

STATEMENT OF THE CASE

Jennifer Whitesell appeals the sentences imposed for her convictions for Operating a Vehicle While Intoxicated, as a Class D felony; Operating a Motor Vehicle as an Habitual Traffic Violator, as a Class D felony; and being an Habitual Substance Offender, in Cause No. 33D02-0612-FD-336 (“Cause No. 336”) and for Operating a Vehicle While Intoxicated, as a Class D felony, and Operating a Motor Vehicle as an Habitual Traffic Violator, as a Class D felony, in Cause No. 33D02-0802-FD-36 (“Cause No. 36”). Whitesell presents two issues for review:

1. Whether the trial court abused its discretion by failing to accord significant weight to her guilty plea and remorse as mitigators.
2. Whether Whitesell’s sentences are inappropriate in light of the nature of the offenses and her character.

We affirm.

FACTS AND PROCEDURAL HISTORY

On December 13, 2006, the State charged Whitesell in Cause No. 336 with operating a vehicle while intoxicated, as a Class A misdemeanor (“Count I”); operating a vehicle per se, as a Class C misdemeanor (“Count II”); public intoxication, as a Class B misdemeanor (“Count III”); and operating a motor vehicle as an habitual traffic violator, as a Class D felony (“Count IV”). The State also petitioned to enhance Whitesell’s sentence for being an habitual substance offender and to enhance Count I to a Class D felony. On October 8, 2007, Whitesell filed a plea agreement. Under that agreement, she agreed to plead guilty to Count I, enhanced to a Class D felony, and Count IV, and the State agreed to dismiss Counts II and III. The State also recommended that Whitesell be

sentenced to two years on Count I, two years on Count IV, and four years for the habitual substance offender enhancement. On December 17, 2007, the court held a sentencing hearing and took the plea agreement under advisement.

On February 8, 2008, the State charged Whitesell in Cause No. 36 with operating a vehicle while intoxicated, as a Class A Misdemeanor (“Count I”); public intoxication, as a Class B misdemeanor (“Count II”); and operating a motor vehicle as an habitual violator, as a Class D felony (“Count III”). The State also petitioned to enhance Whitesell’s sentence for being an habitual substance offender and to enhance Count I to a Class D felony. And on March 18, the State filed an amended information to add a charge of operating a vehicle with elevated blood or breath alcohol, as a Class A misdemeanor (“Count V”).¹ And on May 12, 2008, the parties filed a plea agreement in Cause No. 36, under which Whitesell agreed to plead guilty to Count I, enhanced to a Class D felony, and Count III, with sentencing to be determined by the court.

At a hearing on August 11, the court accepted the plea agreements in both cases and held a contested hearing as to sentencing in Cause No. 36. At the close of evidence, the court found as follows:

I note for the record this will be the defendant’s fifth and sixth convictions for Operating a Vehicle While Intoxicated. The sixth conviction did occur, or the arrest did occur while the defendant was out on bond in the FD-0336 case after the defendant had entered a plea of guilty in that case. I also note for the record the conviction in FD-0036, the information or the evidence contained in the report indicates that a blood test was taken following the defendant’s arrest on February 7 of 2008, at approximately 10:56 A.M. that morning. That blood test showed a result of .23 grams of alcohol per one hundred liters in the defendant’s blood at that time. I also note for the record that the defendant, at that time, did have with her her son, David,

¹ The guilty plea refers to a seatbelt violation as Count IV, but that infraction was not listed on charging information or the amended charging information.

when she was arrested for the [sic] Operating While Intoxicated in that offense. Ms. Whitesell, you indicated once during your testimony about [sic] you made “a” mistake and my note I made here was it’s not just a mistake. When I look back at the Pre-Sentence Investigation Report, the record, if from what you’ve testified to, it’s not just one mistake. It’s been a series of mistakes and I understand and I don’t dispute the fact that a person who is an alcoholic can have a relapse, but in your case, if I look back at the record, after six (6) DUI’s, it certainly would appear that there’s been more than one relapse in your case. It’s been a whole series and while I certainly can sympathize with you with respect to the situation with your children, I also question, if you’d not been using and abusing alcohol and whatever other substances you may have used or abused during that time period, that perhaps some of those things might not have been as severe or as problematic as what they have been, but when you do decide to drink alcohol and if you’re testing .23 at almost 11:00 A.M. in the morning while you’re driving your son, then that is a serious, serious question of judgment at that point in time and I understand the problems that you’ve been through and all those things, but I would have hoped, at that point in time that you would have already known that turning to alcohol at that point was not going to solve any of those problems and, indeed, it was going to make those problems much, much, much worse and that is exactly what has happened in this case.

When I weigh the aggravating factors and mitigating factors in this case, first of all, I find as a mitigating factor that the defendant has accepted responsibility for the commission of the crimes in each of the cases and has entered a plea of guilty. Now, that [sic] I find that mitigating factor somewhat lessened due to the fact that pursuant to the plea agreement in the second case that the Habitual Substance Offender Enhancement Request is going to be dismissed. I also note for the record, as stated in the evidence in that case and it certainly would appear to the Court that it would be a very strong case if the State wished to pursue it at trial, so the defendant’s plea of guilty is somewhat lessened by the fact of those factors.

As far as an aggravating factor, I do find the defendant does have a prior record of criminal convictions as pointed out previously. This would be the defendant’s fifth and sixth Operating While Intoxicated convictions. Also, after entering a plea of guilty to a charge of Operating a Vehicle as an Habitual Traffic Violator in December of 2007, the defendant still saw fit, after knowing she was an habitual traffic violator, to drive in the February 2008 case. I also find as an aggravating factor the defendant has recently violated a condition of probation. Those violations of probation are well[-]documented in the probat—it should be in the Pre-Sentence Investigation Report.

When I weigh those aggravating factors against the mitigating factors, I do find the aggravating factors do outweigh the mitigating factors and will call for imposition of an aggravated sentence in this case.

Appellant's App. at 85-87. In Cause No. 336, the court sentenced Whitesell to two years, with a two-year license suspension, on Count I and to two years, with a lifetime license suspension, on Count IV. The court ordered those sentences to be served concurrently but consecutive to a four-year enhancement for being an habitual substance offender. In Cause No. 36, the court sentenced her to two and one-half years, with a two-year license suspension, on Count I and to two and one-half years, with a lifetime license suspension, on Count III. The court ordered Counts I and III to be served concurrent with each other but consecutive to the sentence imposed in Cause No. 336, for an aggregate sentence of eight and one-half years. Whitesell now appeals.

DISCUSSION AND DECISION

Issue One: Abuse of Discretion in Sentencing

Whitesell contends that the trial court abused its discretion when it imposed an "enhanced sentence."² Appellant's Brief at 5. In particular, she argues that the court "failed to consider her guilty plea and remorse as significant mitigating circumstances." Appellant's Brief at 10. Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of that discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on other grounds on reh'g, 875 N.E.2d 218 (Ind. 2007). "An abuse of discretion occurs if the decision is clearly against the logic

² Whitesell does not specify which of her sentences she is challenging. Instead, she refers to her sentences collectively, apparently challenging the enhanced nature of her aggregate sentence.

and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.” Id. (quotation omitted).

One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that 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. Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.

Id. at 490-91.

Whitesell contends that the trial court abused its discretion when it did not assess more mitigating weight to her guilty pleas. Initially, we observe that the trial court found Whitesell’s guilty plea to be a mitigator, but also that that “mitigating factor [was] somewhat lessened” because Whitesell obtained a benefit from the plea, the dismissal of an habitual substance offender enhancement in Cause No. 36. In any event, under the advisory sentencing scheme, a trial court no longer has an obligation to “weigh” aggravating and mitigating factors against each other when imposing sentence. See Brattain v. State, 891 N.E.2d 1055, 1058 (Ind. Ct. App. 2008) (citing Anglemyer, 868 N.E.2d at 491). As such, we cannot review the weight assigned to Whitesell’s guilty pleas as mitigators. See id.

Whitesell also argues that the trial court should have given more mitigating weight to her remorse. In particular, she argues that she “showed remorse when she stated ‘[]but I realized that I did make a mistake . . . and I am willing to do whatever it take[s] to be sober.’ Remorse may be a proper mitigating circumstance. Jones v. State, 675 N.E.2d

1084, 1080 (Ind. 1996).” Appellant’s Brief at 15 (no internal citation). Whitesell’s uncited quote to her statement to the trial court and a statement of the law regarding remorse do not satisfy her burden to present a cogent argument on this issue. See Ind. Appellate Rule 46(A)(8)(a). As such, the issue is waived. See id.

Waiver notwithstanding, we briefly address the merits of Whitesell’s claim. The statement that Whitesell quotes as showing remorse is not truly a statement of remorse. Instead, Whitesell’s statement shows that she accepted responsibility for her conduct. The trial court acknowledged the same when it observed at sentencing that she had “accepted responsibility[.]” Appellant’s App. at 86. But, while the court acknowledged Whitesell’s statement that she “did make a mistake,” the court also discounted that explanation when it stated that “it’s not just one mistake. It’s been a series of mistakes” Id.

Even if we were to find that the quoted language is evidence of Whitesell’s remorse, this court gives substantial deference to a trial court’s evaluation of a defendant’s remorse. See Allen v. State, 875 N.E.2d 783, 788 (Ind. Ct. App. 2007). The trial court has the ability to directly observe the defendant and listen to the tenor of his voice and is, therefore, in the best position to determine whether the remorse is genuine. See id. Whitesell’s expression of remorse at sentencing was brief, and she does not direct us to any additional evidence that he made the trial court aware of any additional expressions of remorse. We cannot say that the trial court abused its discretion when it did not specifically identify or give weight to Whitesell’s remorse as a mitigator.

Issue Two: Appellate Rule 7(B)

Whitesell next contends that her sentence is inappropriate under Appellate Rule 7(B). Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution “authorize[] independent appellate review and revision of a sentence imposed by the trial court.” Roush v. State, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007) (alteration original). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Revision of a sentence under Appellate Rule 7(B) requires the appellant to demonstrate that his sentence is inappropriate in light of the nature of his offenses and his character. See Ind. Appellate Rule 7(B); Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We assess the trial court’s recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, “a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.” Roush, 875 N.E.2d at 812 (alteration original).

Whitesell contends that her sentence is inappropriate in light of her character. But she directs us to no facts regarding the nature of the offenses or the factual bases for her offenses. Again, revision of a sentence under Indiana Appellate Rule 7(B) requires the appellant to demonstrate that his sentence is inappropriate in light of both the nature of his offenses and his character. See Williams v. State, 891 N.E.2d 621, 633 (Ind. Ct. App. 2009) (emphasis original). See also Ind. Appellate Rule 7(B). Whitesell presents no cogent argument regarding the inappropriateness of her sentences in light of the nature of

the offenses. See App. R. 46(A)(8)(a); Ford v. State, 718 N.E.2d 1104, 1107 n.1 (Ind. 1999) (holding that the defendant’s “argument with respect to the review and revise provision of the constitution is waived for failure to state a cogent argument”). Thus, the issue is waived.

Affirmed.

FRIEDLANDER, J., and VAIDIK, J., concur.