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# IN THE
# COURT OF APPEALS OF INDIANA

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|---|---|---|
| MICHAEL CARLTON, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 49A02-1012-CR-1344 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Clark H. Rogers, Judge
Cause No. 49G17-1009-FD-071723

**June 30, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## Case Summary

Michael Carlton appeals his 545-day sentence for Class D felony escape. Carlton contends that the trial court abused its discretion by relying on an element of the offense as an aggravator. We conclude that the trial court improperly considered Carlton's violation of a home detention order as an aggravator. However, because the trial court found his criminal history as an aggravator, we are confident that the court would have imposed the same sentence without the improper aggravator. We therefore affirm his sentence.

## Facts and Procedural History

In July 2010, Carlton began serving a four-year sentence for Class C felony robbery on home detention through Marion County Community Corrections. Before starting his home detention, he signed a contract informing him that he was to remain confined inside his home except for approved activities, including working or traveling directly to and from employment. The contract also stated that the State could charge him with Class D felony escape if he left his residence without permission or failed to return. On September 13, 2010, Carlton's case manager reminded him that he was not allowed to leave his residence unless he provided written verification.

The next day, Carlton left his residence for work at 2:39 p.m. and returned at 3:45 p.m. He later left his residence at 4:48 p.m. and failed to return. At 6:40 p.m., Indianapolis Metropolitan Police Department officers were dispatched to West Lake Apartments for a domestic disturbance. The officers found Carlton sitting on a stairway with other people in a common area of the apartments. They noticed that he had an ankle

bracelet. After being read his *Miranda* rights, Carlton told the officers that he was on home detention, he was permitted to leave his residence for work only, he did not live at West Lake Apartments, and he left work at 4:00 p.m. to bring diapers for his baby and to visit with family and friends.

The State charged Carlton with Class D felony escape.[1] The trial court found Carlton guilty at a bench trial. In determining his sentence, the trial court stated:

> Court will proceed to sentencing then. Incorporate the P.S.I. in the Court's findings and make it a part of the court . . . part of the court. His mitigator[2] being he was on . . . he was on Community Corrections for four years executed for a Robbery, C felony, under 49G06-1001-FB-004770. And he . . . well even though he said he was going to give Pampers, the problem is he was told the day before, according to testimony that I heard, why I found him guilty, that he was to go directly to and from. The problem is . . . is Mr. Carlton, is . . . what you've done is indicate to the Court well, yeah, I'm not going to listen to the rules. The rules are you couldn't go and drop Pampers off. The rule was you go to and from work. Directly to and from home. There's reasons there are rules and there's reasons for orders and you didn't follow them. So that tells me that you're not going to follow the order no matter what I put you on. It's a concern honestly, and it's an aggravator. The fact that he was released, he was serving an executed sentence, and he picked up a felony. Understanding he didn't escape from . . . the way it was worded is escaping from his Community Correction, his home detention. But the problem is, he was . . . he was in a[n] executed commitment and he chose to . . . I mean, there was more to it than that. Other than what he indicated today. There was more to it than that and that's why I found [him] guilty. . . . [W]ith that being said, the Court does find those aggravators and he is non-suspendable.

Tr. p. 42-43. The court sentenced him to 545 days executed in the Department of Correction to be served consecutive to his robbery sentence.

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[1] Carlton was also charged with Class D felony strangulation, Class D felony domestic battery, Class A misdemeanor domestic battery, Class A misdemeanor battery, and Class A misdemeanor intimidation, but those charges were dismissed on the day of Carlton's bench trial.

[2] Although the trial court used the word "mitigator," it is clear from the context of the oral sentencing statement that the court intended to use the word "aggravator." Both parties concede that the trial court found no mitigators.

Carlton now appeals his sentence.

**Discussion and Decision**

Carlton contends that the trial court abused its discretion in sentencing him by relying on an element of the offense, violation of a home detention order, as an aggravator.

Sentencing decisions rest within the sound discretion of the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). So long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Id.* An abuse of discretion will be found where 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.* One way a trial court may abuse its discretion is by entering a sentencing statement that relies on an aggravator that is improper as a matter of law. *See id.* at 490-91. If a trial court abuses its discretion in sentencing, "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.*

As an initial matter, the State argues that Carlton's argument "is irrelevant because [he] received an advisory sentence and the trial court found no mitigating factors." Appellee's Br. p. 5. The State essentially argues that the trial court's alleged finding of an improper aggravator is harmless since the court did not use that aggravator to enhance the advisory sentence. This may have been a valid argument before our legislature revised our sentencing scheme in 2005, but it is no longer valid now. Our Supreme Court

has explained how our sentencing scheme was revised to avoid the unconstitutionality of starting at a fixed sentence and directly increasing or decreasing that sentence based on additional findings:

> A significant statutory shift occurred in 2005, when the General Assembly revised our criminal sentencing scheme. Before the 2005 legislation, Indiana used "presumptive" sentences. Sentencing decisions began with the fixed presumptive sentence for a given crime, which could then be increased or decreased based on additional findings. We held this scheme unconstitutional, *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005), following the U.S. Supreme Court decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).
>
> The General Assembly responded by eliminating fixed presumptive terms in favor of "advisory" sentences for each offense. It declared that a court could impose any sentence within the statutory range set for the crime, "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code Ann. § 35-38-1-7.1(d) (West 2007). *See also Anglemyer v. State*, 868 N.E.2d 482, 488 (Ind. 2007). Trial judges must provide a statement of reasons for a given sentence if they find aggravating or mitigating circumstances. Ind. Code Ann. § 35-38-1-3.
>
> Indiana sentencing used to be a two-step process—imposing of the presumptive sentence, then deciding whether any aggravators or mitigators warranted deviation. After the 2005 modifications, it consists of only one discretionary determination. Thus, a sentence toward the high end of the range is no longer an "enhanced sentence" in the sense that the former regime provided. Moreover, while the trial court must still list in its sentencing statement those reasons it finds relevant to the sentence, the correlation between those factors and the given sentence is not as precisely tailored as it was under the presumptive sentencing scheme.

*Pedraza v. State*, 887 N.E.2d 77, 79-80 (Ind. 2008). The State's argument here improperly treats the advisory term for escape as a fixed presumptive sentence that can be directly increased or decreased with the finding of aggravators and mitigators.

We now turn to Carlton's argument. A material element of a crime may not be used as an aggravating factor. *McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007).

However, a trial court may properly consider the particularized circumstances of the factual elements as aggravating factors. *Id.* at 590. This aggravator is generally associated with particularly heinous facts or situations. *Id.*

Carlton was charged with knowingly or intentionally violating a home detention order. *See* Appellant's App. p. 15; *see also* Ind. Code § 35-44-3-5(b). Violating a home detention order is therefore an element of the crime of escape as charged here. The trial court's oral sentencing statement shows that it considered the fact that he violated his home detention order as an aggravator:

> [W]hat you've done is indicate to the Court well, yeah, I'm not going to listen to the rules. The rules are you couldn't go and drop Pampers off. The rule was you go to and from work. Directly to and from home. There's reasons there are rules and there's reasons for orders and you didn't follow them. So that tells me that you're not going to follow the order no matter what I put you on. It's a concern honestly, and it's an aggravator.

Tr. p. 43. Because the court did not state any particularized circumstances showing that the violation of his home detention order was particularly heinous, the court abused its discretion.

Carlton thus asks us to remand for resentencing because the trial court might have imposed a shorter sentence absent its consideration of this "single, improper aggravating factor." Appellant's Br. p. 4.

We decline to do so, however, because the trial court found Carlton's criminal history – his Class C felony robbery conviction – as an aggravator. *See* Tr. p. 42 ("His [aggravator] being he was on . . . he was on Community Corrections for four years executed for a Robbery, C felony, under 49G06-1001-FB-004770."). This was a proper aggravating factor. *See Atwood v. State*, 905 N.E.2d 479, 488 (Ind. Ct. App. 2009)

(noting that even limited criminal history can be considered aggravator), *trans. denied*. In light of this aggravator and no mitigators, we are confident that the trial court would have imposed the same advisory sentence of 545 days even without its consideration of the improper aggravator.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.