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IN THE
COURT OF APPEALS OF INDIANA

EDWARD RAY KIND,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-1003-CR-291
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0908-FA-12

August 4, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Edward Kind appeals his sentence following a plea of guilty to two counts of class A felony dealing in cocaine;[1] one count of class A felony possession of cocaine;[2] and one count of class D felony maintaining a common nuisance.[3]

We affirm.

ISSUE

Whether the trial court erred in sentencing Kind.

FACTS

On August 14, 2009, Kind's ex-girlfriend, acting as an informant, went to Kind's Lafayette home, which was located within one thousand feet of a child care center and family housing complex. Using money provided by law enforcement officers, the ex-girlfriend purchased crack cocaine from Kind. The ex-girlfriend informed officers that Kind had a child with him.

During the early morning of August 15, 2009, officers executed a search warrant for Kind's residence. When they entered the residence, officers found Kind's nine-year-old granddaughter in the living room.

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[1] Ind. Code § 35-48-4-1.

[2] I.C. § 35-48-4-6.

[3] I.C. § 35-48-4-13.

Upon searching a bedroom, officers discovered several baggies containing a total of approximately fifteen grams of cocaine.[4] They also discovered a baggie containing marijuana.

On August 20, 2009, the State charged Kind with Count I, dealing in cocaine as a class A felony; Count II, dealing in cocaine as a class A felony; Count III, possession of cocaine as a class A felony; Count IV, possession of marijuana as a class A misdemeanor; Count V, maintaining a common nuisance as a class D felony; and Count VI, neglect of a dependent child as a class C felony. Subsequently, the State agreed to dismiss Count VI in exchange for which Kind agreed to plead guilty to the remaining counts.

The trial court held a guilty plea hearing on January 20, 2010. Kind denied knowledge of the marijuana found in his home. Accordingly, the trial court found a factual basis for a finding of guilt on all counts except Count IV. The trial court subsequently granted the State's motion to dismiss Count IV.

The trial court ordered a pre-sentence investigation report (the "PSI") and held a sentencing hearing on February 16, 2010. According to the PSI, Kind had been adjudicated a juvenile delinquent in 1972 for committing an act which, if committed by an adult, would have constituted aggravated assault. The PSI also listed the following

[4] It is not entirely clear how much cocaine officers found. During the sentencing hearing, Indiana State Police Detective Timothy Kendall testified that officers discovered thirty-eight baggies containing a total of approximately fourteen grams of crack cocaine and twelve additional baggies containing a total of "point nine three grams" of crack cocaine. (Tr. 38). According to the probable cause affidavit, the thirty-eight baggies initially discovered contained "approximately 17.76 grams" of crack cocaine, and the other twelve baggies contained "approximately 1.37 grams" of crack cocaine. (App. 14; 15).

convictions as an adult: three felony convictions for violating the State of Georgia's controlled substance act in 1997; a conviction for class A misdemeanor conversion in 2008; a conviction for class A misdemeanor driving with a suspended license in 2008; and another conviction for class A misdemeanor driving with a suspended license in 2009. On August 6, 2008, the trial court sentenced Kind to a suspended sentence of 365 days and 365 days of unsupervised probation for the conversion conviction.

The PSI further showed that the State had dismissed the following charges against Kind: class C felony aggravated battery in 1993; murder in 1994; and class A misdemeanor trespass in 2008. Charges arising out of Georgia in 1997 for felony armed robbery remained pending due to Kind's failure to appear. Kind denied knowledge of the armed robbery charge.

Following his arrest for the instant offense, the State charged Kind with class A misdemeanor false informing; and class B misdemeanor public intoxication. Also, on December 17, 2009, Kind was charged in federal court with felony conspiracy to distribute five or more grams of crack cocaine.

The PSI further showed that Kind had violated his probation in 1997; Kind, however, disputed that report. On September 1, 2009, the State filed two petitions to revoke his probation; those petitions remained pending as of the date of the sentencing hearing.[5]

[5] Apparently, those petitions arose out of his convictions for driving with a suspended license.

Kind, who was fifty-two years old at the time of sentencing, reported that he had been shot a total of thirteen times on separate occasions; suffered from numerous ailments, including high blood pressure and arthritis; and had a history of drug and alcohol abuse. According to Kind, he had sought alcohol and drug treatment approximately ten years ago but left the program early.

Kind presented as mitigating circumstances his history of alcohol abuse; that he had started taking classes to obtain his General Educational Development diploma ("GED"); his numerous health issues; and his "unusual and interesting life," including having been shot on "several different occasions . . . ." (Tr. 40). Kind's daughter testified that he loves his family and is "a good man . . . ." (Tr. 32).

Detective Kendall also testified. He opined that given the amount of cocaine found in Kind's residence, Kind was "between a lower to a middle level type of dealer." (Tr. 39).

The trial court found as follows:

> The Court finds as a mitigating circumstance that the defendant has taken responsibility for his actions by admitting his guilt and entering a plea of guilty in this matter. An aggravating circumstance is the defendant's criminal history. The Court notes one juvenile adjudication, one prior felony conviction, [and] three prior misdemeanor convictions. Additionally, the court notes three petitions to revoke probation that are pending. One felony charge that is pending, one misdemeanor charge that is pending, and four other cases that have been dismissed. The Court further notes that the defendant disputes the accuracy of several of those charges but the Court finds that even without those charges this is still a significant criminal history and is an aggravating circumstance. A second aggravating circumstance is the defendant's history of illegal drug use and the Court notes that this is a . . . minimum non-suspendable case. . . . I

> always have a heavy heart in these cases. When I listen to your daughter testify about how this punishes her and punishes your grandchildren, the affect [sic] of this. I know that . . . just as sure as I am sitting here. I hear this so often and I know that when I sentence someone to prison I am also sentencing their family and I think Mr. Kind that's [sic] it's clear to me that you deserve to be punished. But your daughter and grandchildren they don't deserve this. . . . It's your conduct that causes these things. Although it breaks my heart I've still go[t] to do it.

(Tr. 45-46). The trial court then sentenced Kind to concurrent sentences of twenty-six years on Counts I, II, and III each, and three years on Count V. Thus, Kind received a total executed sentence of twenty-six years.

DECISION

1. Sentencing

Kind asserts that his sentence is inappropriate. Specifically, he argues that the trial court failed to consider mitigating circumstances and that his sentence is inappropriate.

A sentence that is within the statutory range is subject to review only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). A trial court may abuse its discretion if the sentencing statement

> explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law.

Id. at 490-91. However, the relative weight or value assignable to reasons properly found, or to those which should have been found, is not subject to review for abuse of discretion. *Id.*

a. *Mitigating circumstances*

Kind asserts that the trial court failed to consider the following mitigators: his participation in a GED class; the undue hardship his incarceration would impose on his family; his health issues; the murder of Kind's father; and his age.

> The failure to find a mitigating circumstance clearly supported by the record may imply that the trial court overlooked the circumstance. The trial court, however, is not obligated to consider "alleged mitigating factors that are highly disputable in nature, weight, or significance." The trial court need enumerate only those mitigating circumstances it finds to be significant. On appeal, a defendant must show that the proffered mitigating circumstance is both significant and clearly supported by the record.

Rawson v. State, 865 N.E.2d 1049, 1056 (Ind. Ct. App. 2007) (internal citations omitted), *trans. denied*.

We note that Kind provides no authority in support of the mitigating circumstances set forth in his brief. Thus, these issues are waived. *See Bonner v. State*, 776 N.E.2d 1244, 1251 (Ind. Ct. App. 2002) (stating that a party waives any issue raised on appeal where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record), *trans. denied*. Waiver notwithstanding, we shall address these purported mitigating circumstances.

Kind maintains that he has been "working diligently on obtaining a GED and was making good progress." Kind's Br. at 9. While we commend Kind for pursuing an

education, the record reveals that Kind enrolled in classes only eleven days prior to the sentencing hearing. We therefore cannot say that this is a significant mitigating circumstance. Accordingly, we find no abuse of discretion in failing to find this to be a mitigating circumstance. *See Taylor v. State*, 840 N.E.2d 324, 340 (Ind. 2006) (finding no error in failing to consider the obtainment of the GED as a mitigator).

Kind also argues that the trial court failed to consider that his incarceration will impose an undue hardship on his family. We disagree.

First, we note that Kind has presented no evidence that his family is financially dependent on him. Thus, he has failed to show that the hardship imposed on his family is a significant mitigating circumstance due to special circumstances. *See Benefield v. State*, 904 N.E.2d 239, 247 (Ind. Ct. App. 2009) ("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."), *trans. denied*.

Nevertheless, it is clear from the sentencing statement that the trial court did consider the impact of Kind's incarceration on his family. As to the weight assigned to this mitigating circumstance, it is not subject to review for abuse of discretion. *See Anglemyer*, 868 N.E.2d at 490. Thus, we find no abuse of discretion.

Kind maintains that the trial court abused its discretion in failing to consider that he "has sustained gunshot wounds more than 13 times in his life, and at times had been

confined to a wheelchair"; is "disabled and receiving social security benefits"; and is "blind in his right eye as a result of a gunshot wound." Kind's Br. at 9. We cannot agree.

Kind did not present any evidence that he cannot or will not be treated while incarcerated or that incarceration would constitute an undue hardship due to his health problems. We therefore cannot say the trial court abused its discretion in declining to find his poor health to be a significant mitigating circumstance. *See Henderson v. State*, 848 N.E.2d 341, 345 (Ind. Ct. App. 2006) (finding no abuse of discretion in failing to consider poor health to be a mitigator where the defendant failed to establish that her health problems should be a factor in determining an appropriate period of incarceration).

Kind further argues that the trial court should have considered his difficult childhood; specifically, he maintains that the murder of his father, "when [Kind] was a child," is a mitigating circumstance. Kind's Br. at 9. Kind, however, failed to propose this as a mitigating circumstance to the trial court. He therefore is precluded from advancing this as a mitigating circumstance on appeal. *See Samaniego-Hernandez v. State*, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (declining to acknowledge the defendant's proffered mitigators where he failed to propose them at the trial court level).

Furthermore, we note that Kind states in his brief that his father was murdered "when he was a child." Kind's Br. at 9. The PSI, however, states that Kind's father was murdered "approximately 10 years ago." (PSI at 5). Therefore, waiver notwithstanding, we find no abuse of discretion.

Kind also argues that the trial court should have considered that he was "fifty-two years of age at the time of the sentencing." Kind's Br. at 9. We disagree as "[a]ge is neither a statutory nor a per se mitigating factor." *Monegan v. State*, 756 N.E.2d 499, 504 (Ind. 2001).

Furthermore, this is not a case of a fifty-two-year-old man with no criminal history. Rather, Kind has a fairly extensive criminal history, with his first drug-related conviction in 1997. We also decline to find fifty-two to be such an advanced age that it requires credit as a mitigating circumstance. On the contrary, if we were to consider age as a measurement of culpability, certainly someone who is fifty-two years old is capable of understanding the ramifications of his actions. Moreover, it is inconceivable that a person who has received thirteen gunshot wounds over the course of his lifetime would not understand or appreciate the dangers generally associated with dealing in illegal drugs.

Kind has failed to show that the proffered mitigating circumstances are both significant and clearly supported by the record. Thus, we find no abuse of discretion in the finding of mitigating circumstances. *See Rawson*, 865 N.E.2d at 1056.

b. *Inappropriate sentence*

Kind also argues that his sentence is inappropriate. We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. App. R. 7(B). It is the defendant's burden to "'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 v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

In determining whether a sentence is inappropriate, the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Childress*, 848 N.E.2d at 1081. Indiana Code section 35-50-2-4 provides 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." Indiana Code section 35-50-2-7 provides that a person who commits a class D felony "shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 1/2) years." Thus, Kind received sentences below the advisory sentence for his three class A felony convictions but received the maximum sentence for his class D felony conviction. The trial court ordered that the sentences run concurrently, sentencing Kind to an executed sentence of twenty-six years.

As to the nature of Kind's offense, the record discloses that he possessed at least fifteen grams of cocaine, an amount typically held by a lower to middle level dealer. Kind kept the cocaine in his residence, potentially exposing his young granddaughter to illegal drugs as well as the nefarious people and activities related to the illegal drug trade.

As to Kind's character, this is neither his first drug-related conviction nor felony conviction. He has a lengthy criminal history of convictions, charges, arrests, and probation violations. He also incurred additional charges following his arrest for the

instant offenses. Thus, Kind clearly has a disregard for the law. *See, e.g.*, *Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005) (finding that a defendant's record of arrests "may be relevant to the trial court's assessment of the defendant's character in terms of the risk that he will commit another crime").

Kind pleaded guilty to three class A felonies and one class D felony. Despite the nature of his offense and his character, the trial court sentenced Kind to a total executed sentence of four years less than the advisory sentence for a class A felony. We cannot say that this sentence is inappropriate.

Affirmed.

BRADFORD, J., and BROWN, J., concur.