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IN THE
COURT OF APPEALS OF INDIANA

SAID A. ELKHATIB,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0901-CR-9
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Kenneth R. Scheibenberger, Judge
Cause No. 02D04-0804-FD-345

June 5, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Said A. Elkhatib challenges his sentence following his guilty plea to class D felony auto theft.

We affirm.

ISSUES

1. Whether the trial court's sentencing statement lacked requisite specificity.

2. Whether the trial court overlooked significant mitigating circumstances.

3. Whether Elkhatib's sentence is inappropriate pursuant to Indiana Appellate Rule 7(B).

FACTS

On November 8, 2007, Elkhatib visited Bolyard Auto dealership in Fort Wayne with his brother, Amir. A staffer helped them identify a Chevy Impala that was being advertised for sale in Ohio, on Ebay. The staffer allowed them to test-drive a purple 1996 Ford Taurus with two keys for the car. After they test-drove the car, it was returned with only one key.

On November 18, 2007, John Bolyard reported the purple Ford Taurus stolen. The following day, he called the police to report that the car had been returned to the dealership with four hundred additional miles on the odometer. Bolyard discovered a handwritten note as well as a MapQuest printout of directions to an address in Columbus, Ohio inside the car, which he turned over to police. He also informed the police that

Elkhatib and Amir had test-driven the vehicle a week earlier and, apparently, retained a car key.

Lab technicians conducted a fingerprint analysis of the handwritten note and MapQuest printout and recovered eight partial fingerprints which were a positive match for Elkhatib's fingerprints.

Officer Brian Williams was able to ascertain that the Columbus, Ohio address listed on the MapQuest printout was that of Emmanuel Adjei. Officer Williams telephoned Adjei and learned that two men had visited him regarding the Ebay-advertised sale of the Chevy Impala. Adjei was able to provide physical descriptions of the men, which matched Elkhatib and Amir.

On January 10, 2008, Officer Williams and Detective Jeff Williams traveled to Columbus to question Adjei and his sister, Dina Osman, in person. Adjei and Osman selected Elkhatib and Amir from photographic arrays. Osman also informed the officers that Elkhatib and Amir had arrived in a purple Ford Taurus driven by Elkhatib.[1]

On April 24, 2008, the State charged Elkhatib with one count of class D felony auto theft. Elkhatib posted bond on April 26, 2008. On June 18, 2008, Elkhatib failed to appear for a scheduled hearing. The trial court issued a warrant for his arrest. On June 24, 2008, the State filed a separate information alleging that Elkhatib was an habitual offender.

[1] Osman explained that Elkhatib was the winning Ebay bidder on her black 2000 Chevy Impala, a former police vehicle. In the probable cause affidavit, Officer Williams avers that "it is common knowledge that Said and Amir Elkhatib have exhibited a fascination with police related items in general and police vehicles in particular." (App. 13). Osman said that after test-driving the vehicle, Elkhatib and Amir declined to purchase it due to holes in the roof from the removal of the vehicle's emergency lights.

After police apprehended Elkhatib, he appeared in court on July 16, 2008. The trial court revoked his bond and scheduled a jury trial for September 23, 2008. On September 16, 2008, Elkhatib pled guilty, pursuant to an open plea, to class D felony auto theft. In exchange for his plea, the State agreed to dismiss count II (habitual offender). The trial court accepted Elkhatib's guilty plea. On October 14, 2008, the trial court conducted a sentencing hearing, during which it imposed a two-year sentence in the Department of Correction. Elkhatib now appeals.

DECISION

Elkhatib argues that (1) the trial court's sentencing statement lacked requisite specificity; (2) the trial court overlooked significant mitigating circumstances that were clearly supported by the record; and (3) that his sentence is inappropriate pursuant to Indiana Appellate Rule 7(B).

1. Sentencing Statement

Elkhatib asserts that the trial court "neglected to issue a reasonably detailed recitation of its reasons for imposing [his] sentence," and thereby, abused its discretion. Elkhatib's Br. at 6. We disagree.

Before imposing sentence, the trial court made the following remarks:

> I'll accept your plea of guilty, find you guilty of Count I, Auto Theft, a Class D Felony. Count II is dismissed, that being the Habitual Offender. The Court finds as aggravating circumstances [your] prior criminal history and also [that] prior attempts at rehabilitation have failed. You've been given plenty of opportunity to do what needs to be done, but apparently, that hasn't worked * * * The Court finds no mitigators.

(Tr. 10).

With regard to the adequacy of a trial court's sentencing statement, our Supreme Court has explained that "trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense." *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on rehearing*, 875 N.E.2d 218 (Ind. 2007). This sentencing statement must give a "reasonably detailed" recitation of the trial court's reasons for imposing a particular sentence. *Id.* at 491. If the recitation includes the finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id.*

Here, we acknowledge that the trial court did not provide a lengthy explanation of its reasons for sentencing Elkhatib. However, the record reveals that after reviewing the pre-sentence investigation report ("PSI"), which documents Elkhatib's extensive prior criminal history, and after considering counsel's arguments regarding the specifics of Elkhatib's criminal record and his responses to prior instances of court-ordered incarceration, probation, parole, home detention, and counseling, the trial court found no mitigating circumstances and expressly identified Elkhatib's criminal history and record of failed attempts at rehabilitation as aggravating circumstances. Considerable support for these aggravating circumstances can be found in the PSI, which the State has provided for our review.

In *Anglemyer*, the Supreme Court determined that a trial court's sentencing statement must meet the primary aims of (1) guarding against arbitrary and capricious

sentencing; and (2) providing an adequate basis for appellate review. Here, the trial court's sentencing statement satisfies these aims. We find no abuse of discretion.

2. Overlooked Mitigating Circumstances

Next, Elkhatib argues that the trial court failed to discuss, and thereby, overlooked his proffered mitigating circumstances. Specifically, he asserts in his brief that the lack of damage to the vehicle, his youthful age, his acceptance of responsibility, his expression of remorse, and his contention that he is unlikely to reoffend are all significant mitigating circumstances that are clearly supported by the record. We disagree.

The finding of mitigating factors is within the discretion of the trial court. *McKinney v. State*, 873 N.E.2d 630, 645 (Ind. Ct. App. 2007). The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. *Gross v. State*, 769 N.E.2d 1136, 1140 (Ind. 2002). The trial court is not obligated to explain why it did not find a factor to be significantly mitigating; however, it may "not ignore facts in the record that would mitigate an offense, and a failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them." *Sherwood v. State*, 749 N.E.2d 36, 38 (Ind. 2001). "The allegation that the trial court failed to find a mitigating circumstance 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).

At the sentencing hearing, Elkhatib advanced three mitigating circumstances: (1) his acceptance of responsibility by pleading guilty; (2) his expression of remorse; and (3) the fact that he returned the undamaged Taurus to Bolyard, who requested no restitution.

Because he failed to advance to the trial court his youthful age and his unlikelihood of committing another crime as mitigating circumstances, he is precluded from raising these claims for the first time on appeal. Thus, these claims are waived. *See Pennington v. State*, 821 N.E.2d 899, 905 (Ind. Ct. App. 2005) (defendant waived claim on appeal because he failed to advance proposed mitigating circumstances at trial court level); *see also Anglemyer*, 868 N.E.2d at 492 (barring defendant from advancing for the first time on appeal his claim that the trial court should have considered his expression of remorse). We now address each of Elkhatib's proffered mitigating circumstances in turn.

A. Expression of Remorse

Elkhatib contends that the trial court erred when it declined to recognize his expression of remorse as a significant mitigating circumstance. Indiana courts have recognized remorse as a valid mitigating circumstance. *Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005). On appeal, our review of a trial court's determination of a defendant's remorse is similar to our review of credibility judgments: without evidence of some impermissible consideration by the trial court, we accept its determination. *Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002).

Here, the trial court did not find Elkhatib's expression of remorse to be a mitigating circumstance. The trial court is in the best position to determine whether the defendant's remorse is genuine, and therefore significant enough to be found as a mitigating circumstance. *Stout v. State*, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005).

During his remarks before the court, Elkhatib apologized and acknowledged that "nobody [else was] to blame but [him]self"; that he "kn[e]w [he] was wrong"; and that he

"ha[d] no excuses." (Tr. 9). One's belief in the sincerity of Elkhatib's remorse is counterbalanced against the concern that his regret may have been largely attributable to the punishment that he was facing. *See Ousley v. State*, 807 N.E.2d 758, 763 (Ind. Ct. App. 2004). He also stated, "I don't want to keep coming back in here, and you, know, [experiencing] this adrenaline rushing through me because I don't know what [sentence] I'm going to get . . . ." (Tr. 9).

Based upon the foregoing, and because Elkhatib alleges no impermissible considerations by the trial court, we conclude that the trial court did not abuse its discretion in failing to find his expression of remorse to be a significant mitigating circumstance. *See Price v. State*, 765 N.E.2d 1245, 1253 (Ind. 2002) (holding no error in trial court's failure to accept remorse as a mitigating factor because the statement of remorse was equivocal).

B. Acceptance of Responsibility

Next, Elkhatib argues that the trial court abused its discretion when it failed to recognize his guilty plea as a mitigating circumstance. We disagree.

A defendant who pleads guilty deserves to have some mitigating weight extended to his or her entry of a guilty plea; however, the extent to which a defendant's guilty plea is mitigating varies from case to case. *See Cotto*, 829 N.E.2d at 526; *see also Hope v. State*, 834 N.E.2d 713 (Ind. Ct. App. 2005). We have previously held that "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).

Here, Elkhatib received a substantial benefit in return for his guilty plea, because the State dismissed the pending habitual offender charge. We find no abuse of discretion from the trial court's decision that his guilty plea was not a mitigating circumstance.

C. Damage

Next, Elkhatib directs our attention to Indiana Code section 35-38-1-7.1(b)(1) which provides: "The crime neither caused nor threatened serious harm to persons or property, or the person did not contemplate that it would do so." He argues that the trial court should have found, as mitigating, the fact that he returned the car undamaged, save "for the wear and tear that four hundred miles would cost." Elkhatib's Br. at 8. He adds that the wear and tear cost was apparently "insignificant" because Bolyard declined to seek restitution. Elkhatib's Br. at 8. We disagree.

The record reveals that at sentencing, counsel argued that a one-year executed sentence would be appropriate "for what [Elkhatib]'s done and for his criminal background, and [given that] the victim got the car back, there was no damage, there wasn't even any claim for restitution." (Tr. 6). In response, counsel for the State argued that although Elkhatib had returned the car, the fact remained that he had deprived Bolyard of the vehicle's value or use of the vehicle for a period of time. After considering these arguments, the trial court, in its sound discretion, declined to find this proffered factor to be a mitigating circumstance. We find no error.

3. Inappropriateness of Sentence

Lastly, Elkhatib asserts that his two-year sentence is inappropriate in light of the nature of the offense and his character. We disagree.

Appellate courts have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, the court concludes the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B) (2007). "Although Rule 7(B) does not require us to be 'very deferential' to a trial court's sentencing decision, we still must give due consideration to that decision." *Williams v. State*, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008). "We also understand and recognize the unique perspective a trial court brings to its sentencing decisions." *Id*. The burden is on the defendant to persuade the reviewing court that his sentence is inappropriate. *Anglemyer*, 868 N.E.2d at 491 (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)), *clarified on reh'g,* 875 N.E.2d 218.

In determining whether a sentence is inappropriate, the advisory sentence is the starting point that the Legislature has selected as an appropriate sentence for the crime committed. *Childress*, 848 N.E.2d at 1081. The advisory sentence for a class D felony is one and one-half years, with a minimum of six months and a maximum of three years. Here, the trial court imposed a two-year sentence.

Elkhatib's sentence is not inappropriate in light of the nature of the offense and his character. Our review of the nature of the offense reveals that despite never having been issued an Indiana driver's license, Elkhatib test-drove Bolyard's Taurus; retained a key to the car without permission; returned to the dealership; stole the vehicle; and drove it across the state line.

Elkhatib's criminal history reflects poorly upon his character, as does his history of failed attempts at rehabilitation. His contacts with the criminal justice system began when he was just thirteen years of age. His juvenile record includes six true findings for such offenses as criminal mischief, battery, and receiving stolen property. As an adult, he has been convicted of four misdemeanors and three felonies, including criminal recklessness and escape. According to the PSI, he has had two misdemeanor suspended sentences modified, and one felony probation sentence modified and revoked after his escape from a detention facility. (PSI 6). He also committed the instant offense while he was on parole. As a result, the PSI classifies him as a "high risk" offender. (PSI 4).

After due consideration of the trial court's decision, we cannot say that Elkhatib's two-year sentence is inappropriate in light of the nature of the offense and his character.

Affirmed.

BAILEY, J., and ROBB, J., concur.