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ATTORNEY FOR APPELLANT:

GREGORY CALDWELL
Noblesville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

TAMARA WEAVER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DAVID H. BROWN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A02-1009-CR-1100
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON CIRCUIT COURT
The Honorable Paul Felix, Judge
Cause No. 29C01-0412-FA-123

May 17, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

David H. Brown appeals the sentence imposed following his plea of guilty but mentally ill to two counts of Child Molesting,[1] one as a class A felony and one as a class C felony. On appeal, he claims the trial court abused its discretion when considering his history of mental illness.

We affirm.

On December 13, 2004, the State charged Brown with four counts of class A felony child molesting. Thereafter, in August 2005, Brown entered into a plea agreement with the State. Brown pleaded guilty but mentally ill to one count of class A felony child molesting and a lesser charge of class C felony child molesting, and the State dismissed the two remaining counts. Sentencing was left to the discretion of the trial court.

At the sentencing hearing on January 11, 2006, evidence was presented regarding Brown's history of mental illness dating back to at least 2003 and his troubled childhood. In addition, the court had before it the presentence investigation report (PSI), the results of a court-ordered psychiatric evaluation, and an addendum to the PSI report (issued after said evaluation) recommending a sentence of twenty-five years. Brown, through counsel, argued that his mental condition outweighed his significant criminal history[2] and that he should be sentenced to the minimum term of twenty years. The State disagreed that Brown's mental illness should be considered a significant mitigating circumstance. The court, however, agreed with Brown, finding "his obvious mental disturbance" to be mitigating. *Transcript* at

[1] Ind. Code Ann. § 35-42-4-3 (West, Westlaw through 2011 Pub. Laws approved & effective through 4/6/2011).

[2] According to the PSI, Brown has four prior misdemeanor convictions and one prior felony conviction. Two of these convictions were for offenses against a person, class C felony intimidation (2001) and class A

54. Finding that this mitigator was offset, to some degree, by Brown's criminal history, the court sentenced Brown to concurrent terms of twenty-five years for the class A felony and six years for the class C felony. Brown challenges his twenty-five-year sentence for his class A felony conviction.

In this belated appeal, Brown claims the trial court abused its discretion when considering the mitigating weight of his mental illness. Specifically, Brown asserts that the trial court failed to give proper recognition to his mental health and, rather than basing its determination on an independent adjudication of the facts, the court made a "blanket acceptance of the recommendation of the Probation [department] made without specific mental health information". *Appellant's Brief* at 9. We cannot agree.

Sentencing determinations rest within the trial court's sound discretion. *Cotto v. State*, 829 N.E.2d 520 (Ind. 2005). It is within the trial court's discretion to determine whether a presumptive sentence[3] will be enhanced or mitigated in light of aggravating and mitigating factors. *See Soliz v. State*, 832 N.E.2d 1022 (Ind. Ct. App. 2005), *trans. denied*.

With respect to mental illness as a mitigating factor, our Supreme Court has explained as follows:

> A sentencing court is not required to credit or weigh a possible mitigating circumstance as defendant suggests it should be credited or weighed. Moreover, when a sentencing court finds that both aggravating and mitigating circumstances are present and performs the required balancing process, the

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misdemeanor battery resulting in bodily injury (2004). Further, he was out on bond in the battery case when he committed the instant offense.

[3] Our sentencing statutes now provide for "advisory" rather than "presumptive" sentences. The former sentencing statutes apply here, however, because Brown committed the crime before the substantial revision of our sentencing scheme. *Gutermuth v. State*, 868 N.E.2d 427, 431 n.4 (Ind. 2007) ("sentencing statute in effect at the time a crime is committed governs the sentence for that crime").

> balancing test need not be quantitative, and is generally qualitative. Thus, even where a sentencing court finds a mitigating circumstance such as a mental illness exists, it generally need not assign a substantial positive or numerical value to the circumstance.

Archer v. State, 689 N.E.2d 678, 684 (Ind. 1997) (citations omitted). Further, a guilty but mentally ill defendant is not automatically entitled to mitigation of his sentence. *See Smith v. State*, 770 N.E.2d 818 (Ind. 2002). "Nonetheless, we have held that in sentencing a guilty but mentally ill defendant, trial courts 'should at a minimum carefully consider on the record what mitigating weight, if any, to accord to any evidence of mental illness, even though there is no obligation to give the evidence the same weight the defendant does.'" *Id*. at 823 (quoting *Weeks v. State*, 697 N.E.2d 28, 30 (Ind. 2002)). Our Supreme Court has laid out several factors to consider in weighing the mitigating force of a mental health issue. "Those factors include the extent of the inability to control behavior, the overall limit on function, the duration of the illness, and the nexus between the illness and the crime." *Covington v. State*, 842 N.E.2d 345, 349 (Ind. 2006).

In the instant case, it is clear that the trial court considered the information presented regarding Brown's history of mental illness and accorded substantial mitigating weight to his "obvious mental disturbance".[4] *Transcript* at 54. To be sure, despite a significant criminal history, the court imposed a sentence on the class A felony conviction that was five years less than the presumptive sentence. Contrary to Brown's bald assertion, the trial court was not required to articulate the specific mitigating weight it assigned this mitigator. *See Archer v.*

[4] Brown does not expressly detail his particular mental health issues on appeal, nor does he apply the factors laid out by our Supreme Court. We note, nonetheless, the record establishes that Brown has been diagnosed

State, 689 N.E.2d 678.

Finally, much of Brown's appellate argument focuses on the false premise that the probation department's recommendation of twenty-five years was made without the availability of any of the mental health documentation that was provided to the trial court. On the contrary, probation expressly deferred making a specific sentencing recommendation until it obtained the court-ordered psychiatric evaluation. After receiving the evaluation, probation filed an addendum to the PSI, recommending the mitigated sentence.

In sum, Brown has wholly failed to establish that the trial court abused its discretion when sentencing him to a mitigated sentence of twenty-five years for class A felony child molesting.

Judgment affirmed.

BAILEY, J., and BROWN, J., concur.

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with major depressive disorder, generalized anxiety disorder, personality disorder, and pedophilia. Brown has a history of self-mutilation and suicidal ideation.