Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

FILED
Aug 02 2011, 9:31 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

GILDA W. CAVINESS
Caviness Law Office, LLC
Rushville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ANDREW A. KOBE
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DEBORA A. PHILLIPS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 73A01-1011-CR-598
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE SHELBY SUPERIOR COURT
The Honorable Jack A. Tandy, Judge
Cause No. 73D01-0909-FA-19

August 2, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Debora A. Phillips appeals the sentence imposed after she pled guilty to three counts of dealing a schedule I, II, or III substance, class A felonies.[1]

We affirm.

ISSUES

1. Whether the trial court abused its discretion in sentencing Phillips.

2. Whether the trial court's sentence is inappropriate.

FACTS

In 2002, Phillips began using illegal substances in a misguided attempt to become closer to her oldest son, Doug, who was addicted to illegal substances. At the time, Phillips was in her forties. Phillips became addicted to heroin and other illegal substances, addictions that had a devastating effect on her body and mind. Indeed, she overdosed on multiple occasions. After using illegal substances for approximately four years, and after being convicted of public intoxication and driving under the influence, Phillips attempted to rehabilitate herself by moving to her father's house in January of 2006.

In April 2006, Phillips discovered Doug's body in the front yard of her former home. Doug had died from a lethal mixture of methadone and Alprazolam (Xanax). Following Doug's death, Phillips moved back to her home. She subsequently relapsed on two occasions. In 2008, during a visit with her friend, Marnie Moore, Phillips overdosed

[1] Ind. Code § 35-48-4-2.

on heroin; and her life was saved through medical attention. Another time, Phillips overdosed on methadone that she had obtained from a friend.

At some point, Phillips began selling prescription pills to Moore and Mike Able. She also allowed Scott Vanvleet to use her home for a drug transaction where Vanvleet sold Lortab to a customer. Apparently, Phillips engaged in "trading" of drugs over a significant period of time before being apprehended.

On three different occasions in 2009, Phillips sold controlled substances to a confidential informant. The sales, which occurred at Phillips' home, took place within 1000 feet of a park and a childcare facility. On September 24, 2009, Phillips was charged with three counts of dealing a schedule I, II, or III substance (respectively, Hydrocone, Lortab, and Hydrocone),[2] class A felonies; three counts of dealing a schedule IV controlled substance (Xanax),[3] class B felonies; and one count of corrupt business influence, a class B felony.[4] In an open plea, Phillips pled guilty to the three class A felonies in exchange for dismissal of the four class B felonies.

At the sentencing hearing, Phillips submitted evidence indicating that she was afflicted with multiple medical conditions, including "depression and bipolar," high blood pressure, obesity, a weak bladder, a sleeping disorder, migraines, reflux, nausea, deep vein thrombosis, high cholesterol, degenerative arthritis, and fibromyalgia. She also

---

[2] Indiana Code section 35-48-4-2(b) provides that a person who delivers a controlled substance commits a class A felony if the delivery occurs in, on, or within one thousand feet of school property, a public park, a family housing complex, or a youth program center.

[3] I.C. § 35-48-4-3.

[4] I.C. § 35-45-6-2.

submitted evidence indicating that she needs a cane or walker for assistance with her legs and that she can't stand or walk for more than five to ten minutes at a time. These afflictions were treated with multiple prescription medications. She submitted evidence from a therapist indicating that her health and stability depend on a calm and stable environment in the presence of family and friends. The trial court heard the evidence, observed the witnesses, and sentenced Phillips to concurrent terms of twenty-five years, with seven years suspended to probation. She now appeals.

DECISION

1. Abuse of Discretion

Phillips contends that the trial court abused its discretion in finding as an aggravator that her "attitude is not consistent with rehabilitation." (App. 61). Specifically, Phillips alleges that the record does not support the trial court's finding. Phillips further contends that the trial court abused its discretion in not finding that either her guilty plea or undue hardship on herself and her family were mitigators.

When evaluating sentencing challenges under the advisory sentencing scheme, we first confirm that the trial court issued the required sentencing statement, which includes a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on rehearing*, 875 N.E.2d 218 (Ind. 2007). If the recitation includes a finding of mitigating or aggravating circumstances, the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id*.

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 occurs if 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 in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. *Id.* Another way is to enter a sentencing statement that explains reasons for imposing a sentence, including mitigating and aggravating circumstances, which are not supported by the record. *Id.* at 490-91. A court may also abuse its discretion by citing reasons that are contrary to law. *Id.* at 491.

Here, the trial court imposed a term of twenty-five years with seven years suspended. This sentence is authorized by Indiana Code section 35-50-2-4, which states that a person who commits a class A felony "shall be imprisoned for a fixed term of between twenty (20) and fifty (50) years, with the advisory sentence being thirty (30) years."

In determining the length of the sentence, the court reasoned as follows:

> I'll find one aggravating circumstance here . . . there's a number of factors that go into it, but I'll choose to call it that your attitude is not consistent with rehabilitation. And what I mean by that is I hear from you minimizing your involvement and your behavior, not wanting to concede that you are a drug dealer. You are a drug dealer and whether people come to you or you're trading drugs that you think they need, all those activities are drug dealing and . . . and you're a drug dealer. The second part of what I mean when I say you're [sic] attitude is not consistent with rehabilitation is that, and this is [the deputy prosecutor's] strongest point, I think, that even after the very tragic death of your son, you're continuing to engage in the behavior here. You're . . . you're using drugs and you're dealing drugs and that's . . . that is a tough one to get past and . . . and thinking that you should receive some kind of a break in terms of sentencing.

> On the other side of the ledger are mitigating circumstances, factors in your favor that suggest a more lenient approach to a sentence. I'll find two. One is that you have significant health issues. I appreciate that. I've read about the . . . about your medical situation in the Pre-Sentence report as well as the evidence that you've presented here, and I acknowledge that you have significant health issues. Secondly, I'll find as a mitigator, that you have [a] very minimal criminal history. It's odd that a person who has lived a crime free life and then in their 40's decides to commit crimes and become involved in the criminal justice system. But, I will find that because of your minimal criminal history, you should be given credit for that. . . .

(Tr. 61-62).

The sentencing transcript shows that Phillips, upon questioning by her attorney, admitted that her past drug-selling activities were "most definitely" wrong. (Tr. 51). However, when being questioned by the deputy prosecutor, Phillips downplayed the impact of her actions, characterizing them as "just trading" rather than "dealing" drugs. (Tr. 46-51). She also refused to characterize her actions as "dealing" because her customers came to her with the desire to buy her prescription drugs for relief of their needs; she did not go looking for customers. *Id.* The sentencing transcript further shows that even after she nearly died of an overdose and after her son and Moore died of overdoses, Phillips refused to acknowledge the lethal nature of her "trading" activities. *Id*. The trial court, which observed Phillips' demeanor and heard her testimony at the sentencing hearing, did not abuse its discretion in concluding that Phillips' confession of wrongdoing was occasioned by her arrest and the possibility of a long sentence, not by her sincere belief that "trading" was an activity that should never be repeated. In short, the trial court did not abuse its discretion as the record supports its findings.

With reference to Phillips' argument that the trial court abused its discretion in not finding that her guilty plea was a mitigating factor, we note that 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." *Anglemyer*, 875 N.E.2d at 221. (citation omitted). When a defendant has not demonstrated that a guilty plea was a significant mitigating circumstance, a trial court does not abuse its discretion by omitting reference to the plea when imposing sentence. *Id.*

Here, the trial court implied in its finding of an aggravator that it did not believe that Phillips fully accepted responsibility for her actions. Instead of admitting that she was dealing drugs, she wanted to make the distinction that she sold drugs only to those who came to her with a "need." Furthermore, even though Phillips pled guilty to the more serious class A felonies, she still received a substantial benefit by removing the possibility that she could be sentenced for the three class B felonies for selling Xanax to the confidential informant and for the class B felony of engaging in a corrupt business influence.[5] Phillips has not demonstrated that her guilty plea is a significant mitigating circumstance, and the trial court did not abuse its discretion in omitting reference to the plea when imposing sentence. Faced with proceeding to trial involving multiple "controlled buys," the decision to plead guilty could be construed as a pragmatic or strategic move by Phillips.

[5] A person who commits a class B felony "shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years." I.C. § 35-50-2-5.

With reference to Phillips' argument that the trial court abused its discretion in not finding undue hardship to herself or her family as a mitigator, we initially note that the trial court did find Phillips' physical health issues to be a mitigating circumstance. We will not review the weight given by the trial court to its finding. *See Anglemyer*, 868 N.E.2d at 491. We further note that Phillips did not raise the issue of undue impact upon her family as a mitigating factor at the sentencing hearing. A trial court does not abuse its discretion in failing to consider a mitigating factor not raised at sentencing. *See Georgopulos v. State*, 735 N.E.2d 1138, 1145 (Ind. 2000).

2. Inappropriate Sentence

Phillips contends that her sentence should be revised as inappropriate. While she recognizes that the sentence imposed is less than the advisory sentence, she believes that the sentence does not take into account her unique circumstances.[6]

The revision of a sentence is authorized by the Indiana Constitution through Indiana Appellate Rule 7(B), which provides that we "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." In determining the appropriateness of a sentence, a court of review may consider any factors appearing in the record. *Schumann v. State*, 900 N.E.2d 495, 497 (Ind. Ct. App. 2009). The "nature of the offense" portion of the appropriateness review begins with the advisory sentence. *Anglemyer*, 868 N.E.2d at 491; *Richardson v. State*,

[6] The State argues that the sentence imposed is less than the thirty-year sentence Phillips asked for at the sentencing hearing. In making its argument, the State does not recognize that Phillips was asking for an essentially suspended thirty-year sentence that would include a very short or no period of incarceration, coupled with long periods of community corrections, house arrest, and/or probation.

906 N.E.2d 241, 247 (Ind. Ct. App. 2009). The "character of the offender" portion of the sentence review refers to general sentencing considerations and the relevant aggravating and mitigating circumstances. *Major v. State*, 873 N.E.2d 1120, 1130 (Ind. Ct. App. 2007), *trans. denied*. A defendant bears the burden of persuading us that her sentence is inappropriate in light of both the nature of her offense and her character. *Williams v. State*, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008).

With regard to the nature of the offense, Phillips points out that she sold the controlled substances to the confidential informant at his insistence and upon his claim that he and his wife needed the prescription drugs for their own health reasons. She further points out that at the time of the sales to the confidential informant, she was in extremely poor health awaiting disability and that she was in dire financial circumstances. She reiterates her argument that she did not receive the benefit of pleading guilty. Finally, she claims that in the year that passed after her arrest and release on bond until the date of the trial, she addressed physical, emotional, and financial difficulties without resorting to selling illegal substances.

The State, on the other hand, emphasizes that the sale of controlled substances to this confidential informant was not an isolated event. Phillips "traded" her prescribed medicines to at least two others in exchange for money to live on. In addition, Phillips facilitated another illegal transaction by allowing a seller of Lortab to use her house as a meeting place with the buyer.

With reference to the character of the offender, Phillips emphasizes that she accepted responsibility by entering into a plea agreement and admitting her guilt. She

also emphasizes that she led a productive and law abiding life until she was in her mid-forties--raising two sons as a single parent, maintaining steady employment, and avoiding criminal activity. She further emphasizes that after her introduction to illegal substances, she experienced seriously declining health, forcing her to take many different medications for mental and physical health problems.

The State points out that Phillips' health problems result from her life choices and that she has used the access to prescription medicine gained through her health problems to procure controlled substances for sale. The State further points out that Phillips purchased much of the medicine with Medicaid, thus using public monies to fund her "trading."

In evaluating whether the sentence is inappropriate, we first note that the trial court imposed a sentence that was five years less than the advisory sentence. Furthermore, it imposed an executed sentence that was twelve years less than the advisory sentence. Thus, the trial court gave attention to the totality of the circumstances before it and determined that some mitigation was appropriate. We also note that the trial court did not adopt Phillips' view that a fully or substantially suspended sentence was appropriate. The trial court, which was not required to adopt Phillips' viewpoint regarding the suspension of a sentence for a class A felony, engaged in a meaningful review of the pertinent circumstances. By imposing a term that was less than the advisory sentence, the trial court showed that it took into account both the possible dangerous consequences of Phillips' inability to recognize or refuse the full import of her actions and the effects of incarceration upon Phillips' health. The trial court also

recognized Phillips' pre-drug, crime-free life. After examining these and other factors raised by Phillips and the State, we cannot say that the sentence imposed was inappropriate in light of the nature of the offense and the character of the offender.

CONCLUSION

The trial court did not abuse its discretion in determining that the evidence supported findings of aggravating and mitigating circumstances. The sentence imposed is not inappropriate.

Affirmed.

RILEY, J., and BARNES, J., concur.