

David Delucenay appeals his nineteen-year sentence, arguing the trial court did not appropriately weigh the mitigating and aggravating factors. We affirm his sentence but remand for clarification.

FACTS AND PROCEDURAL HISTORY¹

Cause No. 20D02-0602-FC-72 (“FC-72”)²

In March 2001, Delucenay was charged with various felonies including possession with intent to deliver a controlled substance (marijuana) as a Class C felony.³ He agreed to plead guilty to possession of marijuana in exchange for dismissal of the remaining charges. In July 2001, the trial court sentenced him to six years in the Department of Correction, suspended five years, and gave him credit for 129 days. He was released to probation after serving a year in the Department of Correction. Probation violation petitions or supplements were filed in April 2003, May 2003, and September of 2004, as a result of incidents described below.

Cause No. 20D02-0602-FD-45 (“FD-45”)⁴

In April 2003, Delucenay was charged with operating a vehicle after having been adjudged a habitual traffic violator (“operating as an HTV”) as a Class D felony,⁵

¹ This consolidated appeal involves four cases from the Elkhart Superior Courts. During the proceedings below, the cases were transferred among the various divisions of the Superior Court and assigned new cause numbers. We refer to the cases by the most recent lower cause number assigned in the Elkhart Superior Court No. 2 and heard by the Honorable David Bonfiglio of Elkhart Superior Court No. 6.

² Previously docketed as Cause No. 20D01-0103-CF-65.

³ Ind. Code § 35-48-4-10.

⁴ Previously docketed as Cause Nos. 20D05-0304-FD-100 and 20D01-0307-FD-188.

⁵ Ind. Code § 9-30-10-16.

resisting law enforcement as a Class D felony,⁶ and possession of paraphernalia as a Class A misdemeanor.⁷ The State also alleged he was an habitual criminal offender.⁸

Cause No. 20D02-0602-FD-46 (“FD-46”)⁹

In August 2003, Delucenay was charged with possession of methamphetamine as a Class D felony,¹⁰ and operating as an HTV as a Class D felony. The State also alleged he was an habitual substance offender.¹¹

Cause No. 20D02-0602-FC-73 (“FC-73”)¹²

In November 2003, Delucenay and his brother escaped from the Elkart County Jail. Delucenay was charged with escape as a Class C felony.¹³ The Delucenays were recaptured in May 2004.

In November 2005, Delucenay agreed to plead guilty to most of the charges pending against him, including the probation violations, in exchange for a dismissal of both habitual offender enhancements and a sentence cap of twenty years. The trial court imposed an aggregate sentence of nineteen years and credited Delucenay with 674 days of time served.

In FC-72, the trial court ordered Delucenay serve the remaining five years of his original sentence. In FD-45, the trial court imposed a sentence of three years for

⁶ Ind. Code § 35-44-3-3(b).

⁷ Ind. Code § 35-48-4-8.3.

⁸ Ind. Code § 35-50-2-8(a).

⁹ Previously docketed as Cause No. 20D01-0309-FD-209.

¹⁰ Ind. Code § 35-48-4-6.

¹¹ Ind. Code § 35-50-2-10(b).

¹² Previously docketed as Cause No. 20D01-0311-FC-240.

¹³ Ind. Code § 35-44-3-5(a).

operating as an HTV, three years for resisting law enforcement, and one year for possession of paraphernalia. These sentences were to be served concurrently to each other but consecutively to FC-72. Delucenay was given 39 days of credit time and the habitual offender enhancement was dismissed.

In FD-46, Delucenay was sentenced to three years for possession of methamphetamine and three years for operating as an HTV. The trial court ordered the sentences in FD-46 to be served concurrently with each other but consecutively to FD-45. Delucenay was given credit for 635 days already served and the habitual substance offender enhancement was dismissed. In FC-73, the trial court sentenced Delucenay to eight years for escape and ordered the sentence be served consecutively to FD-46. The trial court specified “all the sentences are to run consecutive [sic]” (Sent. Tr. at 25), resulting in an aggregate nineteen-year sentence.

In sentencing Delucenay, the trial court gave significant weight to his criminal history.

In all my criminal sentencings when I look at sentencing an individual, I certainly look very carefully at a person’s prior criminal history. I do believe that you do have a significant history. You’ve had opportunities for probation supervision and community placements, you’ve not been successful on those, any number of reasons for that, but you haven’t been successful. So I believe that the aggravators, specifically your criminal history as outlined in the presentence report as we’ve went [sic] over here today, excluding those items that we discussed earlier, but just on the ones that we’re all in agreement, is your prior record. I believe that those are aggravating factors which do outweigh the mitigating factors and I will find that is a justification to give you the maximum[.]

(Id. at 24.)

DISCUSSION AND DECISION

Delucenay argues the trial court assigned too much weight to his criminal history as an aggravator and failed to find his guilty plea and expression of remorse as mitigating.

We review sentencing decisions for an abuse of discretion. *Moon v. State*, 823 N.E.2d 710, 717 (Ind. Ct. App. 2005), *reh'g denied, trans. denied* 841 N.E.2d 185 (Ind. 2005). If a trial court relies on aggravating or mitigating circumstances to impose an enhanced sentence, it must: (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate the court's evaluation and balancing of the circumstances. *McMahon v. State*, 856 N.E.2d 743, 749-50 (Ind. Ct. App. 2006).

1. Aggravating Circumstances

Any criminal history is “a possible and proper aggravator.” *White v. State*, 756 N.E.2d 1057, 1062 (Ind. Ct. App. 2001), *trans. denied* 774 N.E.2d 505 (Ind. 2002). The significance of criminal history “varies based on the gravity, nature and number of prior offenses as they relate to the current offense.” *Wooley v. State*, 716 N.E.2d 919, 929 n.4 (Ind. 1999), *reh'g denied*.

Delucenay argues the trial court “mischaracteriz[ed]” his criminal history as significant. (Appellant's Br. at 7.) We disagree.

Delucenay's criminal history¹⁴ begins in January 1992 when he was charged in the Elkhart City Court with failure to appear and received a suspended sentence. In December 1992, he was charged with felony possession of marijuana and misdemeanor operating with BAC .10% or more. He received a suspended sentence on both charges. In November 1993, he was charged with driving while suspended as a Class A misdemeanor, false informing as a Class B misdemeanor, and false registration as an infraction. Delucenay was given a suspended sentence for driving while suspended and the false informing charge was dismissed.

In September 1998, Delucenay was charged with misdemeanor false informing and received a suspended sentence. In October 1998, he was charged with receiving stolen property as a Class D felony, possession of marijuana as a Class D felony, and possession of a controlled substance as a Class D felony. Delucenay was given a suspended sentence for receiving stolen property and the remaining charges were dismissed. Two months after being sentenced, he violated his probation and was required to serve his suspended sentence. In October 1999, Delucenay was charged with being an habitual traffic offender as a Class D felony and was sentenced to three years in the Department of Correction.

In March 2001, under FC-72, Delucenay was charged with possession with intent to deliver marijuana as a Class C felony, possession of methamphetamine as a Class D

¹⁴ At sentencing, Delucenay indicated he did not remember two of the arrests listed in the pre-sentence report, one set of charges was apparently duplicated on the report, and no charges were pending or contemplated in Kentucky where he and his brother were arrested after escaping from the Elkhart County Jail. The trial court did not consider these disputed portions of Delucenay's criminal history in sentencing him and, accordingly, we do not review them here.

felony, resisting law enforcement as a Class D felony, and being an habitual traffic offender as a Class D felony. For the possession with intent to deliver conviction, he was sentenced to six years in the Department of Correction, with five years suspended. The remaining charges were dismissed.

With respect to his current offenses, between April and November of 2003, Delucenay was charged with five felonies, one misdemeanor, two habitual offender counts, and violation of probation under FC-72. Two of the charges were traffic-related and two were drug-related.

Before his probation was revoked under FC-72, Delucenay had been found guilty of four felonies and four misdemeanors in an eleven-year period. Delucenay received suspended sentences five times and violated his probation once. Three of his convictions were traffic-related and two of his felony convictions were drug-related. The trial court did not abuse its discretion in determining Delucenay's criminal history was entitled to significant weight as an aggravating factor.

2. Mitigating Circumstances

Delucenay argues the trial court overlooked two valid mitigating circumstances, his guilty plea and expression of remorse, "despite a clear record." (Appellant's Br. at 7.) We disagree.

It is well-settled that a trial court is not obliged to accept as mitigating each of the circumstances proffered by the defendant. *Ousley v. State*, 807 N.E.2d 758, 761 (Ind. Ct. App. 2004). The finding of mitigating circumstances is within the trial court's discretion. *Id.* The court does not err in failing to find mitigation when the presence of a mitigating

circumstance is highly disputable in nature, weight, or significance. *Id.* at 761-62. Only when the trial court fails to find a significant mitigator that is clearly supported by the record is there a reasonable belief that it was overlooked. *Powell v. State*, 751 N.E.2d 311, 317 (Ind. Ct. App. 2001).

Indiana courts have long held that a defendant who pleads guilty is entitled to receive some benefit in return. *Williams v. State*, 430 N.E.2d 759, 764 (Ind. 1982), *appeal dismissed* 459 U.S. 808 (1982), *reh'g denied* 459 U.S. 1059 (1982). However, a guilty plea does not automatically amount to a significant mitigating factor, particularly if the defendant has already received a substantial benefit in exchange for pleading guilty. *Sensback v. State*, 720 N.E.2d 1160, 1165 (Ind. 1999).

We agree with the trial court that Delucenay's interests "were very well served by the plea agreement" because both habitual offender charges were dismissed. (Sent. Tr. at 25.) The habitual offender count charged in FD-45 could have increased Delucenay's sentence by as much as four-and-one-half years. *See* Ind. Code § 35-50-2-8(h); Ind. Code § 35-50-2-7. The habitual substance offender count charged in FD-46 carried an additional sentence of three to eight years. *See* Ind. Code § 35-50-2-10(f). The dismissal of the habitual offender charges reduced Delucenay's potential sentence by as much as twelve-and-one-half years. The plea agreement also provided Delucenay's executed sentence could not exceed twenty years, further reducing his potential sentence. Because Delucenay received a substantial benefit in exchange for pleading guilty, the trial court did not err in finding his guilty plea was not a significant mitigator.

Delucenay also asserts the trial court overlooked a “valid mitigator” because he “expressed clear remorse for his actions.” (Appellant’s Br. at 8.) We disagree.

At sentencing, Delucenay described his escape from the Elkhart County Jail as probably one of the dumbest things I’ve ever done. I’m sorry that it happened. I apologize to the sheriff of the jail that it happened and to the sheriff’s department. To everybody who was involved in looking for us and I didn’t – we weren’t trying to make anybody look bad, we were just trying to avoid a situation and it was the wrong thing to do and I’m sorry.

(Sent. Tr. at 9.) He stated he was sorry for committing the other charged offenses as well.

The trial court is in the best position to judge the sincerity of a defendant’s remorseful statements. *Stout v. State*, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005), *trans. denied* 841 N.E.2d 188 (Ind. 2005). Without evidence of some impermissible consideration by the trial court, we will not disturb the trial court’s determination as to remorse. *Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002). The trial court did not specifically refer to Delucenay’s remorse, but did take note of the evidence put forth at sentencing: “I believe that there certainly are from the discussions here today, I’ve certainly heard the issues concerning some mitigating factors[.]” (Sent. Tr. at 24.) We conclude the trial court did not overlook Delucenay’s expression of remorse and was within its discretion to assign it little or no mitigating weight.

3. Clarification of Sentence in FC-72

In FC-72, Delucenay was originally sentenced to six years in the Department of Correction with five years suspended to probation. When the trial court revokes an individual’s probation, “the court may . . . order execution of all or part of the sentence

that was *suspended* at the time of initial sentencing.” Ind. Code § 35-38-2-3(g)(3) (emphasis supplied). Because five years were suspended at Delucenay’s initial sentencing, the trial court could have imposed a maximum of five years for the probation revocation under FC-72.

In sentencing Delucenay for violating his probation, the trial court noted it was “very appropriate to impose the suspended jail time.” (Sent. Tr. at 23.) However, the trial court sentenced Delucenay to the Department of Correction for six years with “credit for 1 year served.” (App. at 57.) Because only five years of Delucenay’s six-year sentence had been suspended to probation, the trial court could not order the entire sentence executed. Accordingly, we remand to allow the trial court to correct its sentencing order as appropriate.¹⁵

Affirmed and remanded for clarification.

MATHIAS, J., and NAJAM, J., concur.

¹⁵ We acknowledge the trial court gave Delucenay credit for the year he had already served, effectively sentencing him to five years in FC-72.