



## STATEMENT OF THE CASE

Appellant-Defendant, James W. Cordill (Cordill), appeals his sentence for four Counts of battery on a child, Class B felonies, Ind. Code § 35-42-2-1.

We affirm.

## ISSUE

Cordill raises one issue on appeal, which we restate as whether the trial court properly sentenced him.

## FACTS AND PROCEDURAL HISTORY

On July 17, 2006, Cordill's son, D.B., was born. On August 17, 2006, the State filed an Information charging Cordill with Counts I-IV, battery on a child, Class B felonies, I.C. § 35-42-2-1(a)(4), and Count V, battery on a child, a Class D felony, I.C. § 35-42-2-1(a)(2)(B), for the battery of D.B. On October 22, 2006, Cordill signed a Written Advisement and Waiver of Rights, which included a paragraph stating in pertinent part, "by pleading guilty you have agreed to waive your right to appeal your sentence so long as the Judge sentences you within the terms of your plea agreement." (Appellant's App. p. 19). Additionally that same day, Cordill signed a Motion to Enter a Plea of Guilty (plea agreement), which included the following acknowledgement:

I understand that I have a right to appeal my sentence if there is an open plea. An open plea is an agreement which leaves my sentence to the Judge's discretion. I hereby waive my right to appeal my sentence so long as the Judge sentences me within the terms of my plea agreement.

(Appellant's App. p. 25). In exchange for Cordill's plea of guilty to Counts I-V, battery on a child, all Class B felonies, the State offered to dismiss Count V, battery against a

child as a Class D felony, and agreed that Cordill's sentence for the four remaining Counts should run concurrently.

On November 20, 2006, the trial court accepted the plea agreement, in which Cordill admitted to the following facts:

On at least three (3) occasions I got up in the middle of the night with my son because he was crying. I became angry because I could not get him to stop crying and struck him in the head with the palm portion of my hand. I struck D.B. hard enough on those occasions that I caused three (3) separate skull fractures.

On August 12, 2006, I again was taking care of my son and became angry with him, this time because I had to change his diaper. I grabbed my son very hard by the ankle and twisted his leg while I was changing his diaper. I admit that while doing this I fractured my son's tibia.

At the time I committed all of these offenses my son was less than one (1) month-old [sic], and I was twenty-six (26) years-old [sic].

(Appellant's App. pp. 24-25). On that same date, the trial court held a sentencing hearing where it found that the aggravating factors outweighed the mitigating factors. The trial court then sentenced Cordill to the Indiana Department of Correction for twenty years, the maximum sentence for a Class B felony, for each of the four Counts of battery on a child to be served concurrently pursuant to the plea agreement.

After announcing Cordill's sentence, the trial court explained:

I would note sir that you have the right to appeal when there has been a plea with a sentence left open as in this case. In order to appeal you must file either a notice of appeal or motion to correct errors within thirty days of this date. If you elect to file a motion to correct errors, you must file your notice of appeal within thirty days of an adverse ruling on that motion. Failure to comply with these requirements will usually result in a forfeiture of your right to appeal. You have a right to be represented by counsel at all stages of these proceedings including an appeal.

(Transcript pp. 26-27). The State made no comment following the trial court's explanation that Cordill could appeal his sentence.

Cordill now appeals. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

### *I. Waiver of Right to Appeal*

Initially, we address the contention from the State that Cordill has waived his right to appeal his sentence. Specifically, the State argues that Cordill explicitly waived his right to appeal the trial court's sentencing decision by signing the plea agreement, and asks that we dismiss Cordill's appeal. Cordill argues in reply that he did not knowingly, voluntarily and intelligently waive the right to appeal his sentence.

Our court recently held that an Indiana defendant may explicitly waive the right to appeal a trial court's discretionary sentencing decision as a part of a guilty plea that is open. *Perez v. State*, 866 N.E.2d 817 (Ind. Ct. App. 2007), *trans. denied*; ("A plea agreement where the issue of sentencing is left to the trial court's discretion is often referred to as an 'open plea.'" *Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004)). In so doing, our court referenced the contractual nature of plea agreements and the binding nature of those agreements on the trial court if the trial court accepts the agreement. *Perez*, 866 N.E.2d at 820. More importantly to our analysis today, our court cited the Seventh Circuit Court of Appeals for the proposition that "a defendant's appeal waiver is enforceable if made knowingly and voluntarily." *Id.* at 819 (citing *United States v. Lockwood*, 416 F.3d 604, 608 (7th Cir. 2005)).

Typically, a trial court cannot accept a guilty plea without determining first that the defendant is aware that he is giving up certain rights. *See* I.C. § 35-35-1-2 (ensuring that defendants are aware of their rights to: (1) a public and speedy trial; (2) confront and cross-examine the witnesses against him; (3) have compulsory process for obtaining witnesses against him; and (4) require the state to prove guilt beyond a reasonable doubt). Compliance with this statute is required “to determine that any waiver of a fundamental constitutional right is knowingly and intelligently given.” *Tumulty v. State*, 666 N.E.2d 394, 396 (Ind. 1996) (citing *Davis v. State*, 446 N.E.2d 1317, 1321 (Ind. 1983)).

Ind. Const. Art. 7 § 4 grants our supreme court “in all appeals of criminal cases, the power to . . . review and revise the sentence imposed.” In addition, Ind. Const. Art. 7 § 6 ensures “an absolute right to one appeal and to the extent provided by rule, review and revision of sentences for defendants in all criminal cases.” In explaining these provisions, our supreme court has stated, “a person who pleads guilty is entitled to contest on direct appeal the merits of a trial court’s sentencing decision where the trial court has exercised sentencing discretion, *i.e.*, where the sentence is not fixed by the plea agreement.” *Collins*, 817 N.E.2d at 231. Moreover, a defendant cannot impliedly agree to the appropriateness of a sentence and thereby waive his right to review under Indiana Appellate Rule 7(B) (discussed below) when the trial court retains any form of discretion in making its sentencing order. *See Riviera v. State*, 851 N.E.2d 300, 300-301 (Ind. 2006).

For the foregoing reasons, we hold that the right to appeal a discretionary sentencing decision is paramount to the rights protected by I.C. § 35-35-1-2. Thus, to

ensure that a defendant is acting knowingly and intelligently when waiving his right to appeal his sentence, we conclude a trial court must first determine that a defendant is aware that he is giving up a right to appeal a discretionary sentencing decision before the trial court can accept an open plea which purports to waive that right.

Reviewing the record before us, the facts do not support a finding that Cordill acted knowingly or intelligently when he waived his right to appeal his sentence. At the sentencing hearing, the trial court expressly and thoroughly advised Cordill of his right to appeal his sentence. However, the trial court did not determine whether Cordill was aware he was giving up his right to appeal. Thus, to the extent that the State's Brief constitutes a motion to dismiss Cordill's appeal, that motion is denied.

## II. *Appropriateness of the Sentence*

Cordill argues that the trial court improperly sentenced him. Specifically, Cordill contends that the trial court abused its discretion when considering his criminal history as an aggravating factor. Further, he argues that the nature of the offenses and his character do not warrant the maximum sentence.

Our supreme court recently clarified a defendant's right to appellate review of a trial court's sentencing decision by stating, "[s]o long as the sentence is within the statutory range, it is subject to review only for abuse of discretion." *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007). An abuse of discretion occurs if we find the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Payne v. State*, 854 N.E.2d 7,13 (Ind. Ct. App. 2006). The trial court no longer has any obligation to weigh aggravating and mitigating factors, and therefore

cannot be said to have abused its discretion in failing to properly weigh those factors. I.C. § 35-38-1-7.1(d); *see also Anglemeyer*, 868 N.E.2d at 491. However, if the trial court includes a finding of aggravating or mitigating circumstances in its recitation of its reasons for imposing a particular sentence, then a sentencing statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be aggravating or mitigating. *Anglemeyer*, 868 N.E.2d at 490. One way in which a trial court may abuse its sentencing discretion is by applying aggravating factors that are improper as a matter of law. *Id.* at 490-491.

Additionally, we have the authority to review the appropriateness of a sentence authorized by statute through Appellate Rule 7(B). That rule permits us to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Anglemeyer*, 868 N.E.2d at 491.

Cordill pled guilty to four Counts of battery on a child, Class B felonies, which carry an advisory sentence of ten years, a minimum sentence of six years, and a maximum sentence of twenty years. *See* I.C. §§ 35-42-2-1(a)(4); 35-50-2-5. At the sentencing hearing, the trial court explained that it found the following as aggravating factors: (1) the victim was less than one month old and helpless; (2) Cordill had a prior criminal record which contained a charge of battery; and (3) Cordill was in a position of custody and providing care for the victim. The trial court found that these factors outweighed the sole mitigating factor it found—Cordill's guilty plea. In explaining how it weighed these factors the trial court stated:

I did look at criminal history or the lack thereof and I looked at that for a long time. And the reason I looked at that for such a long time was I wanted to try to figure out in my mind how that battery fit in. And I understand that that was six years ago and I understand it was dismissed. However, it was dismissed upon completion of a program and I'm assuming that that program was one of two things. You had to go a year without any further criminal acts or you had to complete an anger management. I don't [know] which one it was[;] it doesn't change the fact that there was a battery in your history. And so I [] considered that as an aggravator quite frankly and somehow you want me to turn that around and consider that as a mitigator. You've indicated that you're remorseful and I would think that at this moment you probably are. I certainly would be if I was sitting where you're sitting. The question that ran through my mind when I was going through this was whether or not you were remorseful after it occurred the second time, or remorseful after it occurred the third time, or the fourth time. And finally, thank God, after the fourth time, you had to get this child some help. And so I decline that remorsefulness in this particular [matter] is a mitigator because I don't think it's real. I think you're remorseful because you're sitting here this morning. I don't think you were remorseful at any time during the period that these acts were occurring. And with respect [to] you[r] plea of guilty I will certainly find that that's a mitigator, however I lessen the benefit of that because you did get an extreme, I think, benefit because you plead guilty to four serious counts and I have to run those, if I accept it, concurrent. And you also had dismissal of a count.

(Tr. pp. 24-25).

#### *A. Aggravating Factors*

Cordill argues that the trial court improperly considered his criminal record as an aggravating factor based upon a battery charge for which he was never convicted. In analyzing a similar situation where a trial court found a criminal charge without conviction to be an aggravating circumstance, our supreme court recently explained:

Charges that do not result in convictions may be considered by the sentencing court in context, but something more than mere recitation unaccompanied by specific allegations should be shown. We have held that in order to enhance a criminal sentence based, in whole or in part, on the defendant's history of criminal activity, a sentencing court must find

instances of specific criminal conduct shown by probative evidence to be attributable to the defendant. A bare record of arrest will not suffice to meet this standard.

*McElroy v. State*, 865 N.E.2d 584, 591 (Ind. 2007) (quotation marks and citation omitted). We find from reviewing the record in front of us that the trial court considered Cordill's charge for battery an aggravating factor without citing any specific allegations or probative evidence of specific criminal conduct as required. Thus, we conclude the trial court improperly considered this charge as an aggravating factor.

Nevertheless, the trial court did not necessarily abuse its discretion when enhancing Cordill's sentence. "Even when a trial court improperly applies an aggravator, a sentence enhancement may be upheld if other valid aggravators exist." *Walter v. State*, 727 N.E.2d 443, 447 (Ind. 2000). Here, we find that the trial court was particularly swayed by other aggravating factors: that the victim was helpless and that Cordill was in a position of care and custody of the victim. Further, the trial court expressed its opinion that Cordill received "extreme [] benefit" from his guilty plea by receiving concurrent sentences and the dismissal of one Count. (Tr. p. 25). A guilty plea is not a significant mitigator where the defendant received a substantial benefit from the plea. *Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005). Thus, we conclude that the trial court's decision was not an abuse of discretion.

#### *B. The Nature of the Offense and Character of the Offender*

Cordill also argues that he is not deserving of the maximum sentence when considering his character and the nature of the offense. We disagree. Our evaluation of the nature of the crime in this case leads us to conclude that Cordill committed multiple

violent offenses that resulted in serious bodily injury to his one-month-old baby. Specifically, Cordill admitted that he hit his child in the head hard enough to cause the baby's skull to fracture on multiple occasions. Further, Cordill forcefully grabbed and twisted his baby's leg, causing it to break. The fact that this violent behavior happened multiple times in the infant's first month of life before Cordill either sought help for the child, turned himself in, or was caught speaks of his poor character. Further, as the trial court pointed out, the victim was a helpless infant, and Cordill, the victim's father, was in a position of care and custody. Consequently, we conclude that the trial court's sentence of twenty years for each offense, to be served concurrently, is appropriate in light of the nature of the offense and Cordill's character.

#### CONCLUSION

Based on the foregoing, we conclude that the trial court properly sentenced Cordill.

Affirmed.

SHARPNACK, J., and FRIEDLANER, J., concur.