

Defendant-Appellant James Edward Leach appeals the trial court's imposition of a fifty-year sentence after he pled guilty to rape, a Class A felony; criminal deviate conduct, a Class A felony; burglary, a Class A felony; and criminal confinement, a Class B felony. We affirm.

Leach raises two issues for our review, and the State raises one issue on cross-appeal. Because the State's issue is potentially dispositive, we will list it as the first issue below. The issues before us are:

- I. Whether the trial court abused its discretion in granting Leach's petition to file a belated notice of appeal.
- II. Whether the trial court erred in its weighing of the aggravating and mitigating circumstances.
- III. Whether the sentence imposed violated Leach's due process rights.

During the evening hours of January 5, 1993, and early morning hours of January 6, 1993, Leach attended two parties in the Bloomington, Indiana area. While at the second party, Leach assured his friends that he was going to "get lucky" that night. At approximately 1:30 a.m. on January 6, 1993, Leach went to a bar with some friends. Leach's friends subsequently left the bar, but Leach stayed until the bar closed.

Leach left the bar and walked toward a friend's house where he intended to stay for the remainder of the morning. Instead of going to his friend's house, Leach entered a neighbor's house with the intent of stealing money.

While in the house, Leach saw a purse and stole approximately \$167.00. Upon realizing that a woman was in the house, Leach took some knives from the kitchen and

began looking in the rooms. The victim heard Leach, got out of bed, and tried to escape. However, Leach grabbed her and dragged her down the stairs. He told the victim not to move or he would “f**in’ kill [her].” He then ran the knife across her neck, cut off her t-shirt, ran the knife across her breast and front torso, and cut off her underwear.

While holding the knife to the victim’s head, Leach forced her to perform fellatio. Following this act, Leach penetrated the victim vaginally with his penis. He then ordered the victim to go upstairs and he forced her to have vaginal intercourse in her own bed. During this act, Leach banged the victim’s head against the bed’s brass headboard, causing her severe pain. Leach attempted to penetrate the victim’s anus with his penis, but she successfully resisted him. He then forced her to again perform fellatio. During the duration of these acts, Leach used abusive language and repeatedly threatened to kill or harm the victim.

Approximately eighty minutes after the assault began, the victim was able to escape from Leach. She ran to a neighbor’s house and called the police, who found a shirtless Leach on the victim’s front lawn. After a chase, the police were able to capture and arrest Leach. Leach’s shirt was later found in the victim’s bed.

As a result of the attacks, the victim, who had a degenerative bone disease, suffered a broken or bruised tailbone, three collapsed cervical vertebrae, a cervical cord contusion, thoracic vertebrae damage, cuts and bruises to her arms, and internal injuries. The victim had to miss over 340 hours of work for medical appointments.

The State charged Leach with rape, criminal deviate conduct, burglary (resulting in bodily injury), criminal confinement, and intimidation. Leach pled guilty to the first

four of these offenses. The trial court ordered Leach to serve fifty years on each of the first two counts, thirty years on the burglary count, and ten years on the criminal confinement count, with all four sentences to be served concurrently under the plea agreement. The trial court suspended ten years of the sentence.

On May 23, 2003, Leach filed a petition for post-conviction relief, and on September 2, 2004, the trial court appointed a public defender to represent Leach on his petition. While Leach's petition was pending, our supreme court issued *Collins v. State*, 817 N.E.2d 230, 231-33 (Ind. 2004), in which the court held that Indiana trial courts lack jurisdiction to consider sentencing claims raised pursuant to a petition for post-conviction relief where the petitioner has pled guilty pursuant to an agreement permitting the court to exercise discretion in imposing a sentence. Leach subsequently filed a motion to dismiss his petition for post-conviction relief. Although the trial court granted the motion to dismiss on May 5, 2005, the court did not issue the dismissal order until April 4, 2006.

On April 28, 2006, the State Public Defender filed a petition for permission to file a belated appeal. On May 4, 2006, the trial court granted the petition, and Leach filed a belated notice of appeal on June 2, 2006. This belated notice of appeal related to the trial court's April 15, 1994 sentencing order that imposed the fifty-year sentence after Leach's guilty plea.

I.

The State contends that the trial court abused its discretion in granting Leach permission to file a belated notice of appeal.¹ The State argues that Leach failed to prove the prerequisites listed under Indiana Post-Conviction Rule 2(1).

The decision of whether to grant or deny a defendant's petition to file a belated notice of appeal is a matter entrusted to the sound discretion of the trial court, and the trial court's decision will be reversed only for an abuse of discretion or where the decision is contrary to law. *Beatty v State*, 854 N.E.2d 406, 409 (Ind. Ct. App. 2006). A trial court abuses its discretion where its decision is against the logic and effect of the facts and circumstances before it. *Id.* Under P-C.R. 2(1), the trial court shall permit a defendant to file a belated notice of appeal when it finds that (1) the failure to file a timely notice of appeal was not due to the fault of the defendant, and (2) the defendant has been diligent in requesting permission to file a belated notice of appeal.

Here, the trial court found that Leach established the two grounds set forth in P-C.R. 2(1), and it thus granted the petition. The State claims that there is no evidence to support the trial court's findings, and it reasons that Leach's nine-year delay (from 1994 to 2003) in challenging his sentence is conclusive evidence that Leach was not diligent in pursuing his appeal. The State cites *Beatty* for the proposition that a six-year delay is sufficient to warrant a finding that a defendant was at fault in failing to file a timely

¹ The State also contends that this court lacks jurisdiction to address Leach's appeal because the trial court's record does not show that permission was granted. However, Leach has provided us with a supplemental appendix that contains the trial court's order granting permission to file a belated notice appeal. In that order, the trial court found that "failure to file a timely Notice of Appeal was not due to the fault of Petitioner Leach and that he has been diligent in seeking permission to file a Belated Direct Appeal." Supplemental App. at 15.

notice of appeal and that the defendant was not diligent in requesting permission to file a belated notice of appeal. *See Beatty*, 854 N.E.2d at 410.

Determinations of whether petitions for permission to file a belated notice of appeal should be granted are fact sensitive, and the mere passage of years is not conclusive. *See Gallagher v. State*, 274 Ind. 235, 410 N.E.2d 1290, 1292 (1980). Accordingly, our supreme court has held that a petitioner's nine-year delay in filing a petition is not sufficient, by itself, to support a finding of lack of diligence. *Id.* Indeed, in finding fault and lack of diligence, the *Beatty* court cited a number of circumstances which led to its conclusion, not just the passage of six years between the judgment and the request for permission to file a belated notice of appeal.

Here, the trial court's discretionary ruling is presumptively correct, and the challenger (here, the State) bears the burden of persuading us that the court abused its discretion. The State has failed to meet its burden.

II.

On April 15, 1994, the date Leach was sentenced, the sentencing statute supplied a standard or presumptive sentence which had to be imposed unless, in the exercise of its discretion to deviate therefrom, the sentencing court considered, weighed and balanced aggravating circumstances. *See Francis v. State*, 817 N.E.2d 235, 237 (Ind. 2004). Indeed, from the time Indiana adopted this sentencing arrangement in 1977, the courts have understood it as a regime that requires a given presumptive term for each class of crimes except when the judge finds aggravating or mitigating circumstances deemed

adequate to justify adding or subtracting years. *See Smylie v. State*, 823 N.E.2d 679, 683 (Ind. 2005), *cert. denied*, 126 S.Ct. 545, 163 L.Ed.2d 459.

In the present case, the trial court found aggravating circumstances before determining that the thirty-year presumptive sentences for rape and criminal deviate conduct should be enhanced by twenty years. The trial court stated that it found no mitigating circumstances, but it did find “redeeming features” in determining that ten years of the sentence should be suspended because of Leach’s youth, military service, and the court’s belief “that he has redeeming features and can be returned to society.” (Tr. at 433).

Leach contends that he should have received the presumptive sentence. He argues that the aggravators found by the trial court are improper and/or not sufficient to support an increase in his sentence. He further argues that the trial court failed to properly weigh and/or find the mitigators in this case.

In general, sentencing decisions are within the trial court’s discretion. *Henderson v. State*, 769 N.E.2d 172, 179 (Ind. 2002). The trial court’s discretion extends to the determination of whether to increase presumptive penalties, impose consecutive sentences on multiple convictions, or both. *Davies v. State*, 730 N.E.2d 726, 741 (Ind. Ct. App. 2000), *trans. denied, cert. denied*, 532 U.S. 945, 121 S.Ct. 1410, 149 L.Ed.2d 352 (2001). In evaluating the trial court’s exercise of its discretion, we analyze the trial court’s sentencing statement to determine whether the trial court (1) identified all significant aggravators and mitigators; (2) specified the facts and reasons which led the court to find the aggravators and mitigators; and (3) articulated that the aggravators and

mitigators have been evaluated and balanced. *Archer v. State*, 689 N.E.2d 678, 683 (Ind. 1997).

The trial court found four aggravators: (1) that Leach is in need of institutional or rehabilitative treatment in a penal facility; (2) that suspension or imposition of probation would depreciate the seriousness of the crime and the brutal manner in which it was committed; (3) that Leach has a history of criminal activity; and (4) that the particularized circumstances of the crime indicated a need for enhancement. The State concedes, and we agree, that the first two of these aggravators are improper.

The trial court was very specific in characterizing Leach's history as "criminal activity" rather than as a "criminal record." At the sentencing hearing, Leach acknowledged that he was disciplined by the Marines for theft, housebreaking, and false swearing. Leach further acknowledged that he stole another Marine's credit card, a theft that did not result in a conviction. In noting this criminal activity, the trial court stated that the criminal activity was not extensive but was an aggravator. The trial court did not appear to give much weight to this aggravator. We conclude that the trial court did not abuse its discretion in identifying this criminal activity as an aggravator or in determining that the aggravator was of minimal weight.

In its sentencing order, the trial court noted that the crime "involved a defenseless victim who was terrorized and threatened with death." Leach points out that the 1994 rape statute, Ind. Code § 35-42-4-1, stated that a person commits the offense when he knowingly or intentionally has sexual intercourse with a member of the opposite sex, and the victim is compelled by force or imminent threat of force and while the person is

armed with a deadly weapon. He further points out that the 1994 criminal deviate conduct statute, Ind. Code § 35-42-4-2, stated that a person commits the offense as a Class A felony when he compels the victim to engage in the act while armed with a deadly weapon. Both of these statutes refer to compulsion by use or threat of force or imminent threat of force. Leach argues that all Class A rapes and criminal deviate conduct, by their nature, involve defenseless victims who are terrorized and threatened with bodily injury or death, and that the presumptive sentence is the proper sentence for such acts. He further argues that the trial court failed to articulate how his crimes were “particularly egregious beyond what the legislature contemplated when it prescribed the presumptive term.” Appellant’s Brief at 16.

At the sentencing hearing, the victim testified for the purpose of explaining the particularized nature and circumstances of the acts committed by Leach. She related how Leach repeatedly violated her body, how he beat her head against the headboard, and how he injured her body and psyche in numerous ways that left her with extensive medical bills and permanent and chronic pain.

The deputy prosecutor later argued:

This may sound cold, this might sound crass, but there are rapes and then there are rapes. And there are many things about Mr. Leach’s activities toward [the victim] that tells us a lot about him and what he’s capable of. We hear [the victim] describe the way Mr. Leach kept taking the knife, tracing it all over her body as if he took perverse delight in doing that. We heard the death threats repeatedly communicated to [the victim] as if the knives weren’t enough, the death threats: that if you move, I’ll f**in’ kill you, repeatedly expressed to [the victim] in her home. We heard about the viciousness of the assault. It caused physical injuries to [the victim]. Her head

was being banged against the headboard of her own bed. We heard about the fact that he apparently was of the opinion that she should have been taking perverse delight in it as well. When he's in her bedroom, raping her, he points out the fact that when she says to him, yes, I'm a widow, does he have any qualms about what he's doing? Does he have a conscience kick in at that point? No. He says to [the victim], well, this f**k must feel pretty good then, huh?

(Tr. at 407-08).

In articulating its finding of particularized circumstances of the rape and criminal deviate conduct, the trial court later noted that the victim was “terrorized” and “threatened with death.” The trial court further stated that “the circumstances surrounding the act[s]” of brutality warranted a finding of aggravation. (Tr. 432). It is apparent that the trial court is responding to, and agreeing with, the victim's and the deputy prosecutor's description of how Leach's acts exceeded the brutality of the “presumptive” rapes and criminal deviate conduct. We conclude that the trial court did not abuse its discretion in finding that the particularized circumstances constituted an aggravator that warranted imposition of an enhanced sentence.

Leach also contends that the trial court erred in not explicitly finding mitigators, in the manner in which it weighed the mitigators, and in failing to find significant mitigators. Leach argues that “[a] decision to suspend part of a sentence without finding circumstances in mitigation evidences that the court has not properly weighed the mitigators against the aggravators.” Appellant's Brief at 22. Leach particularly emphasizes the trial court's failure to consider the significant mitigating effect of the evidence pertaining to his expression of remorse and his decision to plead guilty.

Although a sentencing court must consider all evidence of mitigating circumstances offered by the defendant, the finding of a mitigating factor rests within the trial court's discretion. *Groves v. State*, 787 N.E.2d 401, 407 (Ind. Ct. App. 2003), *trans. denied*. A court does not err in failing to find mitigation "when a mitigation claim is highly disputable in nature, weight, or significance." *Id.* While a failure to find mitigating circumstances clearly supported by the record "may imply that the sentencing court improperly overlooked them, the court is obligated neither to credit mitigating circumstances in the same way as would the defendant, nor to explain why [the court] has chosen not to find mitigating circumstances." *Id.* Indeed, sometimes the weight to be given to an alleged mitigator is no weight at all. *Ross v. State*, 676 N.E.2d 339, 347 (Ind. 1997).

It appears that when the trial court stated that it did not find any mitigators, it was referring to its conclusion that the statutory mitigators referred to by Leach's counsel did not exist. It is clear that the trial court found Leach's age, military service, and "redeeming features" to be mitigators, and that these mitigators warranted the substantial benefit of the suspension of ten years of the twenty-year enhancement. Therefore, we believe that Leach is wrong in arguing that the trial court abused its discretion in not considering mitigating circumstances.

With reference to Leach's expression of remorse, we note that in referring to Leach's redeeming features, the trial court mentioned evidence of Leach's kindness, good character, and good nature. It then stated that these traits were not exhibited on the night the offenses were committed. Although the trial court did not explicitly use the term

“remorse” in its description of the evidence, it is clear that remorse is a part of good character, and there was clear evidence that Leach was arrogant, not remorseful, when he was questioned immediately after the offenses occurred.² We conclude that the trial court did not overlook evidence of remorse. Instead, it appears that the trial court discounted the evidence in light of Leach’s previous statements.

With reference to Leach’s guilty plea, we note that Indiana courts have recognized that a guilty plea is a significant mitigating factor in some circumstances. *Comer v. State*, 839 N.E.2d 721, 728 (Ind. Ct. App. 2005), *trans. denied*. Where the State reaps a substantial benefit from the defendant’s plea, the defendant deserves to have a substantial benefit returned. *Id.* However, a guilty plea is not automatically a significant mitigating factor. *Id.* Where it is clear from the record that a defendant has received a significant benefit from pleading guilty, “a trial court does not abuse its discretion by not identifying [a defendant’s] guilty plea as a mitigating factor.” *Id.* at 729.

Leach’s guilty plea prevented the trial court from imposing consecutive sentences. Instead of facing a possible 170-year sentence, Leach faced a maximum of 50 years. Thus, Leach reduced his exposure by 120 years. Leach clearly received a significant benefit from pleading guilty, and the trial court did not abuse its discretion in not identifying his plea as a mitigator.

III.

² A tape of an interview with the police was played at the sentencing hearing. The tape revealed that Leach was “cocky” not remorseful.

Leach contends that the trial court erroneously inferred that he “displayed a heightened level of culpability because he intentionally ‘terrorized’ [the victim] with the knife. . . .” Appellant’s Brief at 20. Leach implies that the trial court’s reference indicates a violation of the United States Constitution because it puts him in the position of responding to a charge that was not made in the charging information. *Id.* (citing *In re Ruffalo*, 390 U.S. 544, 551, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968)). Leach appears to argue that the trial court violated his due process rights by subjecting him to punishment for a greater offense than the one charged.

As we note above, Leach’s sentences for rape and criminal deviate conduct were enhanced because of the particularized circumstances of his acts. These acts included the extreme manner in which Leach used the knife, not the fact that he used the knife. There is no constitutional violation here.

Affirmed.

SHARPNACK, J., and FRIEDLANDER, J., concur.