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IN THE
COURT OF APPEALS OF INDIANA

ABJUL K. JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0902-CR-64
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Gene R. Duffin, Senior Judge
Cause No. 20C01-9603-CF-12

July 20, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Abjul K. Johnson pleaded guilty to robbery[1] as a Class A felony and received a sentence of fifty years executed. He belatedly appeals, raising the following restated issue: whether the trial court abused its discretion when it sentenced Johnson.

We affirm.

FACTS AND PROCEDURAL HISTORY

On March 6, 1996, Johnson, Tavario Baskin, and Games Birkhead robbed Dan Smith and Brenda Jones of several firearms and cash. During the course of this robbery, Smith was struck in the head with a gun multiple times causing him to lose consciousness, and Jones was struck once in the head with a gun. Johnson was arrested and initially charged with robbery while armed with a deadly weapon, a Class B felony. The charging information was later amended to allege robbery resulting in serious bodily injury, a Class A felony. On September 16, 1996, Johnson pleaded guilty to robbery as a Class A felony pursuant to a plea agreement, which merged a separate cause number consisting of a charge for murder with his robbery cause number. The plea agreement dismissed Johnson's murder charge, secured Johnson's cooperation in testifying against his co-defendant in the murder charge, and limited the trial court's sentencing discretion to a sentence between forty-five and fifty years.

At Johnson's sentencing, the trial court found his young age to be a mitigating circumstance. The trial court found the following factors to be aggravating: Johnson was a member of a gang; that multiple people were injured/killed as a result of Johnson's and

[1] *See* Ind. Code § 35-42-5-1.

his co-defendants' actions; and that weapons were involved. Finding that the aggravating circumstances outweighed the mitigating circumstances, the trial court sentenced Johnson to fifty years executed in the Department of Correction. Johnson now belatedly appeals.

DISCUSSION AND DECISION

Although Johnson initially frames his argument as whether his sentence was inappropriate in light of the nature of the offense and the character of the offender, his appellant's brief actually challenges the finding of and the weight given to the aggravating and mitigating circumstances by the trial court. As our Supreme Court has stated, "[t]hese are two separate inquiries reviewed under different standards." *Noojin v. State*, 730 N.E.2d 672, 678 (Ind. 2000). Johnson's assertion that his sentence was inappropriate is not supported by cogent reasoning and contains no substantive discussion of Indiana Appellate Rule 7(B). Therefore, this argument has been waived. *See* Ind. Appellate Rule 46(A)(8)(a); *Davis v. State*, 835 N.E.2d 1102, 1113 (Ind. Ct. App. 2005), *trans. denied* (2006).

Generally, sentencing is left to the sound discretion of the trial court, and we will review sentencing for an abuse of that discretion. *Smith v. State*, 675 N.E.2d 693, 697 (Ind. 1996).[2] An abuse of discretion occurs when 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. *Nash v. State*, 881 N.E.2d 1060, 1064 (Ind.

[2] Johnson committed this crime before the legislature amended Indiana's sentencing statutes to provide for "advisory sentences" rather than "presumptive sentences." Therefore, the prior presumptive sentencing scheme applies here, and we will review his contentions under the law in effect at the time he committed his crime. *Monroe v. State*, 886 N.E.2d 578, 579 (Ind. 2008) (citing *Gutermuth v. State*, 868 N.E.2d 427, 431 n.4 (Ind. 2007) (stating that "the sentencing statute in effect at the time a crime is committed governs the sentence for that crime")).

Ct. App. 2008), *trans. denied*. The trial court's discretion includes the ability to determine whether the presumptive sentence for a crime will be increased or decreased because of aggravating or mitigating circumstances. *Smith*, 675 N.E.2d at 697. A trial court may enhance a presumptive sentence based upon a single aggravating circumstance. *Id*.

In this case, Johnson pleaded guilty to robbery as a Class A felony pursuant to a written plea agreement in exchange for the State's dismissal of a murder charge in a merged cause number. The plea agreement stated that Johnson would be sentenced to a determinate term of forty-five to fifty years in the Department of Correction. *Appellant's App*. at 18. The trial court sentenced him to fifty years after finding that the aggravating circumstances of Johnson's gang membership, the existence of multiple victims who were injured or killed by the actions of Johnson and his co-defendants, and that weapons were involved outweighed the mitigating circumstance of Johnson's young age.

Johnson argues that the trial court abused its discretion when it found the aggravating and mitigating circumstances and in the manner that the trial court accorded weight to each. He specifically contends that very little weight should have been given to the existence of multiple victims and the use of weapons during the crime as aggravating factors; he also asserts that his gang involvement should not have been considered as an aggravating circumstance. He further argues that the trial court should have given his youthful age at the time of the crime significant mitigating weight and should have found his rough upbringing, guilty plea, and expression of remorse as significant mitigating factors. We disagree.

The trial court properly found Johnson's gang membership to be an aggravating factor. A defendant's criminal gang activity may be considered as a part of the risk that he could commit another crime, which was a mandatory consideration under the sentencing statute in effect at time Johnson committed crime. Ind. Code § 35-38-1-7.1(a)(1) (1993); *Jackson v. State*, 697 N.E.2d 53, 55 (Ind. 1998). Gang activity can also be considered as "evidencing a history of criminal or delinquent activity, likewise a proper aggravating circumstance for the imposition of an enhanced sentence." *Jackson*, 697 N.E.2d at 55 (citing Ind. Code § 35-38-1-7.1(b)(2) (1993)). There was no abuse of discretion in considering Johnson's gang membership as an aggravating circumstance.

We also conclude that the trial court properly found as aggravators that multiple victims were injured and that weapons were involved. "The particular manner in which a crime is committed may constitute an aggravating factor." *Id*. at 56. Although a trial court may not use a factor constituting a material element of the crime as an aggravating circumstance, the nature and circumstances of a crime is a proper aggravator. *McCann v. State*, 749 N.E.2d 1116, 1120 (Ind. 2001). Here, the evidence showed that two victims were struck in the head with a gun during the robbery, one of whom was hit several times and lost consciousness. The victims were also threatened with being shot if they did not identify the location of the weapons in the apartment. Even though Johnson was not the person who struck or threatened the victims, he was a willing participant in the robbery, during which these things occurred. Further, the evidence showed that at least two of the defendants involved in the robbery were armed with guns when they entered Smith's apartment, and these weapons were used to injure and threaten the victims. Additionally,

Johnson was aware that the purpose of the robbery was to steal weapons from Smith's apartment. We do not find that it was error for the trial court to consider the multiple victims and involvement of weapons, which constituted the nature and circumstances of the crime, as aggravating circumstances.

As to Johnson's contentions regarding mitigating factors, the finding of mitigating circumstances is within the discretion of the trial court. *Id.* at 1121. An allegation that the trial court failed to identify or find a mitigating circumstance requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Id*. The trial court is not obligated to accept the defendant's contentions as to what constitutes a mitigating circumstance. *Id*. Additionally, the trial court is not required to give the same weight or credit to mitigating evidence as does the defendant. *Fugate v. State*, 608 N.E.2d 1370, 1374 (Ind. 1993). Indeed, it may be proper for the trial court to give the proposed mitigating factors no weight at all. *Ross v. State*, 676 N.E.2d 339, 347 (Ind. 1996).

Johnson first contends that the trial court failed to give his youthful age at the time of the crime significant weight. The trial court found Johnson's age to be the sole mitigating factor. As the trial court had the discretion to determine the weight of a mitigating factor and is not required to give it the same weight as does the defendant, we do not believe that the trial court abused its discretion in assigning mitigating weight to Johnson's age.

As to Johnson's guilty plea, a defendant who pleads guilty deserves "some" mitigating weight be given to the plea in return. *Cotto v. State*, 829 N.E.2d 520, 525 (Ind.

2005). However, the significance of a guilty plea as a mitigating factor varies from case to case. *Francis v. State*, 817 N.E.2d 235, 238 n.3 (Ind. 2004). A guilty plea may not be significantly mitigating when it does not demonstrate the defendant's acceptance of responsibility, or when the defendant receives a substantial benefit in return for the plea. *Sensback v. State*, 720 N.E.2d 1160, 1165 (Ind. 1999). In this case, Johnson pleaded guilty pursuant to a written plea agreement, and in exchange, the State dismissed a murder charge under a merged cause number. He therefore received a substantial benefit in that he was able to avoid a murder charge and a potential sentence of an additional forty-five to sixty years. The trial court did not abuse its discretion in not finding Johnson's guilty plea to be a significant mitigating factor.

Johnson further argues that his rough childhood and his expression of remorse should have been found to be mitigating circumstances. As previously stated, a trial court is not obligated to accept the defendant's contentions as to what constitutes a mitigating circumstance nor is it required to give the same weight or credit to mitigating evidence as does the defendant. *McCann*, 749 N.E.2d at 1121; *Fugate*, 608 N.E.2d at 1374. Here, Johnson's presentence report contained information that his parents were divorced when he was six, his father was abusive toward him, and he was expelled from school after the tenth grade. However, we do not believe that the trial court erred in not finding Johnson's childhood to be a significant mitigating factor. Further, as to his remorse, Johnson's counsel stated that Johnson was sorry, and in the presentence report, Johnson had reported that he regretted committing the present offense, but during a psychological evaluation, he claimed that he was innocent of the charges and the police

were against him. We believe that the trial court was well within its discretion in not finding Johnson's remorse as a significant mitigating circumstance.

We conclude that the trial court properly found and assigned the correct weight to the aggravating and mitigating circumstances. It therefore did not abuse its discretion when it sentenced Johnson to fifty years in the Department of Correction.

Affirmed.

RILEY, J., and MATHIAS, J., concur.