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FILED
Jul 30 2009, 9:13 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

CINDY EDWARDS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 32A04-0902-CR-65
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Stephenie LeMay-Luken, Judge
Cause No. 32D05-0810-FA-3

July 30, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Cindy Edwards appeals her sentence following her conviction for Possession of Cocaine, as a Class C felony, pursuant to a plea agreement. She presents the following issues for review:

1. Whether the trial court abused its discretion by identifying an improper aggravator and by failing to identify a significant mitigator.

2. Whether Edwards' sentence is inappropriate in light of the nature of the offense and her character.

We affirm.

FACTS AND PROCEDURAL HISTORY

On September 30, 2008, Detective Brian Elmore of the Indiana State Police/United Drug Task Force and other detectives conducted a controlled buy of cocaine through a confidential informant. On that date, detectives from the Indiana State Police ("ISP") and the task force gave recorded money to the informant, then monitored the informant visually and through a wireless transmitter. Through the wireless transmitter, the detectives heard the informant purchase cocaine from the target, Derek Jefferson.

When the transaction concluded, the informant left and was met by detectives, who found 4.3 grams of a substance that later tests confirmed to be cocaine. Uniform officers from Hendricks County and the Plainfield and Brownsburg Police Departments conducted a traffic stop of the vehicle in which Jefferson was a passenger and Edwards was the driver. At the time of the stop, Jefferson had in his possession the recorded

money, and officers found 2.3 grams of cocaine in the car. Officers arrested Jefferson and Edwards.

The State charged Edwards with dealing in cocaine, as a Class A felony, and possession of cocaine, as a Class C felony. Under a written plea agreement, Edwards pleaded guilty to possession of cocaine, as a Class C felony; the State agreed to dismiss the charge of dealing in cocaine; and sentencing was left to the trial court's discretion. The court accepted the plea agreement at a hearing on January 15, 2009. The court held a sentencing hearing on January 21, 2009, and sentenced Edwards to six years, with four years suspended to probation. Following the hearing, the court issued a written sentencing statement, listing the following aggravators and mitigators:

> AGGRAVATING CIRCUMSTANCES:
>
> 1. The Defendant has a history of criminal activity as shown on the Pre-Sentence Report.
>
> 2. In the past, the Defendant has previously violated probation for using drugs.
>
> 3. The Defendant chose to drive the Co-Defendant [Jefferson] to a drug deal in exchange for cocaine. The Defendant admitted to driving the Co-Defendant on multiple occasions in exchange for cocaine. This is a choice made by the Defendant that has negative consequences for others.
>
> MITIGATING CIRCUMSTANCES:
>
> 1. The Defendant has accepted responsibility for her criminal conduct.
>
> 2. The Defendant has prior military service.
>
> 3. The Defendant has previously successfully complete[d] probation.

Appellants' App. at 26-27. Edwards now appeals.

DISCUSSION AND DECISION

Issue One: Aggravators and Mitigators

Edwards contends that the trial court abused its discretion when it identified an improper aggravator and did not identify a significant mitigating factors when it sentenced her for possession of a cocaine. We engage in a four-step process when evaluating a sentence under the current "advisory" sentencing scheme. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007) ("Anglemyer I"), modified on other grounds on reh'g, 875 N.E.2d 218 (Ind. 2007) ("Anglemyer II"). First, the trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Anglemyer I, 868 N.E.2d at 491. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e., to particular aggravators or mitigators, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id. Even if a trial court abuses its discretion by not issuing a reasonably detailed sentencing statement or in its findings or non-findings of aggravators and mitigators, we may choose to review the appropriateness of a sentence under Rule 7(B) instead of remanding to the trial court. See Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007).

Edwards contends that the trial court identified an improper aggravator. In particular, Edwards argues that "the trial court should not have considered evidence of

Edwards' participation in the dealing of cocaine by the co-defendant as an aggravating circumstance." Appellant's Brief at 9-10. We cannot agree.

It is true that a material element of a crime may not be used as an aggravating factor to support an enhanced sentence. McElroy v. State, 865 N.E.2d 584, 589-90 (Ind. 2007) (citation omitted). However, when evaluating the nature of the offense, the trial court may properly consider the particularized circumstances of the factual elements as aggravating factors. Id. (citation omitted). The trial court must then detail why the defendant deserves an enhanced sentence under the particular circumstances. Id. at 590 (citation omitted). Generally, this aggravator is thought to be associated with particularly heinous facts or situations. Id. (citation omitted).

Here, at the sentencing hearing, the trial court found that Edwards' "choice to drive the co-defendant in exchange for, for cocaine . . is an aggravating circumstance. And the most aggravating circumstance. The one I give the most weigh to." Transcript at 75. In the written sentencing order, the court phrased that aggravator similarly, noting also that Edwards had provided transportation to her co-defendant in exchange for cocaine on multiple occasions and that that choice had "negative consequences for others." Appellant's App. at 26. That aggravator permissibly describes the particularized circumstances of the factual elements of the offense of dealing in cocaine, not the elements of the offense itself. Thus, the trial court did not abuse its discretion in identifying those circumstances as an aggravator. See McElroy, 865 N.E.2d at 589.

Edwards also contends that the trial court abused its discretion when it did not identify her mental illness as a significant mitigator. Although the trial court has an

obligation to consider all mitigating circumstances identified by a defendant, it is within the trial court's sound discretion whether to find mitigating circumstances. Newsome v. State, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003), trans. denied. We will not remand for reconsideration of alleged mitigating factors that have debatable nature, weight, and significance. Id. However, if the record clearly supports a significant mitigating circumstance not found by the trial court, we are left with the reasonable belief that the trial court improperly overlooked the circumstance. Moyer v. State, 796 N.E.2d 309, 313 (Ind. Ct. App. 2003).

Our supreme court has identified four factors that should be considered when considering a defendant's mental illness and its effect on sentencing: "(1) the extent of the defendant's inability to control his or her behavior due to the disorder or impairment; (2) overall limitations on functioning; (3) the duration of the mental illness; and (4) the extent of any nexus between the disorder or impairment and the commission of the crime." Ankney v. State, 825 N.E.2d 965, 973 (Ind. Ct. App. 2005), trans. denied (citing Archer v. State, 689 N.E.2d 678, 685 (Ind. 1997)). We have previously concluded that a defendant with no criminal history "who is suffering from a severe, longstanding mental illness that has some connection with the crime(s) for which he was convicted and sentenced is entitled to receive considerable mitigation of his sentence." Biehl v. State, 738 N.E.2d 337, 340 (Ind. Ct. App. 2000), trans. denied. On the other hand, where a defendant is "capable of controlling his behavior, did not have significant limitations on his functioning, and failed to identify a nexus between his mental illness and the instant offense," mental illness should not be as significant a factor for sentencing. Scott v.

State, 840 N.E.2d 376, 384 (Ind. Ct. App. 2006), trans. denied (concluding that defendant's mental illness should have been given little weight).

Here, Edwards testified at the sentencing hearing that she had "been in depression for twenty years[,]" that she had once attempted suicide, and that she had previously been in treatment but "had only been seen [by her current mental health provider] a couple of times before" her arrest. Transcript at 33-34. She also testified that she was taking Effexor for depression and Ativan for anxiety. Edwards' live-in boyfriend of twelve years also testified that she had suffered from depression for "years[.]" Id. at 54. But Edwards did not demonstrate the extent of her inability to control her behavior due to her mental health, any overall limitations on functioning, or any nexus between her mental health and the commission of the offense. As such, Edwards did not show that her mental illness is a significant mitigator. The trial court did not abuse its discretion by not identifying that mitigator.[1]

Issue Two: Appellate Rule 7(B)

Edwards next contends that her sentence in inappropriate in light of the nature of the offense and her character. 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." Anglemyer I, 868 N.E.2d at 491 (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)). This appellate authority is implemented through

[1] Edwards also contends that, in light of the improper identification of an aggravator and the failure to identify a significant mitigator, we should remand for the trial court to reweigh the properly identified aggravators and mitigators. Because we conclude that the trial court did not abuse its discretion in identifying aggravators and mitigators, a remand for reweighing is unnecessary.

Indiana Appellate Rule 7(B). Id. Under Appellate Rule 7(B), 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." Anglemyer, 868 N.E.2d at 494 (quoting Childress, 848 N.E.2d at 1080) (alteration in original).

Edwards' sentence is not inappropriate in light of the nature of the offense. On the date of the offense, Edwards drove Jefferson to make a cocaine sale in exchange for cocaine for herself. Edwards benefited when the State dismissed a charge of dealing in cocaine, as a Class A felony, in exchange for her guilty plea to possession of cocaine, as a Class C felony. Edwards' sentence was two years shy of the maximum for a Class C felony and only two years greater than the advisory sentence.[2] Although the circumstances underlying her conviction are not particularly egregious, we observe that the trial court suspended four years of the six-year sentence to probation.

Edwards' sentence is also not inappropriate in light of her character. Edwards has a history of two felony convictions for alcohol-related offenses seven and fourteen years earlier. Again, she admitted to providing transportation to Jefferson in exchange for cocaine on "multiple occasions." Appellant's App. at 26. While Edwards violated probation fourteen years ago, she successfully completed probation for a different offense seven years ago. And although Edwards suffers from depression, she did not show that

[2] "A person who commits a Class C felony shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years. In addition, the person may be fined not more than ten thousand dollars ($10,000)." Ind. Code § 35-50-2-6(a).

she had consistently sought treatment for that condition or allege that her sentence would have any impact on her mental health. Edwards' character is not the most objectionable, but neither is her six-year sentence with four years suspended to probation. Edwards has not met her burden to show that her sentence was inappropriate.

Affirmed.

KIRSCH, J., and BARNES, J., concur.