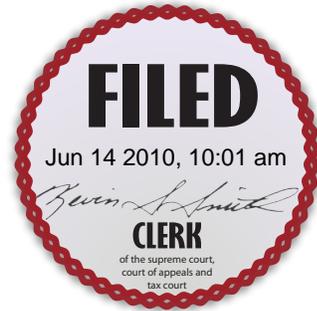


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

MARK A. DABROWSKI
Kokomo, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

CHRISTOPHER ROBERTS,)

Appellant-Defendant,)

vs.)

No. 34A02-1002-CR-147

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE HOWARD CIRCUIT COURT
The Honorable Lynn Murray, Judge
Cause Nos. 34C01-0806-FD-118, 34D04-0806-FB-137 and 34C01-0808-FD-171

June 14, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Christopher Roberts (Roberts), appeals his sentence following a guilty plea for theft, a Class D felony, Ind. Code § 35-43-4-2(a); burglary, a Class C felony, I.C. § 35-43-2-1; and possession of stolen property, a Class D felony, I.C. § 35-43-4-2.

We affirm.

ISSUES

Roberts raises one issue for our review, which we restate as the following two:

- (1) Whether the trial court improperly considered certain aggravators; and
- (2) Whether his sentence was inappropriate in light of the nature of his offense and his character.

FACTS AND PROCEDURAL HISTORY

On April 19, 2008, Roberts broke into his grandmother's house and stole between \$21,000 and \$30,000 in cash, as well as various pieces of jewelry. On June 3, 2008, Roberts and another individual stole metal items from a barn in Howard County, Indiana. On August 26, 2008, Roberts stole the purse of a substitute teacher at his son's school.

On June 5, 2008, the State filed an Information under cause number 34C01-0806-FD-118 (FD-118), charging Roberts with the June 3 theft, a Class D felony, I. C. § 35-43-4-2(a). On June 13, 2008, the State filed an Information under cause number 35D04-0806-FB-137 (FB-137), charging Roberts with Count I, burglary, a Class B felony, I.C. § 35-43-2-1(1)(B)(i) and Count II, possession of stolen property, a Class D felony, I.C. § 35-43-4-2(b). On August 26, 2008, the State filed an additional Information under cause number 34C01-

0808-FD-171 (FD-171), charging Roberts with possession of stolen property, a Class D felony, I.C. § 35-43-4-2.

On September 9, 2009, Roberts entered into a guilty plea to the Class D felonies in cause numbers FD-118 and FD-171, with the executed portion of the sentence in each charge to be capped at one and one-half years. Additionally, in cause number FB-137, Roberts pled guilty to burglary, a Class C felony, as a lesser included offense of Count I, with the executed portion of the sentence to be capped at five years. The State dismissed Count II.

On November 18, 2009, during the sentencing hearing, the trial court noted the following aggravating circumstances: Roberts' juvenile adjudications; his one prior felony and six misdemeanor convictions; he was on probation at the time he committed the current offenses; and as the most serious aggravating circumstance, the fact that one of the victims was his grandmother. The trial court found the following mitigating circumstances: his mental health issues; hardship on his wife and children, however, the trial court noted that in essentially all cases, when a person goes to prison, his family is impacted; and the fact that he pled guilty, although that was tempered by the benefit he received from the plea agreement. In cause number FD-118, the trial court sentenced Roberts to three years, with one and one-half years executed and the balance to be served on supervised probation. In cause number FD-171, he was sentenced to three years, with one and one-half years executed and one-half years suspended. Finally, in cause number FB-137, the trial court sentenced Roberts to eight years with five years executed and three years suspended to be served on supervised

probation. The sentences were to run consecutive, for a total of fourteen years of which eight are executed, and six years to be served on supervised probation.

Roberts now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Standard of Review

Initially, we note that the State has failed to file an appellee's brief. "The obligation of controverting arguments presented by the appellant properly remains with the State." *Mateyko v. State*, 901 N.E.2d 554, 557 (Ind. Ct. App. 2009), *trans. denied*. Where, as here, the appellee fails to submit a brief, the appellant may prevail by making a *prima facie* case of error, *i.e.*, an error at first sight or appearance. *Id.* Still, we must correctly apply the law to the facts of the record to determine if reversal is required. *Id.*

Roberts was convicted of two Class D felonies and one Class C felony. A person who commits a Class D felony shall be imprisoned for a fixed term of between one-half year to three years, and the advisory sentence is one and one-half years. I.C. § 35-50-2-7. A person who commits a Class C felony shall be imprisoned for a fixed term of between two and eight years, with the advisory sentence being four years. I.C. § 35-50-2-6.

"[S]entencing decisions rest within the sound discretion of the trial court and are reviewed on appeal 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. As 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 occurs if the decision is clearly against the logic and effects of the facts and

circumstance before the court, or the reasonable, probable and actual deductions to be drawn therefrom. *Id.* The weight to be given to properly found aggravating and mitigating circumstances is a determination made by the trial court and not subject to review on appeal. *Id.* at 491.

II. *Improper Aggravators*

Roberts argues that the trial court erred when it sentenced him. Specifically, he argues that the trial court “improperly relied upon a history of unrelated misdemeanor convictions and a very old [felony] conviction.” (Appellant’s Br. p. 5).

In this case, the trial court found as aggravating circumstances: (1) Roberts’ criminal history, which included a prior felony conviction for theft from 1995 and six misdemeanor convictions; (2) the fact that he was on probation at the time he committed the current offenses; and (3) one of the victims was his grandmother. To the extent that Roberts argues that the trial court’s reliance on his criminal history was misplaced, we disagree and note that a defendant’s criminal history has been identified by our legislature as a permissible aggravator. *See* I.C. § 35-38-1-7.1(a)(2). While “[t]he significance of a criminal history varies based on the gravity, nature and number of prior offenses as they relate to the current offense,” we no longer review the trial court’s weighing of aggravating factors. *Morgan v. State*, 829 N.E.2d 12, 15 (Ind. 2005); *Anglemyer*, 868 N.E.2d at 491. The trial court was not required to ignore his criminal history just because it was mainly unrelated to the current offenses.

Even if we were to find that Roberts' criminal history was an invalid aggravator, the trial court identified two additional aggravating circumstances other than his criminal history: the fact that he was on probation at the time he committed the offenses, and, the as a serious aggravating circumstance, the fact that one of the victims was his grandmother. Because we no longer review the weighing by the trial court, these two aggravating circumstances alone could outweigh the mitigating circumstances. Thus, the trial court did not err when it considered his criminal history as an aggravating circumstance.

III. *Appropriateness of Roberts' Sentence*

Roberts contends that his sentence is inappropriate considering the nature of his offense and his character. Regardless of whether the trial court has sentenced the defendant within its discretion, we have the authority to independently review the appropriateness of a sentence authorized by statute through Indiana Appellate Rule 7(B). *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008). That rule permits us to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). "Ultimately the length of the aggregate sentence and how it is to be served are the issues that matter." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). "The principle role of appellate review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived

correct result in each case.” *Id.* at 1225. The defendant carries the burden to persuade us that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

With regard to the nature of the offender, we note that Roberts committed acts of theft on three separate instances only months apart. First, on April 19, 2008, Roberts broke into his grandmother’s house and stole between \$21,000 and \$30,000 in cash, as well as various pieces of jewelry. Roberts’ grandmother intended to use the money he stole for a family business she owned. As a result of the theft, Roberts’ uncle, Dale Lewis (Lewis), testified that the loss of money caused

irrefutable damage to the company because I have 5 other families that work for me and this was a real blow to the finances of this company. With the economic times as of today, having to borrow that kind of money not knowing if I’m ever going to get it back or not, it was just, it’s just damaging.

(Transcript p. 19). Two months later, on June 3, 2008, Roberts stole several metal items from a barn with the intent to sell those items. Finally, on August 26, 2008, Roberts stole a purse from a substitute teacher at his son’s school. It is clear that Roberts believed that he was above the law and continued on his path of crime until he was finally caught.

Turning to the character of the offender, Roberts is clearly unable to learn from his mistakes. In addition to the fact that he committed the current offenses while on probation, he committed all three crimes in a span of five months. To top it off, he stole from his own

family members—namely, his elderly grandmother. He also caused damage to the family company and affected the lives of five other families by his actions.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not err in considering certain aggravating circumstances and the sentence was not inappropriate when considering the nature of the offender and the offense.

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.