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IN THE
COURT OF APPEALS OF INDIANA

JOSHUA GARRARD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 55A01-1101-CR-10
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MORGAN SUPERIOR COURT
The Honorable Jane Spencer Craney, Judge
Cause No. 55D03-1009-FD-263

June 7, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Joshua Garrard appeals his three-year sentence for Class D felony theft. He contends that the trial court abused its discretion by failing to recognize certain mitigating circumstances and that his sentence is inappropriate. Concluding that the trial court did not abuse its discretion and that his sentence is not inappropriate, we affirm.

Facts and Procedural History

Garrard, his girlfriend Jenna, and their infant son Blake lived with Jenna's mother Mary Stewart and her partner Carolyn Stewart in Brooklyn, Indiana. Garrard was unemployed, and the Stewarts provided him with free housing and food. They also "helped out quite a bit" with Blake. Tr. p. 9. At some point in 2010, Garrard stole around $8000 worth of jewelry from the Stewarts. The Stewarts had collected the jewelry over the course of seventeen years through inheritance, gifts, and purchases. Garrard gave some of the jewelry to an associate. Garrard sold his portion of the loot for its gold, received $1400 for it, and used the money to fuel his drug habit.

The State charged Garrard with Class D felony theft and Class A misdemeanor possession of marijuana. Garrard pled guilty to the theft charge pursuant to an open plea agreement.

At the sentencing hearing, Garrard testified that he plans to get help for his abuse of pain pills and to find a job so he can make restitution and support his six-month-old son when he is released from jail. He also said that he was sorry for what he did. Garrard has a welding background and said he could make between twelve to fourteen dollars an hour. Mary made a victim impact statement.

Before proceeding to sentencing, the trial court said, "Well, Mr. Garrard, you got the wrong Judge. See this ring? . . . [T]he stones have been in my family for four generations. If I get mugged, they're just gonna have to kill me because I'm not giving it up." *Id.* at 19.

The trial court noted Garrard's age of twenty-four years as a mitigating circumstance. As aggravating circumstances, the court identified his criminal history, which consists of two arrests and a 2004 criminal confinement conviction that was reduced to an A misdemeanor, and that he violated his probation imposed as a result of the confinement conviction. The trial court sentenced Garrard to three years: one year in Morgan County Jail and two years on home detention as a condition of probation. The court also ordered Garrard jointly and severally liable with his associate for $4000 in restitution. The court noted that it would modify the one year in Morgan County Jail if Garrard could find a job paying fourteen dollars an hour or as a welder, and that it would reduce the theft conviction to a Class A misdemeanor if he successfully completed probation and made restitution.

The State moved to dismiss the possession charge, which the trial court granted.

Garrard now appeals.

Discussion and Decision

Garrard contends that the trial court abused its discretion by failing to recognize certain mitigating circumstances and that his sentence is inappropriate.

At the outset, the State argues that Garrard has waived review of his sentence because he failed to provide us with his guilty plea hearing and pre-sentence investigation

report. *See Nasser v. State*, 727 N.E.2d 1105, 1110 (Ind. Ct. App. 2000) (defendant waived review of sentencing issue where he failed to include presentence investigation report but court addressed issue notwithstanding waiver), *trans. denied*. Our appellate rules, however, provide that "[a]ny party's failure to include any item in an Appendix shall not waive any issue or argument." Ind. Appellate Rule 49(B); *see also Eiler v. State*, 938 N.E.2d 1235, 1237 n.2 (Ind. Ct. App. 2010) (noting that defendant's failure to include presentence investigation report "hampers our ability to consider [the defendant]'s argument and review the trial court's sentencing decision" but not finding waiver), *reh'g denied*. Moreover, the transcript of the sentencing hearing in this case is sufficient to allow adequate review of Garrard's sentence. We decline to find waiver.

I. Abuse of Discretion

Garrard contends the trial court abused its discretion by failing to recognize certain mitigating circumstances.

Sentencing decisions rest within the sound discretion of the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). So long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Id.* An abuse of discretion will be found where 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.* We review the presence or absence of reasons justifying a sentence for an abuse of discretion, but we cannot review the relative weight given to these reasons. *Id.* at 491. When an allegation is made that the trial court failed to find a mitigating factor, the defendant is required to

establish that the mitigating evidence is both significant and clearly supported by the record. *Id.* at 493. However, a trial court is not obligated to accept a defendant's claim as to what constitutes a mitigating circumstance. *Rascoe v. State*, 736 N.E.2d 246, 249 (Ind. 2000). "If the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist." *Anglemyer*, 868 N.E.2d at 493 (quotation omitted).

Garrard argues that the trial court overlooked several mitigating factors: that he pled guilty, was cooperative in the investigation, was remorseful, was willing to make restitution, plans to get a job and substance abuse help, has a limited criminal history, and has a minor child. He also makes the overarching claim that the trial judge's comments show judicial bias.

A defendant who pleads guilty generally deserves "some" mitigating weight to be afforded to the plea. *Anglemyer*, 875 N.E.2d at 220 (citing *McElroy v. State*, 865 N.E.2d 584, 591 (Ind. 2007)). However, our Supreme Court has recognized that a trial court does not necessarily abuse its discretion by failing to recognize a defendant's guilty plea as a significant mitigating circumstance. *See id.* at 221. 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 the defendant 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*. The State's evidence included invoices from a Mooresville jeweler showing Garrard received money for selling gold for melt down and texts from Garrard's associate about going to trade in more gold in Mooresville. Tr. p. 18; Appellant's App. p.

43-44 (probable cause affidavit).[1] Further, the Mooresville jeweler recalled Garrard selling a unique ring matching a description given by Mary. Appellant's App. p. 43. In light of the substantial evidence of Garrard's guilt, his decision to plead guilty was merely pragmatic.

Garrard also argues that the trial court failed to identify as mitigators his cooperation in the investigation and his remorse. As to his cooperation, however, the probable cause affidavit shows that Garrard denied taking the jewelry until faced with substantial evidence of his guilt. *Id.* at 44. As to remorse, a trial court is in the best position to judge the sincerity of a defendant's remorse. *Stout v. State*, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005), *trans. denied*. Garrard stated at the sentencing hearing, "I'm sorry, Mary. I . . I realize what I did was wrong and I'm . . I'm ready to start over and pay you back for it and be there for Blake." Tr. p. 7. Garrard's expression of remorse was not so compelling that we can say the trial court abused its discretion by failing to identify it as a mitigator.

Garrard claims that his willingness to make restitution and plans to get a job and substance abuse help should have been mitigators. A trial court need not give a defendant's desire to make restitution the same significance as he or she would like. *See Creekmore v. State*, 853 N.E.2d 523, 530 (Ind. Ct. App. 2006) (finding no abuse of discretion where trial court did not identify defendant's desire to make restitution as significantly mitigating), *clarified on denial of reh'g*, 858 N.E.2d 230 (Ind. Ct. App. 2006). There is no evidence in the record that Garrard had paid the Stewarts any

[1] Both parties rely on the probable cause affidavit in their appellate briefs.

restitution before the sentencing hearing. We also note that the $4000 amount agreed to by the parties, Tr. p. 9, is only half the monetary value of the jewelry stolen. As to Garrard's future plans, the trial court was free to find that these factors were not significant. The trial court did not abuse its discretion by not identifying these factors as significant mitigating circumstances.

Garrard also argues that his limited criminal history, particularly the fact that his last offense was back in 2004, should have been a mitigating circumstance. The trial court noted that Garrard has been convicted of criminal confinement, has two arrests, and has violated probation in the past. The trial court did not abuse its discretion by failing to identify Garrard's criminal history as mitigator and instead identifying it as an aggravator.

Garrard claims that the trial court should have considered as a mitigator the fact that he "has a minor child for whom he, though not legally bound to do so, provides financial and parenting support when not incarcerated." Appellant's Br. p. 9-10. There is no evidence in the record that Garrard provides financial support for his son. In fact, the record implies the opposite, as he was unemployed at the time of the sentencing hearing. Moreover, Garrard can provide support for his son by finding a job during his two years of home detention, and the trial court was even willing to modify his one year in jail if he could find a job earlier than that. Further, many people convicted of crimes have one or more dependents and, "absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship." *Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999); *see also Benefield v. State*, 904 N.E.2d 239, 247-48 (Ind. Ct. App.

2009) (recognizing that incarceration "almost always" works a hardship on others and concluding that the defendant failed to show "special circumstances" because there were other people who could take care of the defendant's mother while she was incarcerated), *trans. denied*. Garrard has failed to show any special circumstances.

We further find no evidence of judicial bias. Indiana law presumes that a judge is unbiased and unprejudiced. *Everling v. State*, 929 N.E.2d 1281, 1287 (Ind. 2010); *see also* Ind. Judicial Conduct Canon 2.2 ("A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."). "[A]dverse rulings on judicial matters do not indicate personal bias or prejudice, nor typically do statements at sentencing hearings." *Bahm v. State*, 789 N.E.2d 50, 55 (Ind. Ct. App. 2003), *clarified on reh'g*, 794 N.E.2d 444 (Ind. Ct. App. 2003), *trans. denied*. Here, the trial judge's remarks before pronouncing Garrard's sentence do not support a claim for judicial bias. Instead, the judge was merely recognizing the devastation that the theft caused the Stewarts.

We conclude that the trial court did not abuse its discretion in sentencing Garrard.

II. Inappropriate Sentence

Garrard also contends that his sentence is inappropriate.

Although a trial court may have acted within its lawful discretion in imposing a sentence, Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a 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." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer*, 868 N.E.2d at 491). The defendant has the burden of persuading us that his sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)). In assessing whether a sentence is inappropriate, appellate courts may take into account whether a portion of the sentence is ordered suspended or is otherwise crafted using any of the variety of sentencing tools available to the trial judge. *Davidson v. State*, 926 N.E.2d 1023, 1025 (Ind. 2010).

Garrard pled guilty to a Class D felony. The statutory range for a Class D felony is between six months and three years, with the advisory sentence being one and a half years. Ind. Code § 35-50-2-7(a). Although the trial court sentenced Garrard to three years, two years were ordered to be served on home detention as a condition of probation. In addition, the court stated that it would modify his one year in jail if he could find a job and that it would reduce the theft conviction to a Class A misdemeanor if he successfully completed probation and made restitution.

As to the character of the offender, Garrard has two arrests and a conviction for criminal confinement, and he has also violated his probation in the past. He is also a drug abuser. Garrard's character shows he disregards the law.

As to the nature of the offense, Garrard stole a significant amount of jewelry from the Stewarts, who provided him with free housing and food and "helped out quite a bit" with his son. The jewelry had been collected by the Stewarts over the course of seventeen years and included jewelry received through inheritance. Garrard gave some of the jewelry to an associate and sold the rest for its gold. He used the $1400 he

received in exchange to buy drugs. Garrard took advantage of people who showed him great generosity. The nature of his offense warrants an enhanced sentence.

Garrard has failed to persuade us that his sentence is inappropriate.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.