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FILED
Apr 13 2009, 9:26 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

JACKIE ROSE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 52A04-0812-CR-717
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MIAMI CIRCUIT COURT
The Honorable Robert A. Spahr, Judge
Cause No. 52C01-0709-FA-169

April 13, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Jackie Rose (Rose), appeals his sentence following a guilty plea for possession of methamphetamine, a Class B felony, Ind. Code § 35-48-4-6.1(a), (b)(2)[1].

We affirm.

ISSUES

Rose raises one issue on appeal, which we restate as the following two issues:

(1) Whether the trial court abused its discretion by not finding any mitigators; and

(2) Whether his sentence is appropriate in light of his character and the nature of his offense.

FACTS[2] AND PROCEDURAL HISTORY

> According to the probable cause affidavit, on 9-9-07, Deputy Dausch received information that Monique Featherstone was at [Rose's] home located at 231 East Third Street in Peru, Indiana. Ms. Featherstone was wanted on an outstanding felony warrant for a probation violation. At first, [Rose] would not allow Deputy Dausch to enter the residence, but did state Ms. Featherstone was in the residence and he knew that she had a warrant out for her arrest. He eventually allowed Deputy Dausch to enter the residence. Upon entering, [Rose] was placed under arrest for [a]ssisting a [c]riminal. Deputy Dausch then observed a small plastic bag of what appeared to be a powder like substance and a smoking device. [Rose] then agreed to a warrantless search of his home. It was determined that methamphetamine was being manufactured in the home.

(Appellant's App. II, p. 82).

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[1] In a separate appeal before this court, Rose is also appealing his ten-year sentence that was imposed following a plea of guilty in Cause No. 52A04-0812-CR-716.

[2] The chronological case summary indicates that a factual basis hearing was held on July 24, 2008; however, Rose did not provide us with a transcript of this hearing, as required by Ind. Appellate Rule 50(B)(1)(d). At the sentencing hearing, Rose acknowledged that the pre-sentence investigation report was accurate. Therefore, we will rely on the pre-sentence report for our recitation of the relevant facts.

On September 20, 2007, the State filed an Information, charging Rose with Count I, dealing in methamphetamine, a Class A felony, I.C. § 35-48-4-1.1(a)(1), (b)(3); Count II, possession of methamphetamine, a Class B felony, I.C. § 35-48-4-6.1(a), (b)(2); and Count III, assisting a criminal, a Class D felony, I.C. § 35-48-4-13(b)(2). On July 24, 2008, Rose entered a plea of guilty, pleading guilty to Count II, possession of methamphetamine, a Class B felony, in exchange for the State dismissing all remaining charges. The plea agreement left sentencing to the discretion of the trial court. On October 2, 2008, and October 6, 2008, the trial court conducted a sentencing hearing. At the conclusion of the hearing, the trial court sentenced Rose to the Department of Correction for an executed sentence of ten years, to run consecutively to his ten-year sentence in Cause No. 52C01-0801-FA-008.

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

DISCUSSION AND DECISION

I. *Standard of Review*

Rose contends that the trial court abused its discretion by sentencing him to an executed term of ten years. A person who commits a Class B felony shall be imprisoned for a fixed term of between six and twenty years, with the advisory sentence being ten years. I.C. § 35-50-2-5. As such, the trial court imposed the advisory sentence.

As long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Anglemeyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *aff'd 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*. One way in which a trial court may abuse its discretion is by failing to enter a sentencing statement at all. Another example includes entering a sentencing statement that explains reasons for imposing a sentence, including aggravating and mitigating factors, which are not supported by the record. *Id*. at 490-91.

Because the trial court no longer has any obligation to weigh aggravating and mitigating factors against each other when imposing a sentence, a trial court cannot now be said to have abused its discretion by failing to properly weigh such factors. *Id*. at 491. This is so because once the trial court has entered a sentencing statement, which may or may not include the existence of aggravating and mitigating factors, it may then impose any sentence that is authorized by statute and permitted under the Indiana Constitution. *Id*.

This does not mean that criminal defendants have no recourse in challenging sentences they believe are excessive. *Id*. Although a trial court may have acted within its lawful discretion in determining a sentence, Appellate Rule 7(B) provides that the appellate court may revise a sentence authorized by statute if the appellate court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Id*. It is on this basis alone that a criminal defendant may now challenge his sentence where the trial court has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing the particular sentence that is supported by the record, and the reasons are not improper as a matter of law. *Id*.

Although Rose in his Summary of the Argument and Standard of Review appears to request this court to review his sentence for inappropriateness pursuant to Appellate Rule 7(B), in the Argument section of his brief he nevertheless challenges the trial court's failure to find any mitigating factors. Accordingly, we will review his sentence for an abuse of discretion and for inappropriateness.

II. *Abuse of Discretion*

Rose first argues that the trial court abused its discretion by failing to consider his plea agreement as a mitigating factor. However, a guilty plea does not automatically amount to a significant mitigating factor. For example, a guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one. *Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), *trans. denied.* Here, under the terms of the plea agreement, the State dismissed one Class A felony and a Class D felony. In light of this already substantial benefit to Rose, the trial court did not abuse its discretion in failing to find Rose's guilty plea to be a mitigating factor.

Next, Rose asserts that the trial court failed to list his remorse as a mitigator. Substantial deference must be given to a trial court's evaluation of remorse. *Corralez v. State*, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004). The trial court, which has the ability to directly observe the defendant and listen to the tenor of his voice, is in the best position to determine whether the remorse is genuine. *Id*. The record reflects that Rose's apology was a

cursory "I'm sorry for what I've done" at the sentencing hearing. (Tr. p. 57). Without any further evidence, we cannot say that the trial court abused its discretion.

In addition, Rose contends that the trial court abused its discretion by failing to find as a mitigator the undue hardship his sentence imposes on his parents. Specifically, Rose claims that his parents are elderly and depend on his assistance. In *Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999), our supreme court acknowledged the hardship that incarceration may cause a defendant's family, but stated that "absent special circumstances, trial courts are not required to find that imprisonment will result in undue hardship." At the sentencing hearing, Rose stated "I want to [] help my family that I've turned my back on," but fails to show that the hardship is undue, *i.e.*, that his parents' hardship would be worse than that suffered by any other parents whose child is incarcerated. (Tr. p. 53). As such, we conclude that the trial court did not abuse its discretion.

III. *Appropriateness of the Sentence*

In addition, we find that Rose's sentence is appropriate in light of his character and nature of the crime. With respect to the nature of the crime, we note that besides the probable cause affidavit included in the pre-sentence report, the record is devoid of any additional details. Nevertheless, the probable cause affidavit indicates that Rose was running a methamphetamine laboratory out of his home.

Turning to Rose's character, we observe that Rose has been arrested six times, resulting in one criminal mischief charge, one operating with a schedule I or II controlled substance charge, one public intoxication charge, one battery resulting in bodily injury

charge, one interference with reporting of a crime charge, two dealing in methamphetamine charges, two possession of methamphetamine charges, one assisting a criminal charge, two maintaining a common nuisance charges, one possession of chemical reagents charge, one possession of marijuana charge, and one possession of paraphernalia charge. As a result of these charges, Rose has two misdemeanor convictions. During the sentencing hearing, Rose admitted to being a drug addict who has never taken any steps towards rehabilitation. He conceded to having lived "a criminal's life for the last six years." (Tr. p. 59).

Rose contends that his sentence is inappropriate mainly because he must serve his sentence at the Department of Correction, and instead is requesting placement in a community corrections program. The location where a sentence is to be served is an appropriate focus for application of our review and revise authority. *Biddinger v. State*, 868 N.E.2d 407, 414 (Ind. 2007). However, in *Fonner v. State*, 876 N.E.2d 340, 343 (Ind. Ct. App. 2007), we noted that it will be quite difficult for a defendant to prevail on a claim that the placement of his sentence is inappropriate. As a practical matter, trial courts know the feasibility of alternative placements in particular counties or communities. *Id*. Here, Rose was screened for community corrections and was found "not [to be] an acceptable candidate." (Appellant's App. p. 48). In light of these circumstances, we conclude that the

imposition of the advisory sentence and his placement with the Department of Correction was not inappropriate.

CONCLUSION

Based on the foregoing, we conclude that the trial court properly sentenced Rose.

Affirmed.

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