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IN THE
COURT OF APPEALS OF INDIANA

CHARLES E. HUBBARD,	)	
	)	
Appellant/Defendant,	)	
	)	
vs.	)	No. 89A01-0901-CR-25
	)	
STATE OF INDIANA,	)	
	)	
Appellee/Plaintiff.	)	

APPEAL FROM THE WAYNE SUPERIOR COURT
The Honorable Gregory A. Horn, Judge
Cause No. 89D02-0809-FA-8

September 21, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Charles Hubbard appeals from the aggregate 135-year sentence imposed following his convictions for Class A felony Attempted Rape,[1] Class A felony Kidnapping,[2] Class B felony Criminal Confinement,[3] Class B felony Robbery,[4] and Class B felony Carjacking[5] and the adjudication that he is a Habitual Offender.[6] Concluding that the record does not show that the trial court properly considered Hubbard's mental illness in determining his sentence, we reverse and remand with instructions.

FACTS AND PROCEDURAL HISTORY

On June 22, 2008, sixty-three-year-old M.T. was doing her laundry in a Richmond laundromat when Hubbard walked in. Hubbard asked M.T. if the car parked outside was hers and whether she "t[ook] passengers[,]" claiming that he needed to return to Ohio. Tr. p. 192. When M.T. told Hubbard that she would not give him a ride, he struck her in the face with his open hand, knocking her to the floor, causing pain. Hubbard, who was holding a knife in his hand, told M.T. that if she did not do everything he told her to do that he would kill her and that he would "slash" her throat. Tr. p. 195. Hubbard and M.T. drove in M.T.'s car to a cornfield, where he had her undress. Hubbard attempted to

[1] Ind. Code § 35-42-4-1(a) (2007); 35-41-5-1 (2007).

[2] Ind. Code § 35-42-3-2(a) (2007).

[3] Ind. Code § 35-42-3-3 (2007).

[4] Ind. Code § 35-42-5-1 (2007).

[5] Ind. Code § 35-42-5-2 (2007).

[6] Ind. Code § 35-50-2-8 (2007).

have vaginal intercourse with M.T., but was unable to achieve an erection. Hubbard tied M.T.'s arms and legs with her clothing and left in her car.

On September 4, 2008, the State charged Hubbard with a total of ten crimes stemming from the attack on M.T. and alleged that he was a habitual offender. As part of an investigation into Hubbard's competence to stand trial, he was examined by Dr. Glenn S. Davidson, Jr., Ph.D. Dr. Davidson concluded that "the defendant is of reduced intellectual ability[,] has had problems with acting out and aggressive behaviors in the past, but it is unclear whether he would have fully met the diagnosis for schizophrenia at the time of the offense." Davidson Report p. 5. Dr. George Parker, M.D., also examined Hubbard and concluded, *inter alia*, that "the defendant did have a mental disease and a mental defect at the time of the alleged offenses." Parker Report p. 6. On November 14, 2008, the trial court found Hubbard competent to stand trial.

On November 21, 2008, a jury found Hubbard guilty but mentally ill ("GBMI") as charged, and Hubbard admitted his habitual offender status. On December 19, 2008, the trial court sentenced Hubbard to forty-five years of incarceration for attempted rape, forty-five years for kidnapping, fifteen years for criminal confinement, fifteen years for robbery, and fifteen years for carjacking. The trial court ordered that Hubbard's attempted rape, kidnapping, and robbery sentences be served consecutively, that the criminal confinement and carjacking sentences would run concurrently with the attempted rape sentence, and that the sentence be enhanced by thirty years by virtue of Hubbard's habitual offender status, for an aggregate sentence of 135 years. The trial court found Hubbard's criminal record to be an aggravating circumstance, found no

mitigating circumstances, and made no mention of Hubbard's mental illness or the fact that he had been found GBMI at either the sentencing hearing or in the sentencing statement.

DISCUSSION AND DECISION

Hubbard contends that the trial court abused its discretion in declining to find his mental illness to be a mitigating circumstance. Under Indiana's current sentencing scheme, "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). 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 490-91. 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, under the new statutory scheme, the relative weight or value assignable to reasons properly found, or to those which should have been found, is not subject to review for abuse of discretion. *Id*.

The Indiana Supreme Court has emphasized that a GBMI defendant "'is not automatically entitled to any particular credit or deduction from his otherwise aggravated sentence' simply by virtue of being mentally ill." *Weeks v. State*, 697 N.E.2d 28, 30 (Ind. 1998) (quoting *Archer v. State*, 689 N.E.2d 678, 684 (Ind. 1997)). "This derives from clear legislative intent that, subject to exceptions not applicable here, a defendant found GBMI is to be sentenced 'in the same manner as a defendant found guilty of the offense.'" *Id.* (citing IND. CODE § 35-36-2-5(a) (1994)). "Nonetheless, in sentencing a GBMI defendant 'in the same manner' as any other guilty defendant, trial courts should at a minimum carefully consider *on the record* what mitigating weight, if any, to accord to any evidence of mental illness, even though there is no obligation to give the evidence the same weight the defendant does." *Id.* (emphasis added). "A verdict of GBMI may signal that significant evidence of mitigating value on the point has been presented." *Id.*

The Indiana Supreme Court has identified several considerations that bear on the weight, if any, that should be given to mental illness in sentencing. These factors include: (1) the extent of the defendant's inability to control his or her behavior due to the disorder or impairment; (2) overall limitations on functioning; (3) the duration of the mental illness; and (4) the extent of any nexus between the disorder or impairment and the commission of the crime. *Archer*, 689 N.E.2d at 685.

Here, although the jury found Hubbard GBMI and the record contains additional material and evidence touching on his mental illness, there is no indication that the trial court considered this in sentencing him. The Indiana Supreme Court, in a case where the defendant pled GBMI, has addressed this situation as follows:

> Here, implicit in the trial court's sentencing order is a finding that Smith's mental illness is entitled no mitigating weight. This finding is not necessarily improper. However, because there is no indication the trial court reached that conclusion after applying any of the criteria set forth in *Weeks* and *Archer*, we must remand this cause for a new sentencing order. A new sentencing hearing, however, is unnecessary.

Smith v. State, 770 N.E.2d 818, 823 (Ind. 2002).

We see no reason to depart from the procedure set forth in *Smith*, and the State concedes that that would be the proper course of action. As such, while we emphasize that the sentence imposed by the trial court was not necessarily improper, we remand for a new sentencing order indicating that the trial court has applied the *Archer* criteria in determining Hubbard's sentence.

The sentencing order of the trial court is reversed and remanded with instructions.

BAILEY., J., and VAIDIK, J., concur.