

Case Summary

Kenneth Beavers pled guilty pursuant to a plea agreement to forgery as a Class C felony and being a habitual offender. In exchange, the State dismissed one charge in the instant case, charges in another case pending against Beavers, and agreed to a thirteen-year executed sentencing cap. The trial court accepted the plea and sentenced Beavers to eleven years executed in the Department of Correction and two years suspended to probation. On appeal, Beavers argues that the trial court abused its discretion by failing to properly support the aggravators with more than a perfunctory recitation and failing to recognize several mitigators and that his sentence is inappropriate in light of the nature of the offense and his character. Concluding that the trial court did not abuse its discretion and that Beavers' sentence is not inappropriate, we affirm.

Facts and Procedural History

On September 17, 2008, Beavers pled guilty pursuant to a plea agreement to forgery as a Class C felony¹ and being a habitual offender.² In exchange, the State agreed to dismiss a Class D felony theft charge³ in this case and outstanding charges in another case against Beavers⁴ and agreed to a thirteen-year executed sentencing cap. At the guilty plea hearing, the State laid a factual basis, establishing that on March 15, 2007, Beavers intentionally wrote a check for \$19.00 to Gas America in Tippecanoe County

¹ Ind. Code § 35-43-5-2(b).

² Ind. Code § 35-50-2-8.

³ Ind. Code § 35-43-4-2(a).

⁴ Beavers was charged with maintaining a common nuisance as a Class D felony and possession of marijuana as a Class A misdemeanor under Cause No. 79D04-0606-FD-00080. Additionally, Beavers does not appeal the sentence imposed on the Petition to Revoke Probation under Cause No. 79D02-0108-CF-00105.

without the permission of the account holders. Beavers also admitted that he had previously been convicted of three felonies. The trial court later accepted the plea agreement.

At his sentencing hearing, Beavers testified that he had been working to improve his life and recognized that his substance abuse problem was a major factor in all the criminal offenses he had committed. Beavers also stated that he had recently discovered, through a DNA test, that he was the father of a child. After argument from both sides, the trial court sentenced Beavers as follows:

You have a long history of not doing well on probation after having many chances, including in this case where we were all set to go to sentencing [under Cause No. 79D02-0108-CF-00105] and you violated your probation with this. So that's the easy one.

In terms of aggravating factors, you do have a history of criminal or delinquent behavior. You have recently violated the conditions of probation and pre-trial release.

The only mitigating factor I can find is your difficult childhood and the mental illness that it's caused and that certainly puts you at a tremendous disadvantage. It also makes you a risky citizen. And if anybody is going to change it, it's going to be you, and you're going to have to do it and you start at a disadvantage to a lot of the other people around you who had more direction in their childhood than you did.

I'm going to sentence the defendant to five years on the C felony enhanced by eight years on the habitual offender for a total of thirteen years, of which eleven years shall be executed in the Department of Correction and two years shall be suspended on probation.

Tr. p. 41-42. Beavers' executed sentence of eleven years is two years less than the sentencing cap. The trial court also ordered Beavers to pay \$19.00 in restitution. Beavers now appeals his sentence.

Discussion and Decision⁵

⁵ We remind Beavers' counsel that the Appellant's Appendix should contain a table of contents. Ind. Appellate Rule 50(B)(1).

On appeal, Beavers argues that the trial court abused its discretion in sentencing him and that his sentence is inappropriate in light of the nature of the offense and his character.⁶

I. Abuse of Discretion

Beavers argues that the trial court abused its discretion by failing to provide more than a perfunctory recitation of the aggravating circumstances and failing to recognize several additional mitigating circumstances. Sentencing 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 (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.* We 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.

⁶ Beavers frames his argument solely as whether his sentence is inappropriate. The State construes Beavers' argument, as do we, as including the contention that the trial court abused its discretion by failing to provide more than a perfunctory recitation of statutory aggravating circumstances and failing to find several additional mitigating circumstances, including his willingness to make restitution, his acceptance of responsibility by pleading guilty, and undue hardship to Beavers' minor child. Whether a trial court has abused its discretion by improperly recognizing aggravators and mitigators and ordering an executed sentence rather than a suspended one and whether a defendant's sentence is inappropriate under Indiana Appellate Rule 7(B) are two distinct analyses. *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008).

However, 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).

With regard to the aggravators, Beavers argues that the aggravators found by the trial court, that is, his history of criminal and delinquent behavior and that he recently violated the terms of his probation and pre-trial release, were merely perfunctory recitations of statutory factors that were insufficient to afford this Court an adequate basis for review. Although a perfunctory recitation and conclusive listing of the statutory factors to be considered is not enough to provide an adequate basis for review of a sentence, *Ridenour v. State*, 639 N.E.2d 288, 296 (Ind. Ct. App. 1994), the trial court here did provide an adequate sentencing statement. The State described Beavers' history of criminal activity and substance abuse, and the trial court then revoked Beavers' probation in an unrelated case and explained that Beavers had a history of failing to meet the terms of probation and a history of criminal behavior. These aggravators were supported by the record and clear from the trial court's statement.

With regard to the mitigators, Beavers argues that the trial court failed to consider his willingness to make restitution, his guilty plea, and undue hardship on his minor child. First, Beavers argues that the fact that he did not dispute the trial court's order to pay \$19.00 in restitution is mitigating. Beavers did not affirmatively express a desire to make restitution or argue that his "willingness to make restitution" was a mitigating circumstance at trial. We will not consider this mitigator for the first time on appeal. *See Spears v. State*, 735 N.E.2d 1161, 1167 (Ind. 2000), *reh'g denied*.

Second, Beavers argues that his acceptance of responsibility by pleading guilty is a mitigating circumstance. However, Beavers received a benefit in exchange for his plea: the State dropped other charges against him in the instant case, dropped charges in another case, and agreed to an executed sentencing cap of thirteen years. Additionally, the probable cause affidavit included in the PSI reveals that Beavers was caught on videotape at the Wal-Mart at the date and time where a fraudulent check was written from the victims' account, and he was recognized on the tape by a family member of the victims. We do not conclude that Beavers' decision to plead guilty is sufficient to mitigate his sentence because he received a substantial benefit from the plea and the evidence against him is strong. *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 or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one.”), *trans. denied*.

Last, Beavers argues that the trial court should have found that incarceration would result in undue hardship to his minor child.⁷ A trial court “is not required to find a defendant’s incarceration would result in undue hardship on his dependents.” *Davis v. State*, 835 N.E.2d 1102, 1116 (Ind. Ct. App. 2005), *trans. denied*. Indeed, “[m]any persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship.” *Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999).

⁷ To the extent that Beavers is arguing that the trial court abused its discretion by failing to sentence him to a placement in community corrections instead of the Department of Correction so that he could spend time with and support his child, we note that the location where a sentence is to be served is not subject to review for abuse of discretion. *See King*, 894 N.E.2d at 267.

Prison is always a hardship on dependents. The PSI reflects that while Beavers was incarcerated paternity was established, and he was ordered to pay \$120 per month in child support. Beavers failed to demonstrate at trial the existence of special circumstances which would require the trial court to find this proffered mitigator. *See Weaver v. State*, 845 N.E.2d 1066, 1074 (Ind. Ct. App. 2006), *trans. denied*. The trial court did not abuse its discretion in not finding undue hardship to be a mitigating circumstance. In conclusion, the trial court did not abuse its discretion in sentencing Beavers.

II. Inappropriate Sentence

Although a trial court may have acted within its lawful discretion in imposing a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a 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.” *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer*, 868 N.E.2d at 491). The burden is on the defendant to persuade us that his or her sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

The advisory sentence for a Class C felony is four years, with a minimum of two years and a maximum of eight years. Ind. Code § 35-50-2-6. The trial court shall sentence a person found to be a habitual offender to an additional term that is not less than the advisory sentence for the underlying offense and not more than three times the

advisory sentence for the underlying offense, with a cap of thirty years. Ind. Code § 35-50-2-8. Here, the trial court sentenced Beavers to five years for the Class C felony forgery, added eight years for the habitual offender enhancement, and ordered eleven of those thirteen years to be executed.

Regarding the nature of the offense, we conclude that there is nothing particularly egregious about the forgery to which Beavers pled guilty. However, we do note that Beavers wrote several unauthorized checks from the same victims' account at various locations around Tippecanoe County. Also, Beavers had a petition to revoke probation pending at the time of this offense.

Regarding the character of the offender, the record demonstrates that Beavers has a serious history of criminal activity and substance abuse. As a juvenile, Beavers was twice adjudicated a delinquent child. As an adult, Beavers has convictions for operating a vehicle while never receiving a license as a Class C misdemeanor, burglary as a Class B felony, possession of marijuana as a Class A misdemeanor, three counts of robbery as a Class C felony, two counts of theft as a Class D felony, and possession of a Schedule II controlled substance as a Class D felony. At the time the pre-sentence investigation report ("PSI") was compiled, there were two other pending cases against Beavers. Additionally, Beavers has twice been found to have violated his probation, resulting in its revocation both times. Beavers was on probation when he committed the instant offense.

Beavers wrote in his version of his offenses, "Everything I have ever done had something to do with drugs." PSI 11. Beavers' reported history of substance abuse is astounding and saddening. He reported that he began using marijuana occasionally

between the ages of three and five. Between the ages of five and nine, Beavers used marijuana nightly except when he was in a foster home. He used marijuana daily between the ages of twelve and thirty-one. He also used hashish during this time. As a young man, Beavers began snorting and then shooting cocaine. He experimented with methamphetamine, L.S.D., mushrooms, mescaline, ecstasy, heroin, opium, morphine, inhalants, and Lortab. Daily between the ages of twenty-nine and thirty-one, Beavers used illegally obtained Oxycontin, Dilaudid, Percocet, Valium, Xanax, and Fentanyl. Beavers reported that he completed an inpatient substance abuse treatment program in 1997 and 1998 at Riverside, that he started a substance abuse treatment program in 2001 at Riverside but did not finish, and that he started a substance abuse treatment program in 1997 at Home with Hope but did not finish. This history reflects poorly on his character. Beavers has not convinced us that his sentence is inappropriate.

Finally, Beavers asks that he receive a sentence in community corrections so that he can gainfully work, pay child support, and visit with his child. Although we may consider the location where a sentence is to be served when exercising our authority under Indiana Appellate Rule 7(B), *Biddinger v. State*, 868 N.E.2d 407, 414 (Ind. 2007), it is difficult for a defendant to prevail on a claim that his placement is inappropriate because we are not in as good a position to determine the location of a sentence as trial courts are. *See Fonner v. State*, 876 N.E.2d 340, 343-44 (Ind. Ct. App. 2007) (“[A] trial court is aware of the availability, costs, and entrance requirements of community corrections placements in a specific locale.”). Beavers has failed to persuade us that his placement in prison as opposed to a community corrections alternative is inappropriate.

Affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.