

Case Summary

Steven Kincade appeals his six-year sentence for Class C felony escape, Class D felony resisting law enforcement, and Class C misdemeanor operating while intoxicated (“OWI”). We affirm.

Issues

The issues before us are:

- I. whether the trial court abused its discretion in sentencing Kincade; and
- II. whether his sentence is inappropriate.

Facts

On December 31, 2007, Kincade was on probation for Class C felony attempted escape and Class D felony resisting law enforcement. His terms of probation required him not to consume any alcohol and not to commit any new criminal offense. Nevertheless, on that date Kincade consumed a large quantity of alcohol, resulting in a blood alcohol content of .23, and drove a vehicle. A deputy sheriff attempted to pull Kincade over, but he continued driving. After eventually stopping, the deputy had to taser Kincade in order to subdue him and place him under arrest. Because of the tasing, the deputy took Kincade to the hospital. While in the deputy’s custody, Kincade ran away, but was later apprehended.

The State charged Kincade with Class C felony escape, Class D felony resisting law enforcement, and Class C misdemeanor OWI. The State also alleged that Kincade

was an habitual offender and that he had committed four traffic infractions. On July 14, 2008, Kincade pled guilty to the escape, resisting law enforcement, and OWI charges, with sentencing left to the trial court's discretion. In return, the State moved to dismiss the infraction charges and habitual offender allegation. The trial court sentenced Kincade to six years for the escape conviction, two-and-a-half years for the resisting law enforcement conviction, and sixty days for the OWI conviction, all to run concurrently. Kincade now appeals.

Analysis

We engage in a multi-step process when evaluating a sentence. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). First, the trial court must issue a sentencing statement that includes “reasonably detailed reasons or circumstances for imposing a particular sentence.” Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e. to particular aggravators or mitigators, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id. Even if a trial court abuses its discretion by not issuing a reasonably detailed sentencing statement or in its findings or non-findings of aggravators and mitigators, we may choose to review the appropriateness of a sentence under Rule 7(B) instead of remanding to the trial court. See Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007).

I. Abuse of Discretion

Kincade first argues the trial court abused its discretion in its identification of aggravating circumstances. An abuse of discretion in identifying or not identifying aggravators and mitigators occurs if it 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)). Additionally, an abuse of discretion occurs if the record does not support the reasons given for imposing a sentence, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Id. at 490-91.

The basis of Kincade’s argument is that the trial court purportedly relied upon his criminal history multiple times to support several aggravating circumstances. The trial court’s sentencing order states in part:

In sentencing the defendant, the Court has considered the factors made mandatory by statute¹ as follows:

1. The risk that the defendant will commit another crime:
 - (a) Defendant’s prior criminal history and violation of probation.
 - (b) The court considers that the crime herein was committed while the defendant was on probation.

¹ The trial court apparently was referring to the fact that prior to the switch from presumptive to advisory sentencing, Indiana Code Section 35-38-1-7.1(a) listed several factors that a trial court “shall” consider in sentencing, including the risk the defendant will commit another crime, the nature and circumstances of the crime, and the defendant’s prior criminal record, character, and condition. This subsection (a) was deleted with the adoption of advisory sentences in 2005. There are no mandatory sentencing considerations in the current version of Indiana Code Section 35-38-1-7.1.

- (c) Prior convictions for similar offenses.
- 2. The nature and circumstances of the crime committed: the elements of the crime speak for themselves but the offense was committed while the defendant was on probation for attempted escape.
- 3. The defendant's prior criminal record, character, and condition:
 - (a) The defendant's significant prior criminal history including juvenile adjudications involving felonies, violations of probation and community corrections.

The above factors are found to be aggravating. Mitigating factors include the fact that the defendant plead [sic] guilty to the charges in this case but such guilty plea is ameliorated by the dropping of the Habitual Offender charge. Also mitigating is the fact that defendant did undertake some voluntary counseling. The Court finds that the aggravating factors outweigh the mitigating factors.

App. p. 7.

In the context of determining the validity of aggravators under Blakley v. Washington, our supreme court has held that statements by a trial court that are derivative of a defendant's criminal history, such as the likelihood of re-offending or the need for rehabilitation in a penal facility, are not properly considered separate aggravating circumstances. Williams v. State, 838 N.E.2d 1019, 1021 (Ind. 2005). Instead, "such statements are more properly characterized as 'legitimate observations about the weight to be given to facts . . .'" Id. (quoting Morgan v. State, 829 N.E.2d 12, 17 (Ind. 2005)). Cases such as Williams and Morgan, however, did not hold that a trial court's sentencing

statement is improper if it includes such observations, or that such observations constitute an abuse of discretion.

We find no abuse of discretion in the trial court's sentencing statement. The trial court's multiple references to Kincade's criminal history merely reflect the court's belief that that history was entitled to significant aggravating weight. Specifically, it noted that Kincade's criminal and juvenile delinquency history is substantial, consisted of some convictions for offenses similar to the present offenses, and that prior attempts at more lenient sentencing, such as probation, had been unsuccessful, as most glaringly reflected by the fact that Kincade was on probation when he committed these offenses. To the extent Kincade may be arguing that the trial court's repeated references to his criminal history caused it to improperly weigh the aggravating and mitigating circumstances, that is not an issue we review under the advisory sentencing scheme. See Anglemyer, 868 N.E.2d at 491. The trial court's sentencing statement is adequate.

II. Appropriateness

When considering whether a sentence is inappropriate under Indiana Appellate Rule 7(B) in light of the nature of the offense and the character of the offender, we need not be "extremely" deferential to a trial court's sentencing decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). Still, we must give due consideration to that decision. Id. We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. "Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id.

We concede that there is nothing particularly noteworthy or egregious about the offenses Kincade committed. Nonetheless, we readily conclude that his character justifies the aggregate six-year sentence, representing two years above the advisory for his Class C felony escape conviction. See Ind. Code § 35-50-2-6(a). As noted by the trial court, Kincade's criminal history is extensive, particularly considering he was only twenty-six at the time of the offenses. As a juvenile, he was adjudicated delinquent for having committed a number of acts, including what would have been Class B felony burglary, Class D felony receiving stolen property, Class A misdemeanor criminal mischief (apparently twice), and OWI if committed by an adult. As an adult, Kincade has convictions for Class C felony attempted escape, Class D felony theft, Class D felony resisting law enforcement, and Class D felony possession of methamphetamine, and a misdemeanor conviction for OWI. He was still on probation for the attempted escape and resisting law enforcement convictions when he committed the present, very similar offenses. The significance of a defendant's prior criminal history varies based upon the gravity, nature, and number of prior offenses as they relate to the current offense. Prickett v. State, 856 N.E.2d 1203, 1209 (Ind. 2006). All three of these criteria, as well as the temporal proximity of Kincade's previous offenses, give his criminal history great weight.

That weight is not offset by the fact that Kincade pled guilty. A guilty plea usually is entitled to some mitigating weight, although the amount of such weight varies from case to case. Sanchez v. State, 891 N.E.2d 174, 176 (Ind. Ct. App. 2008). Where a

defendant receives a substantial benefit from the plea agreement, its significance as a mitigator is reduced. See id. Here, the State dismissed the habitual offender allegation against Kincade in exchange for his guilty plea; based on his criminal history, there seems to be little doubt that the State could have pursued this sentencing enhancement if it was so inclined. Kincade received a very substantial benefit from his plea agreement, making it of little mitigating weight as compared to his troubling criminal history.

Kincade also asserts that since his arrest for these offenses, he has dedicated himself to becoming sober and living a law-abiding life. Given Kincade's numerous prior opportunities to live a law-abiding life after committing other crimes, we believe the trial court was in the best position to gauge the sincerity of Kincade's desire to reform only now. Cf. Stout v. State, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005) (noting that trial courts are in a much better position than appellate courts to determine the sincerity of a defendant's remorse), trans. denied. It evidently gave little mitigating weight to Kincade's assertions and we will not second-guess that determination. Kincade also contends that he had a troubled childhood that helped lead to his life of alcohol-related crimes, namely because his father was an alcoholic. Our supreme court, however, "has consistently held that evidence of a difficult childhood warrants little, if any, mitigating weight." Coleman v. State, 741 N.E.2d 697, 700 (Ind. 2000), cert. denied. Additionally, Kincade told his probation officer, as reflected in the presentence report, that he experienced "no type of abuse" during childhood. App. p. 106.

In sum, Kincade has failed to meet his burden of persuading us that the nature of the offenses or his character warrants a reduction in his sentence. For much the same reason, we reject his request that we order the trial court to allow him to serve his sentence on community corrections rather than in the Department of Correction. It is true that where a sentence is to be served is an appropriate focus for our review under Appellate Rule 7(B). Biddinger v. State, 868 N.E.2d 407, 414 (Ind. 2007). Nonetheless, it is very difficult for a defendant to prevail on a claim that the place where a sentence is to be served is inappropriate. Fonner v. State, 876 N.E.2d 340, 343 (Ind. Ct. App. 2007). “As a practical matter, trial courts know the feasibility of alternative placements in particular counties or communities.” Id. There is no evidence in the record that Kincade definitely was qualified or accepted to enter a community corrections program. We see no basis to question the trial court’s determination that Kincade needed to serve his sentence in the Department of Correction rather than in community corrections.

Conclusion

The trial court did not abuse its discretion in sentencing Kincade and his sentence is appropriate. We affirm.

Affirmed.

BAKER, C.J., and MAY, J., concur.