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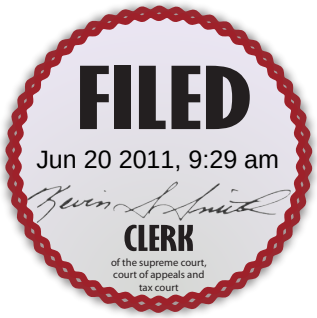

ATTORNEY FOR APPELLANT:

MARK SMALL
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ANGELA N. SANCHEZ
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

SPENCER MCCOMBS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 38A04-1008-CR-551
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE JAY CIRCUIT COURT
The Honorable Brian D. Hutchison, Judge
Cause No. 38C01-1004-FA-3

June 20, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Spencer McCombs appeals his sentence following a plea of guilty to class A felony dealing in cocaine.[1]

We affirm.

ISSUE

Whether the trial court erred in sentencing McCombs.

FACTS

On April 1, 2010, officers with the Portland Police Department and the Jay County Probation Department encountered McCombs in the living room of a probationer's apartment during a probation search. McCombs was holding a clear plastic box, which contained a substance that appeared to be cocaine. Officers also discovered a pill bottle, containing what appeared to be cocaine, in McCombs' pocket. In McCombs' bedroom, officers discovered digital scales and cash. Subsequent tests revealed that the box contained approximately sixty-three grams of cocaine, and the pill bottle contained approximately four grams of cocaine. McCombs admitted that he and his roommate intended to deliver the cocaine.

On April 5, 2010, the State charged McCombs with Count 1, class A felony dealing in cocaine; Count 2, class A felony possession of cocaine; and Count 3, class D felony maintaining a common nuisance. On July 6, 2010, McCombs and the State

[1] Ind. Code § 35-48-4-1.

entered into a plea agreement, whereby McCombs agreed to plead guilty to Count 1, in return for which the State agreed to dismiss the remaining counts. As to the executed portion of McCombs' sentence, McCombs and the State agreed to a "cap of 20 years[.]" (App. 10).

The trial court held a guilty plea hearing on July 22, 2010, after which the trial ordered a pre-sentencing investigation report ("PSI"). The PSI reported that McCombs had no prior criminal history, either as a juvenile or adult.

The trial court accepted the guilty plea and held a sentencing hearing on August 24, 2010. The trial court found McCombs' lack of criminal history, age of nineteen years, and remorse to be mitigating circumstances. The trial court found the substantial amount of cocaine in McCombs' possession to be an aggravating circumstance. Specifically, the trial court noted McCombs' case to be "one of the largest cocaine dealing arrangements that Jay County has uncovered in the last twenty years." (Sent. Tr. 28). The trial court, however, found that the mitigating circumstances outweighed the aggravating circumstance. The trial court then sentenced McCombs to an executed sentence of twenty years.

DECISION

McCombs asserts that the trial court erred in sentencing him. Specifically, he argues that the trial court failed to consider his guilty plea as a mitigating circumstance and that his sentence is inappropriate because the trial court failed to suspend a portion of his sentence.

1. Guilty Plea

McCombs contends that the trial court abused its discretion by failing to identify his guilty plea as a mitigating circumstance. We disagree.

Sentences are within the trial court's 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 record does not support the reasons given for imposing the sentence, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration. *Id.* at 490-91.

> We have held that a defendant who pleads guilty deserves "some" mitigating weight be given to the plea in return. But an allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is not only supported by the record but also that the mitigating evidence is significant. And the significance of a guilty plea as a mitigating factor varies from case to case. For example, a guilty plea may not be significantly mitigating when it does not demonstrate the defendant's acceptance of responsibility, . . . or when the defendant receives a substantial benefit in return for the plea.

Anglemyer, 875 N.E.2d at 220-21.

Regarding the acceptance of responsibility by pleading guilty, "the record shows that the plea agreement was 'more likely the result of pragmatism than acceptance of responsibility and remorse.'" *Id.* at 221 (quoting *Mull v. State*, 770 N.E.2d 308, 314 (Ind. 2002) (citations omitted)). This is so because the evidence against McCombs was overwhelming. *See Primmer v. State*, 857 N.E.2d 11, 16 (Ind. Ct. App. 2006) ("The plea may also be considered less significant if there was substantial admissible evidence of the defendant's guilt.").

Moreover, McCombs received a significant benefit from his guilty plea. In exchange for his guilty plea, the State dismissed two charges, one of which was a class A felony. Thus, we do not find that the trial court abused its discretion in failing to identify McCombs' guilty plea as a mitigating circumstance because we cannot say that it was significant. *See Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005) ("[A] guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea . . . ."). We therefore conclude the trial court did not abuse its discretion by omitting reference to the plea when imposing sentence.[2]

2. Inappropriate Sentence

McCombs also asserts that his sentence is inappropriate. He argues that the trial court should have suspended a portion of his sentence.

With exceptions not applicable in this case, a trial court "may suspend any part of a sentence for a felony[.]" I.C. § 35-50-2-2. We review a decision not to suspend a sentence only for an abuse of discretion. *Turner v. State*, 878 N.E.2d 286, 296 (Ind. Ct. App. 2007). "The suspension of a sentence is a matter of grace and a judicial favor to a defendant. In other words, a suspended sentence is not something to which a defendant has a right or an entitlement." *Id.*

Here, the trial court sentenced McCombs to an executed sentence of twenty years. Thus, the trial court sentenced McCombs to the maximum executed sentence allowed

[2] To the extent McCombs argues that the trial court failed to give sufficient weight to any of the mitigating circumstances, we note that 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. *Anglemyer*, 868 N.E.2d at 490.

under the plea agreement and the minimum sentence provided by law. *See* I.C. § 35-50-2-4 (providing that a "person who commits a Class A felony shall be imprisoned for a fixed term of between twenty (20) and fifty (50) years, with the advisory sentence being thirty (30) years"); I.C. § 35-50-2-1(c)(2). Although McCombs received the maximum executed sentence allowed under the plea agreement, he could have received a greater aggregate sentence under the plea agreement, which imposed no minimum total sentence.[3] Given the large quantity of cocaine found in McCombs' possession, we cannot say that the trial court abused its discretion in declining to suspend a portion of the minimum sentence.

In light of the nature of his offense, we also cannot say that McCombs has persuaded this court that his sentence is inappropriate. *See Anglemyer*, 868 N.E.2d at 494 (stating that it is the defendant's burden to "'persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review'") (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)). We therefore find McCombs' executed sentence of twenty years to be appropriate.

Affirmed.

RILEY, J., and BARNES, J., concur.

[3] For example, the trial court could have sentenced McCombs to the advisory sentence of thirty years, with ten years suspended. Such a sentence would subject McCombs to the revocation of probation, requiring him "to serve up to the full original sentence." *See Davidson v. State*, 926 N.E.2d 1023, 1025 (Ind. 2010) (determining that a reviewing court is not precluded from "determining a sentence to be inappropriate due to its overall sentence length despite the suspension of a substantial portion thereof").