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IN THE
COURT OF APPEALS OF INDIANA

MARKI ANTWAN ALSUP,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0901-CR-69
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0803-FA-7

August 7, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Marki Antwan Alsup appeals the sentence imposed following his plea of guilty to class B felony dealing in cocaine.[1] We affirm in part and vacate in part.

Issues

Alsup raises two issues, which we restate as the following three:

I. Whether the trial court abused its discretion in sentencing him;

II. Whether his sentence is inappropriate in light of the nature of the offense and his character; and

III. Whether the trial court committed fundamental error by imposing a countermeasures fee.

Facts and Procedural History

On March 5, 2008, Alsup knowingly or intentionally delivered 1.5 grams of cocaine to a confidential informant. On March 7, 2008, the State charged him with class B felony conspiracy to commit dealing in cocaine, class B felony dealing in cocaine, class A felony possession of cocaine, and class B misdemeanor false informing. Pursuant to a plea agreement, Alsup pled guilty to class B felony dealing in cocaine, and the State agreed to dismiss the remaining charges, dismiss cause 79D05-0702-CM-207, and not to file charges based on a controlled buy in LPD 2008-2514. The plea agreement also provided that "the defendant shall receive such sentence as this Court deems appropriate after hearing any evidence or argument of counsel." Appellant's App. at 7.

At sentencing, the trial court made the following statement:

[1] Ind. Code § 35-48-4-1(a).

> The aggravating factors here are [Alsup's] criminal or delinquent behavior and [his] violation of the conditions of at least pre-trial release and possible parole or probation.
> The mitigating factor is [Alsup's] plea of guilty and taking responsibility for his crime. [Alsup] has offered a couple of other mitigators which the Court does not believe are appropriate mitigators.
> ….
> Okay. Then a lot of people have a troubled childhood, that doesn't excuse later criminality. And [Alsup's] age [twenty-five] is not so young that you haven't had opportunities to learn what the consequences of the crime are and you've determined to persist. And you've been at this business for a long time, so I'm disregarding [Alsup's] age as a potential mitigator. Then the other mitigator offered by [Alsup] is the hardship to [him] and his family. And once again, you put your family at risk when you undertook this crime and so I can't count that as a mitigating factor.
> Hopefully appropriate arrangements will be made for them, but … it's a danger to children to grow up in a home where drugs are being used and sold and so it's a question about whether the kids are more at risk without you there or with you there doing what you were doing before. …. I will note as our discussion before indicated that you have a record that is as close as one can get to being a habitual offender without actually being there. And you certainly have a record which suggests that you could have been charged as a habitual substance offender, which would have aggravated your sentence.

Tr. at 37-40. The trial court then sentenced Alsup to fifteen years in the Department of Correction, fully executed, and entered judgment against Alsup for a $200 countermeasures fee.

Discussion and Decision

I. Abuse of Discretion

Alsup contends that the trial court's sentencing statement is "merely a perfunctory recitation of statutory factors that may be considered which is not sufficient to afford this Court with an adequate review[.]" Appellant's Br. at 9. Under the current "advisory" sentencing scheme, a trial court must issue a sentencing statement that includes "reasonably

detailed reasons or circumstances for imposing a particular sentence." *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. We then review the presence or absence of reasons justifying a sentence for an abuse of discretion, but we cannot review the relative weight given to these reasons. *Id*. at 491. "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*. at 490 (quoting *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006)).

Here, the trial court stated that Alsup's criminal history and violations of pre-trial release conditions were aggravating factors. The trial court then clearly explained that Alsup's age was not a significant mitigator because he had been engaged in criminal activity for such a long time. As to the hardship to Alsup's family, the trial court recognized that Alsup's absence would be difficult for them, but noted that his criminal activity put his children at great risk. The trial court again turned to Alsup's criminal history, noting that it could have supported a habitual substance offender finding. We believe that the trial court's statement taken as a whole is adequate for our review.

Alsup also argues that the trial court abused its discretion when it found that his troubled childhood, age, and the hardship caused to his family by his incarceration were not appropriate mitigating factors. To succeed on his claim, Alsup must establish that the proffered mitigators are both significant and clearly supported by the record. *See Spears v. State*, 735 N.E.2d 1161, 1167 (Ind. 2000) ("[A] defendant must show that the proffered mitigating circumstance is both significant and clearly supported by the record."). We

observe that a trial court is not obligated to accept a defendant's claim as to what constitutes a mitigating circumstance. *Rascoe v. State*, 736 N.E.2d 246, 249 (Ind. 2000). Indiana courts have "consistently held that evidence of a difficult childhood warrants little, if any, mitigating weight." *Ritchie v. State*, 875 N.E.2d 706, 725 (Ind. 2007); *see also Holsinger v. State*, 750 N.E.2d 354, 363 (Ind. 2001) (assigning the defendant's troubled childhood "weight in the low range"). As to age, it is true that "a defendant's youth, although not identified as a statutory mitigating circumstance, is a significant mitigating circumstance in *some* circumstances[,]" *Carter v. State*, 711 N.E.2d 835, 842 (Ind. 1999) (emphasis added). At the time of the current offense, Alsup was nearly twenty-five and had been engaged in criminal activity for six years, with his first conviction at age nineteen. Under these circumstances, age is not a significant mitigating factor. As to the hardship caused to his family by his incarceration, the presentence investigation report shows that Alsup has two daughters that live with their mothers in Chicago, Illinois, and that he has not been ordered to pay child support. As such, Alsup has failed to show how his imprisonment will result in undue hardship to his family. *See Wilkins v. State*, 500 N.E.2d 747, 749 (Ind. 1986) (holding that trial court did not err by failing to consider alleged mitigating circumstance of hardship upon dependents where record indicated that defendant had been separated from wife at time of offense, there was no evidence of defendant's pattern of prior support, and no showing that defendant's family would suffer undue hardship by defendant's incarceration). In sum, the trial court did not abuse its discretion by failing to find the mitigating factors proffered by Alsup.

II. Inappropriateness of Sentence

Alsup also argues that his fifteen-year sentence is inappropriate. Article 7, Section 6 of the Indiana Constitution authorizes this Court to independently review and revise a sentence imposed by the trial court. *Anglemyer*, 868 N.E.2d at 491. Indiana Appellate Rule 7(B) states, "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." "Although appellate review of sentences must give due consideration to the trial court's sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." *Purvis v. State*, 829 N.E.2d 572, 587 (Ind. Ct. App. 2005) (internal citations omitted), *trans. denied*. The defendant bears the burden of persuading us that the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

The advisory sentence for a class B felony is ten years, with a fixed term of between six and twenty years. Ind. Code § 35-50-2-5. "When determining whether a sentence is inappropriate, we recognize that the advisory sentence 'is the starting point the Legislature has selected as an appropriate sentence for the crime committed.'" *Filice v. State*, 886 N.E.2d 24, 39 (Ind. Ct. App. 2008) (quoting *Weiss v. State*, 848 N.E.2d 1070, 1072 (Ind. 2006)), *trans. denied*. Here, the trial court imposed a sentence five years above the advisory.

Turning first to the nature of the offense, we note that although it was nonviolent, it was committed in the hallway of an apartment complex. Appellant's App. at 14. Dealing

drugs near an area where children may be present is a factor that our legislature has indicated justifies a longer sentence. *See* Ind. Code § 35-48-4-1 (enhancing dealing cocaine to a class A felony if it is committed on a school bus, or within 1000 feet of school property, a public park, a family housing complex, or a youth program center).

As to Alsup's character, we observe that he has not presented an argument regarding this consideration. *See* Ind. Appellate Rule 46(A)(8)(a) ("The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning."); *see also Williams v. State*, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008) (noting that appellant's failure to present a cogent argument regarding the inappropriateness of his sentence in light of his character results in waiver of inappropriateness argument). Nevertheless, we choose to exercise our authority to review and revise sentences.

Alsup's criminal history consists of three felony convictions involving illegal possession of or dealing in narcotics or controlled substances, one felony conviction involving possession of a stolen vehicle, and one misdemeanor conviction for possession of marijuana. He was also out on bond on two other cases when he committed the instant offense. His criminal history thus reveals disrespect for and an unwillingness to obey the law. We conclude that Alsup's sentence is not inappropriate in light of the nature of the offense and his character.

III. Countermeasures Fee

Finally, Alsup asserts that the trial court erred in imposing a countermeasures fee because the statutory requirements were not satisfied. As an initial matter, the State argues

that Alsup waived this argument because he failed to present it to the trial court. "'Generally, a failure to object to error in a proceeding, and thus preserve an issue on appeal, results in waiver. However, a court may remedy an unpreserved error when it determines the trial court committed fundamental error. An improper sentence constitutes fundamental error and cannot be ignored on review.'" *Collins v. State*, 835 N.E.2d 1010, 1017 (Ind. Ct. App. 2005) (quoting *Groves v. State*, 823 N.E.2d 1229, 1231-32 (Ind. Ct. App. 2005)), *trans. denied* (2006). Likewise, we have recently recognized that "the vast weight of the recent caselaw in this state indicates that appellate courts will review a trial court's restitution order even where the defendant did not object based on the rationale that 'a restitution order is part of the sentence, and it is the duty of the appellate courts to bring illegal sentences into compliance.'" *Rich v. State*, 890 N.E.2d 44, 48-49 (Ind. Ct. App. 2008) (quoting *Cherry v. State*, 772 N.E.2d 433, 440 (Ind. Ct. App. 2002)), *trans. denied*; *but see Long v. State*, 867 N.E.2d 606, 618 (Ind. Ct. App. 2007) ("failure to make a specific and timely objection to the trial court's receipt of evidence concerning the amount of restitution constitutes a failure to preserve the matter and waives it as an issue for appeal."); *Huddleston v. State*, 764 N.E.2d 655, 657 (Ind. Ct. App. 2002) (stating that defendant "did not object to the restitution order and may be deemed to have waived that issue on appeal[,]" but addressing merits of defendant's argument), *opinion on reh'g*. We find that the countermeasures fee is part of Alsup's sentence and, therefore, we will review his argument on the merits.

Although the trial court did not specifically cite the statute upon which it relied in imposing the countermeasures fee, we note that such fees are governed by Indiana Code

Section 33-37-5-10, which provides as follows:

> (a) The clerk shall collect an alcohol and drug countermeasures fee of two hundred dollars ($200) in each action in which:
> (1) a person is found to have:
> (A) committed an offense under IC 9-30-5;
> (B) violated a statute defining an infraction under IC 9-30-5; or
> (C) been adjudicated a delinquent for an act that would be an offense under IC 9-30-5, if committed by an adult; and
> (2) the person's driving privileges are suspended by the court or the bureau of motor vehicles as a result of the finding.
>
> (b) The clerk shall collect an alcohol and drug countermeasures fee of two hundred dollars ($200) in each action in which:
> (1) a person is charged with an offense under IC 9-30-5; and
> (2) by a plea agreement or an agreement of the parties that is approved by the court:
> (A) judgment is entered for an offense under:
> (i) IC 9-21-8-50;
> (ii) IC 9-21-8-52;
> (iii) IC 7.1-5-1-3; or
> (iv) IC 7.1-5-1-6; and
> (B) the defendant agrees to pay the alcohol and drug counter measures fee.

The State acknowledges that Alsup did not plead guilty to any of the offenses cited in the countermeasures fee statute. Nevertheless, the State urges that we uphold the imposition of the fee, citing *Like v. State*, 766 N.E.2d 416 (Ind. Ct. App. 2002), *opinion on reh'g*. However, *Like* is inapposite in that it involved criminal costs under Indiana Code Section 33-19-5-1(a) (now Indiana Code Section 33-37-4-1).[2] Accordingly, we conclude that the trial court committed fundamental error in imposing a countermeasures fee. We therefore vacate that portion of the trial court's sentencing order. We affirm the order in all other respects.

[2] In addition to the countermeasures fee, Alsup was also ordered to pay the costs of the action. Appellant's App. at 4.

Affirmed in part and vacated in part.

MAY, J., and BROWN, J., concur.