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**IN THE
COURT OF APPEALS OF INDIANA**

JOSHUA BROWN,)

Appellant-Defendant,)

vs.)

No. 54A01-0912-CR-575

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MONTGOMERY CIRCUIT COURT
The Honorable Thomas K. Milligan, Judge
Cause No. 54C01-0506-FC-88

June 2, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Joshua Brown (Brown), appeals his sentence following a guilty plea to possession of methamphetamine, a Class C felony, Ind. Code § 35-48-4-6.

We affirm.

ISSUE

Brown raises one issue on appeal, which we restate as: Whether the trial court properly sentenced him.

FACTS AND PROCEDURAL HISTORY

On May 29, 2005, shortly after noon, a Montgomery County Sheriff's Department deputy was dispatched to a disabled vehicle on Concord Road located in Montgomery County, Indiana. The deserted vehicle was found in a ditch and had front-end damage. During an inventory search, the deputy found fifty rounds of live .22 caliber ammunition on the floor of the vehicle. An eyewitness at the scene provided the deputy with a description of the occupants of the car. Brown and a female companion, both fitting the description of the occupants, were found walking towards a nearby fast food restaurant. Brown was carrying a duffel bag.

A second deputy with the Montgomery County Sheriff's Department stopped Brown and his friend. Because Brown was acting nervous, wringing his hands, and sweating profusely, the deputy handcuffed him for safety reasons. During the pat down search of Brown, the deputy discovered a .22 caliber bullet and a large folding knife in Brown's pant pocket. A subsequent search of Brown's duffel bag resulted in the discovery of a digital

scale and coffee grinder containing methamphetamine powder and a nine shot Harrington and Richardson revolver. In addition, the deputy also found several packages of Energizer lithium batteries, a number of white caplets and white powder which were consisted with ephedrine or pseudoephedrine used to clandestinely manufacture methamphetamine.

On June 1, 2005, the State filed an Information charging Brown with Count I, possession of methamphetamine, a Class C felony, I.C. § 35-48-4-6; Count II, possession of ephedrine or pseudoephedrine, a Class C felony, I.C. § 35-48-4-14.5; Count III, carrying a handgun without a permit, a Class C felony, I.C. §§ 35-47-2-1; 35-47-2-23; Count IV, possession of precursors, a Class C felony, I.C. § 35-48-4-14.5; Count V, leaving the scene of a property damage accident, a Class B misdemeanor, I.C. § 9-26-1-4; and Count VI, driving while suspended, a Class A misdemeanor, I.C. § 9-24-19-2. On November 29, 2005, the State and Brown entered into a plea agreement pursuant to which Brown agreed to plead guilty to Count I in exchange for the dismissal of the five remaining Counts and the State's promise not to file an habitual offender Count. Under the terms of the plea agreement, Brown's sentence was left to the discretion of the trial court.

On January 27, 2006, the trial court conducted a sentencing hearing. During the hearing, the trial court accepted Brown's plea agreement and stated

The court in considering sentencing is obliged to consider the character of the defendant, the circumstances surrounding the commission of the offense and other aggravating or mitigating circumstances that may have a bearing on the sentence to be imposed. The court will find based on information in the presentence report, [Brown] comes from an abusive background and [] apparently his father had a drug and alcohol problem and that caused problems for the whole family and not only was [Brown] and his brothers and sisters beaten, but his mother was too and that the beatings got out of control and [Brown] was

beaten severely and his father went to prison for a long time for that. The court will find that [Brown] has never been married and has no children although he's got a significant other that he maintains a relationship with. He was not able to finish high school leaving the eleventh grade. He's yet to get his GED or his high school diploma. His employment has been sporadic because he's been in so much trouble with the law he's not been able to maintain employment for any significant period of time. He's presently working; just prior to his arrest he was working some construction as a self-employed person with his cousin. Has had some work in the prison to help pass the time and keep busy. The most significant aspect of [Brown's] character I guess is the criminal history which is significant. It started in nineteen ninety-six and has pretty much continuously been involved in the criminal justice system since then. Although as [Brown's counsel] notes he was not under supervision of any court or other authority when this offense was committed. He's had a significant history of substance abuse which is reflected in the criminal history and this is clearly a substance, possession of illegal substance which is aggravated with the possession of a handgun at that same time. [Brown] had five previous felony convictions. Most recently he did parole violation time and was released about three or four months prior to this offense occurring, maybe six or seven months prior. The court does not believe that [Brown] is a suitable candidate for any sort of suspended sentence, either probation or community corrections. The court believes based on the criminal history that the sentence should be enhanced. It will be the judgment of the court that [Brown] be committed to the Indiana Department of Correction for a period of eight years. . . . The court also would order that this sentence run consecutive to the time that's being served in Illinois since that time for those offenses were committed after these while he was on bond for these offenses.

(Transcript pp. 16-19).

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

DISCUSSION AND DECISION

Brown contends that the trial court abused its discretion when it imposed an eight-year sentence for a Class C felony. A person who commits a Class C felony shall be imprisoned

for a fixed term of between two and eight years, with the advisory sentence being four years. I.C. § 35-50-2-6. Here, the trial court imposed the maximum sentence under the statute.

As long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (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. *Id.* 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.*

A. *Mitigator*

Although Brown framed his argument as an appropriateness challenge pursuant to Ind. Appellate Rule 7(B), the main part of his claim is focused on a mitigating factor which he asserts should be given more weight. Specifically, Brown argues that the trial court failed to identify his abusive family background as a mitigating circumstance. However, it is clear from the sentencing statement that the trial court did not overlook Brown's abusive childhood. As the trial court did consider this circumstance, the court obviously decided not to give it significant weight. Whatever weight the trial court assigned to Brown's childhood abuse as a mitigating factor, is no longer subject to our review. *See id* at 491.

B. *Nature and Character*

With respect to Brown's argument pursuant to Ind. Appellate Rule 7(B), his entire claim consists of "[c]apsules, with which [Brown] was arrested, he said 'was ground ephedrine pills, not meth.' It would appear that the methamphetamine in his possession at the time of his arrest consisted of the residue on scales in the duffel-type bag he was holding." (Appellant's Br. p. 8). We agree with the State that Brown failed to make a cogent argument as to why his eight-year sentence is not appropriate in light of the nature of his

offense and his character. It is well-established that failure to make a cogent claim results in waiver of the claim. Ind. Appellate Rule 46(A)(8)(a); *Johnson v. State*, 837 N.E.2d 209, 217 (Ind. Ct. App. 2005), *trans. denied*.

Waiver notwithstanding, we will address the merits of Brown's argument. Turning to the nature of the offense, we note that during the search of Brown's duffel bag, the deputy not only found evidence of drug manufacturing—a digital scale, coffee grinder, lithium batteries and a number of with ephedrine or pseudoephedrine caplets and powder—but also a revolver. In addition, the vehicle search revealed fifty rounds of live .22 caliber ammunition and Brown was carrying a large folding knife on his person.

With regard to Brown's character, we observe that despite being only twenty-six years old, Brown has already amassed an extensive criminal record. His criminal history consists of nineteen convictions, with his first felony conviction at age seventeen when he was tried as an adult for possession of cannabis with intent to deliver. His other felonies include financial exploitation of the elderly, and three convictions for unlawful possession of a weapon by a felon. He also incurred several misdemeanor convictions for driving while suspended. Furthermore, within two months of being charged in this cause, Brown received two more illegal possession of a weapon by a felon charges. Moreover, Brown received a substantial benefit by pleading guilty. His guilty plea mandated the dismissal of five of the six Counts—three C felonies, a Class A misdemeanor and a Class B misdemeanor—in addition to the State's agreement to forego the filing of an habitual offender charge.

Therefore, based on the evidence before us, we cannot conclude that Brown's eight-year sentence is not appropriate in light of the nature of the offense and his character.

CONCLUSION

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

Affirmed.

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