

Case Summary

Appellant-Defendant Edgar I. Diaz-Deleon appeals his sentence for Possession of Marijuana, as a Class D felony,¹ alleging that the trial court abused its discretion in failing to recognize mitigators supported by the record. We affirm.

Facts and Procedural History

On April 16, 2007, a City of Fort Wayne police officer initiated a traffic stop of a car that he recognized to be on the list of stolen vehicles. As the suspect vehicle rolled to a stop, the officer observed an unusual amount of movement by the two occupants in the car. Diaz-Deleon was the passenger in the suspect vehicle. During his interaction with the occupants, the officer detected a strong smell of marijuana in the car and initiated a search of the vehicle. The search resulted in the recovery of 416 grams of compressed marijuana that was found under the passenger seat where Diaz-Deleon was sitting.

The State charged Diaz-Deleon with Possession of Marijuana, as a Class D felony. After a jury trial, Diaz-Deleon was found guilty as charged. The trial court sentenced him to the advisory sentence of one and one-half years of imprisonment, which was suspended to probation.

Discussion and Decision

Diaz-Deleon contends that the trial court abused its discretion in failing to consider his proffered mitigating circumstances. Sentencing decisions rest within the discretion of the

¹ Ind. Code § 35-48-4-11.

trial court. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). As long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. Id. One way in which a trial court may abuse its discretion is by failing to include mitigating factors that are clearly supported by the record and advanced for consideration. Id. at 490-91.

The reasons proffered as mitigating circumstances at sentencing were that Diaz-Deleon did not have a felony criminal record, has two young children to support, and that his conviction was based on constructive possession. None of these are valid mitigating circumstances. First, while this is his first felony conviction, Diaz-Deleon admits that his record does include six misdemeanors. Second, many individuals convicted of crimes have children, and absent evidence that special circumstances exist making such hardship undue, a trial court does not abuse its discretion by not finding this to be a mitigator. Roney v. State, 872 N.E.2d 192, 205 (Ind. Ct. App. 2007), trans. denied. Furthermore, Diaz-Deleon does not explain how his sentence, which is entirely suspended to probation, prevents him from providing for his children in any manner. Finally, the theory upon which an individual is found guilty is not a mitigating circumstance. Diaz-Deleon was found guilty of possessing 416 grams of compressed marijuana. The trial court did not abuse its discretion in sentencing Diaz-Deleon.

Affirmed.

DARDEN, J., and ROBB, J., concur.