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IN THE
COURT OF APPEALS OF INDIANA

JEROME WILKINS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A04-1101-CR-47
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert J. Pigman, Judge
Cause No. 82D02-0911-FD-1145

August 25, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Jerome Wilkins appeals his eighteen-month sentence for Class D felony resisting law enforcement, Class A misdemeanor resisting law enforcement, and Class B misdemeanor reckless driving. He contends that the trial court abused its discretion by failing to recognize certain mitigating circumstances and that his sentence is inappropriate. Concluding that the trial court did not abuse its discretion and that his sentence is not inappropriate, we affirm.

Facts and Procedural History

In November 2009, Officers Wheeler and Deeg from the Evansville Police Department were on routine patrol when they observed a black Chevy Blazer with an Illinois license plate run the stop sign at Covert and Lodge Avenues.[1] The Blazer proceeded west on Covert at a high rate of speed and weaved between vehicles. As the officers attempted to catch up to the Blazer, it turned north on Kerth Avenue. The officers turned north on Kerth and activated their emergency equipment. The Blazer accelerated, turned west on Ravenswood Drive, and attempted to turn north in an alley just east of Kentucky Avenue. The Blazer missed the turn and ran into a fence and some bushes. The fence was damaged and completely knocked down. The driver, later identified as Wilkins, exited the Blazer and fled on foot. Officer Deeg yelled, "Police[,] [s]top," but Wilkins continued to run. Appellant's App. p. 32. Officer Deeg deployed his taser, and Wilkins was taken into custody.

[1] The transcript of the jury trial is not included in the record on appeal. Because Wilkins recites the facts as provided by the probable cause affidavit and the State in turn relies on Wilkins' appellate brief, we also rely on the probable cause affidavit for the facts of this case.

Wilkins' driver status came back suspended out of Illinois. Although Wilkins smelled strongly of alcohol and had bloodshot eyes, he refused to take any field sobriety tests or a portable breath test. After Officer Deeg informed him of Indiana's implied consent law, Wilkins started to perform a certified breath test but then refused to cooperate. The test came back incomplete. Officer Deeg attempted to give a second breath test, but Wilkins refused, becoming belligerent and uncooperative.

The State charged Wilkins with Class D felony resisting law enforcement, Class C misdemeanor operating a vehicle while intoxicated, Class A misdemeanor resisting law enforcement, and Class B misdemeanor reckless driving. In November 2010, a jury found Wilkins not guilty of Class C misdemeanor operating a vehicle while intoxicated but guilty on all other counts.

At sentencing, the trial court found Wilkins' criminal history, which includes a first degree murder conviction in Illinois, and failure to take the breath test as aggravators. As mitigators, the trial court noted that there were only minor property damages and no injuries as a result of the instant offenses. Finding that the aggravators and mitigators balanced, the trial court sentenced Wilkins to the Indiana Department of Correction for concurrent terms of eighteen months for Class D felony resisting law enforcement, twelve months for Class A misdemeanor resisting law enforcement, and six months for Class B misdemeanor reckless driving.

Wilkins now appeals.

Discussion and Decision

Wilkins contends that the trial court abused its discretion by failing to recognize certain mitigating circumstances and that his sentence is inappropriate.

I. Abuse of Discretion

Wilkins contends that the trial court abused its discretion by failing to recognize as mitigators that (1) he fixed the damaged fence and apologized to the owner and (2) incarceration would place an undue burden on his family, particularly in light of the fact that he was currently working and owned his own business.

Sentencing decisions rest within the sound discretion of the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). So long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Id.* An abuse of discretion will be found 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.* We 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. When an allegation is made that the trial court failed to find a mitigating factor, the defendant is required to establish that the mitigating evidence is both significant and clearly supported by the record. *Id.* at 493. However, 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). "If the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist." *Anglemyer*, 868 N.E.2d at 493 (quotation omitted).

Wilkins argues that the trial court should have considered as a mitigator that he fixed the damaged fence and apologized to the owner. We note that Wilkins did not present this information to the trial court until after the court pronounced his sentence. Specifically, Wilkins' defense counsel and the State presented arguments, Wilkins made a statement, the trial court pronounced his sentence, and only then did Wilkins inform the court that he fixed the fence and apologized for the damage. This is too late. In any event, the trial court could have changed the sentence had it found this circumstance to be significantly mitigating. It did not. Even if Wilkins had informed the court of this circumstance before the court pronounced his sentence, the court would have been within its discretion to reject it as a mitigator.

Wilkins also argues that the trial court should have considered as a mitigator that incarceration would place an undue burden on his family, particularly in light of the fact that he was currently working and owned his own business. However, many people convicted of crimes have one or more dependents and, "absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship." *Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999); *see also Benefield v. State*, 904 N.E.2d 239, 247-48 (Ind. Ct. App. 2009) (recognizing that incarceration "almost always" works a hardship on others and concluding that the defendant failed to show "special circumstances" because there were other people who could take care of the defendant's mother while she was incarcerated), *trans. denied*. Wilkins has failed to show any special circumstances.

We conclude that the trial court did not abuse its discretion in sentencing Wilkins.

II. Inappropriate Sentence

Wilson also contends that his eighteen-month sentence is inappropriate because the trial court failed to find the above mitigators. He therefore asks us to revise his sentence to allow him to serve his time either on house arrest or in a work release program.

Although a trial court may have acted within its lawful discretion in imposing a sentence, Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a 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." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer*, 868 N.E.2d at 491). The defendant has the burden of persuading us that his sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

The location where a sentence is to be served is an appropriate focus for application of our review and revise authority. *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008). It is not, however, subject to review for abuse of discretion. *Id.* Nonetheless, we note that it will be quite difficult for a defendant to prevail on a claim that the placement of his sentence is inappropriate. *Id.* This is because the question under Appellate Rule 7(B) is not whether another sentence is *more* appropriate; rather, the question is whether the sentence imposed is inappropriate. *Id.* at 268. A defendant challenging the placement of a sentence must convince us that the given placement is

itself inappropriate. *Id.* As a practical matter, trial courts know the feasibility of alternative placements in particular counties or communities. *Id.* For example, a court is aware of the availability, costs, and entrance requirements of community corrections placements in a specific locale. *Id.*

Here, Wilkins does not provide any argument as to why placement in the Department of Correction is itself inappropriate but instead bases his claim on his belief that the trial court abused its discretion by failing to find the mitigators argued above. The location where a sentence may be served is not subject to review for an abuse of discretion. Wilkins' claim that his placement is inappropriate thus fails.[2]

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.

[2] Had Wilkins made a cogent inappropriate sentence argument with regard to the nature of the offense and the character of the offender, we nevertheless would have concluded that his eighteen-month sentence was not inappropriate in light of his first degree murder conviction and the fact that he gave the officers chase, fled on foot, and had to be tasered.