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ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

TORREY J. BAUER
Lavender & Bauer, PC
Warsaw, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

KELLY A. MIKLOS
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

MATTHEW BANTA,)
)
Appellant-Defendant,)
)
vs.) No. 25A03-0812-CR-595
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE FULTON SUPERIOR COURT
The Honorable Wayne E. Steele, Judge
Cause No. 25D01-0801-FB-33

April 13, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Matthew Banta (Banta), appeals his sentence for causing serious bodily injury to another person while operating a motor vehicle with an alcohol concentration equivalent to at least 0.08, as a Class D felony, Ind. Code § 9-30-5-4(a)(1).

We affirm.

ISSUES

Banta presents two issues for our review:

- (1) Whether the trial court abused its discretion in its finding of aggravating and mitigating circumstances; and
- (2) Whether his sentence is inappropriate in light of the nature of his offense and his character.

FACTS AND PROCEDURAL HISTORY

On the morning of December 30, 2007, Banta picked up his eight-year-old daughter, M.B., to exercise his parental visitation time. On the road, Banta struck another vehicle. M.B. fractured her pelvis, her right leg, and some ribs. A blood draw revealed that Banta had a blood alcohol concentration (BAC) of 0.38. On March 10, 2008, the State filed an Information charging Banta with Count I, causing serious bodily injury to another person while operating a motor vehicle with an alcohol concentration equivalent to at least 0.08 gram of alcohol per 100 milliliters of blood or 210 liters of breath, as a Class D felony, I.C. § 9-30-5-4(a)(1), and Count II, neglect of a dependent resulting in serious bodily injury, a Class B felony, I.C. § 35-46-1-4(b)(2).

On October 23, 2008, the State filed a motion to dismiss Count II because Banta had agreed to plead guilty to Count I. In sentencing Banta, the trial court identified four aggravating factors: (1) the victim was less than twelve years old; (2) a violation of the “sacred trust between a father and daughter”; (3) Banta’s BAC of 0.38 at the time of the collision; and (4) the State’s dismissal of the Class B felony neglect of a dependent charge. (Appellant’s App. p. 10). As for mitigating factors, the trial court noted that Banta had no prior convictions and that he expressed sincere remorse. Finding that the aggravators outweighed the mitigators, the trial court imposed the maximum sentence of three years and ordered Banta to pay restitution in the amount of \$46,918.85.

Banta now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

On appeal, Banta argues that the trial court abused its discretion in finding the aggravating and mitigating circumstances and that his sentence is inappropriate in light of the nature of his offense and his character.

I. Aggravators and Mitigators

Banta first contends that the trial court abused its discretion in identifying the relevant aggravating and mitigating circumstances. Subject to our power to review and revise sentences under Indiana Appellate Rule 7(B), discussed below, sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218 (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. *Id.*

Banta asserts that the trial court abused its discretion by relying upon his BAC as an aggravating circumstance because his BAC is an element of the crime he committed. Generally, a fact that comprises a material element of an offense may not also be relied upon as an aggravator to increase the sentence for that offense. *Rodriguez v. State*, 785 N.E.2d 1169, 1178 (Ind. Ct. App. 2003), *trans. denied*. However, the particularized circumstances of a criminal act may constitute a separate aggravating circumstance. *Id.* In *Rodriguez*, we held that the trial court properly considered as an aggravating circumstance the fact that the defendant's BAC was nearly three times the legal limit at the time of a traffic accident. *Id.* Likewise, here, the trial court did not abuse its discretion by finding Banta's 0.38 BAC, which was nearly *five* times the legal limit, as an aggravator.

Another aggravator relied upon by the trial court was that the State dismissed the Class B felony neglect of dependent charge in exchange for Banta's guilty plea to the OWI charge. Banta argues that the trial court abused its discretion not only by finding this

aggravator, but also by failing to identify his guilty plea as a mitigator.¹ The State acknowledges that the trial court should not have relied upon the dismissal of the neglect charge as an aggravating circumstance but urges that “it is sufficient to offset any mitigating weight Banta would like to enjoy due to his guilty plea.” (Appellee’s Br. p. 5). We agree with the State. While a defendant’s guilty plea is generally entitled to some mitigating weight, a trial court does not abuse its discretion by failing to make such a finding where the defendant has received a substantial benefit in return for the plea. *Anglemyer v. State*, 875 N.E.2d 218, 220-21 (Ind. 2007). Here, Banta received a substantial benefit when the State agreed to dismiss the Class B felony neglect of a dependent charge, which carried a sentencing range of six to twenty years. *See* I.C. § 35-50-2-5. Therefore, while the trial court abused its discretion by relying upon the dismissal of that charge as an aggravating factor, the dismissal did offset any mitigating weight to be assigned to Banta’s guilty plea.

Banta maintains that the trial court should have considered as a mitigating circumstance the hardship that his incarceration would cause to M.B. Banta notes that, at the time of the sentencing hearing, he was current on his child support and was exercising

¹ In making this argument, Banta’s attorney cites two unpublished memorandum decisions from this court. We direct counsel to Indiana Appellate Rule 65(D), which provides that “a not-for-publication memorandum decision shall not be regarded as precedent and shall not be cited to any court except by the parties to the case to establish *res judicata*, collateral estoppel, or law of the case.”

For its part, the State argues that Banta waived any argument that his guilty plea is a mitigator because it failed to make that argument to the trial court. The State correctly notes that, as a general matter, a defendant who fails to raise a proposed mitigator at the trial court level is precluded from advancing it for the first time on appeal. *See Johnson v. State*, 837 N.E.2d 209, 215 (Ind. Ct. App. 2005), *trans. denied*. However, the State fails to acknowledge the one well-settled exception to that rule: guilty pleas. Because a sentencing court is inherently aware of the fact that a guilty plea is a mitigating circumstance, the general rule of waiver is inapplicable. *Anglemyer v. State*, 875 N.E.2d 218, 220 (Ind. 2007).

visitation with M.B. But, as our supreme court has stated, “[m]any persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship.” *Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999). Banta has failed to show any such “special circumstances.” M.B. lives primarily with her mother, and Banta presented no evidence of the amount of support he is paying, *i.e.*, the degree to which M.B. relies upon him for support. Where the defendant fails to demonstrate that any hardship suffered by his children is “undue” in the sense that it is any worse than that suffered by any children whose father is incarcerated, the trial court does not abuse its discretion by failing to find the hardship mitigator. *See Roney v. State*, 872 N.E.2d 192, 205 (Ind. Ct. App. 2007), *trans. denied*.

Banta next contends that the trial court should have considered the likelihood that he would respond affirmatively to probation or short term imprisonment as a mitigating circumstance. *See* I.C. § 35-38-1-7.1(b)(7). The only source Banta cites in support of this argument is the probation department’s recommendation that he receive a three-year sentence with two years suspended to probation. However, he does not direct us to any evidence that tends to support the probation department’s recommendation. More importantly, in light of the egregious nature of Banta’s actions and the seriousness of his daughter’s injuries, Banta’s prison sentence is “short term.” Banta could easily have been convicted of Class B felony neglect of a dependent and faced a prison term between six and twenty years. As it stands now, assuming good behavior, he could serve less than a year-and-a-half in prison. As such, the trial court did not abuse its discretion by rejecting this proposed mitigator.

Finally, Banta asserts that the fact that M.B. will receive restitution is a mitigating circumstance. Indiana Code section 35-38-1-7.1(b)(9) provides that a trial court may consider as a mitigator the fact that the defendant “has made or will make restitution to the victim of the crime for the injury, damage, or loss sustained.” Here, however, there is no indication that Banta is paying anything out of his own pocket, voluntarily or otherwise. Banta himself notes “civil litigation [is] in progress by which restitution would be made pursuant to Banta’s *insurance policy*[.]” (Appellant’s Br. p. 11) (emphasis added). Absent evidence that Banta has any personal responsibility for the restitution obligation, we cannot say that the trial court abused its discretion by failing to find this mitigator.

In sum, the trial court abused its discretion with regard to one aggravator: the State’s dismissal of the Class B felony neglect of a dependent charge. Where a trial court abuses its discretion in its finding of aggravating and mitigating circumstances, we will not remand for resentencing if we can say with confidence that the trial court would have imposed the same sentence even if it had considered only proper factors. *See Anglemeyer*, 868 N.E.2d at 491. Here, we can say with confidence that the trial court would have imposed the maximum sentence of three years even if it had not considered the dismissal of the neglect charge as an aggravating circumstance. While this aggravator appeared in the trial court’s written sentencing order, the court did not even mention it in its oral comments during the sentencing hearing. Rather, the court focused on Banta’s high BAC, M.B.’s age, and the violation of the “sacred trust” between father and daughter. (Transcript p. 65). Under the circumstances, the

trial court's abuse of discretion as to one aggravator does not require remand for resentencing.

II. *Appropriateness*

Banta also argues that his sentence is inappropriate. Although, as here, a trial court may have acted within its lawful discretion in determining a sentence, Article VII, sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a sentence imposed by the trial court. *Anglemyer*, 868 N.E.2d at 491. This appellate authority is implemented through Indiana Appellate Rule 7(B), which permits us to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Id.* The burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). Banta has not carried this burden.

Banta emphasizes several positive character traits. As the trial court found, Banta has no prior criminal convictions, and he has expressed genuine remorse for this offense. He voluntarily enrolled in a recovery program to help deal with his drinking, he is employed, he is current on his child support obligation, and he is active in his church. Nevertheless, in light of the startling nature of Banta's offense, we cannot say that the maximum sentence of three years is inappropriate. Knowing that he would be driving a vehicle with his eight-year-old daughter as a passenger, Banta drank his way to a 0.38 BAC, nearly five times the legal limit. Not surprisingly, Banta collided with another vehicle, leaving his daughter seriously

injured. We stress one last time that Banta could very easily have been convicted of neglect of a dependent causing serious bodily injury, a Class B felony carrying a minimum sentence of six years and a maximum sentence of twenty years.² Therefore, three years is not an inappropriate sentence.

CONCLUSION

Based on the foregoing, we conclude that the trial court abused its discretion by relying upon the State's dismissal of the Class B felony neglect of a dependent charge as an aggravating circumstance. Nonetheless, we need not remand for resentencing because we can say with confidence that the trial court would have imposed the same sentence even if it had not considered that aggravator. Furthermore, Banta's sentence is not otherwise inappropriate.

Affirmed.

DARDEN, J., and VAIDIK, J., concur.

² The neglect of a dependent statute, Indiana Code section 35-46-1-4, provides, in pertinent part, that a person having the care of a dependent, whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally places the dependent in a situation that endangers the dependent's life or health commits a Class B felony if it results in serious bodily injury.