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IN THE
COURT OF APPEALS OF INDIANA

JOHNNIE GUSTAFSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 05A04-1010-CR-647
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BLACKFORD CIRCUIT COURT
The Honorable Dean A. Young, Judge
Cause No. 05C01-0912-FB-84

July 28, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Johnnie Gustafson pleaded guilty to Possession of a Controlled Substance,[1] a class D felony. Following his guilty plea the trial court sentenced Gustafson to three years imprisonment, the statutory maximum.[2] Gustafson frames the single issue presented upon appeal in terms of the appropriateness of the sentence; yet, his argument addresses only the identification and weighing of the mitigating factors. Thus, we restate the issue presented upon appeal as follows: Did the trial court err in identifying and weighing mitigating circumstances?

We affirm.

On December 18, 2009, the State charged Gustafson with dealing in a schedule II controlled substance and dealing in marijuana. On August 31, 2010, Gustafson pleaded guilty to possession of a controlled substance pursuant to a plea agreement that left sentencing to the discretion of the trial court. In conjunction with his guilty plea, Gustafson admitted that on April 14, 2009, he knowingly possessed Hydrocodone, a schedule II controlled substance, contrary to Indiana law.

At the sentencing hearing, Gustafson asked the court to take into consideration that he was employed by Five Star Roofing and his young age of twenty-two. In sentencing Gustafson, the trial court acknowledged his age, but emphasized the existence of three prior, unrelated felony convictions: class D felony residential entry, class D felony receiving stolen property, and class C felony burglary. Additionally, the trial court found that the State had

[1] Ind. Code Ann. § 35-48-4-7 (West, Westlaw through 2011 Pub. Laws approved & effective through 06/28/2011).
[2] Ind. Code Ann. § 35-50-2-7 (West, Westlaw through 2011 Pub. Laws approved & effective through 06/28/2011).

filed multiple petitions to revoke Gustafson's probation. The trial court determined that Gustafson failed to avail himself of multiple opportunities at rehabilitation. The trial court then sentenced Gustafson to three years imprisonment, the statutory maximum. *See* I.C. § 35-50-2-7.

Gustafson challenges his sentence as inappropriate under Ind. Appellate Rule 7(B), which provides that the "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." A defendant must persuade the appellate court that his or her sentence has met this inappropriateness standard of review. *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006). Gustafson, however, does not address the nature of the offense and character of the offender, but rather focuses on the trial court's alleged error in failing to consider purported mitigating factors. Thus, Gustafson has failed to properly bring the issue before the Court and thereby has waived the issue. *See Marsh v. Dixon*, 707 N.E.2d 998 (Ind. Ct. App. 1999).[3]

Gustafson contends the trial court failed to recognize his guilty plea as a mitigating factor and failed to give sufficient mitigating weight to his young age. In support of his contentions, Gustafson argues "that the trial court should be 'inherently aware of the fact that a guilty plea is a mitigating circumstance.'" *Appellant's Brief* at 5 (quoting *Hope v. State*, 834 N.E.2d 713, 718 (Ind. Ct. App. 2005)). Citing *James v. State*, 868 N.E.2d 543 (Ind. Ct.

[3] Gustafson would not prevail on this argument even were it not waived. As discussed below, Gustafson's criminal history is not insubstantial for a person of his comparative youth, and he has failed to take advantage of lenient sentences on previous occasions. These factors wholly undercut his claim that a three-year sentence is inappropriate.

App. 2007), Gustafson further argues that the trial court's failure to give appropriate weight to his age, accompanied with the failure to recognize the guilty plea as a mitigating circumstance, makes his sentence revisable under Appellate Rule 7(B).[4]

An allegation that the trial court failed to identify a mitigating circumstance requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Anglemyer v. State*, 868 N.E. 482 (Ind. 2007), *clarified on reh'g by* 875 N.E.2d 218. Our Supreme Court has determined that a guilty plea is not necessarily a significant mitigating circumstance. *See Cotto v. State*, 829 N.E.2d 520 (Ind. 2005). "For instance, a guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one." *Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), *trans. denied*. Gustafson received a considerable benefit under the plea agreement. By pleading to class D felony possession, Gustafson avoided the elevated charge of class B felony possession, as well as an additional charge of a separate class A misdemeanor. Thus, the trial court was not required to find that Gustafson's guilty plea was a significant mitigating circumstance.

We now turn to the claim of improper weighing of mitigating circumstances. Our Supreme Court has determined that a claim of improper weighing is no longer available. *See Anglemyer v. State*, 868 N.E.2d 482. The trial court has no obligation to weigh aggravating and mitigating factors against each other when imposing a sentence, and thus cannot be said to have abused its discretion in failing to properly weigh such factors. *Id*. In this case, the

[4] As explained above, Gustafson fails to properly raise an App. R. 7(B) claim.

trial court clearly stated, "the aggravating circumstances substantially outweigh any mitigating circumstances that [were] presented to the court, including [Gustafson's] young age." *Transcript* at 14. In discounting his young age, the trial court found that Gustafson had already been convicted of multiple felonies and given considerable breaks and leniency on previous occasions. Gustafson's commission of the instant offense illustrates his continued disregard for the law and apparent failure to learn from prior lenient treatment. We cannot say the trial court abused its discretion in sentencing Gustafson.

Judgment affirmed.

BAILEY, J., and BROWN, J., concur.