373 cause, when he was charged under 130,” and that he “admittedly has a significant prior criminal record.” Clemons’ Br. at 10, 13. He argues, nonetheless, that he should not have received the “maximum sentence permitted by law” because he is not in the category of “the most heinous offenders.” *Id.* at 13.

Clemons’ character is reflected in his repeated and nearly continuous violations of the law. Apart from his self-serving testimony that at the time of sentencing he was “trying to change,” and the testimony of his mother and his girlfriend’s mother that he

had changed during his pre-sentencing incarceration, the record supports the trial court's conclusion that Clemons would "continue to commit crimes." (Tr. 26, 34).

The nature of Clemons' offenses indicates (1) his commission of resisting law enforcement followed two previous convictions thereof, and (2) his failure to register followed a previous probation therefor. In other words, both offenses reflect Clemons' continuing refusal to comply with the laws of civil society.

Clemons has failed to persuade us that based on his character and the nature of the offenses, the sentence ordered is inappropriate.

Affirmed.

KIRSCH, J., and MAY, J., concur.