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IN THE
COURT OF APPEALS OF INDIANA

LEE KERSHAW,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 10A01-1011-CR-572
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CLARK SUPERIOR COURT
The Honorable Vicki L. Carmichael, Judge
Cause No. 10D01-1005-MR-97

June 24, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Lee Kershaw appeals his aggregate sixty-year sentence following his convictions for one count of Class A felony voluntary manslaughter and one count of Class A felony attempted voluntary manslaughter. We affirm.

Issue

Kershaw raises two issues, which we combine and restate as whether the trial court abused its discretion in sentencing him.

Facts

Kershaw was married to L.K. for fifteen years. However, in 2009, the two divorced. After the divorce was finalized in mid-November 2009, Kershaw's seventeen-year-old son, T.R., continued living at the prior marital residence in Mt. Vernon with L.K. In the early morning hours of November 21, 2009, Kershaw drove to the residence, carrying a rifle, and went inside using a key he still had for the residence. When he went into his ex-wife's bedroom, he found her in bed with Jon David, whom Kershaw blamed for breaking up his marriage. Kershaw fired a number of shots at the bed, striking David three times and killing him. L.K. rolled off the bed when the shooting began and was not shot, although there were bullet holes in L.K.'s pillow. T.R. was at home at the time and heard the shooting.

On November 21, 2009, the State charged Kershaw with murder, Class A felony attempted murder, and Class A felony burglary resulting in bodily injury. Kershaw

initially fled to Mexico, but soon thereafter turned himself in at a United States Consulate office and confessed to the crimes. On August 24, 2010, the State filed an amended information charging Kershaw with Class A felony voluntary manslaughter and Class A felony attempted voluntary manslaughter. Also on that date, Kershaw entered a "blind" guilty plea to those two charges, meaning there was no agreement as to the sentence Kershaw would receive. Tr. p. 4. On October 5, 2010, the trial court sentenced Kershaw to thirty years for each conviction, to be served consecutively for a total of sixty years. Kershaw now appeals.

Analysis

We engage in a four-step process when evaluating a sentence under the current "advisory" sentencing scheme. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). First, the trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e. to particular aggravators or mitigators, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id. Even if a trial court abuses its discretion by not issuing a reasonably detailed sentencing statement or in its findings or non-findings of aggravators and mitigators, we may choose to review the appropriateness of a sentence under Rule 7(B) instead of remanding to the trial court. See Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007).

Kershaw asserts that the trial court abused its discretion in identifying aggravating circumstances and failing to identify certain claimed mitigating circumstances. Here, the trial court found one aggravating circumstance, that the crimes took place in the presence of a person under eighteen years old. It found one mitigating circumstance, Kershaw's lack of a criminal record. Kershaw contends the trial court abused its discretion in relying upon the aggravator of the presence of a child, and in failing to recognize as mitigating his guilty plea, alleged remorse, and alleged unlikelihood that he would commit another crime.

An abuse of discretion in identifying or not identifying aggravators and mitigators occurs if it 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.'" Anglemyer, 868 N.E.2d at 490 (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)). Additionally, an abuse of discretion occurs if the record does not support the reasons given for imposing sentence, 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.

We do find one clear abuse of discretion in the trial court's sentencing statement, and that is the failure to mention Kershaw's guilty plea. Generally, "a defendant who pleads guilty deserves to have some mitigating weight extended to the guilty plea in return." Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005). "A guilty plea demonstrates a

defendant's acceptance of responsibility for the crime and at least partially confirms the mitigating evidence regarding his character." Id.

It is true that in assessing the weight to be given a guilty plea, courts often consider whether the State dismissed charges in exchange for the plea. See Marlett v. State, 878 N.E.2d 860, 866 (Ind. Ct. App. 2007), trans. denied. However, courts should not automatically presume that the State would have been able to obtain a conviction on a charge that was dismissed as part of a plea bargain. Id. "Evidentiary hurdles, witness reluctance, and other legal impediments may make it both necessary and legally required for certain charges to be dismissed. In these instances, we think that the 'benefit' to a defendant from a dismissal is not pronounced, if present at all." Id.

The State asserts here that it essentially dismissed the murder, attempted murder, and burglary charges in exchange for Kershaw's guilty plea, noting that the amended information charging him with voluntary manslaughter and attempted manslaughter was filed on the same day as Kershaw's plea. However, as the State admits, there is no written plea agreement in the record and no evidence that the State dismissed charges in exchange for Kershaw's plea. In fact, at the sentencing hearing, the State indicated simply that it believed the amended information reflected the appropriate charges in the case. It stated, with respect to psychiatric examinations of Kershaw that had been conducted, "in all honesty to the Court and everyone in the courtroom, that is why the State agreed to the voluntary manslaughter and not the original charge of murder." Tr. p. 43.

This would appear to be precisely a scenario contemplated by Marlett, where any alleged dismissal of charges in exchange for Kershaw's guilty plea did not represent a "benefit" to him. Rather, it was a recognition by the State that the evidence more closely conformed to voluntary manslaughter and attempted voluntary manslaughter charges, rather than the original murder and attempted murder charges. We also note that Kershaw's "blind" plea left sentencing entirely to the trial court's discretion. It also was entered after Kershaw had already confessed to the crimes after turning himself in to law enforcement authorities not long—apparently a matter of approximately two weeks—after he committed them. In sum, we find no reason in the record for failing to give Kershaw's guilty plea any mitigating weight.

Having concluded the trial court abused its discretion in failing to recognize Kershaw's guilty plea as a mitigator, we believe it is unnecessary to address whether the trial court also abused its discretion in failing to recognize Kershaw's remorse as a mitigator, and in recognizing the presence of a child under eighteen years old as an aggravator. Rather than remanding to the trial court for resentencing, we choose to evaluate whether, despite the trial court's abuse of discretion in sentencing Kershaw, his sentence is inappropriate in light of the nature of the offense and his character.

Although Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id.

"Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id. When reviewing a sentence under Rule 7(B), we may consider any factors appearing in the record and are not limited to those factors considered by the trial court. Calvert v. State, 930 N.E.2d 633, 643 (Ind. Ct. App. 2010).

The principal role of Rule 7(B) 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." Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008). We "should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count." Id. Whether a sentence is inappropriate ultimately turns on the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case. Id. at 1224.

Regarding Kershaw's character, he did plead guilty, as we have noted. Also, as found by the trial court, Kershaw has no prior criminal convictions. He has two prior arrests that did not result in convictions, the most recent being in 1997. He served in the military during the First Gulf War period and has been gainfully employed for most his life thereafter. Kershaw also contends that he expressed remorse for his actions, directing us to statements he made to a psychiatrist before he pled guilty in which he professed to be sorry that he had killed David. In the same breath, however, Kershaw also stated that he "hates" David, using the present tense, which the psychiatrist found significant. App.

p. 126. Kershaw also said he was "buried in guilt and rage" and called David "a piece of s***." Id. at 108, 126. We conclude that, to the extent Kershaw expressed some remorse for killing David, it was highly equivocal.

Turning to the nature of the offense, Kershaw entered his former marital residence and proceeded to shoot and kill his ex-wife's current boyfriend. By pleading guilty to attempted voluntary manslaughter, Kershaw admitted that he also intended to kill his ex-wife at the same time, but fortunately was unsuccessful in doing so. Although Kershaw understandably may have been upset by the disintegration of his marriage, the fact is that numerous marriages end without either spouse taking the kind of violent action that Kershaw took. We cannot say, despite some of Kershaw's positive character attributes, that presumptive sentences are inappropriate when considering the nature of the offenses. As for the imposition of consecutive sentences, that is justified by the fact that there were two victims in this case. See Townsend v. State, 860 N.E.2d 1268, 1273 (Ind. Ct. App. 2007) (affirming imposition of consecutive sentences for counts of murder and attempted murder in order to recognize separate harms against two separate victims), trans. denied. Kershaw's sixty-year sentence is not inappropriate.

Conclusion

Although the trial court abused its discretion in sentencing Kershaw, we conclude that his aggregate sixty-year sentence is not inappropriate in light of his character and the nature of the offenses.

Affirmed.

RILEY, J., and DARDEN, J., concur.