

STATEMENT OF THE CASE

Appellant-Defendant, Gerardo Hernandez (Hernandez), appeals his sentence following a guilty plea to possession of cocaine, a Class D felony, Ind. Code § 35-48-4-6(a).

We affirm.

ISSUES

Hernandez raises one issue for our review, which we restate as the following three:

- (1) Whether the trial court abused its discretion by failing to enter a sentencing statement;
- (2) Whether the trial court abused its discretion by not affording weight to mitigators; and
- (3) Whether his sentence was inappropriate in light of the nature of his offense and his character.

FACTS AND PROCEDURAL HISTORY

On March 19, 2004, at approximately 1:20 a.m., Officers Brian Sheetz (Officer Sheetz) and Brad Reed (Officer Reed) of the Kokomo Police Department responded to a dispatch reporting a possible drunk driver. Officer Sheetz initiated a traffic stop and approached the driver. Officer Reed, who was riding in a separate car, approached the passenger side of the vehicle and instructed Hernandez to roll down the window, however he refused. Both Officers could smell alcohol in the car and noticed opened beer cans on the passenger side floor. Officer Reed observed Hernandez place his hands under his leg and then he attempted to place his hand inside his pants pocket. After refusing to show his hands

to Officer Reed, Hernandez twisted around “and it appeared as though he was attempting to discard something or conceal an item.” (Appellant’s App. p. 31). Eventually, Officer Reed removed Hernandez from the vehicle and Hernandez attempted to urinate in public. After refusing Officer Reed’s commands to stop attempting to urinate in public and after failing field sobriety tests, Officer Reed arrested him. A search incident to arrest revealed cocaine in Hernandez’s right front pocket.

On March 19, 2004, the State filed an Information, which was amended on March 29, 2004, charging Hernandez with Count I, possession of cocaine, as a Class D felony, I.C. § 35-48-4-6(a), and Count II, public intoxication, as a Class B misdemeanor, I.C. § 7.1-5-1-3. Hernandez posted bond and was released five days later.

Between the time he posted bond and the guilty plea hearing on July 31, 2008, Hernandez amassed four more convictions. On October 8, 2004, Hernandez was charged under another cause number for operating a vehicle while intoxicated, a Class A misdemeanor; operating a vehicle with a blood alcohol content of .15% or more, a Class A misdemeanor; operating a vehicle while intoxicated, a Class A misdemeanor; and endangering a person, a Class A misdemeanor. He pled guilty to operating a vehicle while intoxicated. On May 31, 2005, Hernandez was charged under a third cause number for operating a vehicle while intoxicated, a Class D felony; operating a vehicle with a blood alcohol content of .15% or more, a Class A misdemeanor; and operating a vehicle while never receiving a license, a Class C misdemeanor. Hernandez was sentenced to 30 months for operating while intoxicated with 18 months executed, one year probation and his license

suspended for one year. On February 1, 2008, Hernandez was charged under a fourth cause number for driving while suspended, a Class A misdemeanor; and driving without a license, a Class C misdemeanor. He was sentenced to one year supervised probation for driving while suspended. Finally, in May 19, 2008, Hernandez was charged with driving while suspended, a Class A misdemeanor; and sentenced to one year jail, suspended, one year informal probation, and his license was suspended for one year.

On July 31, 2008, Hernandez pled guilty to possession of cocaine in the current case. Sentencing was scheduled for December 11, 2008, but was rescheduled and finally held on June 4, 2009. The trial court sentenced Hernandez to one and half years executed.

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

DISCUSSION AND DECISION

I. Standard of Review

Hernandez committed his offense in March 2004, prior to the April 25, 2005 revision to the sentencing statutes. The Indiana supreme court has held that we apply the sentencing scheme in effect at the time of the defendant's offense. *See Robertson v. State*, 871 N.E.2d 280, 286 (Ind. 2007). Under the pre-April 25, 2005 sentencing statutes, sentencing decisions rest within the discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Smallwood v. State*, 773 N.E.2d 259, 263 (Ind. 2002). An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances" before the court. *Pierce v. State*, 705 N.E.2d 173, 175 (Ind. 1998).

II. Sentencing Statement

Hernandez argues that the trial court abused its discretion by failing to provide a sentencing statement. Consequently, he argues that we should reduce his sentence to an A misdemeanor conviction or in the alternative, remand to the trial court for resentencing. In support of his argument, Hernandez cites to *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, where our supreme court held that “[o]ne way in which a trial court may abuse its discretion is failing to enter a sentencing statement.” First, as we noted, the pre-April 25, 2005, presumptive sentencing scheme applies to Hernandez’s case; thus, *Anglemyer* is inapplicable. See *Robertson*, 871 N.E.2d at 286. Additionally, even under the presumptive sentencing scheme, because the trial court imposed the statutory presumptive sentence, it was not required to list aggravating or mitigating factors. *Childress v. State*, 848 N.E.2d 899, 905 (Ind. Ct. App. 2005). A trial court must set forth its reasoning only when deviating from the statutory presumptive sentence. *Id.* Here, the trial court did not deviate from the presumptive sentence, thus a sentencing statement was not necessary.²

III. Mitigating Circumstances

Hernandez also argues that the trial court abused its discretion by failing to find as mitigators the fact that he attended substance abuse treatment and that he pled guilty. Although a court must consider all evidence of mitigating factors presented by a defendant, a

² Hernandez argues that I.C. § 35-38-1-7.1 sets forth “mandatory statutory factors that are to be considered by a trial court at a hearing.” (Appellant’s Br. p. 7). However, these are not mandatory; they are permissive. See I.C. § 35-38-1-7.1 (The court may consider the following factors as mitigating circumstances . . .). Additionally, as a general rule, the trial court is not required to find the presence of mitigating factors, and is under no obligation to assign a particular weight to a mitigator it has found. *Bluck v. State*, 716 N.E.2d 507, 514 (Ind. Ct. App. 1999).

finding of mitigating circumstances is within the trial court's discretion. *Harris v State*, 659 N.E.2d 522, 528 (Ind. 1995). A trial court is not obligated to explain why it has not chosen to find mitigating circumstances. *Id.* An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Carter v. State*, 711 N.E.2d 835, 838 (Ind. 1999). The trial court's assessment of the proper weight of mitigating and aggravating circumstances and the appropriateness of the sentence as a whole is entitled to great deference on appeal and will be set aside only upon showing of a manifest abuse of discretion. *Donnegan v. State*, 809 N.E.2d 966, 978 (Ind. Ct. App. 2004).

Hernandez has failed to show that the mitigating evidence is both significant and clearly supported by the record. A guilty plea is not automatically a significant mitigating factor. *Payne v. State*, 838 N.E.2d 503, 508 (Ind. Ct. App. 2005), *trans. denied*. “[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, Hernandez was faced with the potential of a three year sentence, and instead, pled guilty. In exchange, the State dismissed the Class B misdemeanor public intoxication charge. Based on these facts, the trial court did not abuse its discretion when it refused to give his guilty plea mitigating weight. With respect to his argument that the trial court should have given the fact that he attended substance abuse treatment

mitigating weight, the trial court chose not to do so, and as we have stated, a finding of mitigating circumstances is within the trial court's discretion. *Harris*, 659 N.E.2d at 528.

IV. *Nature and Character*

Hernandez finally argues that his sentence is inappropriate in light of the nature of the offense and his character and should be revised pursuant to Indiana Appellate Rule 7(B) and that we should order the trial court to treat his conviction as a Class A misdemeanor pursuant to I.C. § 35-50-2-7(b). The sentencing range for a Class D felony is three to one half year, with the presumptive sentence being one and a half years. I.C. § 35-50-2-7. The sentencing range for a Class A misdemeanor is for a fixed term for not more than one year. I.C. § 35-50-3-2.

This court has authority to revise a sentence “if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Ind. Appellate Rule 7(B). We recognize “the presumptive sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed.” *Weiss v. State*, 848 N.E.2d 1070, 1072 (Ind. 2006) (footnote omitted). When examining the nature of the offense and the character of the offender, we may look at any factors appearing in the record. *Roney v. State*, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), *trans. denied*. Ultimately, the burden is on the defendant to demonstrate his sentence is inappropriate. *Childress*, 848 N.E.2d at 1080.

First, we address Hernandez's argument that he is entitled to have his conviction lowered from a Class D felony to a Class A misdemeanor. We note that I.C. § 35-50-2-7(b)

is discretionary. The trial court was not required to impose alternative misdemeanor sentencing. “[I]f a person has committed a Class D felony, the court *may* enter judgment of conviction of a Class A misdemeanor and sentence accordingly.” *Id.* (Emphasis added).

A review of the character of the offender reveals that between March 2004 and the guilty plea hearing in July 2008, he was convicted of four more offenses. The mere fact that two of the offenses were for operating a vehicle while intoxicated and the other two were for driving with a suspended license reveals that he is unable to learn from his mistakes. Additionally, the fact that he was convicted of four other offenses while out on bond demonstrates his disregard for the law.

A review of the nature of the offense reveals that he attempted to discard or conceal the cocaine from the officer. Ultimately, Hernandez has not persuaded us that his sentence is inappropriate based on the character of the offender or the nature of the offense.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion by failing to provide a sentencing statement or afford weight to mitigators, and the sentence was not inappropriate considering the character of the offender and nature of his offense.

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.