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ATTORNEY FOR APPELLANT:

BRUCE W. GRAHAM
Graham Law Firm P.C.
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ARTURO RODRIGUEZ II
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ESSU E. BRUNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0901-CR-95
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0806-FA-23

August 27, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Essu Brunson appeals his sentence for dealing in a narcotic drug as a class A felony[1] and battery by means of a deadly weapon as a class C felony.[2] Brunson raises two issues, which we revise and restate as:

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

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

We affirm.

The relevant facts follow. In June 2008, Brunson delivered three grams or more of heroin to an undercover officer. After three controlled buys, police officers attempted to arrest Brunson. Sergeant Payne was driving an unmarked police van with Officer Natalie Lovett in the passenger seat and Officer Albert Demello in the backseat with his "partner, canine Tiko." Transcript at 35.

Sergeant Payne pulled up behind Brunson's vehicle, and Officer Demello and Tiko exited the vehicle. Brunson started to back up his vehicle. Officer Demello grabbed Tiko and threw him out of the way, and Brunson's vehicle struck the police vehicle in the passenger side door and also struck Officer Demello in his left knee which caused Officer Demello to fall to the ground. When Officer Demello fell to the ground, Brunson's vehicle continued to back up so that Officer Demello was pinned underneath the car. Officer Demello felt "excruciating pain" in his knee. Id. at 37. The rear right

[1] Ind. Code § 35-48-4-1 (Supp. 2006).

[2] Ind. Code § 35-42-2-1 (Supp. 2007) (subsequently amended by Pub. L. No. 120-2008, § 93 (eff. July 1, 2008)).

tire on Brunson's vehicle was spinning but the vehicle could not back up anymore because it was pinned against the police vehicle. Brunson then moved his vehicle forward and attempted to drive over the curb.

The police officers arrested Brunson. Officer Demello suffered a complete dislocation of his left patella. Officer Lovett's right leg and hip area were bruised and sore from the impact.

On June 30, 2008, the State charged Brunson with three counts of dealing in a narcotic drug as class A felonies, two counts of possession of a narcotic drug as class B felonies, one count of possession of a narcotic drug as a class A felony, battery as a class C felony, and resisting law enforcement as a class D felony. That same day, the trial court scheduled a jury trial for October 28, 2008. On October 10, 2008, the trial court scheduled a guilty plea hearing for October 14, 2008. A chronological case summary entry dated October 14, 2008, states: "Guilty plea hearing set this date is vacated and the Court reaffirms trial date of October 28, 2008." Appellant's Appendix at 8. On October 21, 2008, Brunson pled guilty to one count of dealing in a narcotic drug as a class A felony and battery by means of a deadly weapon as a class C felony, and the State dismissed the remaining charges.

The trial court found Brunson's "extensive criminal history" and his "extensive history of substance abuse" as aggravators. Transcript at 45. The trial court also stated that it was "moved by the fact that around here in this community, heroin is normally dealt on the basis of one tenth of a gram and then on the first sale here that [Brunson] got

caught on, five grams, which this officer said was a large amounts [sic]." Id. The trial court also stated, "the Court finds that circumstance aggravating, that the size of – the extent of your involvement is an aggravating fact that the court considers." Id. The sentencing order states: "The Court takes into consideration the large amount of heroin involved in the instant case." Appellant's Appendix at 36. The trial court found Brunson's family support as a mitigator. The trial court found that the aggravators outweighed the mitigators. The trial court sentenced Brunson to thirty-five years for dealing in a narcotic drug as a class A felony and five years for battery as a class C felony. The trial court ordered that the sentences be served consecutively for a total sentence of forty years.

I.

The first issue is whether the trial court abused its discretion in sentencing Brunson. The Indiana Supreme Court has held that "the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). We review the sentence for an abuse of discretion. Id. An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Id.

A trial court abuses its discretion if it: (1) fails "to enter a sentencing statement at all;" (2) enters "a sentencing statement that explains reasons for imposing a sentence – including a finding of aggravating and mitigating factors if any – but the record does not

support the reasons;" (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration;" or (4) considers reasons that "are improper as a matter of law." Id. at 490-491. If the trial court has abused its discretion, we will remand for resentencing "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." Id. at 491. However, the relative weight or value assignable to reasons properly found, or those that should have been found, is not subject to review for abuse of discretion. Id.

Brunson argues that the trial court abused its discretion by failing to consider his child support payments, education and employment history, and guilty plea as mitigators. Brunson also argues that the trial court improperly considered his substance abuse and the amount of heroin involved as aggravators. We will address each argument separately.

A. Mitigators

"The finding of mitigating factors is not mandatory and rests within the discretion of the trial court." Ellis v. State, 736 N.E.2d 731, 736 (Ind. 2000). The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. Gross v. State, 769 N.E.2d 1136, 1140 (Ind. 2002), trans. denied. "Nor is the court required to give the same weight to proffered mitigating factors as the defendant does." Id. Further, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. Sherwood v. State, 749 N.E.2d 36, 38 (Ind. 2001). However, the trial court may "not ignore facts in the record that would mitigate an offense, and a

failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them." Id. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999).

1. Child Support

Brunson appears to argue that the trial court abused its discretion by failing to find his child support payments as a mitigator. Brunson only directs us to the presentence investigation report, which reveals that Brunson had a son in Illinois with his first wife and that Brunson stated that he was current on child support payments for this son. The presentence investigation report indicates that Brunson fathered a daughter with his second wife but does not reveal whether Brunson was ordered to pay child support. The presentence investigation report also reveals that Brunson fathered a daughter with a third woman but that Brunson "has not been ordered to pay child support." Appellant's Green Appendix at 5. Brunson does not point to any other evidence in the record to indicate that he paid child support. We cannot say that the evidence is both significant and clearly supported by the record. Thus, the trial court did not abuse its discretion by not considering Brunson's child support payments as a mitigating circumstance.

2. Education & Work History

Brunson argues that the trial court abused its discretion by failing to find his education and employment history as a mitigator. Again, Brunson only directs us to the

presentence investigation report, which reveals that Brunson reported that he attended college and earned certification as a forklift operator and worked at various temporary agencies. Brunson has failed to establish that the mitigating evidence is both significant and clearly supported by the record. Thus, the trial court did not abuse its discretion by not considering Brunson's education and work history as a mitigating circumstance. See, e.g., Bennett v. State, 787 N.E.2d 938, 948 (Ind. Ct. App. 2003) (holding that the trial court properly did not find that the defendant's employment was a significant mitigating circumstance where defendant did not present a specific work history, performance reviews, or attendance records), trans. denied.

3. Guilty Plea

Brunson argues that the trial court failed to consider his guilty plea as a mitigator. The Indiana Supreme Court has held that "a defendant who pleads guilty deserves 'some' mitigating weight be given to the plea in return." Anglemyer Rehearing, 875 N.E.2d at 220 (quoting McElroy v. State, 865 N.E.2d 584, 591 (Ind. 2007)). However, "an allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is not only supported by the record but also that the mitigating evidence is significant." Id. at 220-221. The significance of a guilty plea as a mitigating factor varies from case to case. Id. at 221. We have previously explained that 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. Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied.

Here, the State charged Brunson with three counts of dealing in a narcotic drug as class A felonies, two counts of possession of a narcotic drug as class B felonies, one count of possession of a narcotic drug as a class A felony, battery as a class C felony, and resisting law enforcement as a class D felony. Brunson pled guilty to one count of dealing in a narcotic drug as a class A felony and battery by means of a deadly weapon as a class C felony, and the State dismissed the remaining charges.

Brunson argues that he did not receive an excessive benefit from the plea agreement because he sold heroin on three different occasions to the same undercover police officer and consecutive sentencing would have been inappropriate under Beno v. State, 581 N.E.2d 922 (Ind. 1991). In Beno, after two controlled drug purchases in which an acquaintance of the defendant went to the defendant's house and gave the defendant money in exchange for cocaine, the defendant was convicted of two counts of dealing in cocaine and one count of maintaining a common nuisance. 581 N.E.2d at 923. The trial court sentenced the defendant to the maximum sentence for each offense and ordered that the sentences be served consecutively. Id. On appeal, the defendant argued that his sentence was manifestly unreasonable. Id. The Indiana Supreme Court noted the defendant "was convicted of committing virtually identical crimes separated by only four days," and that "[m]ost importantly, the crimes were committed as a result of a police

sting operation." Id. at 924. The Court did not consider it "appropriate to then impose maximum and consecutive sentences for each additional violation." Id.

Initially, we note that the Indiana Supreme Court has held that Beno "in no way intimated that the convictions and *some* sentence on each of those convictions were inappropriate." Owens v. State, 659 N.E.2d 466, 475 (Ind. 1995), reh'g denied. Further, here, unlike in Beno, we cannot say from the record that the drug deals were virtually identical. It appears that Brunson may have initiated at least one of the three different drug deals and that the drug deals occurred at two different locations. Thus, we find Beno distinguishable. See Mendoza v. State, 737 N.E.2d 784, 789 (Ind. Ct. App. 2000) (distinguishing Beno by noting that one of the buys was initiated by the defendant), reh'g denied; Bray v. State, 611 N.E.2d 187, 188 (Ind. Ct. App. 1993) ("Unlike the defendant in Beno, Bray sold different drugs at two different places, and more importantly, Bray, not the police, initiated the second transaction.").

Finally, we note that the charges stemmed from controlled buys and involved marked money which strongly suggests the State's evidence of guilt was substantial. Under the circumstances, we cannot say that Brunson's guilty plea constituted a significant mitigating factor or that the trial court abused its discretion. See Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999) (holding that the defendant received "benefits for her plea adequate to permit the trial court to conclude that her plea did not constitute a significant mitigating factor"); Wells, 836 N.E.2d at 479-480 (holding that in light of the State's substantial evidence, the trial court could have reasonably concluded that the

defendant's decision to plead guilty was largely a pragmatic one and was not required to accord significant weight to his guilty plea).

B. Aggravators

1. Substance Abuse

Brunson argues that the trial court abused its discretion by considering his substance abuse history as an aggravator instead of a mitigator. A history of substance abuse is sometimes found by trial courts to be an aggravator, not a mitigator. Iddings v. State, 772 N.E.2d 1006, 1018 (Ind. Ct. App. 2002), trans. denied. Furthermore, a trial court is not required to consider as mitigating circumstances allegations of appellant's substance abuse or mental illness. James v. State, 643 N.E.2d 321, 323 (Ind. 1994). The presentence investigation report reveals that thirty-two-year-old Brunson has used marijuana daily and heroin and pain killers every other day since he was twenty-four years old. Brunson also admitted to using cocaine. Despite Brunson's history of substance abuse, he has never voluntarily sought drug treatment and has continued to use illicit substances. Thus, we cannot say that Brunson has shown that the mitigating evidence is both significant and clearly supported by the record or that the trial court abused its discretion by considering Brunson's substance abuse as an aggravator. See Bryant v. State, 802 N.E.2d 486, 501 (Ind. Ct. App. 2004) (holding that the trial court did not err in determining that the defendant's substance abuse was an aggravating factor because the defendant was aware of his drug and alcohol problem and had not taken any positive steps to treat his addiction), trans. denied.

2. Amount of Heroin

Brunson argues that the trial court's consideration of the amount of heroin involved in the transaction as an aggravator was improper. A trial court may not use a material element of the offense as an aggravating circumstance. Lemos v. State, 746 N.E.2d 972, 975 (Ind. 2001). The State argues that the trial court "did not rely on the amount of the substance in question, but rather, the extent of [Brunson]'s involvement in dealing heroin as an aggravating factor." Appellee's Brief at 5.

Assuming, arguendo, that the trial court abused its discretion by considering the amount of heroin as an aggravator, we will remand for resentencing "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." Anglemyer, 868 N.E.2d at 491. The trial court found Brunson's "extensive history of juvenile and criminal activity" and his "extensive history of substance abuse" as aggravators. Given these remaining aggravating factors as discussed below, we can say with confidence that the trial court would have imposed the same sentence without consideration of the amount of heroin. See, e.g., Robertson v. State, 871 N.E.2d 280, 287 (Ind. 2007) (holding that the trial court would have imposed the same sentence based solely on the permissible aggravators); Drakulich v. State, 877 N.E.2d 525, 535 (Ind. Ct. App. 2007) (holding that we could say with confidence that the trial court would have imposed the same sentence if it considered only the proper aggravators), trans. denied.

II.

The next issue is whether Brunson's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute 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." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Brunson appears to argue that we should reduce his sentence to thirty years.

Our review of the nature of the offense reveals that Brunson delivered three grams or more of heroin to an undercover officer. After three controlled buys, police officers attempted to arrest Brunson. After the police pulled behind Brunson's vehicle, Brunson started to back up his vehicle and struck Officer Demello and the police van. Officer Demello fell to the ground, and Brunson's vehicle continued to back up so that Officer Demello was pinned underneath the car. Officer Demello felt "excruciating pain" in his knee. Transcript at 37. Brunson then moved his vehicle forward and attempted to drive over the curb. Officer Demello suffered a complete dislocation of his left patella. Officer Lovett's right leg and hip area were bruised and sore from the impact.

Our review of the character of the offender reveals that, as a juvenile, Brunson was charged with gang organization recruitment in Illinois and the charge was "[s]tricken [o]ff [l]eave," Appellant's Green Appendix at 3, which means "[b]asically dismissed." Transcript at 23. Brunson was adjudicated a delinquent for unlawful possession of a

firearm/ammunition in 1992. As an adult, beginning in 1993, Brunson has convictions for dealing in a controlled substance as a felony, manufacturing/dealing heroin as a felony, forgery as a felony, and unlawful use of a weapon by a felon as a felony. Brunson was also arrested while an adult for domestic battery, theft, criminal trespass to a vehicle, theft of stolen property, and possession of cannabis, but the charges were "[s]tricken [o]ff [l]eave." Appellant's Green Appendix at 3-4. The presentence investigation report reveals that thirty-two-year-old Brunson has used marijuana daily and heroin and pain killers every other day since he was twenty-four years old. Brunson also admitted to using cocaine.

After due consideration of the trial court's decision, we cannot say that the maximum sentence is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Vazquez v. State, 839 N.E.2d 1229, 1235 (Ind. Ct. App. 2005) (concluding that the defendant's sentence of fifty years with five years suspended for conspiracy to commit dealing in cocaine as a class A felony was not inappropriate in light of the nature of the crime and his character), trans. denied; Hale v. State, 875 N.E.2d 438, 446 (Ind. Ct. App. 2007) (holding that a fifty-year sentence for dealing in cocaine as a class A felony was not inappropriate), trans. denied.

For the foregoing reasons, we affirm Brunson's sentence for dealing in a narcotic as a class A felony and battery as a class C felony.

Affirmed.

CRONE, J., and MAY, J., concur.