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FILED
Sep 18 2009, 8:54 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

CONNIE STOCKTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A04-0903-CR-123
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Richard Dailey, Judge
Cause No. 18C02-0709-FD-98

September 18, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Connie Stockton appeals her three-year aggregate sentence for Receiving Stolen Property,[1] a class D felony, and Possession of Marijuana,[2] a class A misdemeanor. Stockton presents the following issues for review:

> 1. Did the trial court abuse its discretion by not finding certain mitigating circumstances?
>
> 2. Is Stockton's sentence inappropriate in light of the nature of the offense and her character?
>
> We affirm.

On October 30, 2008, Stockton pleaded guilty, pursuant to a plea agreement, to class D felony receiving stolen property and class A misdemeanor possession of marijuana. In exchange, the State dismissed two counts of class D felony theft. The agreement left sentencing to the discretion of the court.

The trial court accepted the plea and proceeded with sentencing on February 12, 2009. At the conclusion of the hearing, the court found the following aggravating and mitigating circumstances:

> The following aggravating circumstances exist:
>
> 1. The Defendant has a history of criminal behavior, including five prior felony convictions.
> 2. There is a high probability that the Defendant will commit another offense.
> 3. Prior attempts at probation have been unsuccessful.
> 4. Defendant is in need of correctional rehabilitative treatment that is best provided by a penal facility.

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[1] Ind. Code Ann. § 35-43-4-2(b) (West, PREMISE through 2009 Public Laws approved and effective through 4/20/2009).

[2] Ind. Code Ann. § 35-48-4-11(1) (West, PREMISE through 2009 Public Laws approved and effective through 4/20/2009).

The following mitigating circumstances exist:

1. The Defendant has plead [sic] guilty in this cause.

Appendix at 48-49. In light of the aggravating and mitigating circumstances, the court sentenced Stockton to three years in prison for receiving stolen property and one year for possession of marijuana. The sentences were ordered to be served concurrently, for an aggregate sentence of three years in prison. Stockton now appeals.

1.

Stockton initially argues that the trial court abused its discretion by failing to find a number of mitigating circumstances. Specifically, she challenges the court's failure to find the following proffered mitigators: 1) Drug addiction; 2) mental illness; 3) hardship to her three children (ages eighteen, fourteen, and two); and 4) employment history.

It is well settled that sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. The trial court must enter a sentencing statement that includes the court's reasons for the imposition of the particular sentence. *Id*. If the statement includes a finding of aggravating and/or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances. *Id*. An abuse of discretion occurs if the trial court overlooks mitigating circumstances that are clearly supported by the record and advanced by the defendant for consideration. *Id.* The trial court, however, is not obligated to credit mitigating circumstances the same as the defendant or explain why it has chosen to reject certain factors

as mitigating. *Rousch v. State*, 875 N.E.2d 801 (Ind. Ct. App. 2007). To demonstrate an abuse of discretion, the defendant must show the court failed to find a mitigating circumstance that is both significant and clearly supported by the record. *Felder v. State*, 870 N.E.2d 554 (Ind. Ct. App. 2007). With this in mind, we will address each of the mitigating circumstances asserted by Stockton on appeal.

With respect to Stockton's claim that the trial court erred in rejecting her history of drug addiction as a mitigator, we observe that a trial court is not required to consider a defendant's substance abuse or mental illness as mitigating. *See James v. State*, 643 N.E.2d 321 (Ind. 1994). In fact, trial courts have sometimes found a history of substance abuse to be an aggravating rather than mitigating circumstance. *See Bryant v. State*, 802 N.E.2d 486 (Ind. Ct. App. 2004), *trans. denied*; *Iddings v. State*, 772 N.E.2d 1006 (Ind. Ct. App. 2002), *trans. denied*. In the instant case, the record establishes that Stockton has had ample opportunity to address her long-term addiction to cocaine. Indeed, she completed treatment programs in 2002 and 2004 to no avail. Despite treatment, she has continued to resort to drugs and other illegal activity and has done nothing to change her lifestyle. On this record, Stockton has not established an abuse of discretion based upon the trial court's refusal to consider her addiction as a mitigating circumstance.

In addition to her cocaine addiction, the record establishes that Stockton has dealt with mental health issues for a significant number of years. Based upon her testimony, with no supporting medical records, it appears that she has made a number of suicide attempts and has suffered from depression since the early 1990s. After a suicide attempt in 2002, she was

committed to Richmond State Hospital for a few months.

The existence of mental health issues, however, does not necessarily constitute a mitigating circumstance. Our Supreme Court has explained:

> The American Psychiatric Association's definitions of mental illness, contained in the Diagnostic and Statistical Manual of Mental Disorders (presently "DSM-IV-TR") have continued to expand to the point that a recent study declared that about half of Americans become mentally ill and half do not. This suggests the need for a high level of discernment when assessing a claim that mental illness warrants mitigating weight. In *Weeks v. State*, we laid out several factors to consider in weighing the mitigating force of a mental health issue. Those factors include the extent of the inability to control behavior, the overall limit on function, the duration of the illness, and the nexus between the illness and the crime.

Covington v. State, 842 N.E.2d 345, 349 (Ind. 2006) (footnote and citation omitted). Aside from maybe the duration of the illness, Stockton makes no attempt to address these factors on appeal and the record is devoid of evidence regarding these factors. Therefore, she has wholly failed to establish an abuse of discretion regarding this alleged mitigator.

With respect to undue hardship, our Supreme Court has recognized that "[m]any people convicted of serious crimes have one or more children, 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). In this regard, Stockton simply asserts that she has cared for her three children over the years and has recently been paying support while they have not been in her custody. We observe, however, that while "rearing" her children Stockton has had at least three separate commitments to the Department of Correction (with sentences imposed totaling seven years between 1999 and 2005) and has funded a substantial drug habit out of very little income. Based on the facts of

this case, we cannot say that the trial court abused its discretion in declining to find undue hardship as a mitigator. *See Weaver v. State*, 845 N.E.2d 1066, 1074 (Ind. Ct. App. 2006) ("sentencing court is not required to find a defendant's incarceration would result in undue hardship on his dependents"), *trans. denied*.

Finally, Stockton asserts that the trial court should have found her employment history to be a mitigating circumstance. Contrary to her self-serving testimony at the sentencing hearing, upon which she relies solely on appeal, the record does not establish a stable employment history. The presentence investigation report reveals that she was hired at her most-recent job in July 2008, only seven months prior to the sentencing hearing. Before that, Stockton had not work since 2006. The trial court did not err, as this alleged mitigator is not clearly supported by the record.

2.

Stockton also challenges her sentence for theft as inappropriate. We have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. *See* Indiana Appellate Rule 7(B); *Anglemyer v. State*, 868 N.E.2d 482. Although we are not required under App. R. 7(B) to be "extremely" deferential to a trial court's sentencing decision, we recognize the unique perspective a trial court brings to such determinations. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). On appeal, Stockton bears the burden of persuading us that her sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867.

It is difficult to gauge the nature of the offense because Stockton has failed to provide us with the probable cause affidavit or a transcript of the plea hearing at which the factual basis was established. Suffice it to say, it appears that the nature of her offense alone does not warrant the maximum sentence[3] that was imposed.

The nature of the offense aside, Stockton's poor character, as reflected by her extensive criminal history, clearly warrants the sentence imposed. As the trial court recognized, Stockton is forty-year-old career criminal/thief. Since 1993, Stockton has accumulated five prior felony convictions and seven prior misdemeanor convictions, as well as numerous other charges that did not result in convictions. She has also had probation revoked in the past. Further, while out on bond in the instant case, she committed another class D felony theft to which she subsequently pleaded guilty, as well as an unrelated possession of paraphernalia offense. In sum, it is clear that Stockton has learned nothing in the way of rehabilitation from her repeated encounters with the criminal justice system. It is equally apparent that she will reoffend when given the chance and that she will not take advantage of treatment opportunities. In other words, the only way to keep Stockton from committing criminal offenses appears to be imprisonment and, therefore, the maximum sentence is warranted.

Judgment affirmed.

BAKER, C.J., and RILEY, J., concur.

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[3] "A person who commits a Class D felony shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 1/2) years." Ind. Code Ann. § 35-50-2-7(a) (West, PREMISE through 2009 Public Laws approved and effective through 4/20/2009).