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ATTORNEY FOR APPELLANT:

JOHN T. EVANS
Corydon, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DANNY L. WILBERT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 31A05-0809-CR-536
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HARRISON SUPERIOR COURT
The Honorable H. Lloyd Whitis, Special Judge
Cause No. 31D01-0712-FA-875

June 3, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Danny L. Wilbert ("Wilbert") appeals his aggregate fifty-eight-year sentence for four counts of Burglary, one as a Class A felony, and three as Class C felonies.[1] We affirm.

Issues

Wilbert raises two issues for review:

I. Whether the trial court abused its sentencing discretion in the finding of aggravators and mitigators; and

II. Whether Wilbert's sentence is inappropriate.

Facts and Procedural History

On December 17, 2007, the State filed nine charges against Wilbert, alleging that between December 12 and December 13, 2007, Wilbert burglarized four residential garages and committed four thefts and one instance of battery upon homeowner Jerry Crosier ("Crosier"). On June 24, 2008, Wilbert pleaded guilty as charged. Because of double jeopardy concerns, the trial court imposed sentence upon Wilbert for only four counts of Burglary, one as a Class A felony and three as Class C felonies. The Class C felony sentences were to be served concurrently, but consecutive to the Class A felony sentence. Wilbert appeals his aggregate fifty-eight year executed sentence.

Discussion and Decision

I. Abuse of Discretion

The trial court found four aggravating circumstances and no significant mitigating

[1] Ind. Code § 35-43-2-1.

circumstances. Wilbert challenges the trial court's findings that "a sentence less than an enhanced term would depreciate the seriousness of the crime" and "[Wilbert] requires corrective or rehabilitative treatment that can best be provided by a penal facility for a period in excess of the presumptive sentence." (App. 11.) He further contends that his misdemeanor criminal history should have been treated as a mitigating circumstance rather than an aggravating circumstance.[2] Finally, he challenges the omission of several proffered mitigators.

"So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on other grounds, 875 N.E.2d 218 (Ind. 2007) (Anglemyer II). This includes the finding of an aggravating circumstance and the omission to find a proffered mitigating circumstance. Id. at 490-91. When imposing sentence for a felony, the trial court must enter "a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing a particular sentence." Id. at 491.

The trial court's reasons must be supported by the record and must not be improper as a matter of law. Id. However, a trial court's sentencing order may no longer be challenged as reflecting an improper weighing of sentencing factors. Id. A trial court abuses its discretion if its reasons and circumstances for imposing a particular sentence are 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. Hollin v. State, 877 N.E.2d 462, 464

[2] He does not contest the finding that he had recently violated the terms of his probation.

(Ind. 2007).

Finding of Aggravators. The trial court found that the imposition of a sentence less than an enhanced term would depreciate the seriousness of Wilbert's crimes. "This aggravating factor is only used to support a refusal to reduce the presumptive [now advisory] sentence." Mayberry v. State, 670 N.E.2d 1262, 1270 (Ind. 1996). There is no indication of record that the trial court was considering a sentence for Wilbert that was less than the advisory sentence. Accordingly, this was not a proper sentencing aggravator.

With respect to the need for lengthy rehabilitative treatment, Wilbert argues that the trial court's supportive reasoning was inadequate. A trial court's finding of this aggravator should be accompanied by a specific or individualized statement of the reason or reasons why the defendant was in need of correctional and rehabilitative treatment that could best be provided by a period of incarceration in a penal facility beyond the presumptive (now advisory) term. Id. at 1271. Here, the trial court explained that Wilbert needed "education and training best provided in a secured facility." (Tr. 162.) The trial court did not explain in particular why treatment was needed for a period of time in excess of the advisory term. This omission was error.

Criminal history. Wilbert argues that his misdemeanor criminal history should have been a mitigating circumstance, rather than an aggravating circumstance, as found by the trial court, because he "has no previous felony conviction or violent history." Appellant's Brief at 8. However, Wilbert did not lack a criminal record. He had four prior misdemeanor convictions, primarily drug related. Furthermore, he had violated his probation and was

facing new charges (in Kentucky as well as Indiana) in addition to the charges to which he pleaded guilty. The trial court did not abuse its discretion in declining to find Wilbert's criminal history to be a circumstance that was mitigating as opposed to aggravating. See Townsend v. State, 860 N.E.2d 1268, 1272 (Ind. Ct. App. 2007) (concluding that a trial court was not required to find a "relatively minor and unrelated" criminal history to be mitigating), trans. denied.

Other Proffered Mitigating Circumstances. Wilbert contends that he "presented the trial court with no less than fourteen facts and circumstances to consider as mitigating factors" and "[y]et the trial court did not find a single mitigating circumstance." Appellant's Brief at 16. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is not only supported by the record but also that the mitigating evidence is significant. Anglemyer II, 875 N.E.2d at 220-21. On appeal, Wilbert does not develop an argument as to each of the claimed mitigators, but asserts that he showed remorse, accepted responsibility by pleading guilty, and had a significant substance abuse problem.

Remorse. Wilbert apologized to Crosier and offered to pay restitution. The trial court gave some consideration to Wilbert's expression of remorse, indicating that the decision to order some sentences served concurrently as opposed to consecutively was based in part upon Wilbert's remorse and decision to plead guilty.

Guilty Plea. A defendant who pleads guilty deserves "some" mitigating weight be given to the plea, but the significance of a guilty plea as a mitigating factor varies from case

to case. Anglemyer II, 875 N.E.2d at 220. For example, a guilty plea may not be significantly mitigating when it does not demonstrate the defendant's acceptance of responsibility or when the defendant receives a substantial benefit in return for the plea. Id.

Here, Wilbert and an accomplice were identified by Crosier after a face-to-face encounter. Wilbert was implicated in a series of burglaries in the geographic vicinity. Trial had been set, the jury venire had been assembled, and Crosier was available to provide testimony, when Wilbert notified the trial court of his change of plea. Given the strength of the State's case against Wilbert, his last minute decision to plead guilty appears to be largely pragmatic as opposed to an effort to promptly assume responsibility for his actions. We find no abuse of discretion in the trial court's failure to consider his guilty plea to be a significant mitigating factor.

Substance Abuse. Wilbert believes he is entitled to leniency because of his long-standing drug problems. He testified that he began to abuse drugs at age thirteen. However, Wilbert had not sought drug treatment prior to his instant incarceration at age twenty-four. Wilbert's awareness of his problem and failure to address it through appropriate steps is inconsistent with a desire for reformation or rehabilitation. Wilbert has not shown that his substance abuse problem is deserving of treatment as a mitigating circumstance. See Bryant v. State, 802 N.E.2d 486, 501 (Ind. Ct. App. 2004) (noting that a substance abuse problem may be considered as an aggravating circumstance where the defendant is aware of the problem and fails to address it), trans. denied.

Having reviewed the trial court's sentencing statement as a basis to begin our analysis,

we now turn to Wilbert's contention that his sentence is inappropriate under Indiana Appellate Rule 7(B).

II. Appropriateness of Sentence

Under Indiana Appellate Rule 7(B), this "Court may revise a sentence authorized by statute 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). In performing our review, we assess "the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." Cardwell v. State, 895 N.E.2d 1219, 1224 (Ind. 2008). A defendant "'must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.'" Anglemyer, 868 N.E.2d at 494 (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)).

For a Class A felony, the advisory sentence is thirty years, while the maximum sentence is fifty years. Ind. Code § 35-50-2-4. For a Class C felony, the minimum, advisory, and maximum sentences are respectively two years, four years, and eight years. Ind. Code § 35-50-2-6. Wilbert was sentenced for one Class A felony and three Class C felonies. He received maximum individual sentences of fifty years and eight years, although he did not receive the maximum possible aggregate sentence, because his Class C felony sentences were concurrent.

As to the nature of the offenses, the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Childress, 848

N.E.2d at 1081. Indiana Code Section 35-43-2-1 provides that burglary is elevated to a Class A felony if it results in bodily injury to any person other than the defendant.

The Class A burglary of which Wilbert was convicted involved his breaking into an attached residential garage, taking items, and becoming embroiled in a confrontation with the homeowner. Wilbert struck Crosier in the head with a flashlight, causing injury of such significance that Crosier was hospitalized and required staples in his head. His wife testified that she observed "blood everywhere," and further described how traumatic it was to await an ambulance not knowing "how bad he's been hurt." (Tr. 190.) Once Crosier was released from the hospital, he was unable to work for a week.

The Class C burglaries consisted of a series of garage break-ins committed by Wilbert within a short span of time. The crime spree was motivated, at least partially, by Wilbert's need to provide financing for his drug habit. He took numerous small items easily removable from the premises.

As to the nature of the offender, Wilbert has failed to benefit from prior rehabilitative efforts. He had several misdemeanor convictions and had violated the terms of his probation. At his guilty plea hearing, Wilbert advised the trial court that he was charged with receiving stolen property in Kentucky. Subsequently, Kentucky reported Wilbert as a fugitive.

By the time of his sentencing in the instant matter, he was facing additional charges in Indiana, with the State alleging that Wilbert had committed three more burglaries and four thefts. While it is true that arrests and charges do not constitute evidence of criminal history, a record of arrests and charges may reveal that a defendant has not been deterred from

criminal activity even after having been subject to the police authority of the State. Cotto v. State, 829 N.E.2d 520, 526 (Ind. 2005).

In sum, Wilbert committed crimes against four separate homeowners, severely injuring one. Because of the multiple crimes against multiple victims, he faced a potential aggregate sentence of seventy-four years. He received an aggregate sentence of fifty-eight years. In light of Wilbert's character and the nature of his offenses, we do not find his sentence to be inappropriate.

Affirmed.

DARDEN, J., and ROBB, J., concur.