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.

FILED
Jun 08 2009, 9:14 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

RANDY M. FISHER
Deputy Public Defender
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

J.T. WHITEHEAD
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

BENNIE R. SPICER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0812-CR-578
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause Nos. 02D04-0703-FB-33, 02D04-0703-FB-35, 02D04-0705-FB-74, 02D04-0705-FB-123

June 8, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Bennie R. Spicer appeals the sentence imposed on his guilty pleas to two counts of class B felony robbery, one count of class B felony attempted robbery, and one count of class C felony burglary. We affirm.

Issues

Spicer raises two issues, which we restate as follows:

I. Whether the trial court abused its discretion in failing to consider certain mitigating factors; and

II. Whether his sentence is inappropriate in light of the nature of the offenses and his character.

Facts and Procedural History

On March 7, 2007, the State charged Spicer with one count of robbery resulting in bodily injury, a class B felony,[1] in cause number 02D04-0703-FB-33 ("FB-33") and another count of class B felony robbery in cause number 02D04-0703-FB-35 ("FB-35"). On May 3, 2007, the State charged Spicer with one count of class C felony burglary[2] in cause number 02D04-0705-FB-123 ("FB-123"). On May 9, 2007, the State charged Spicer with class B felony attempted robbery in cause number 02D04-0705-FB-74 ("FB-74").

On July 20, 2007, Spicer pled guilty in causes FB-33 and FB-35. In cause FB-33, Spicer admitted that he took Cheryl Peggins's purse, causing injury. In cause FB-35, Spicer

[1] Ind. Code § 35-42-5-1.

[2] Ind. Code § 35-43-2-1.

admitted that he took Latoya Cannon's purse, causing injury. On August 21, 2007, Spicer pled guilty in causes FB-123 and FB-74. In cause FB-123, Spicer admitted that he broke into Shads Auto Sales with the intent to commit theft. In cause FB-74, Spicer admitted that he attempted to take Sara Kohler's purse by grabbing the purse and ordering her to give up control of the purse, resulting in bodily injury.

On September 6, 2007, Spicer was sentenced in all four causes. At the hearing, Spicer argued for an aggregate sixteen-year sentence: ten years for each class B felony robbery or attempted robbery conviction to be served concurrently, and six years for the class C felony burglary conviction to be served consecutive to the ten-year sentence. Spicer asserted that such a sentence was warranted in light of mitigating circumstances, that is, his acceptance of responsibility and his troubled childhood. He also contended that the sentences for the robberies should be served concurrently because they were committed as part of one continuous "crack binge." Sentencing Tr. at 5-6.

The State asserted that Spicer's criminal history, consisting of seven felony convictions, thirteen misdemeanor convictions, and four probation revocations, was an aggravating factor justifying enhanced sentences. In addition, the State argued that consecutive sentences were warranted because there were different victims for each offense. The State further noted that Spicer physically assaulted three of his victims: he bit Cannon, punched Peggins, and kicked Kohler while she was on the ground. The State asked that twelve-year sentences be imposed for the robberies and the attempted robbery and that a six-

year sentence be imposed for the burglary, all to be served consecutively, for an aggregate sentence of forty-two years.

The trial court then sentenced Spicer as follows:

> I will find that [Spicer] has entered a plea of guilty and … has entered a plea of guilty as a mitigating circumstance of relatively small weight. That I have considered [Spicer's] family history as well and do not find that to be a mitigating circumstance. I've also considered and find to be an aggravating, a substantial aggravating factor, [Spicer's] criminal history in a couple of ways. Number one, just the weight of it, the length of it and the number of convictions he has which also indicates to me as I look down through here there are various terms of probation. He clearly has been offered assistance by the system in the past and for whatever reason has been unable or unwilling to take advantage of it. It appears that there is no other program or process that we could expect that would assist [Spicer] in becoming at least at this moment or the immediately foreseeable future, becoming a productive member of society. I'm going to order [Spicer] committed to the Indiana Department of Correction for a period of ten years in cause number 33; ten years in 35; ten years in 74; and [four] years in 123. …. [A]s to the three robbery charges, … as I read in the PC's yesterday in preparation for today's hearing that there were acts of violence, unnecessary acts of violence, perpetrated on each of these individual victims. I'm going to order those four sentences to be served consecutive to one another. That's a total of 34 years and that's a lot of time and I know that and that troubles me, but I see no other alternative.

Id. at 12-14. Spicer appeals.

Discussion and Decision

I. Mitigating Factors

Spicer contends that the trial court abused its discretion in failing to recognize and consider as mitigating factors the following three circumstances: his troubled childhood; the hardship that his incarceration would cause his dependent child; and his addiction to crack cocaine. As to the latter two circumstances, Spicer tacitly admits that he did not argue them before the trial court. It is well established that the trial court cannot be said to abuse its

discretion in failing to consider a mitigating factor that was not raised at sentencing. *Anglemyer v. State*, 868 N.E.2d 482, 492 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218; *see also Creekmore v. State*, 853 N.E.2d 523, 530 (Ind. Ct. App. 2006) ("[I]f the defendant fails to advance a mitigating circumstance 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."). Accordingly, we address only whether the trial court abused its discretion in failing to recognize Spicer's troubled childhood as a mitigating factor.[3]

"[S]entencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." *Anglemyer*, 868 N.E.2d at 490. "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*. (quoting *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006)). We can 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. One way in which a court may abuse its discretion is by entering a sentencing statement that omits mitigating circumstances that are clearly supported by the record and advanced for consideration. *Id*. at 490-91.

[3] Spicer asserts that we should consider the hardship to his son and his cocaine addiction because "where the trial court is 'inherently aware' of the mitigator, such as the defendant's guilty plea, the appellate court will consider the mitigator regardless of whether the defendant argued the mitigator at the trial level." Appellant's Br. at 15. We observe that our supreme court has held that trial courts should be "inherently aware of the fact that *a guilty plea* is a mitigating circumstance." *Francis v. State*, 817 N.E.2d 235, 237 n.2 (Ind. 2004) (emphasis added). Other than a guilty plea, Indiana courts have not found any other mitigators of which the trial court should be "inherently aware."

Here, the trial court specifically stated that it "considered [Spicer's] family history" and "[did] not find that to be a mitigating circumstance." Sentencing Tr. at 12. We observe that 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). Further, Indiana courts have "consistently held that evidence of a difficult childhood warrants little, if any, mitigating weight." *Ritchie v. State*, 875 N.E.2d 706, 725 (Ind. 2007); *see also Holsinger v. State*, 750 N.E.2d 354, 363 (Ind. 2001) (assigning the defendant's troubled childhood "weight in the low range"). Accordingly, we conclude that the trial court did not abuse its discretion in sentencing Spicer.

II. Inappropriateness of Sentence

Spicer also argues that his thirty-four-year sentence is inappropriate. Article 7, Section 6 of the Indiana Constitution authorizes this Court to independently review and revise a sentence imposed by the trial court. *Anglemyer*, 868 N.E.2d at 491. Indiana Appellate Rule 7(B) states, "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." "Although appellate review of sentences must give due consideration to the trial court's sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." *Purvis v. State*, 829 N.E.2d 572, 587 (Ind. Ct. App. 2005) (internal citations

omitted), *trans. denied*. The defendant bears the burden of persuading us that the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

The advisory sentence for a class B felony is ten years, with a fixed term of between six and twenty years. Ind. Code § 35-50-2-5. Although the State argued, and the presentence investigation report ("PSI") recommended, an enhanced sentence of twelve years for each class B felony conviction, the trial court imposed the advisory sentence. *See* PSI at 7, 8, 19. The advisory sentence for a class C felony is four years, with a fixed term of between two and eight years. Ind. Code § 35-50-2-6. The trial court also imposed the advisory sentence for Spicer's class C felony burglary conviction even though the State asked for, and the PSI recommended, an enhanced sentence of six years. *See* PSI at 20.

"When determining whether a sentence is inappropriate, we recognize that the advisory sentence 'is the starting point the Legislature has selected as an appropriate sentence for the crime committed.'" *Filice v. State*, 886 N.E.2d 24, 39 (Ind. Ct. App. 2008) (quoting *Weiss v. State*, 848 N.E.2d 1070, 1072 (Ind. 2006)), *trans. denied*. Therefore, when the trial court imposes the advisory sentence, the defendant bears a heavy burden in persuading us that his or her sentence is inappropriate. *McKinney v. State*, 873 N.E.2d 630, 647 (Ind. Ct. App. 2007), *trans. denied*. Here, however, the trial court ordered all sentences to be served consecutively. Our supreme court has stated that our review of a defendant's sentence "should focus on the forest–the aggregate sentence–rather than the trees–consecutive or concurrent, number of counts, or length of the sentence on any individual count." *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008).

> The circumstances do, however, bear on whether consecutive sentences are appropriate. Whether the counts involve one or multiple victims is highly relevant to the decision to impose consecutive sentences if for no other reason than to preserve potential deterrence of subsequent offenses. Similarly, additional criminal activity directed to the same victim should not be free of consequences. Finally, the nature of the crime can certainly be significant. All of these circumstances must be balanced in view of the fact that the legislature has already built into its sentencing range the consequences to victims, moral revulsion, and other factors inherent in the crime.

Id.

As to the nature of Spicer's offenses, the most significant factor is that each involved a different victim, which justifies consecutive sentences. *See Green v. State*, 870 N.E.2d 560, 568 (Ind. 2007) (holding that consecutive sentences are necessary to vindicate the fact that there were separate harms and separate acts against multiple victims).

As to Spicer's character, he has an extensive criminal history. He has been involved with the criminal justice system continuously since 1993. He has been convicted of seven felonies and thirteen misdemeanors, and the court has revoked his probation four times. His past crimes include seven batteries, escape, theft, and residential entry, as well as multiple drug-related crimes. Spicer has been given opportunities, including probation, to improve his situation but has been unable or unwilling to do so. Based upon the nature of Spicer's offenses and his character we cannot say that his thirty-four-year sentence is inappropriate.

Affirmed.

BRADFORD, J., and BROWN, J., concur.