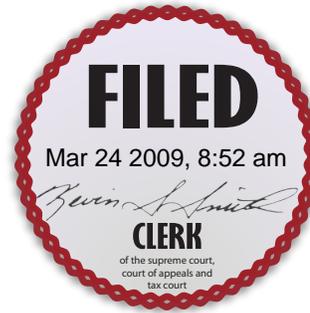


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

JASON W. BENNETT
Bennett Boehning & Clary LLP
Lafayette, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

CESAR DE LA ROSA,)
)
 Appellant-Defendant,)
)
 vs.) No. 79A04-0810-CR-582
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0607-FC-68

March 24, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Cesar De la Rosa appeals his amended sentence after a plea of guilty to operating a motor vehicle with a controlled substance causing death, a class B felony, and possession of marijuana, a class A misdemeanor.

We affirm.

ISSUES

1. Whether the trial court abused its discretion at sentencing.
2. Whether the sentence is inappropriate.

FACTS

After waking up on July 12, 2006, De la Rosa smoked marijuana and drank beer with friends. While under the influence, he drove his vehicle through a residential neighborhood. De la Rosa drove with his left foot because of an injury to his right. When the vehicle in front of him stopped unexpectedly, De la Rosa swerved his vehicle onto the sidewalk – where he ran over and killed a nine-year old boy who had been riding his bicycle with three other children. Marijuana was found inside of De la Rosa's vehicle.

On July 19, 2006, the State charged De la Rosa with the following: Count I, operating a vehicle while intoxicated causing death, a class C felony; Count II, operating a vehicle with a schedule I or II controlled substance causing death, a class C felony; Count III, reckless homicide, a class C felony; Count IV, possession of marijuana, a class A misdemeanor; Count V, possession of paraphernalia, a class A misdemeanor; and Count VI, maintaining a common nuisance, a class D felony. Subsequently, the State

added Count VII, operating a vehicle while at least twenty-one years of age and having a schedule I or II controlled substance in the blood causing death, a class B felony.

On May 8, 2007, De la Rosa filed with the trial court his plea agreement with the State, whereby he agreed to plead guilty to Count IV and Count VII; the State agreed to dismiss the remaining five counts in this case and all counts in another pending case; with sentencing left to the discretion of the trial court – however, “the executed portion of the sentence may not exceed fourteen (14) years.” (App. 76). On May 9, 2007, the trial court held a change-of-plea hearing; De la Rosa established a factual basis for his plea; and the trial court took the matter under advisement.

On June 21, 2007, the trial court held a sentencing hearing. The trial court found specific aggravating and mitigating factors, but held that the “aggravating factors outweigh[ed] the mitigating factors.” (App. 82). It sentenced De la Rosa to eighteen years on Count VII and one year concurrent on Count IV – fourteen years executed at DOC “followed by four (4) years on supervised probation to be served at Tippecanoe County Community Correction as a condition of probation.” *Id.*

De la Rosa appealed his sentence. We found that the trial court violated the plea agreement “by issuing an executed sentence that exceeded fourteen years.” *De la Rosa v. State*, No. 79A05-0710-CR-562 at *10 (Ind. Ct. App. Mar. 14, 2008). Accordingly, we reversed and remanded “with instructions that the trial court either reject the [plea agreement], or order a sentence that conforms to its written terms.” *Id.*

On August 8, 2008, the trial court issued an amended sentencing order. Although it again sentenced De la Rosa to eighteen years, it “order[ed] that fourteen (14) years of

said sentence . . . be executed at the Indiana Department of Correction[], and four (4) years suspended with term to be served on supervised probation” (App. 119). The trial court expressly “incorporate[d] by reference its findings as to aggravating and mitigating circumstances in its previous sentencing hearing and order which was conducted and issued on June 21, 2007.” *Id.*

The June 21, 2007, sentencing order found

the following mitigating factors: The defendant is twenty-four years of age. The defendant pled guilty to the offenses and is remorseful. The defendant has a General Education Degree. The defendant has a good work history.

(App. 81). The order further found

the following aggravating factors: The defendant was out on bond for possession of marijuana at the time he committed this offense. There were prior attempts at rehabilitation in the juvenile system. The defendant has a long term substance abuse history. The Court considers the impact on the family of the victim as aggravating; the victims recommend an aggravated sentence. The defendant has an acute marijuana dependence that he failed to address. The victim was under the age of twelve years.

(App. 81-82).

DECISION

1. Abuse of Discretion

Our Supreme Court has provided the considerations to be applied in appellate review of the sentence imposed by the trial court under the current “advisory” sentencing scheme. *See Anglemeyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh’g on other grounds*, 875 N.E.2d 218 (Ind. 2007). First, the trial court must issue a sentencing statement that includes “reasonably detailed reasons or circumstances for imposing a particular sentence.” *Id.* Second, the reasons or omission of reasons given for choosing a

sentence are reviewable on appeal for an abuse of discretion; 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 reasonably detailed sentencing statement, or a defect as to the trial court's findings or non-findings of aggravators and mitigators, is an abuse of discretion. *Id.*

De la Rosa first argues that the trial court abused its discretion when it found “the impact on the family of the victim” to be an aggravating factor. (App. 32). He cites our footnote in his first appeal:

Although we make no definite holding on this point, we wish to point out that in order to find the impact on the victim's family to be an aggravating circumstance, the trial court must explain how the impact on the family was different than the impact which normally results from the commission of the offense. *McElroy v. State*, 865 N.E.2d 584, 590 (Ind. 2007). Our supreme court has explained that “[b]ecause the terrible loss that accompanies the loss of a family member accompanies almost every murder, this impact on the family is encompassed within the range of impact which the presumptive sentence is designed to punish.” *Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002). Also, in order to properly find the impact on to be an aggravating circumstance, such harm must have been foreseeable by the defendant. *Id.* We note that De la Rosa did not choose his victim, and find it hard to imagine how any impact not normally associated with his crime could therefore have been foreseeable. Based upon these considerations, we express considerable doubt that the impact on the victim's family is a proper aggravator given the facts of this case.

De la Rosa at *3-4 n.3. Contrary to De la Rosa's assertion, the opinion did not hold that this factor “was not a proper aggravator in the circumstances of this case.” De la Rosa's Br. at 8. Further, *Pickens* involved the crime of murder, for which it held that the family's loss is encompassed in the presumptive sentence and the harm must have been foreseeable by the defendant. *Id.* In addition, we note that in his plea agreement, De la

Rosa expressly agreed that “any victims shall have the right to make sentencing recommendations.” (App. 76).

In his reply, De la Rosa directs our attention to *Pedraza v. State*, 873 N.E.2d 1083 (Ind. Ct. App. 2007), *summarily aff’d in relevant part*, 887 N.E.2d 77, 81 (Ind. 2008). He argues that consistent with *Pedraza*, the trial court could not use the impact on the victim’s family to “aggravate his sentence.” Reply at 4.

In *Pedraza*, the extremely intoxicated defendant drove his truck at least ten miles over the speed limit through a red light at the intersection in front of the White River Gardens. His truck struck another vehicle containing five people who had just left a wedding reception -- the groom’s father, brother, and three family friends. The groom’s father and one family friend died of injuries sustained in the accident, and another family friend suffered serious injuries. We held that the voluminous evidence concerning the circumstances of the victims, their relationships, the wedding event, and the ripple effects of the tragedy on the family could not serve to justify “sentencing Pedraza to a near-maximum sentence.”¹ 873 N.E.2d at 1091. We noted that all deaths caused by intoxicated drivers were tragic and senseless, but that

although harming an innocent party may be ‘foreseeable’ to anyone who steps behind the wheel of a vehicle while intoxicated, it would certainly be a stretch to say that causing the death of a father and guest leaving a wedding reception in the presence of loved ones was foreseeable.

Id. However, “circumstances other than the tragic wake of suffering caused by Pedraza” led us to conclude that his sentence was “not inappropriate.” *Id.* Thus, our analysis in

¹ His fifty-two year sentence was “four years shorter than the maximum sentence the trial court could legally have imposed.” 873 N.E.2d at 1091.

Pedraza addressed his argument that his sentence was inappropriate. Therefore, it is not apposite to De la Rosa's argument that the trial court erred when it found the impact on the victim's family to be an aggravating factor. Inasmuch as there are other valid aggravating factors, we do not find dispositive the issue of whether the trial court may have abused its discretion when it found the impact on the victim's family to be an aggravating factor.

De la Rosa next argues that the trial court abused its discretion when it found as two separate aggravating factors his "long term substance abuse history" and his "acute marijuana dependence that he failed to address." App. 81, 82. He admits that "both statements are true and supported by the record," but asserts that the abuse of discretion lies in having found two separate aggravating factors in this regard. De la Rosa's Br. at 9. Again, because there are other valid aggravating factors, we do not find this matter dispositive.

De la Rosa does not challenge the existence of five valid aggravating factors (arguing only that the impact-on-victim's family factor and one of the substance abuse factors should be stricken). Therefore, his argument that his sentence must be reversed because it constitutes an abuse of discretion must fail.

2. Inappropriate 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)).

De la Rosa contends that his sentence is inappropriate. Specifically, De la Rosa directs our attention to the trial court’s finding of six aggravating factors ((1) De la Rosa was on bond at the time of the offense; (2) his failed prior rehabilitation attempts; (3) his long term substance abuse; (4) the impact on the victim’s family; (5) his acute marijuana dependence; and (6) the victim was under the age of twelve), and asserts that two should be stricken (the impact-on-victim’s-family factor and one of the two substance abuse factors). He reminds us that the trial court found five mitigating factors ((1) De la Rosa was twenty-four; (2) he pled guilty; (3) he was remorseful; (4) he had a GED; and (5) he had a good work history. De la Rosa acknowledges the validity of certain aggravating factors, but he suggests that certain of the mitigating factors were especially significant and that certain aggravating factors the trial court found should be given less significance.

De la Rosa essentially argues that the trial court failed to properly weigh the aggravating and mitigating factors. This argument cannot prevail, inasmuch as the trial court has no “obligation to ‘weigh’ aggravating and mitigating factors against each other when imposing a sentence.” *Anglemyer*, 868 N.E.2d at 491. Thus, his argument challenging the weight given to the reasons for the sentence imposed must fail.

The nature of the offense reveals that on the day of the incident, De la Rosa -- who had a long-term marijuana addiction -- smoked marijuana and consumed beer, and due to an injury to his dominant right foot, drove his vehicle with his left foot through a residential area, failed to maintain a proper lockout, and was unable to move his foot from the accelerator to the brake when he encountered an unexpected stop by the vehicle in front of him. His actions caused the death of a nine-year old boy riding his bicycle on the sidewalk.² The character of the offender is reflected in De la Rosa's testimony when he testified that he thought it was "okay to use marijuana" and "drink and get behind th[e] wheel" of a vehicle. (Tr. 18). Further, at the time of the incident, De la Rosa was out on bond, having been charged with other substance-related offenses; and prior rehabilitation attempts had failed.

De la Rosa has not persuaded us that the amended sentence imposed by the trial court is inappropriate based on the nature of the offense and the character of the offender.

Affirmed.

RILEY, J., and VAIDIK, J., concur.

² The record includes evidence that the boy was dragged for more than forty feet, and testimony by a crash reconstructionist that there was no evidence of braking.