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 12 2009, 9:02 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

IVAN A. ARNAEZ
Arnaez Law Offices
Evansville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

GARY DAMON SECREST
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CHRISTOPHER MITCHELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 87A05-0812-CR-701
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WARRICK SUPERIOR COURT
The Honorable Keith A. Meier, Judge
Cause No. 87D01-0705-FA-137

June 12, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Christopher Mitchell appeals his sentence following a plea of guilty to class C felony intimidation[1] and class D felony criminal recklessness.[2]

We affirm.

ISSUE

Whether the trial court erred in sentencing Mitchell.

FACTS

On May 18, 2007, Mitchell got off from work at approximately 11:30 p.m. and had a couple of beers and mixed drinks. He then went home, where he consumed two to three shots of rum. He was upset because he knew that his ex-girlfriend, Miai Nguyen, was hosting a party in her parents' Newburgh home and had invited a male friend, Mitchell Rea. After failing to reach Nguyen on the telephone, Mitchell drove to her home, taking a loaded high-powered rifle with him.

Once inside the Nguyen home, Mitchell walked through the house, "'clearing rooms'" and announcing, "'Marine Corp[s].'" (App. 88). As he went through the house, he pointed his gun at several partygoers, asking whether they were Rea. At some point, two men wrestled the gun away from Mitchell. The gun discharged several times during the struggle. Police officers later estimated that twelve rounds were fired inside the

[1] Ind. Code § 35-45-2-1.

[2] I.C. § 35-42-2-2.

residence. On one of the shell casings later retrieved from the residence, Mitchell had written "'X Chris X'" and "sry mom.'" *Id.* at 89.

Detectives from the Warrick County Sheriff's Department later searched Mitchell's bedroom. The detectives discovered what appeared to be a suicide note as well as notes reading "'kill,'" "'Mitch,'" "'die,'" and "'now is the time.'" *Id.* at 87. According to Mitchell, he often referred to himself as "Mitch."

On May 23, 2007, the State charged Mitchell with one count of attempted murder, a class A felony. Subsequently, the State filed an amended information, charging him with Count 1, attempted murder, a class A felony; Count 2, pointing a firearm at another person as a class D felony; and Count 3, criminal recklessness as a class D felony.

In June of 2007, Dr. John Ireland, a clinical psychologist, met with Mitchell to evaluate his "sanity, competence to stand trial, and risk of dangerousness." *Id.* at 107. Mitchell reported several prior instances of violent behavior, including "beating on" a friend and fighting with strangers. *Id.* at 126.

Regarding Mitchell's dangerousness, Dr. Ireland deemed him to be "very dangerous," with "no knowledge of anything he can do to control his actions and see[ing] himself as having no responsibility because they are out of his control." *Id.* at 130. Dr. Ireland determined that "there is no guarantee if he is placed on the streets that he will not act up in another manner, given whatever stimuli, internal or external, may occur." *Id.* at 131. As to Mitchell's sanity at the time of the offense, Dr. Ireland opined that he was not "being honest" regarding his knowledge and memory of the events. *Id.* Dr. Ireland deemed Mitchell fully competent to stand trial.

In September of 2007, Dr. Thomas Liffick, a psychiatrist at Southwestern Indiana Mental Health Center, Inc., conducted a court-ordered psychiatric evaluation of Mitchell "to determine his competency to stand trial and with respect to a plea of not responsible by reason of insanity . . . ." *Id.* at 96. The trial court also ordered that Mitchell be evaluated for his "'risk of harm to himself and other persons, violence, risk lethality, and threat assessment' and, if appropriate, to 'make recommendations for further evaluation and treatment.'" *Id.*

Dr. Liffick opined that Mitchell's "mood liability and reported amnesic periods are consistent with the diagnosis of Mixed Personality Disorder . . . ." *Id.* at 101. He determined that "there is no significant evidence that at the time of these events there was psychiatric illness present that prevented [Mitchell] from understanding the wrongness of his actions . . . ." *Id.* According to his report, Mitchell "does not describe any motivation derived from psychotic symptoms, and in fact alludes to anger and jealousy as a motivation." *Id.* Dr. Liffick opined that Mitchell "seems to have no remorse for the degree of danger that he placed other people in, which again speaks to the high level of risk for violence that he represents." *Id.* at 102. Finally, Mitchell reported a history of violence, including getting into fights with strangers.

On July 29, 2008, the trial court granted the State's motion to amend the charging information to add Count 4, intimidation as a class C felony. Also on July 29, 2008, Mitchell and the State entered into a sentence agreement, whereby Mitchell agreed "to plead guilty to either Court 2 . . . or Count 3" and also to plead guilty to Count 4; in return, the State agreed to dismiss any remaining charges. *Id.* at 18. The parties agreed

that sentencing would be within the trial court's discretion, "with both parties free to present evidence and argument in support of such sentence as they believe to be appropriate." *Id.* The trial court accepted and entered Mitchell's subsequent plea of guilty to Count 3, criminal recklessness as a class D felony, and Count 4, intimidation as a class C felony.

The trial court ordered a pre-sentence investigation report ("PSI") and held a sentencing hearing on October 27, 2008. According to the PSI, Mitchell had been adjudicated a juvenile delinquent for committing two acts in 1999 which, if committed by an adult, would have constituted class D felony theft. As an adult, Mitchell had two convictions for class A misdemeanor operating a vehicle while intoxicated in 2003; two convictions—one in 2003 and one in 2004—for class C misdemeanor illegal consumption; and one conviction for operating a motor vehicle in violation of a restricted license in 2003. In addition to the PSI, the trial court also considered the court-ordered evaluations conducted by Drs. Ireland and Liffick.

The trial court found, in pertinent part, as follows:

> I've had the opportunity to think for quite some time about what is an appropriate sentence in this case . . . . When you're dealing with mental health issues, you have to have strict supervision, strict monitoring of medication, strict compliance with treatment. And that requires not only staff, but qualified staff. We don't have that. . . . So, there's [sic] limits at least here, physically here in this county of being able to do things like that, although it probably would be beneficial. So I've considered all of those things, and I've considered a lot of things actually. . . . In order to commit any offense, there are certain minimum elements to commit the offense. Often times when a person is committing an offense, they will go above and beyond the minimum elements necessary to commit the offense, and I looked in the record for the [sic] this. Neither of the offenses required that the firearm be pointed at a person's chest. All it requires is pointing a

firearm, not necessarily at the chest, which I think anyone who's had a gun pointed at them would consider that to be a pretty vulnerable area. It's certainly a lot different than if a person is pointing a gun at your foot. Secondly, that it was not required by the elements of the offense were the fact that there were numerous individuals in the home. Also, the Court looked at the amount of planning and perhaps calculation that went into the commission of the offense, things such as the notes about "kill Mitch," "die," "now is the time," . . . . The Defendant had enough time and opportunity to leave from his home and he drove to the Nguyen home. And at the time he did that, he was carrying his SAR10 high-powered rifle with him, which is different than just pulling a gun from where you are and pointing it at a person at that location. This took some contemplation to actually carry the weapon to another location. Also, the fact that the Defendant had written on the shell casings several things. One was "X Chris X," . . . "S-R-Y Mom," . . . and a frowning face. I think those all took some planning and calculation over and above what is necessary just to commit the basic elements of the offense. I've also considered the trauma to Mr. Rea. I don't doubt that he is fearful. As to his effect on his mental health, I don't know. I would have to take his word for that. I'm not a mental health expert. I also looked at the Defendant's prior criminal history, and his criminal history wasn't significant in terms of these particular offenses that were committed here. . . . [I]n this case I would say what Mr. Mitchell's criminal history does is show he's got some antisocial behavior. . . . But I also noted that . . . the adult offenses were all committed within four years of the offense or offenses for which the Defendant has pled guilty here. Which does mean a little bit more than if they had been spaced out over a period of twenty years. I also considered the fact that the Defendant needs treatment. I have read through Doctor Ireland's report and Doctor Liffick's report. And I think anybody that would read those, it would be clear that the Defendant does have a lot of mental health issues, some more serious than not. . . . He does have some significant mental health issues. And if not properly attended to, he does have the propensity to be violent and do the things that he's charged with in this particular case. . . . [T]here's three things that are constant here. Number one, that he needs daily monitoring. Secondly, that he needs restriction or confinement. And, thirdly, that there's a high probability that he will commit additional offenses unless there is some significant intervention. On the other side of the coin, I'm also required to consider those things that are in the Defendant's favor. The mental health issue cuts both ways. I also consider that as some mitigation for what the Defendant did. I also considered the fact that . . . the prior offenses that he's committed were all misdemeanors except for the juvenile adjudication . . . . I also have noticed the Defendant's attitude in Court. He has not been

> disrespectful. He has been cooperative in Court. There's been no outbursts, no displays of any antagonistic behavior. . . . I considered the fact that he pled guilty. That does save the State of Indiana a great deal of time in bringing these matters to trial. It saves a great deal of expense. It saves the witnesses the trauma of having to re-live this . . . . And as far as the Defendant's remorse, I do get a sense that he is sorry for what happened. . . . I give you some consideration for all of those things I've just indicated . . . .

(Tr. 34-41). The trial court then sentenced Mitchell to concurrent sentences of thirty-four months on Count 3 and ninety months on Count 4.

DECISION

Mitchell argues that the trial court abused its discretion in sentencing him by considering improper aggravating circumstances. He also argues that his sentence is inappropriate.

1. Aggravating Circumstances

Mitchell contends that the trial court abused its discretion in finding the risk of injury to others, his mental illness, and the psychological impact on Rea to be aggravating circumstances. A sentence that is within the statutory range is subject to review only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). "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.* at 490 (quoting *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006)).

One way in which a trial court may abuse its discretion is if the sentencing statement "explains reasons for imposing a sentence—including a finding of aggravating

and mitigating factors if any—but the record does not support the reasons, . . . or the reasons given are improper as a matter of law." *Id.* at 490-91. However, the relative weight or value assignable to reasons properly found, or to those which should have been found, is not subject to review for abuse of discretion. *Id.*

a. *Risk of injury*

Mitchell argues that the trial court improperly considered the risk of injury to others as an aggravating circumstance where no one incurred an injury. We disagree.

A "trial court may find the nature and circumstances of the offense to be an aggravating circumstance.'" *Id.* (quoting *Lemos v. State*, 746 N.E.2d 972, 975 (Ind. 2001)). In this case, the trial court found the nature and circumstances of Mitchell's crime—namely, going to a residence with a loaded firearm; threatening several people with it; and the subsequent firing of the firearm in a crowded residence—to be an aggravating circumstance. We find no abuse of discretion.

b. *Mental illness*

Mitchell also contends that the trial court abused its discretion by giving him "more time due to his lack of mental health." Mitchell's Br. at 13. We cannot agree that that is what the trial court did in this case.

A review of the record shows that the trial court clearly considered Mitchell's mental health as a mitigating circumstance while it considered his propensity for violence

and risk of re-offending to be aggravating circumstances.[3] We find no abuse of discretion. *See Johnson v. State*, 855 N.E.2d 1014, 1016 (Ind. Ct. App. 2006) (finding no abuse discretion where trial court considered defendant's failure to control mental illness and risk of re-offending to be aggravators), *trans. denied*.

c. *Psychological impact*

Mitchell further argues that the trial court improperly considered the emotional trauma suffered by Rea as a result of Mitchell's offense as an aggravating circumstance. "[T]he emotional and psychological effects of a crime are inappropriate aggravating factors unless the impact, harm, or trauma is greater than that usually associated with the crime." *Thompson v. State*, 793 N.E.2d 1046, 1053 (Ind. Ct. App. 2003) (emphasis added).

The trial court did not indicate that the psychological or emotional effects on Rea were greater than those on any other victim in a similar situation. Thus, the trial court's sole reliance on such an aggravating circumstance would be improper. However, it does not appear that the trial court found the emotional impact on Rea to be an aggravating circumstance. We therefore find no abuse of discretion.

Even if we were to find that the trial court improperly considered the emotional impact on Rea to be an aggravator, this court would have at least three courses of actions:

> 1) "remand to the trial court for a clarification or new sentencing determination", 2) "affirm the sentence if the error is harmless", or 3)

[3] Particularly telling about Mitchell's risk of re-offending and propensity for violence is his statement to Dr. Liffick that he would be willing "to hurt other prisoners or the guards just to prove a point if he were in the prison system." (App. 98).

> "reweigh the proper aggravating and mitigating circumstances independently at the appellate level."

Scott v. State, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006) (quoting *Cotto v. State*, 829 N.E.2d 520, 525 (Ind. 2005)), *trans. denied*.

Here, the record clearly supports the finding of the nature and circumstances of Mitchell's crime as an aggravating circumstance. A single circumstance may be sufficient to support an enhanced sentence. *Edwards v. State*, 842 N.E.2d 849, 855 (Ind. Ct. App. 2006). We find that such is the case here.

2. Inappropriate Sentence

Mitchell also asserts that his sentence is inappropriate. We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). It is the defendant's burden to "'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)).

In determining whether a sentence is inappropriate, 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. The advisory sentence for a class C felony is four years. I.C. § 35-50-2-6. The potential maximum sentence is eight years. *Id.* The advisory sentence for a class D felony is one and one-half years, with a potential maximum sentence of three years. I.C. § 35-50-2-7. Here, the trial court sentenced Mitchell to concurrent sentences of ninety months—or seven and one-half years—on Count 4 and thirty-four months—two months short of three years—on Count 3.

Regarding the nature of Mitchell's offense, the record discloses that he loaded a high-powered rifle with thirty rounds of ammunition before driving to his ex-girlfriend's house. Once there, he pointed his weapon at the chest area of several people as "he walked through the house 'clearing rooms.'" (App. 88). His reign of terror only ended when two by-standers wrestled the rifle from him. During the struggle, the weapon discharged twelve rounds inside the residence.

As to Mitchell's character, he does not have an extensive criminal history. Most of his prior offenses, however, were alcohol-related. This is significant where Mitchell admitted to consuming alcohol prior to going to Nguyen's residence. Thus, it appears that prior attempts to rehabilitate him and deter him from future unlawful conduct have failed, leading to more serious felony convictions. Furthermore, while recognizing Mitchell's mental issues, there is nothing in the record to indicate that he has attempted to control his behavior, did not understand the wrongfulness of his behavior, or sought meaningful treatment.[4]

Regarding Mitchell's guilty plea, he received a significant benefit when the State dismissed two charges, including an attempted murder charge. Thus, Mitchell's guilty plea is not a significant reflection of his character. Accordingly, we cannot say that his sentence is inappropriate.

Affirmed.

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

---

[4] According to Dr. Liffick's report, Mitchell found no benefit from Prozac, and though he had tried other anti-depressants, he did not take his medications consistently. He also reported taking an antidepressant that had not been prescribed for him.