

Case Summary

James McDuffie appeals his three-year sentence for criminal recklessness, a Class D felony. We affirm.

Issue

We consolidate and restate the issue as whether the trial court properly sentenced McDuffie.

Facts

On December 19, 2005, officers from the Kokomo Police Department responded to a call of a shooting at the residence of Matthew Debusk. McDuffie and an unidentified acquaintance had come to Debusk's residence at around 4:30 p.m. that day. McDuffie told Debusk that his mother had been robbed and beaten and that McDuffie suspected that a man named Debiele "Chicago" Scales had done it. Debusk told McDuffie that Scales had left a handgun at the residence. McDuffie asked Debusk to assist him in beating up Scales. Scales then arrived at the residence. McDuffie fired a handgun at Scales as he entered the residence, hitting him in the left forearm. Thereafter, McDuffie and his acquaintance left the residence.

On December 20, 2005, the State charged McDuffie with attempted murder, a Class A felony. Under the terms of a plea agreement, McDuffie pled guilty to criminal recklessness, a Class D felony.

At the sentencing hearing held on November 15, 2006, the trial court stated that it disagreed with the State's decision to reduce the attempted murder charge to Class D felony criminal recklessness because, from its assessment, the evidence supported at least

a Class C felony criminal recklessness charge. The trial court stated, “[a]s a result, basically this case has been pled down so far that I don’t really have a whole lot, I don’t feel that I have a whole lot of options as to what I can do.” Tr. p. 51. Moreover, the trial court found two aggravating circumstances: use of a handgun in commission of the crime and a prior juvenile conviction. The trial court found two mitigating circumstances: that McDuffie was eighteen years old at the time of the offense and that it was his first adult offense. The trial court determined that the aggravators outweighed the mitigators and sentenced McDuffie to three years incarceration, the maximum possible sentence. McDuffie now appeals.

Analysis

McDuffie asserts that the trial court abused its discretion when it failed to properly identify and weigh the aggravating and mitigating circumstances. We note that McDuffie committed this crime after our legislature replaced “presumptive” sentences with “advisory” sentences in April 2005. Our supreme court recently provided an outline for the respective roles of trial and appellate courts under the 2005 amendments to Indiana’s sentencing statutes. See Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). First, a trial court must issue a sentencing statement that includes “reasonably detailed reasons or circumstances for imposing a particular sentence.” Id. 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.

McDuffie claims that the trial court's failure to identify and assign the appropriate weight to specific mitigating factors including McDuffie's successful completion of a drug rehabilitation program, remorse, stable employment, non-violent nature of prior juvenile offense, and educational efforts resulted in an abuse of discretion. Our supreme court has held, "while a finding of mitigating circumstances is well within the discretion of the trial court, the trial court is not obligated to accept the defendant's assertions as to what constitutes a mitigating circumstance." Magers v. State, 621 N.E.2d 323, 324 (Ind. 1993). Moreover, "only when the trial court fails to find a mitigator that the record clearly supports does a reasonable belief arise that the mitigator was improperly overlooked." Id. at 324-25.

McDuffie first claims that the trial court failed to consider his lack of a criminal record as a mitigating circumstance. Contrary to McDuffie's first contention, the trial court did in fact assign mitigating weight to his lack of an adult criminal record. Specifically, the record indicates that the trial court found the fact that the instant offense was McDuffie's first adult offense to be a mitigating circumstance. Any claim otherwise is without merit.

McDuffie also claims that the trial court failed to give sufficient mitigating weight to certain mitigators including his expression of remorse, age, and successful completion of a drug abuse program. The trial court determined that the record did not support McDuffie's contention that he was remorseful and was not persuaded by McDuffie's

completion of a drug treatment program. These findings regarding mitigating circumstances were within the trial court's discretion. See Id. Moreover, any challenges to the weight afforded particular mitigators and aggravators are not subject to appellate review. See Anglemyer, 868 N.E.2d at 491.

McDuffie next challenges the trial court's finding that the use of a handgun was an aggravating circumstance. Specifically, McDuffie claims that the use of a handgun was an element of the offense and therefore, cannot be considered as an aggravating circumstance. It is generally true that a trial court may not consider a material element of an offense as an aggravating circumstance. Townsend v. State, 498 N.E.2d 1198, 1201 (Ind. 1986). Here, however, McDuffie specifically pled guilty under Indiana Code Section 35-42-2-2-(d)(1) as Class D felony criminal recklessness by causing serious bodily harm. The same statute may make the offense a Class D felony if it is committed while the defendant is armed with a deadly weapon. See Ind. Code § 35-42-2-2(c)(2)(A). However, the use of a firearm in the commission of the offense was not a material element of the offense of which McDuffie was convicted. See I.C. § 35-42-2-2-(d)(1). The trial court, therefore, did not consider an inappropriate aggravator in its sentencing determination.

McDuffie also contends that the trial court exhibited personal bias against him when it rendered the maximum three-year sentence. "The law presumes that a judge is unbiased and unprejudiced." Timberlake v. State, 753 N.E.2d 591, 610 (Ind. 2001), cert. denied. To rebut that presumption McDuffie must demonstrate that "an objective person, knowledgeable of all the circumstances, would have a reasonable basis for doubting the

judge's impartiality." Id. Adverse rulings or the imposition of the maximum sentence do not support a claim of bias. Radcliff v. State, 579 N.E.2d 71, 73 (Ind. 1991).

McDuffie claims that the trial court made several statements during the sentencing hearing that amounted to bias. Although the State claims that McDuffie waived this claim by failing to raise the issue during the hearing, we choose to address this claim on the merits. Although several of the trial court's statements concerning the appropriateness of the plea agreement might have been better left unsaid, they do not indicate a lack of judicial fairness. Moreover, the trial court acknowledged that its observations regarding the plea agreement had no bearing on its sentencing decision. Although the trial court's frustration with the reduced plea agreement is apparent, its comments were appropriate reflections at sentencing upon the gravity of the offense and the amount of evidence in the State's possession. McDuffie has failed to demonstrate that his sentence was the result of unfair prejudice.

We independently address whether the sentence was appropriate in light of the nature of the offense and the character of the offender. See Anglemyer, 868 N.E.2d at 491. The record reveals that McDuffie went to Debusk's residence believing that Scales had physically abused his mother. McDuffie waited for Scales to arrive at Debusk's residence and upon his arrival, fired a handgun at him. McDuffie is fortunate that he did not cause much more serious harm or even death. Furthermore, McDuffie was eighteen years of age at the time of the instant offense and while this is his first adult conviction, McDuffie has failed to learn from his previous contact with the justice system as evidenced by his prior juvenile conviction. In light of the nature of the offense and

McDuffie's character, we find that the trial court's sentence, three years imprisonment, is not inappropriate.

Conclusion

McDuffie's three-year sentence is not the result of an abuse of trial court discretion and is not inappropriate. We affirm.

Affirmed.

KIRSCH, J., and ROBB, J., concur.