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IN THE
COURT OF APPEALS OF INDIANA

TYRONE A. THOMPSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-1011-CR-694
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 6
The Honorable Mark D. Stoner, Judge
Cause No. 49G06-1007-FD-57880

July 7, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Tyrone A. Thompson (Thompson), appeals his sentence for Count I, criminal recklessness with a deadly weapon, a Class D felony, Ind. Code § 35-42-2-2; Count II, battery, a Class A misdemeanor, I.C. § 35-42-2-1; and Count III, battery, a Class C felony, I.C. § 35-42-2-1.

We affirm.

ISSUES

Thompson raises two issues on appeal, which we restate as follows:

(1) Whether the trial court abused its discretion in sentencing him because it failed to consider a mitigating factor; and

(2) Whether the trial court's sentence was appropriate in light of his character and the nature of his offense.

FACTS AND PROCEDURAL HISTORY

On July 25, 2010, Justin Mackey (Justin) traveled from Kokomo, Indiana, to Indianapolis, Indiana, to visit his brother Robert Matthew Mackey (Matt) and to attend the Brickyard 400 race the following day. On the night of July 25, they planned to go out to a few bars downtown. First, they went to the Bourbon Street Distillery, where each had one drink. Then they went to another bar and each had a drink there, also. Finally, they went to a bar downtown named Blu because Matt was good friends with a bartender there. Meanwhile, Thompson bought a "little bit" of beer and went to Blu. (Transcript p. 196).

When Matt and Justin reached Blu, there was some kind of confrontation in front of the bar involving Thompson. Thompson "turned right into" Matt and Justin and "body[-] checked" Justin. (Tr. pp. 19, 74). Matt and Justin told Thompson that they did not want any problems, and both of them backed away and tried to walk around him. They continued along the street to a different bar called Hyde, but realized once they got there that Justin's clothing did not meet Hyde's dress code. Therefore, after failing to get into Hyde, both Matt and Justin went back to Blu to try once again to enter the bar.

When Matt and Justin reached Blu the second time, Matt saw Thompson out of the corner of his eye, and Thompson body-checked him. Matt threw his hands up and told Thompson again that he did not want any problems. In response, Thompson "threw his arm" at Matt and knocked the phone out of his hand. (Tr. p. 23). Matt reached down to pick up his phone, and at that time Justin thought he saw Thompson reach for something – possibly a gun. To protect Matt, who had his back turned to Thompson, Justin body[-]checked Thompson. In response, Thompson started stabbing Justin with a broken beer bottle.

Subsequently, Thompson backed away from Matt and Justin and went down an alley between Blu and another bar, but Matt started following him so that he could not get away. Once they got down the alley, Thompson said to Matt: "[I will] kill you mother fucker," "I'll kill you, your family," and "I'm a gangster." (Tr. pp. 29, 32, 83). In the alley, and then in the middle of Georgia Street, Thompson and Matt started to swing at each other with their belts. Once they exited the alley, though, police officers were on the scene and handcuffed and arrested Thompson.

On July 27, 2010, the State filed an Information charging Thompson with Count I, criminal recklessness with a deadly weapon, a Class D felony, I.C. § 35-42-2-2; and Count II, battery, a Class A misdemeanor, I.C. § 35-42-2-1. On July 29, 2010, the State amended Count I to a Class C felony and added Count III, battery, a Class C felony, I.C. § 35-42-2-1. On October 6, 2010, a jury trial was held. After the State's case-in-chief, Thompson moved for judgment on the evidence as to Count II, which alleged serious bodily injury to Matt, because the State had not presented any evidence that Matt had been injured. The trial court granted Thompson's motion. At the conclusion of the evidence, the jury found Thompson guilty of Counts I and III.

On October 20, 2010, the trial court held a sentencing hearing and determined that entering a judgment and sentence for both Counts I and III would violate the prohibition against double jeopardy, so the trial court did not enter a judgment for Count I, criminal recklessness with a deadly weapon. Instead, the trial court sentenced Thompson to eight years in the Indiana Department of Correction for Count III, battery. As mitigating factors, the trial court found that Thompson had an extensive mental health history and suffered from substance abuse issues. As an aggravating factor, the trial court found that Thompson had an extensive criminal history dating back to 1982. Overall, the trial court determined that the aggravating factor outweighed the mitigating factors.

Thompson now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *The Trial Court's Consideration of Mitigating Factors*

First, Thompson argues that the trial court abused its discretion in sentencing him because it should have considered as a mitigating factor the fact that his girlfriend was five months pregnant at the time of his sentencing and that incarceration would prevent him from supporting his child. Under a previous Indiana rule, trial courts were required to properly weigh mitigating and aggravating factors. Now, under the advisory sentencing scheme, trial courts no longer have such an obligation. *Anglemeyer v. State,* 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g,* 875 N.E.2d 218 (Ind. 2007). Instead, "once the trial court has entered a sentencing statement, which may or may not include the existence of aggravating and mitigating factors, it may then 'impose any sentence that is…authorized by statute; and…permissible under the Constitution of the State of Indiana.'" *Id.*; *see also* I.C. § 35-38-1-7.1(d) (stating that a court may impose any sentence authorized by statute "regardless of the presence or absence of aggravating circumstances or mitigating circumstances.").

A trial court abuses its discretion when its decision is clearly against the logic and effect of the facts and circumstances before the court or when the trial court has misinterpreted the law. *Crawford v. State,* 946 N.E.2d 1221, 1225 (Ind. Ct. App. 2011). In order to show that a trial court failed to identify or find a mitigating factor, the defendant must establish that the mitigating evidence is both significant and clearly supported by the record. *Anglemeyer,* 868 N.E.2d at 493. Although a failure to find mitigating circumstances

clearly supported by the record may imply that the trial court improperly overlooked them, though, the trial court "is not obligated to explain why it has chosen not to find mitigating circumstances. Likewise, the court is not obligated to accept the defendant's argument as to what constitutes a mitigating factor." *Id.*

Here, we cannot agree with Thompson that the trial court abused its discretion in concluding that his girlfriend's pregnancy was not a mitigating factor. We have held in the past that "a trial court is not required to find that a defendant's incarceration would result in undue hardship" on a dependent. *Roney v. State*, 872 N.E.2d 192, 204 (Ind. Ct. App. 2007), *trans. denied.* Instead, "many persons convicted of crimes have dependents and, absent special circumstances showing that the hardship to them is 'undue,' a trial court does not abuse its discretion by not finding this to be a mitigating factor." *Benefield v. State*, 904 N.E.2d 239, 247 (Ind. Ct. App. 2009), *trans. denied*. During his sentencing hearing, Thompson merely stated that his girlfriend was pregnant and that he wanted to be present for the child's birth. He did not identify that there would be an undue hardship on his dependents due to his incarceration.

Moreover, because Thompson mentioned his girlfriend's pregnancy during the sentencing hearing, the trial court was aware of her pregnancy and chose not to consider it a mitigating factor. As stated above, a trial court is not obligated to explain why it has not chosen to find a mitigating circumstance. *Anglemeyer*, 868 N.E.2d at 493. Accordingly, we find that the trial court did not abuse its discretion in choosing not to consider Thompson's girlfriend's pregnancy a mitigating factor.

II. *The Nature of the Offense and Character of the Offender*

Next, Thompson argues that the trial court inappropriately sentenced him in light of his character and the nature of the offense. Under Indiana Appellate Rule 7(B), this 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. *Childress v. State*, 848 N.E.2d 1073, 1079 -80 (Ind. 2006). Although this court is not required to use "great restraint," we nevertheless exercise deference to a trial court's sentencing decision, both because Appellate Rule 7(B) requires that we give "due consideration" to that decision and because we recognize the unique perspective a trial court has when making decisions. *Stewart v. State*, 866 N.E.2d 858, 865-66 (Ind. Ct. App. 2007). The "principal role of appellate 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). In addition, the defendant bears the burden of persuading this court that his sentence is inappropriate. *Childress*, 848 N.E.2d at 1080.

In regards to the nature of the offense, Thompson claims that the confrontation was, in part, provoked by Justin. Namely, Justin body-checked Thompson under the mistaken belief that Thompson was reaching for a gun. Also, after the fight, Thompson backed away, but Matt continued the fight by following Thompson down the alley.

We disagree with Thompson's claim that his sentence was inappropriate in light of the nature of his offense. When the facts are interpreted in the light most favorable to the trial court, Thompson approached two random strangers and initiated a confrontation on two separate occasions – when Matt and Justin first approached Blu and when they returned to Blu after their original confrontation with Thompson. Moreover, Thompson escalated the physical confrontation to one with a deadly weapon when he broke his beer bottle in order to stab Justin. As a result of Thompson's stabs, Justin required fourteen stitches for one stab wound and nine staples for another. Two days later, a "baseball-sized" hematoma developed, which caused the staples to pop out. (Tr. p. 89).

Turning to Thompson's character, he argues that his sentence is inappropriate because he received the maximum sentence possible for a Class C felony under our advisory sentencing scheme. *See* I.C. § 35-50-2-6. Thompson cites our statement in *Hornbostel* that "[a] maximum sentence permitted by law should be reserved for the very worst offenses and offenders," in support of his argument. *Hornbostel v. State*, 757 N.E.2d 170, 185 (Ind. Ct. App. 2001), *trans. denied.* According to Thompson, he is not one of the worst offenders.

We cannot agree with Thompson that the trial court misjudged his character because, as the trial court pointed out when it sentenced Thompson, his criminal history is very extensive and dates back to at least 1982. As highlighted by the trial court,

> He was convicted in June '82 for the 1935 Firearms Act; he was convicted of [r]obbery in February, 1984; [a]uto [t]heft in November of 1987; [f]elony [e]scape in 1991; misdemeanor [r]esisting [l]aw [e]nforcement and [b]attery in April of 1992; again, two separate [C]ounts of [b]attery and [r]esisting [l]aw [e]nforcement in 1996; and on March 26, of 2009, he was convicted of two different cases[--] one involving [t]heft and [b]attery, the second involving

> [t]heft and [p]ossession of [p]araphernalia. Most recently, within the last twelve months he was convicted of [r]esisting [l]aw [e]nforcement on October 27th of 2009; [c]riminal [c]onversion in April of 2010; and [p]ossession of [p]araphernalia in…May of this year. While not listed in the criminal history[,] [Thompson] has self-reported a federal conviction from the United States District Court of the Southern District of Indiana for felony [p]ossession of a [f]irearm for which he believes he received an executed sentence of roughly thirteen years.

(Tr. p. 267). Most notably, as listed, Thompson has received several other convictions for battery since 1982. Based on this long list of prior criminal convictions, including other convictions for battery, we cannot find that the trial court misjudged Thompson's character.

CONCLUSION

Based on the foregoing, we conclude that the trial court properly sentenced Thompson, and his sentence was not inappropriate in light of his character and the nature of his offense.

Affirmed.

DARDEN, J., and BARNES, J., concur.