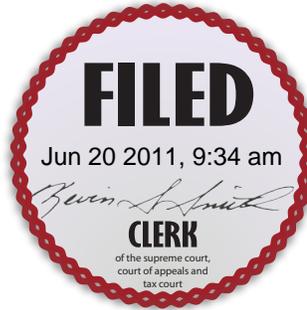


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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NELSON E. RIOS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A05-1010-CR-612

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Steven R. Eichholtz, Jr., Judge  
Cause No. 49G20-0909-FC-79297

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**June 20, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**DARDEN, Judge**

STATEMENT OF THE CASE

Nelson Rios appeals the sentence imposed by the trial court upon resentencing for his convictions for two counts of class C felony dealing in a look-alike substance.<sup>1</sup>

We affirm.

ISSUE

Whether the trial court erred in sentencing Rios.

FACTS

The relevant facts are set forth in this court's decision in *Rios v. State*, 930 N.E.2d 664, 665-66 (Ind. Ct. App. 2010), which reads as follows:

In August of 2009, an Indianapolis Metropolitan Police ("IMPD") officer advised Detective Jamie Guilfooy of the IMPD that a confidential informant named Demetrius Graves would be willing to make a drug buy for IMPD. In mid-August, Guilfooy met with Graves, who "told [him] he could buy . . . amounts of cocaine from" Rios, who "was involved in the trafficking of cocaine."

On September 1, 2009, Guilfooy and other officers met with Graves to arrange a controlled drug buy. Graves called Rios and arranged to meet at a restaurant to purchase one-half ounce of cocaine for \$485.00. Guilfooy searched Graves and his vehicle, confirmed that Graves had no money or drugs, and then provided Graves with \$485 in pre-recorded buy money to purchase the cocaine. Rios arrived as scheduled, walked to Graves' driver's side window, made a hand-to-hand exchange with Graves, and then left the area.

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<sup>1</sup> Ind. Code § 35-48-4-4.6.

Guilfoy followed Graves' vehicle to a nearby meeting place. There, Graves handed Guilfoy the plastic bag containing an off-white rock-like substance that he had obtained from Rios; Guilfoy again searched Graves and his vehicle; and Guilfoy gave Graves \$100.00 "for his service." Guilfoy sent the bag containing what he believed to be one-half ounce of cocaine to the crime laboratory for testing.

One week later, on September 8, 2009, consistent with the general procedure of conducting "at least two (2), three (3) buys off the individual, so it shows a pattern," Graves and Guilfoy met again; Graves called Rios and arranged for another buy at the same restaurant. Graves was again searched, then given \$485 in pre-recorded buy money. Graves met Rios and again engaged in a hand-to-hand transaction. Guilfoy again followed Graves. At the meeting place, Graves handed him "the white package" that "he had purchased from Mr. Rios," and Graves and his vehicle were searched. Guilfoy returned to his office, and sent the substance purchased from Rios for laboratory testing.

The next day, September 9, 2009, Guilfoy learned that the substances obtained from Rios on September 1<sup>st</sup> and September 8<sup>th</sup> were not cocaine but a look-alike substance. Guilfoy located Graves, had Graves arrange to meet Rios, and placed Graves under surveillance. When Graves picked up Rios, Guilfoy ordered a traffic stop of Graves' vehicle. Officers arrested Graves and Rios. The search of Rios incident to his arrest found a purple Crown Royal bag tucked into the waistband of his pants. The bag contained two plastic bags of a look-alike substance and a bag of marijuana. The search of Graves incident to his arrest found in his shoe more than \$500 of the pre-recorded buy money given to Graves by Guilfoy to make the two buys of cocaine.

On September 15, 2009, the State charged Rios with ten counts: two counts of conspiracy to commit dealing in a look-alike substance, a class C felony; two counts of dealing in a look-alike substance, a class C felony; two counts of theft of police department funds, a class D felony; three counts of possessing a look-alike substance, a class C misdemeanor; and possession of marijuana, a class A misdemeanor. On October 30, 2009, Rios moved to be tried separately from Graves, and the motion was granted on November 12, 2009.

On November 18, 2009, a jury trial was held, and the above evidence was heard. The jury found Rios guilty on all ten counts. Merging several counts, the trial court entered judgment of conviction on only six counts: two counts of dealing in a look-alike substance, a class C felony; two counts of theft, a class D felony; one count of possession of marijuana, a class A misdemeanor; and one count of a possessing a look-alike substance, a class C misdemeanor.

On December 1, 2009, the sentencing hearing was held. The trial court noted twenty-nine year old Rios' "lengthy juvenile history," and that his adult criminal history began when Rios was seventeen. The trial court then found Rios' "criminal history, including seven prior felony convictions as well as just recently coming off of parole at the time of this offense, to be aggravating circumstances," and that there were "no mitigating circumstances in this matter." The trial court ordered Rios to serve a five-year sentence for each dealing in a look-alike conviction, and "[b]ased on aggravating factors, that those sentences shall run consecutive[ly]." The trial court sentenced Rios to serve concurrently the advisory 1½ -year terms for each of the two class D felony theft convictions, a one-year term for the class A misdemeanor possession of marijuana conviction, and sixty days for the class C misdemeanor possessing a look-alike substance conviction. Thus, an aggregate ten-year sentence was imposed.

(Footnotes and citations to the record omitted).

On appeal, Rios argued that the trial court improperly sentenced him to consecutive sentences on the two counts of dealing in a look-alike substance. Finding that the two convictions arose from "virtually identical drug deals," this court agreed. 930 N.E.2d at 669. Accordingly, this court reversed the trial court's order and remanded to the trial court for a new sentencing determination. In so doing, this court noted that "in resentencing Rios to serve concurrent terms on the dealing in look-alike convictions, the trial court retains its rights to enhance the advisory term based on any factors it finds applicable." *Id.*

The trial court held a resentencing hearing on September 13, 2010. Rios presented as mitigating circumstances the hardship his imprisonment would impose on his daughter and mother and his participation in substance abuse programs and therapy while incarcerated.

The trial court again found Rios' criminal history, including "six misdemeanor convictions and seven prior felony convictions," and "the fact that [Rios] had just recently come off of parole at the time this offense was committed,"<sup>2</sup> to be aggravating circumstances. (Tr. 14). The trial court found no mitigating circumstances.

The trial court then re-imposed the original sentences on Counts 4, 8, 9, and 10. For each count of felony dealing in a look-alike substance, the trial court sentenced Rios to eight years, with three years suspended. The trial court ordered that the sentences be served concurrently, for a total executed sentence of five years.

### DECISION

Rios asserts that the trial court erred in sentencing him. Specifically, he argues that the trial court failed to enter an adequate sentencing statement and failed to consider mitigating circumstances. He also asserts that his sentence is inappropriate.<sup>3</sup>

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<sup>2</sup> According to the PSI, Rios was released to parole supervision on October 15, 2007, and was discharged from parole on September 13, 2009, after he committed the instant offense but prior to the State filing charges in this case.

<sup>3</sup> We remind Rios' counsel that "whether a trial court has abused its discretion by improperly recognizing . . . mitigators when sentencing a defendant and whether a defendant's sentence is inappropriate under Indiana Appellate Rule 7(B) are two distinct analyses." *Hape v. State*, 903 N.E.2d 977, 1000 n.12 (Ind. Ct. App. 2009), *trans. denied*.

## 1. Sentencing Statement

Rios argues that the trial court's sentencing statement is inadequate. 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). Thus, we review a sentence for abuse of that discretion. *Id.* "One way in which a trial court may abuse its discretion is failing to enter a sentencing statement . . ." *Id.* In *Anglemyer*, Indiana's Supreme Court explained that

Indiana trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. In order to facilitate its underlying goals, the statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating.

*Id.* (internal citations omitted).

We acknowledge that the trial court's sentencing statement could have been more detailed. However, the trial court did identify two aggravating circumstances in sentencing Rios and found no mitigating circumstances. We therefore find that the sentencing statement is adequate.

## 2. Mitigating Circumstances

Rios also asserts that the trial court abused its discretion in failing to consider the hardship his imprisonment will impose on his family and his efforts at rehabilitation to be mitigating circumstances. A sentence that is within the statutory range is subject to

review only for an abuse of discretion. *Id.* A trial court may abuse its discretion 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 sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law.

*Id.* at 490-91.

The failure to find a mitigating circumstance clearly supported by the record may imply that the trial court overlooked the circumstance. The trial court, however, is not obligated to consider “alleged mitigating factors that are highly disputable in nature, weight, or significance.” The trial court need enumerate only those mitigating circumstances it finds to be significant. On appeal, a defendant must show that the proffered mitigating circumstance is both significant and clearly supported by the record.

*Rawson v. State*, 865 N.E.2d 1049, 1056 (Ind. Ct. App. 2007) (internal citations omitted).

a. *Hardship*

Rios contends that the trial court’s failure to find as a mitigating circumstance that his imprisonment will result in undue hardship on Rios’ dependents “is against the weight of the evidence . . . .” Rios’ Br. at 11. A trial court is not required to find that a defendant’s incarceration would result in an undue hardship on his dependents. *Benefield v. State*, 904 N.E.2d 239, 247 (Ind. Ct. App. 2009), *trans. denied*. “Many persons convicted of crimes have dependents and, absent special circumstances showing that the hardship to them is ‘undue,’ a trial court does not abuse its discretion by not finding this to be a mitigating factor.” *Id.*

During the sentencing hearing, Rios testified that he has a one-year old-daughter and that his mother is disabled. Rios, however, presented no evidence that he has been ordered to pay, or has paid, child support for his daughter and stated that he would like to “help [his] mother because she hasn’t got [sic] her disability yet.” (Tr. 9).

Here, Rios presented no evidence of special circumstances. We therefore find no abuse of discretion in not finding that his incarceration will impose an undue hardship on his family to be a mitigating circumstance.

b. *Efforts at rehabilitation*

Rios also contends that the trial court improperly overlooked his attempts at rehabilitation while incarcerated. “[P]ositive adjustment to incarceration is relevant mitigating evidence and may not be excluded from the sentencer’s consideration.” *Wilkes v. State*, 917 N.E.2d 675, 690 (Ind. 2009), *reh’g denied, cert. denied*, 131 S. Ct. 414 (2010). “This is an application of the general rule that ‘the sentence may not refuse to consider . . . any relevant mitigation evidence.’” *Id.* (quoting *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986)).

Although the trial court is obligated to receive and consider factors, the trial court is not obligated to accept the defendant’s contentions as to what constitutes a mitigating circumstance or to give the proffered mitigating circumstances the same weight the defendant does. . . . The trial court is required to accept as mitigating a circumstance that is established by the facts and as a matter of law is to be considered. But it is not reversible error to fail to consider a factor that is not significant in relation to all the circumstances of the case.

*Id.* (internal citations omitted).

In this case, Rios presented as a mitigating circumstance his participation in a substance abuse program and therapy while incarcerated for the instant offense. Rios, however, presented no evidence regarding the nature of these programs or whether he has completed them. While we commend Rios for his attempts to better himself, we cannot say that he has presented a significant mitigating circumstance. Accordingly, we find no abuse of discretion in failing to find this to be a mitigating circumstance.

Even if this court were to find the trial court's sentencing statement inadequate or that the trial court abused its discretion in failing to consider Rios' proffered mitigating circumstances, this court would have at least three courses of action:

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

Here, the record clearly supports the finding of Rios' criminal history 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). Rios' criminal history far outweighs the proffered mitigating circumstances. Thus, error, if any, in sentencing Rios was harmless.

### 3. Inappropriate Sentence

Rios 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(a). The potential maximum sentence is eight years. *Id.* In this case, the trial court sentenced Rios to concurrent maximum sentences for each dealing in a look-alike substance count.

The record reveals that Rios had been adjudicated a juvenile delinquent several times and has numerous prior convictions, including drug-related and felony convictions. The record also shows that Rios has violated probation three times; was on parole when he committed the instant offense; and has an extensive record of arrests. Thus, Rios clearly has a disregard for the law. *See, e.g., Cotto*, 829 N.E.2d at 526 (finding that a defendant's record of arrests "may be relevant to the trial court's assessment of the defendant's character in terms of the risk that he will commit another crime"). We therefore cannot say that Rios' sentence is inappropriate.

Affirmed.

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