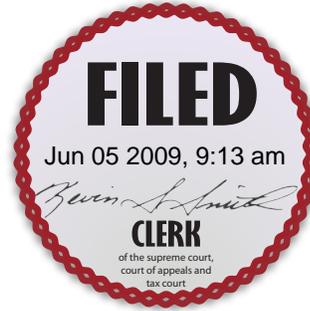


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

MARK A. BATES
Lake County Public Defender Agency
Crown Point, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

TIFFANY N. ROMINE
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

MATTHEW D. TAYLOR,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)
)

No. 45A05-0812-CR-687

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Salvador Vasquez, Judge
Cause No. 45G01-0412-FB-107

June 5, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Matthew D. Taylor appeals following his conviction, pursuant to a guilty plea, for Class B felony Robbery,¹ for which he received a ten-year sentence in the Department of Correction, to be served consecutive to an Illinois term of imprisonment for separate convictions. Upon appeal Taylor challenges his sentence by claiming that the trial court abused its discretion in its consideration of aggravating and mitigating circumstances and in its imposition of a consecutive sentence. In addition, Taylor claims that his ten-year sentence is inappropriate. We affirm.

FACTS AND PROCEDURAL HISTORY

According to the factual basis entered during the plea hearing, during the early morning hours of October 26, 2004, Taylor, accompanied by his brother Michael, drove from Illinois to a predetermined location in Merrillville, where they met codefendants Ralph Smith and Robert Desimone. Taylor and Desimone had earlier parked a black Ford vehicle at that location, and the four drove together in the Ford to the Helzberg Diamonds jewelry store in Hobart, where they arrived at approximately 10:05 a.m. Taylor and Desimone entered the store, and Michael followed shortly thereafter. Taylor, Desimone, and Michael were carrying loaded handguns, which they pulled out and pointed at store manager Mary Pearson. Taylor and his cohorts ordered Pearson and two other persons into the store's gem room. There, they ordered these three persons and another store employee onto the floor and tied their hands behind their backs with plastic ties. During this time, Smith entered the store, where he and Desimone took approximately \$800,000 worth of store merchandise, and placed it into a pillowcase

¹ Ind. Code § 35-42-5-1 (2004).

which Smith later placed into the trunk of the Ford. The parties also took the store's surveillance system.² Taylor, Michael, and Desimone left the store, and together with Smith, drove to the parking lot where they had left their vehicles. There, Taylor and Michael split up with Smith and Desimone, and both drove away in their respective vehicles. Taylor later admitted that, after "fencing" the jewelry, he received approximately \$22,000. Tr. p. 18. Michael received approximately \$16,000, and Desimone received approximately \$8,000.

On December 23, 2004, the State charged Taylor with four counts of Class B felony confinement (Counts I-IV) and one count of Class B felony robbery (Count V). On August 1, 2007, Taylor entered into a plea agreement in which he agreed to plead guilty to the robbery charge in exchange for the State's agreement to dismiss the four confinement charges. As an additional term of the plea agreement, the parties agreed that the sentence would not exceed ten years of imprisonment. During a plea hearing that day, Taylor pled guilty to Count V.

During an August 29, 2007 sentencing hearing, the trial court imposed a ten-year executed sentence, to be served consecutive to Taylor's Illinois sentence for another Class B felony armed robbery conviction in Case Number 04CF358902.³ In imposing its sentence, the trial court stated that the nature and circumstances of the offense warranted

² A backup surveillance system located in California was subsequently used to identify and apprehend Taylor.

³ The record reflects that Taylor apparently committed this offense in October of 2003, was charged on December 23, 2004, and convicted on approximately April 23, 2006.

a sentence no less than the presumptive, but it did not specifically designate this factor as aggravating.

The trial court identified as a significant mitigating circumstance the fact that Taylor pled guilty and accepted responsibility for the crime. The trial court further identified as significant aggravating circumstances Taylor's criminal history and the fact that one of his prior offenses similarly involved the armed robbery of a jewelry store. The trial court concluded that the aggravating factors outweighed the mitigating factor. In further ordering that the sentence be served consecutive to Taylor's Illinois sentence, the trial court opined that the imposition of a concurrent sentence would serve as an unfair "pass" for Taylor's Indiana offense and do a disservice to the victims and the criminal justice system.

On May 13, 2008, Taylor filed a *pro se* petition for permission to file a belated notice of appeal as well as a motion to correct error on abstract of judgment, both of which were denied. On July 25, 2008, Taylor filed a second *pro se* motion to correct and reconsider erroneous ruling and order, which the trial court granted. On November 10, 2008, the trial court granted Taylor's petition for permission to file a belated appeal. This appeal follows.

DISCUSSION AND DECISION

I. Applicable Standard of Review

Taylor challenges his ten-year sentence on a number of grounds. As a preliminary matter, it is noteworthy that Taylor committed his crime in 2004, so we apply the presumptive sentencing scheme in effect prior to the 2005 sentencing amendments

creating advisory sentences. *See Guteruth v. State*, 868 N.E.2d 427, 431 n.4 (Ind. 2007) (“[T]he sentencing statute in effect at the time a crime is committed governs the sentence for that crime.”). We specifically observe that the rule articulated in *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), that the relative weight of aggravators and mitigators is not reviewable for abuse of discretion, does not apply here.

Sentencing determinations, including whether to adjust the presumptive sentence, are within the discretion of the trial court. *Ruiz v. State*, 818 N.E.2d 927, 928 (Ind. 2004). Based upon the law applicable to Taylor at the time of his sentence, if a trial court relied on aggravating or mitigating circumstances to modify the presumptive sentence, it was required to do the following: (1) identify all significant aggravating and mitigating circumstances; (2) explain why each circumstance is aggravating or mitigating; and (3) articulate the evaluation and balancing of the circumstances. *Id.*

When a defendant offers evidence of mitigators, the trial court has the discretion to determine whether the factors are mitigating, and the trial court is not required to explain why it does not find the proffered factors to be mitigating. *Stout v. State*, 834 N.E.2d 707, 710 (Ind. Ct. App. 2005), *trans. denied*. The trial court is not required to give the same weight as the defendant does to mitigating evidence. *See Fugate v. State*, 608 N.E.2d 1370, 1374 (Ind. 1993). A single aggravating circumstance is sufficient to justify an enhanced sentence. *McNew v. State*, 822 N.E.2d 1078, 1082 (Ind. Ct. App. 2005). 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. *Matshazi v. State*, 804 N.E.2d 1232, 1239 (Ind. Ct. App. 2004),

trans. denied. Further, a trial court is not required to include within the record a statement that it considered all proffered mitigating circumstances, but rather only those that it considered significant. *Id.*

II. Aggravating Factors

Taylor first challenges the trial court's consideration of the nature and circumstances of his crime as an alleged aggravating factor. According to Taylor, the trial court's consideration of this factor runs afoul of *Blakely v. Washington*, 542 U.S. 296 (2004), because the facts constituting the nature and circumstances of the crime were not included in the charging information. The State responds by arguing that the trial court did not consider this factor to be aggravating, that this factor was not used to enhance Taylor's sentence beyond the presumptive term, and that, in any event, any consideration by the trial court of this factor did not run afoul of *Blakely*.

To the extent that the "nature and circumstances" factor received aggravating weight, the State is correct that *Blakely* applies only to aggravating factors which are used to enhance sentences beyond their presumptive term. *Rodriguez v. State*, 868 N.E.2d 551, 554 (Ind. Ct. App. 2007). Here, Taylor received the ten-year presumptive sentence for a Class B felony. *See* Ind. Code § 35-50-2-5 (2004). The rule announced in *Blakely* therefore does not apply. *See Rodriguez*, 868 N.E.2d at 554. In any event, the facts constituting the "nature and circumstances" factor, including that victims were restrained at gunpoint during a well-planned robbery where hundreds of thousands of dollars in jewelry was taken, were admitted by Taylor as part of the factual basis during the plea hearing, which is all that is required under *Blakely*. *See McGinity v. State*, 824 N.E.2d

784, 789 (Ind. Ct. App. 2005) (finding no *Blakely* violation when trial court considered facts underlying “nature and circumstances” aggravator which defendant had admitted to as part of factual basis of guilty plea and during sentencing hearing) *trans. denied*. Taylor’s argument on *Blakely* grounds is without merit.

III. Mitigating Factors

A. Waiver

Taylor argues that the trial court failed to consider certain allegedly significant mitigators, among them his expression of remorse, the fact that he had led a law-abiding life for a substantial period before committing the instant crime; the likelihood of his responding affirmatively to probation or short term imprisonment; that his character and attitude indicated he was unlikely to commit another crime; and that continued imprisonment would result in undue hardship to himself and his dependents. *See* Ind. Code §§ 35-38-1-7.1(c)(6), (7), (8), (10) (2004).

While Taylor apologized to the victims and their families and referred to his prior role of caring for the needs of his child, he did not argue the “remorse” and “undue hardship” mitigating circumstances he now pursues on appeal. With respect to the additional mitigators alleged pursuant to Indiana Code sections 35-38-1-7.1(c)(6) (law-abiding life), 35-38-1-7.1(c)(7) (affirmative response to probation or short term imprisonment), 35-38-1-7.1(c)(8) (character and attitudes), Taylor similarly did not raise

them at sentencing.⁴ Taylor is therefore precluded from advancing his claim on these grounds for the first time on appeal. *See Spears v. State*, 735 N.E.2d 1161, 1167 (Ind. 2000) (“If a defendant does not advance a factor to be mitigating at sentencing, this Court will presume that the factor is not significant and the defendant is precluded from advancing it as a mitigating circumstance for the first time on appeal.”).

B. Age

During sentencing, Taylor argued that his young age of twenty-one was a significant mitigating factor, especially given that he was the youngest participant in the robbery and that his cohort, Smith, was approximately fifty. “[A] defendant’s youth, although not identified as a statutory mitigating circumstance, is a significant mitigating circumstance in some circumstances.” *Brown v. State*, 720 N.E.2d 1157, 1159 (Ind. 1999) (quotation omitted). Youth is not automatically a significant mitigating circumstance, however. *Smith v. State*, 872 N.E.2d 169, 178 (Ind. Ct. App. 2007), *trans. denied*. As the Supreme Court has observed, “There are both relatively old offenders who seem clueless and relatively young ones who appear hardened and purposeful.” *Ellis v. State*, 736 N.E.2d 731, 736 (Ind. 2000). Whether a defendant’s age constitutes a significant mitigating circumstance is a decision that lies within the discretion of the trial court. *See id.*

⁴ Although in his reply brief Taylor points to his criminal history in the pre-sentence investigation report as evidence of the alleged mitigators of “law-abiding life” and “affirmative response to probation or short term imprisonment,” the mere fact that there was evidence in the record to support an alleged mitigator does not demonstrate that the mitigator was raised before the trial court. This similarly applies to the alleged “undue hardship” mitigator, which Taylor claims was evidenced through a letter from his child’s mother included in the PSI. *See Spears v. State*, 735 N.E.2d 1161, 1167 (Ind. 2000) (observing that mitigators not advanced at sentencing are presumed to lack significance).

Here, despite his relatively young age, Taylor was a full participant in the armed robbery. He drove himself and Michael to the meeting site to join Smith and Desimone, he entered the jewelry store armed with a loaded handgun and helped hold people hostage, and he made off with one of the larger shares of the spoils.⁵ In light of this record, we conclude that the trial court was within its discretion to conclude that Taylor's age was not a significant mitigating circumstance.

C. Weight

Taylor makes passing reference in his brief to the allegedly improper weighing by the trial court of the aggravators and mitigators. Taylor's argument is largely based upon the trial court's alleged error in failing to identify certain mitigators and to find them significant. Having found no error in the trial court's consideration of mitigators, we similarly find no error in its weighing them. To the extent Taylor's argument challenges the trial court's weighing of the existing aggravators and mitigator, we are unable to conclude that Taylor's admission of responsibility through a guilty plea somehow so outweighs his criminal history involving the prior armed robbery of another jewelry store that the imposition of the presumptive ten-year term is an abuse of discretion.

IV. Consecutive Sentence

Taylor additionally challenges the trial court's ordering his sentence to be served consecutive to the sentence he is currently serving in Illinois for a separate conviction. Taylor argues that a trial court may not impose consecutive sentences without express statutory authority. Yet the language in Indiana Code section 35-50-1-2 (2004), which

⁵ The record is silent as to Smith's share.

provides that “the court shall determine whether terms of imprisonment shall be served concurrently or consecutively,” has been interpreted as an express grant of authority to the trial court to impose consecutive sentences, including in cases where a sentence is to be served consecutive to a sentence in another jurisdiction. *See Sweeney v. State*, 704 N.E.2d 86, 110 (Ind. 1998). “[I]t is established law that there is no right to serve concurrent sentences for different crimes in the absence of a statute so providing” *Id.* (quotation omitted). As the trial court found, and we agree, it would be unjust for Taylor to be relieved of his accountability to the State of Indiana for his crime against its citizens. We reject Taylor’s claim of error based upon the trial court’s imposition of a consecutive sentence.

V. Appropriateness

Taylor also challenges the appropriateness of his sentence by emphasizing his youth and what he alleges was his relatively minimal role in the crime. Article VII, Sections 4 and 6 of the Indiana Constitution “authorize[] independent appellate review and revision of a sentence imposed by the trial court.” *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007) (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006) (emphasis and internal quotations omitted)). Such appellate authority is implemented through Indiana Appellate Rule 7(B), which provides that the “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.” We exercise deference to a trial court’s sentencing decision, both because Rule 7(B) requires that we give “due consideration” to that decision and

because we recognize the unique perspective a trial court has when making sentencing decisions. *Stewart v. State*, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). It is the defendant's burden to demonstrate that his sentence is inappropriate. *Childress*, 848 N.E.2d at 1080.

Taylor does not dispute the "frightening" nature of his offense, in which he and his cohorts took four persons hostage and bound their hands at gunpoint inside a jewelry store as part of a planned attack in which they stole approximately \$800,000 of merchandise and the video recorder which could implicate them. Appellant's Br. p. 13. Taylor argues, however, that no one was "beaten or shot or otherwise assaulted" during his crime, in an apparent claim that the crime might have been worse. Appellant's Br. p. 13. While this argument is often used in cases where the defendant receives the maximum sentence, here Taylor received merely the presumptive sentence of ten years. In any event, we find it unpersuasive to hypothesize about significantly more despicable scenarios when the facts at issue are adequately egregious, as they are here, to support the sentence. *See Buchanan v. State*, 767 N.E.2d 967, 973 (Ind. 2002) ("Despite the nature of any particular offense and offender, it will always be possible to identify or hypothesize a significantly more despicable scenario.").

Taylor's criminal history includes April 2006⁶ convictions for Class B felonies armed robbery and aggravated unlawful restraint in Illinois for which he is currently serving a sixteen-year sentence in the Illinois Department of Corrections. Contrary to

⁶ It appears that these offenses were committed in October of 2003, approximately a year before the instant offense.

Taylor's suggestion that he was merely a "follower" in the instant robbery, the evidence indicates that he drove to the meeting site, carried a loaded gun, and made a considerable profit from the merchandise, demonstrating that he was an active participant, if not a leader. In spite of the support of his family and friends, Taylor has already committed two Class B felony armed robberies in his young life, both of them involving the restraint of other persons. This criminal history reflects adequately upon Taylor's lack of moral character such that, together with the egregious nature of his offense, we are convinced that his ten-year presumptive sentence, to be served consecutive to his Illinois sentence, is appropriate.

The judgment of the trial court is affirmed.

CRONE, J., and BROWN, J., concur.