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IN THE
COURT OF APPEALS OF INDIANA

JEREMY H. LEE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 68A01-0905-CR-224
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE RANDOLPH CIRCUIT COURT
The Honorable Jay L. Toney, Judge
Cause No. 68C01-0703-FB-0017

August 25, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Jeremy H. Lee appeals his eighteen-year sentence for class B felony possession of a firearm by a serious violent felon. We affirm.

Issues

Lee raises the following issues for review:

I. Did the trial court abuse its discretion in determining aggravating and mitigating factors?

II. Is Lee's sentence inappropriate in light of the nature of the offense and his character?

Facts and Procedural History

On July 31, 2006, Lee's girlfriend A.H. died from a self-inflicted gunshot wound. Randolph County Sheriff's Detective Doug Fritz found a .45 caliber handgun in the trailer where A.H. died and questioned Lee about the firearm. Lee initially told him that he had found the firearm in a garage outside the trailer. Later, he admitted that he had retrieved it from a storage unit that he had cleaned out for a friend. He also admitted that he kept it at A.H.'s trailer and had unsuccessfully attempted to sell it to two different individuals.

Lee's criminal record includes a 1997 conviction for class B felony cocaine dealing. As a result, he is considered a serious violent felon. Ind. Code § 35-47-4-5. On March 16, 2007, the State charged him with class B felony unlawful possession of a firearm by a serious violent felon.[1]

[1] *See* Ind. Code § 35-47-4-5(b)(23), -(c) (stating that knowing or intentional possession of a firearm by a person convicted of cocaine dealing constitutes unlawful possession of a firearm by a serious violent felon).

On December 11, 2008, Lee pled guilty pursuant to a plea agreement, and the State agreed to dismiss pending charges for class B felony criminal confinement and class A and class B misdemeanor battery. The plea agreement capped the executed portion of Lee's sentence at fifteen years. On March 9, 2009, the trial court addressed each of Lee's proffered mitigating factors and found none of them significant. The court listed Lee's extensive criminal history among the significant aggravating factors and sentenced Lee to eighteen years, with fifteen years executed and three years suspended to probation. Lee appeals his sentence. Additional facts will be provided as necessary.

Discussion and Decision

I. Aggravating and Mitigating Factors

Lee contends that the trial court abused its discretion in assigning weight to certain aggravating factors and concluding that no mitigating factors exist. Sentencing decisions are left to the trial court's sound discretion and will be reversed only upon a showing of manifest abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. An abuse of discretion occurs where 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*. An allegation that the trial court abused its discretion by improperly including certain aggravating circumstances requires that the defendant show that the aggravators are either improper as a matter of law or are not supported by the record. *Id*. at 490-91. An allegation that the trial court failed to identify a mitigating factor requires the defendant to establish that the mitigating evidence is both

significant and clearly supported by the record. *Id*. at 493. Although a failure to find mitigating circumstances clearly supported by the record may imply that the trial court improperly overlooked them, the court is not obligated to explain why it has chosen not to find mitigating circumstances. *Roush v. State*, 875 N.E.2d 801, 811 (Ind. Ct. App. 2007). Likewise, the court is not obligated to accept the defendant's argument as to what constitutes a mitigating factor. *Hape v. State*, 903 N.E.2d 977, 1000 (Ind. Ct. App. 2009), *trans. denied*.

Here, the sentencing order states, "there are no mitigating circumstances that exist." Appellant's App. at 222. Lee asserts that the trial court abused its discretion by failing to identify as significant mitigators his guilty plea, his troubled childhood, undue hardship on his children, and the unlikelihood that the crime was the result of circumstances likely to recur.

First, regarding Lee's guilty plea, the significance of a guilty plea as a mitigating factor varies from case to case. *Francis v. State*, 817 N.E.2d 235, 238 n.3 (Ind. 2004). For example, "a guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one." *Lavoie v. State*, 903 N.E.2d 135, 143 (Ind. Ct. App. 2009) (citation and quotation marks omitted). Here, Lee admitted to a police officer that he possessed the firearm, and eyewitnesses said he had shown them the firearm. Thus, as the trial court noted, the evidence against him was overwhelming. Moreover, he received a significant benefit in the form of dismissed pending charges, which included two misdemeanors and one class B felony criminal confinement

charge. Thus, the trial court acted within its discretion in not finding Lee's guilty plea to be a significant mitigating factor.

Next, regarding Lee's troubled childhood, trial courts are not obligated to consider a defendant's dysfunctional childhood as a mitigating factor. *Coleman v. State*, 741 N.E.2d 697, 700 (Ind. 2000). The trial court addressed Lee's childhood and specifically noted the length of his adult criminal record and his failure to respond positively to probation in making its determination not to assign it mitigating weight. We also note that the trial court specifically referenced his troubled teen years when deciding not to assign aggravating weight to his juvenile record. We find no abuse of discretion here.

To the extent Lee cites significant evidence of undue hardship on his children from a lengthy prison term, we note that trial courts are not required to find that imprisonment of a parent will result in undue hardship. *Roush*, 875 N.E.2d at 811. The trial court thoroughly addressed the various financial and emotional effects Lee's incarceration could have on his children. The court also noted that an unincarcerated parent who continues to commit crimes can have an emotionally detrimental influence on his children. Thus, we find no abuse of discretion in the court's treatment of family hardship.

Next, Lee asserts that the record supports his proffered mitigator that his offense arose from circumstances unlikely to recur. He bases this argument on the fact that he happened to find the firearm while cleaning out his friend's home or storage unit. He asserts that, knowing it was illegal for him to possess the firearm, he tried to "get rid of it but was not

able to."[2] Appellant's Br. at 7. Because it was unlawful for him to possess it in the first place, he should not have been the person trying to dispose of it. Thus, his argument is unavailing. In sum, the trial court acted within its discretion in finding no significant mitigating factors.

Finally, Lee asserts that the trial court abused its discretion in identifying aggravating circumstances. First, Lee contends, and the State concedes, that the trial court erred in finding that he committed the instant offense while he was out on bond. The record does not support such a conclusion. However, the record indicates that Lee committed the instant offense while on probation for class A misdemeanor operating a vehicle in a manner that endangers a person. Appellant's App. at 242. When the trial court improperly applies an aggravator, a sentence enhancement may be upheld if other valid aggravators exist. *Garrett v. State*, 714 N.E.2d 618, 623 (Ind. 1999). The trial court also relied on Lee's extensive criminal record. To the extent the trial court's general reference to Lee's overall record may have included Lee's class B felony cocaine conviction, we note that the offense that serves as the basis for the "serious violent felon" determination cannot be used as an additional aggravator when sentencing a defendant for possession of a firearm by a serious violent felon. *Hatchett v. State*, 740 N.E.2d 920, 928 (Ind. Ct. App. 2000), *trans. denied* (2001). Lee's record includes a 2007 class D felony check fraud conviction. In addition, as of his March 2009 sentencing date, he had a class D felony criminal confinement conviction. *See Sauerheber v. State*, 698 N.E.2d 796, 806 (Ind. 1998) (stating that "[c]riminal activity that

[2] The record shows that he tried to sell the firearm.

occurs subsequent to the offense for which one is being sentenced is a proper sentencing consideration"). Moreover, at sentencing, the court relied not only on Lee's felony convictions, but also on his misdemeanor convictions for resisting law enforcement and intimidation. *See* Tr. at 44 (referring to each as "a very serious matter").[3] As such, improper aggravators notwithstanding, other valid aggravators exist to support the trial court's sentencing decision. Thus, the trial court acted within its discretion in sentencing Lee.

II. Appropriateness of Sentence

Lee also challenges the appropriateness of his eighteen-year sentence. On appeal, we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [this] Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). A defendant bears the burden of persuading the reviewing court that his sentence meets the inappropriateness standard. *Anglemyer*, 868 N.E.2d at 494; *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

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[3] We note that Lee entered a plea agreement that included a fifteen-year cap on the executed portion of his sentence. [P]lea agreements are in the nature of contracts entered into between the defendant and the State." *Valenzuela v. State*, 898 N.E.2d 480, 482 (Ind. Ct. App. 2008), *trans. denied* (2009). Therefore, when construing plea agreements, we look to contract principles to give effect to the parties' intent. *Id*. The law is well established that if a court accepts a plea agreement worked out by the parties, it is bound by the agreement's terms. Ind. Code § 35-35-3-3(e); *Tubbs v. State*, 888 N.E.2d 814, 816 (Ind. Ct. App. 2008). Thus, the trial court must impose a sentence that conforms to any cap the plea agreement places on the executed portion of the defendant's sentence. *Abernathy v. State*, 852 N.E.2d 1016, 1021 (Ind. Ct. App. 2006). Here, the fifteen-year cap was explicit. By entering this agreement, Lee contractually agreed to an executed sentence of up to fifteen years. Thus, the trial court did not violate the explicit terms of the plea agreement by imposing a fifteen-year executed sentence.

In addressing the nature of the crime, "the advisory sentence is the starting point the Legislature has selected as an appropriate sentence." *Anglemyer*, 868 N.E.2d at 494. Class B felony unlawful possession of a firearm by a serious violent felon carries an advisory sentence of ten years, with a range of six to twenty years. Ind. Code § 35-50-2-5. To the extent Lee argues that there was nothing particularly violent about his offense, we note that it is a possession offense. The State argues that we should consider the fact that Lee's possession of the firearm resulted in A.H.'s death. However, A.H.'s eventual use of the firearm to commit suicide is not a proper consideration here, as Lee was not charged with any crime against A.H. The seriousness of the classification of the instant offense has to do with *who* possesses the firearm, not what the possessor does with the firearm on a particular occasion. As such, we now address the character of the offender.

Lee's lengthy criminal record does not reflect well on his character. His misdemeanor record includes convictions for intimidation, resisting law enforcement, criminal mischief, criminal conversion, reckless driving, and marijuana- and alcohol-related offenses. In addition to his felony cocaine dealing conviction, for which he received his serious violent felon classification, his record includes a class D felony check fraud conviction. On October 20, 2008, after the charges were filed in the instant case, he was convicted of class D felony criminal confinement. Moreover, he committed the instant offense while on probation. Appellant's App. at 242. Thus, he has demonstrated a pattern of unwillingness to abide by the law. Finally, to the extent he asserts that he was cooperative during the investigation, we note that he initially provided false information to Detective Fritz regarding where he found

the firearm. Tr. at 21. In sum, Lee has failed to establish that his sentence is inappropriate. Accordingly, we affirm.

Affirmed.

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