



## **Case Summary**

Marshawn W. Wilson (“Wilson”) appeals his sentence for Battery<sup>1</sup> and Neglect of a Dependant,<sup>2</sup> both as Class A felonies. We affirm in part, reverse in part, and remand with instructions.

## **Issues**

Sua sponte, we analyze whether the judgments of conviction violated Wilson’s Double Jeopardy rights. Wilson argues that the trial court abused its discretion in sentencing him and that his sentence is inappropriate.

## **Facts and Procedural History**

On July 28, 2007, Wilson calmly walked to a bar carrying his two-month-old daughter, Ariona Wilson. He asked to use Stephanie Richardson’s (“Richardson”) cell phone, placed a call, and began to panic. Upon hearing him say that the baby was not breathing, Richardson took her and began administering CPR. According to a bartender, the baby was cool, very pale, and showed no signs of movement. Ariona did not respond to paramedics’ life support efforts. From the very cool temperature of the baby, Paramedic Leah Boren concluded that she had not “had any respirations or any heart beat for quite a while.” Transcript at 232. A hospital nurse observed that Ariona had

multi-stages of bruising on her head, around her eye, on her neck. There was scabbing above her eyes. There was [sic] different marks on her body. The

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<sup>1</sup> Ind. Code § 35-42-2-1(a)(5).

<sup>2</sup> Ind. Code § 35-46-1-4.

head was swollen in different parts of it, on her body. The fontanelles were bulging [which] would indicate brain trauma, swelling of the brain.

Tr. at 245, 246. Ariona died.

Dr. Robert Gutekunst performed an autopsy on Ariona, and testified as follows:

[T]he body does not lie to us. It tells me a story and that story is how I form my opinion. And sometimes the story isn't very clear but in other cases, to me it can be very clear. And in this particular case I have in my opinion evidence of at least three separate event injuries, one of which is a fatal skull fracture of a hematoma, subdural hematoma.

Tr. at 469. The back of Ariona's skull was fractured two to twelve hours before she died.

Dr. Gutekunst concluded that "either the head struck something very hard or something struck the head very hard." Tr. at 480.

The State charged Wilson with Battery and Neglect of a Dependent, both as Class A felonies. A jury found Wilson guilty as charged, and the trial court entered judgments of conviction.<sup>3</sup>

The trial court found two aggravating circumstances, the nature of the offenses and Wilson's history as a juvenile delinquent; and one mitigating circumstance, Wilson's youth (age twenty-one when the offenses were committed). It sentenced Wilson to concurrent, forty-year terms of imprisonment.

Wilson now appeals.

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<sup>3</sup> The State also charged Wilson's wife with criminal conduct; the actions were consolidated.

## Discussion and Decision

### I. Double Jeopardy

Sua sponte, we analyze whether the judgments of conviction violated Wilson's Double Jeopardy rights. The severity of each offense was elevated by the same harm, Ariona's death. Each charge included "resulting in death." App. at 16, 18. While Richardson v. State, 717 N.E.2d 32 (Ind. 1999) does not bar multiple convictions where each offense has a unique element, "[e]nhancement of one offense for the very same harm as another is not permissible." Robinson v. State, 775 N.E.2d 316, 320 (Ind. 2002) (citing Guyton v. State, 771 N.E.2d 1141, 1143 (Ind. 2002)). In Strong v. State, Strong was convicted of Murder and Neglect of a Dependent, as a Class A felony, based upon the same child's death. As the same harm served as an element of Murder and the elevation of Neglect of a Dependent, the Strong Court remanded with instructions to reduce the Neglect conviction from a Class A felony to a Class D felony. Strong v. State, 870 N.E.2d 442, 444 (Ind. 2007). Upon this authority, we remand with instructions to reduce the conviction for Neglect of a Dependent from a Class A felony to a Class D felony.

### II. Abuse of Discretion

Wilson challenges the trial court's findings regarding six proffered mitigating circumstances, as well as the trial court's finding the nature of the offense to be an aggravating circumstance. "So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on other grounds, 875 N.E.2d 218 (Ind. 2007). This includes the finding of

an aggravating circumstance and the omission to find a proffered mitigating circumstance. Id. at 490-91; and Hollin v. State, 877 N.E.2d 462, 464 (Ind. 2007). “An abuse of discretion occurs if the decision is ‘clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.’” Anglemyer, 868 N.E.2d at 490 (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)).

When imposing 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. Its reasons must be supported by the record and must not be improper as a matter of law. Id. However, a trial court’s sentencing order may no longer be challenged as reflecting an improper weighing of sentencing factors. Id. Where a sentence fails to meet the above standards, we may remand for resentencing “if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.” Id. A trial court is neither obligated to find a circumstance to be mitigating simply because it was proffered by the defendant, nor to explain why it found that the factor did not exist. Highbaugh v. State, 773 N.E.2d 247, 252 (Ind. 2002); and Anglemyer, 868 N.E.2d at 493 (quoting Fugate v. State, 608 N.E.2d 1370, 1374 (Ind. 1993)).

Criminal history. Wilson argues that his “limited criminal history” should have been a mitigating circumstance, rather than an aggravating circumstance, as found by the trial court. Appellant’s Brief at 13. While the young man had no adult record, he had been adjudicated a juvenile delinquent on four occasions, including offenses that, if committed by an adult,

would be two convictions for Battery with Bodily Injury in 1999 and 2000, Criminal Trespass, and Criminal Conversion, all as Class A misdemeanors. The first two were very similar to the instant offense. In addition, he twice violated his probation.

Remorse. He argues that the trial court abused its discretion in not finding his remorse to be a mitigating circumstance. In a letter to the trial court, Wilson stated that he and his wife understood and took full responsibility “for decisions we made during our two and a half months” of being parents. Appendix at 98. He said that they regretted not seeking medical attention for Ariona and that they accepted “100% blame for her demise.” App. at 98. However, his remorse was questioned. Wilson’s mother-in-law wrote that he and her daughter,

didn’t show any remorse at the funeral. After the baby was buried they went and played basketball for four hours, and the weekend after they went to Cedar Point for the whole weekend. And for just losing your daughter I wouldn’t be able to do anything like that.

Pre-Sentence Investigation Report at 15.

Academic Achievements. Wilson did not graduate from high school, but obtained his GED in 2003 and an Associate’s Degree from International Business College, in Ft. Wayne, Indiana. His mother testified that he was one month away from receiving his bachelor degree.

Troubled Childhood. Two of Wilson’s cousins were killed in a double homicide, and a man who was “like a brother” to Wilson was fatally shot. App. at 119. In addition, he lost numerous friends to gang violence. A probation officer wrote,

The defendant reported having a rough childhood. He informed he was raised by his mother and continues to have a good relationship with his family. He denied suffering from any forms of abuse.

PSI at 4.

Gainful Employment. At the sentencing hearing, Wilson argued indirectly that he “was making progress in his life and trying to further himself and have a better life down the road.” App. at 118. The pre-sentence investigation report indicated that Wilson had worked sixteen months at McDonald’s and that he worked seasonally with United Parcel Service.

Undue Hardship. Incredibly, Wilson also asserts that his sentence will place an undue hardship upon his dependents. However, his daughter is dead, as a result of the instant offense, and his wife is incarcerated. The pre-sentence investigation report, which Wilson acknowledged to be accurate, listed no other dependents.

Wilson asserts that the trial court “ignor[ed] these mitigating circumstances.” Appellant’s Brief at 16. To the contrary, the record makes clear that the trial court simply disagreed that they represented significant mitigating circumstances. There was evidence in the record to support the trial court’s finding Wilson’s criminal history to be an aggravating, rather than a mitigating, circumstance. Also, Wilson’s mother-in-law wrote that he and her daughter demonstrated a lack of remorse. While there was some evidence in the record regarding Wilson’s childhood, employment, and education, we cannot say that it was clearly against the logic and effect of the facts and circumstances before the court to find that these were not significant mitigating circumstances.

Finally, Wilson argues that the trial court abused its discretion in finding the nature of

the offense to be an aggravating circumstance. “[T]he seriousness of the offense, . . . , which implicitly includes the nature and circumstances of the crime as well as the manner in which the crime is committed, has long been held a valid aggravating factor.” Anglemyer, 868 N.E.2d at 492. The Battery statute elevates the punishment where the victim is less than fourteen. Ind. Code §§ 35-42-2-1(a)(5). Here, Ariona was two and a half months old, significantly younger than fourteen. Dr. Gutekunst testified that at that age an infant cannot even hold up her head. According to him, “either [her] head struck something very hard or something struck [her] head very hard.” Tr. at 480. We conclude that the trial court did not abuse its discretion in sentencing Wilson.

### III. Appropriateness of Sentence

Wilson also argues that his sentence is inappropriate. Under Indiana Appellate Rule 7(B), this “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.” Ind. Appellate Rule 7(B); see IND. CONST. art. VII, § 6. In performing our review, we assess “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). This “introduces into appellate review an exercise of judgment that is unlike the usual appellate process, and is very similar to the trial court’s function.” Id. at 1223. A defendant ““must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.”” Anglemyer, 868 N.E.2d at 494 (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind.

2006)).

As to the nature of the offenses, the advisory sentence “is the starting point the Legislature has selected as an appropriate sentence for the crime committed.” Childress, 848 N.E.2d at 1081. For a Class A felony, the advisory sentence is thirty years, while the maximum sentence is fifty years. Ind. Code § 35-50-2-4. For a Class D felony, the minimum, advisory, and maximum sentences are respectively six months, eighteen months, and three years. Ind. Code § 35-50-2-7.

In her brief life, Wilson’s daughter suffered at least three significant injuries, including a skull fracture sustained two to twelve hours before her death. Wilson waited multiple hours before seeking medical attention, and then walked calmly to a bar to use a stranger’s cell phone. His actions were heinous.

It appears that Wilson was making a sincere effort to improve the conditions of his life. However, by age twenty-one, he had committed three batteries resulting in injury, including the instant matter. He had two additional juvenile adjudications and had twice violated the terms of probation. Based upon our review of the record, Wilson’s forty-year sentence for Battery is not inappropriate. Additionally, although obligated to reduce his conviction for Neglect of a Dependent to a Class D felony, we nevertheless believe under the facts of this case that the trial court would have imposed the maximum sentence for this Class D felony. Where it is clear what the sentence would be on remand, we need not impose upon the trial court the burden of conducting a new sentencing hearing. McDonald v. State, 868 N.E.2d 1111, 1114 (Ind. 2007); and Pierce v. State, 761 N.E.2d 826, 830 n.5 (Ind. 2002).

Therefore, we remand with instructions to impose the maximum, three-year term for Neglect of a Dependent, as a Class D felony, to be served concurrently with the Class A felony sentence.

### **Conclusion**

The judgments of conviction, as entered, violated Wilson's Double Jeopardy rights. The trial court did not abuse its discretion in sentencing Wilson. His sentence is not inappropriate.

Affirmed in part, reversed in part, and remanded with instructions.

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