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FILED
Jun 29 2009, 9:03 am
CLERK
of the supreme court, court of appeals and tax court

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# IN THE
# COURT OF APPEALS OF INDIANA

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| JAMES W. OSWALT, JR., | ) | |
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| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 79A04-0812-CR-00756 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0609-FA-13

**June 29, 2009**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellant-defendant James W. Oswalt, Jr., appeals the twelve-year executed sentence that was imposed following his guilty plea to Possession of a Narcotic Drug,[1] a class B felony, claiming that the trial court abused its discretion in sentencing him. Specifically, Oswalt argues that the trial court erred in concluding that a police detective's testimony accusing Oswalt of bringing "large amounts of heroin into the community" was a proper aggravating factor. Appellant's Br. p. 11. Oswalt further argues that his sentence must be set aside because the trial court did not identify his decision to plead guilty as a mitigating factor, and that the trial court erred when it arbitrarily rejected various substance abuse treatment options that a psychologist and Oswalt's family had recommended. Finding that the trial court did not abuse its discretion in sentencing Oswalt, we affirm.

## FACTS

On September 15, 2006, Lafayette police officers executed a search warrant at Oswalt's residence, which was located within 1000 feet of a public park. The officers seized eleven glassine baggies of heroin, a spoon, a syringe containing a liquid, and a handwritten note that appeared to be a ledger setting forth amounts that other individuals owed to Oswalt.

The State charged Oswalt with two counts of dealing in a narcotic drug, a class A felony, conspiracy to commit dealing in a narcotic drug, a class A felony, possession of a narcotic drug, a class B felony, possession of paraphernalia, a class A misdemeanor,

[1] Ind. Code § 35-48-4-6.

maintaining a common nuisance, a class D felony, and possession of a syringe, a class D felony.

Prior to that arrest, Oswalt had been arrested for battery on May 20, 2006. When Oswalt was searched at the Tippecanoe County Jail, the police seized a quantity of heroin from Oswalt's clothing. The State charged Oswalt with possession of a narcotic drug, a class B felony, on February 28, 2007.

On July 15, 2008, Oswalt agreed to plead guilty to possession of a narcotic drug, a class B felony, pursuant to a plea agreement negotiated with the State. In exchange for Oswalt's guilty plea, the State agreed to dismiss all other pending charges and two petitions to revoke Oswalt's probation that the State had filed in a different cause number. The plea agreement also provided that Oswalt was to "receive a sentence of not more than twelve (12) years with a cap of twelve (12)." Appellant's App. p. 48.

The trial court accepted the plea agreement, and at the sentencing hearing that commenced on October 31, 2008, Detective Dan Shumaker of the Lafayette Police Department testified that he had information from several individuals that "Oswalt was bringing heroin into the Lafayette community." Tr. p. 18. Detective Shumaker recommended that Oswalt serve "an aggravated sentence of twelve (12) years." Id. at 19. Even though Detective Shumaker was not listed on any of the State's discovery disclosures and was not the investigating officer in the case, the prosecutor asserted that Detective Shumaker was a "victim" of the crime. Id. Oswalt did not object to Detective Shumaker's testimony.

Following the hearing, the trial court identified the following aggravating factors: (1) Oswalt committed the instant offense while out on bond;[2] (2) Oswalt's criminal history, which included prior convictions for fraud on a financial institution, attempted acquisition of a controlled substance by fraud, forgery, or deception, and at least two probation revocations; (3) prior failed attempts at rehabilitation; and (4) the fact that Oswalt was responsible for bringing a large amount of heroin into the community over the years. As for mitigating factors, the trial court found that Oswalt has a high school diploma and attended post-secondary education, incarceration would cause an undue hardship on his children, and Oswalt has "strong family support." Appellant's App. p. 74. The trial court then determined that the aggravating factors outweighed the mitigating circumstances and sentenced Oswalt to twenty years of incarceration with twelve years to be served at the Indiana Department of Correction (DOC) and the remainder to be served on supervised probation. The trial court also recommended Oswalt for re-entry and rehabilitation programs while incarcerated. Moreover, the trial court ordered Oswalt to participate in a rehabilitation program when he began probation.

At some point during the hearing, Oswalt's counsel pointed out that the sentence should not exceed twelve years and the sentence that the trial court imposed violated the terms of the plea agreement. In response, the trial court ordered Oswalt to serve "a flat twelve years." Tr. p. 27. Oswalt now appeals.

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[2] Oswalt suggests in his "statement of facts," and we agree, that he was not "out on bond" when he committed the instant offenses. Appellant's Br. p. 4. Indeed, the record shows that although Oswalt was arrested for possession of a narcotic drug on May 20, 2006, following the search at the jail, bond was not set in that case until February 28, 2007. Id. at 109-110.

## DISCUSSION AND DECISION

### I. Standard of Review

In addressing Oswalt's claims that his sentence must be set aside, we initially observe that sentencing decisions rest within the trial court's sound discretion 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 (2007). Trial courts are required to enter sentencing statements whenever imposing a sentence for a felony offense. The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. 868 N.E.2d at 490. If the recitation includes the finding of aggravating or mitigating circumstances, the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. Id. A trial court may abuse its discretion by entering a sentencing statement that includes reasons for imposing a sentence not supported by the record, omits reasons clearly supported by the record, or includes reasons that are improper as a matter of law. Id. at 490-91. Finally, the relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse. Id. at 491.

### II. Mitigating Circumstances

Oswalt maintains that the trial court abused its discretion in sentencing him when it failed to identify his plea of guilty as a significant mitigating factor. Specifically, Oswalt maintains that the trial court should have found that his decision to plead guilty

was a mitigating circumstance because he expressed remorse and "took full responsibility for his actions." Appellant's Br. p. 7.

In addressing Oswalt's contention, we note that it is within the trial court's discretion to determine both the existence and weight of a significant mitigating circumstance. Creager v. State, 737 N.E.2d 771, 782 (Ind. Ct. App. 2000). An allegation that the trial court did not identify or find a mitigating circumstance requires the defendant on appeal to establish that the mitigating evidence is both significant and clearly supported by the record. Pennington v. State, 821 N.E.2d 899, 905 (Ind. Ct. App. 2005). In other words, a trial court is not obligated to find a circumstance to be mitigating merely because it is advanced as such by the defendant. Spears v. State, 735 N.E.2d 1161, 1167 (Ind. 2000).

A guilty plea demonstrates acceptance of responsibility for a crime and must be considered a mitigating factor. Scheckel v. State, 655 N.E.2d 506, 511 (Ind. 1995). However, a plea bargain does not constitute a substantial mitigating factor when the defendant has already received a significant benefit from the plea agreement. Sensback v. State, 720 N.E.2d 1160, 1165 (Ind.1999). Moreover, a guilty plea may not rise to the level of significant mitigation where the evidence against the defendant is such that the decision to plea guilty is merely a pragmatic one. Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005).

In this case, it is apparent that Oswalt reaped a substantial benefit by pleading guilty to only one class B felony. In exchange for his guilty plea, the State dismissed a number of offenses, including three class A felonies, two class D felonies, a class A

misdemeanor, and the State's petitions to revoke probation. The plea agreement also "capped" Oswalt's sentence at twelve years, thus providing him with an additional benefit of a shorter sentence.[3] Oswalt also waited nearly two years after the charges were filed before deciding to plead guilty. Appellant's App. p. 10-16, 48. In light of these circumstances, we conclude that the trial court did not abuse its discretion when it did not identify Oswalt's guilty plea as a significant mitigating factor.

III. Aggravating Factors

Oswalt next argues that his sentence must be set aside because the trial court identified an improper aggravating factor when imposing the sentence. Specifically, Oswalt argues that the trial court improperly considered Detective Shumaker's testimony at the sentencing hearing where implicating Oswalt as a longstanding supplier of illegal drugs to individuals in Tippecanoe County. As a result, Oswalt maintains that the trial court erred in identifying his alleged prior involvement with drugs in the community as an aggravating circumstance.

In resolving this issue, we initially observe that Oswalt did not object to Detective Shumaker's testimony, and he has not asserted that the testimony was false or inaccurate. Tr. p. 17-19. Thus, Oswalt has waived the issue. See Lykins v. State, 726 N.E.2d 1265, 1276 (Ind. Ct. App. 2000) (holding that the defendant waived his argument on appeal regarding his right to remain silent when he chose to answer the trial court's questions about his finances without objection).

[3] The sentencing range for a class B felony is from six to twenty years with an advisory term of ten years. Ind. Code § 35-50-2-5.

Waiver notwithstanding, even if we assume solely for argument's sake that the trial court erred in considering Detective Shumaker's testimony and improperly identified Oswalt's alleged prior drug activity in the county as an aggravating factor, it does not necessarily follow that the sentence must be set aside. Indeed, our Supreme Court has held that a sentence may be upheld if a legitimate aggravator otherwise supports it, so long as we can say with confidence that the trial court would have imposed the same sentence in the absence of the invalid aggravating factors. Bacher v. State, 722 N.E.2d 799, 803 (Ind. 2000). A single aggravating circumstance is adequate to justify a sentence enhancement. Id. And, as Oswalt acknowledges, Indiana Code section 35-38-1-7.1(d) provides that the trial court may impose any sentence authorized by statute and permissible under the Indiana Constitution regardless of the presence or absence of aggravating or mitigating circumstances.

As discussed above, the trial court also properly identified Oswalt's criminal history and the prior failed attempts at rehabilitation as aggravating factors. Appellant's App. p. 73. In our view, these aggravating factors justified the imposition of a twelve-year executed sentence. See Garrett v. State, 714 N.E.2d 618, 623 (Ind. 1999) (holding that the trial court did not abuse its discretion because, even though trial court erred in finding one improper aggravating circumstance, other valid aggravating circumstances remained); see also Bennett v. State, 787 N.E.2d 938, 947 (Ind. Ct. App. 2003) (observing that even if the trial court erred in considering either of the two challenged aggravating circumstances, the trial court could still enhance the defendant's sentence

through the single aggravating circumstance of his criminal history).[4] As a result, Oswalt's contention fails.

## IV. Sentencing Statement

In a related issue, Oswalt claims that the trial court abused its discretion in imposing a twelve-year executed sentence because the trial court failed to adequately explain its reasons for imposing the sentence. Specifically, Oswalt contends that the trial court "arbitrarily withdrew the [sentencing] recommendations" regarding the suggested treatment options and re-entry programs when sentencing him. Appellant's Br. p. 14-15. Therefore, Oswalt claims that the trial court's "modification" of the original sentencing order was erroneous because it did not set forth sufficient reasons for rejecting the treatment options that a psychologist and family members had recommended. Id.

We note that a trial court's sentencing statement serves the primary purposes of guarding against "arbitrary and capricious sentencing" and providing an adequate basis for appellate review. Dumbsky v. State, 508 N.E.2d 1274, 1278 (Ind. 1987). Moreover, sentencing statements serve the additional goals of "contribut[ing] significantly to the rationality and consistency of sentences" and "help[ing] both the defendant and the public understand why a particular sentence was imposed." Anglemyer, 868 N.E.2d at 490.

In this case, Oswalt does not contend that the trial court's sentencing statement failed to support the initial sentence that was imposed. Rather, he claims that the

[4] There was no objection to the trial court's mistaken belief that Oswalt was on bond when he committed the instant offenses. Moreover, Oswalt does not assert on appeal that he must be resentenced as a result of the trial court's purported error. However, even if Oswalt had raised the issue, he would not have prevailed in light of the remaining aggravating factors that the trial court properly identified.

statement did not support the amended sentence of twelve years with no probation. Appellant's Br. p. 13-15. However, the record shows that the trial court sufficiently explained its reasons for imposing the initial sentence of twenty years with eight years suspended to probation. And the trial court's reasons did not change when it imposed the amended sentence that did not include a term of probation. Appellant's App. p. 71-72. In other words, Oswalt received the same twelve-year executed sentence in both the initial and amended sentence as set forth in the written plea agreement. Id. at 48. Moreover, we note that the plea agreement did not provide for a term of probation or for any treatment programs, and it is apparent that the trial court was allowing for a probationary period only after Oswalt served twelve years in the DOC. In short, the trial court amended the sentencing order to conform to the terms of the plea agreement after being apprised of the error in the initial sentence. As a result, Oswalt's claim fails.[5]

The judgment of the trial court is affirmed.

MAY, J., and BARNES, J., concur.

[5] As an aside, we note that Oswalt does not make any additional argument that his sentence was inappropriate pursuant to Indiana Appellate Rule 7(B). Even so, when considering the nature of the offense and Oswalt's character, including his prior criminal history involving fraud and convictions involving illegal substances, probation violations, and prior failed attempts at rehabilitation, it is apparent that Oswalt has not been deterred from engaging in criminal conduct. Therefore, we cannot say that the twelve-year sentence for this offense was inappropriate. See Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007) (recognizing that although Rule 7(B) does not require this Court to be "extremely deferential" to a trial court's sentencing decision, this court still gives due consideration to that decision).