

STATEMENT OF THE CASE

Joshua J. Hubble appeals his sentencing following a guilty plea for causing death while operating a motor vehicle with an alcohol concentration equivalent (“A.C.E.”) of .15 or more, a class B felony,¹ two counts of criminal recklessness as class D felonies,² and criminal mischief as a class D felony.³

We affirm.

ISSUES

1. Whether the trial court abused its discretion in sentencing Hubble.
2. Whether the twenty-three year sentence imposed was inappropriate.

FACTS

On the night of August 27, 2010, Hubble went to the 6th Avenue Bar in Terre Haute to celebrate his returning to college. Despite being an alcoholic, Hubble had been sober for five years and thought he could drink in moderation that night. When an obviously intoxicated Hubble left the bar, a group of people including Ashley Mapol, an employee at the bar, and Christopher Weck, a patron at the bar, gathered around Hubble’s truck to confront him about an earlier argument. While driving away from the bar, Hubble struck and killed Weck and injured Mapol. Hubble continued driving, left the roadway and later struck the residence of David Funk, causing damage to the house. When Terre Haute City Police Department Officers arrested Hubble, he was so

¹ Ind. Code § 9-30-5-5.

² I.C. § 35-42-2-2.

³ I.C. § 35-43-1-2

intoxicated he could not perform the sobriety test that the police administered to him. His B.A.C. registered .14 several hours after his arrest.

On September 2, 2010, the State charged Hubble with Count 1, voluntary manslaughter, as a class A felony; Count 2, causing death while operating a motor vehicle with an A.C.E. of .15 or more, a class B felony; Count 3, failure to stop after an accident resulting in serious bodily injury as a class D felony; Count 4, failure to return to the scene of an accident resulting in death as a class C felony, Count 5, criminal recklessness as a class D felony, Count 6, criminal recklessness as a class D felony; and Count 7, criminal mischief as a class D felony. On September 28, 2010, Hubble and the State entered into a plea agreement, whereby Hubble agreed to plead guilty to Counts 2, 5, 6, and 7, in exchange for the State's dismissal of the remaining counts.

The trial court accepted the guilty plea and held a sentencing hearing on November 8, 2010. The trial court found Hubble's character and attitude, his remorse for committing the crimes, and his history of gainful employment to be mitigating circumstances. The trial court found Hubble's prior criminal history involving multiple alcohol convictions to be the only aggravating circumstance. The court found that the aggravating circumstance outweighed the mitigating circumstances. The trial court then sentenced Hubble to twenty years on the class B felony count and three years on each class D felony count. The trial court ordered the sentences on the class D felonies to be served concurrently but consecutive to the sentence on the class B felony. Accordingly, the trial court sentenced Hubble to an aggregate sentence of twenty-three years.

DECISION

1. Abuse of Discretion

Hubble asserts that the trial court erred in sentencing him. Specifically, he argues that the trial court failed to consider certain other mitigating circumstances, such as the victims induced or facilitated the crimes; imprisonment would cause an undue hardship on his dependent daughter; his alcoholism; and, the fact of his pleading guilty to the charges. He also asserts that the trial court erred improperly by considering Weck's death and the impact of Weck's death on his family, as an aggravating circumstance, since the same are inexplicably inherent in the crimes as charged.

Sentences are within the trial court's discretion. *Anglemyer v State*, 868 N.E. 2d 482, 490 (Ind. 2007). A trial court may impose any sentence within the allowable range for a given crime without a requirement to identify specific aggravating or mitigating circumstances. *Cardwell v. State*, 895 N.E. 2d 1219, 1222 (Ind. 2008). Sentences within the statutory range are only reviewed for abuse of discretion. *Anglemyer*, 868 N.E. 2d at 490. A trial court abuses its discretion if its decision is clearly against the record. *Id.*

When sentencing a defendant for a felony, a trial court must enter a sentencing statement that includes reasonably detailed reasons or circumstances for imposing the sentence. *Id.* A trial court abuses its discretion if it fails to enter a sentencing statement at all; enters a sentencing statement that explains reasons for imposing a sentence that are not clearly supported by the record; enters a sentencing statement that omits reasons that are improper as a matter of law; or, enters a sentencing statement that fails to state reasons that are clearly supported by the record and advanced for consideration. *Id.*

a. Mitigating Circumstances

Hubble argues that Weck induced or facilitated Hubble's actions and that such strong provocation is a mitigating circumstance that was clearly supported by the record, but the trial court failed to consider it. According to Indiana Code section 35-38-1-7.1(b)(3), the trial court may consider as a mitigating factor that the victim of the crime induced or facilitated the crime. However, Hubble bears the burden of proof to show that the victim of the crime induced or facilitated the crimes, and that such mitigating circumstance is both significant and clearly supported by the record. *Anglemyer*, 868 N.E. 2d at 493.

Hubble cites to the fact that there was a crowd surrounding his truck when he wanted to leave. In addition, he states that Mapol was hanging in the passenger window of the truck and was arguing with him. He also argues that Weck had taken off his hat, adjusted the chain around his neck and started to walk toward the front of the truck, telling Hubble that if he wanted to get feisty, to get out of the truck, and do it with a man. Hubble asserts that he was so fearful of the crowd attacking him that he panicked and tried to drive away, unfortunately, hitting both Weck and Mapol.

The trial court specifically noted that Hubble initially stated that he lacked memory of some of the events that occurred and did not know that he struck someone. The trial court could have concluded that Hubble's limited "memory" was self-serving. The trial court did not abuse its discretion by failing to find that the victims induced or facilitated Hubble's actions as a mitigating circumstance.

Hubble also argues that that the trial court failed to find as a mitigating factor that his imprisonment would cause undue hardship to his 11-year-old daughter. Undue hardship to dependents is a mitigating circumstance that the trial court may consider, but a trial court is not obligated to find that a defendant's incarceration will cause undue hardship. *Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999). Many persons convicted of crimes have dependents, and absent specific or unique circumstances showing that the hardship to them is undue, a trial court does not abuse its discretion by not finding such to be a mitigating factor. *Id.*

Hubble presented evidence about his relationship with his dependent daughter. He testified that he sees her every weekend and takes her hunting, to church, and other activities. He takes her and her mother to school activities because her mother is schizophrenic, has panic attacks, and cannot drive. He pays weekly child support and buys her school supplies, clothes, and shoes. It is undisputed that even the minimum time Hubble would serve would result in a substantial financial loss for his daughter. *See Gray v. State*, 790 N.E. 2d 174, 178 (Ind. Ct. App. 2003). However, there is no evidence of a unique circumstance, herein, to support finding the same to be a significant mitigating factor. Thus, the trial court did not abuse its discretion by failing to find the proffered evidence to be a significant mitigating circumstance that would warrant a lesser sentence herein. *See Battles v. State*, 688 N.E.2d 1230, 1237 (Ind. 1997).

Hubble argues that his history of alcoholism is another mitigating circumstance that the trial court failed to consider. According to Indiana Code section 35-38-1-7.1(c),

factors such as a defendant's alcoholism may be considered to be a mitigating circumstance. *See Mata v State*, 866 N.E. 2d 346, 349 (Ind. Ct. App. 2007).

Hubble acknowledges that he has had a problem with alcohol for years and that alcohol is the major reason he has had many encounters with the criminal justice system, including ten prior offenses related to alcohol. Hubble has received substance abuse treatment multiple times and had been sober for five years before August 27, 2010. However, Hubble was well aware of the fact that he had a problem with alcohol, yet he voluntarily chose to drink. The trial court did not abuse its discretion in determining that Hubble's alcoholism was not a mitigating circumstance.

Hubble also asserts that his guilty plea is a mitigating circumstance that the trial court should have considered. A guilty plea may be a significant mitigating circumstance since it saves the State time and resources. *Widener v. State*, 659 N.E.2d 529, 534 (Ind. 1995). A guilty plea may also show the defendant's willingness to take responsibility for his actions. *Id.* However, a trial court is not bound to find a guilty plea to be a mitigating circumstance unless the guilty plea significantly mitigates the offense and is clearly supported by the record. *Antrim v. State*, 745 N.E.2d 246, 248 (Ind. Ct. App. 2001). Further, the trial court does not have to consider a guilty plea as a mitigating circumstance if the defendant received a substantial benefit from the plea agreement or the evidence is so overwhelmingly against the defendant, that the decision to plead guilty is pragmatic. *Sensback v State*, 720 N.E. 2d 1160, 1163-65. (Ind. 1999).

The plea agreement allowed Hubble to plead guilty to one class B felony and three class D felonies, while the State dismissed the other three charges, including a class A

felony. Hubble received a potential sentencing benefit in pleading guilty. The trial court did not abuse its discretion in not considering Hubble's guilty plea to be a significant mitigating circumstance.

b. Aggravating Circumstances

Hubble also asserts that the trial court erred by improperly considering Weck's death and the impact on Weck's family as aggravating circumstances; and, that the trial court then improperly used the same aggravating circumstance of his alcohol convictions to both enhance his sentence and to justify the imposition of consecutive sentences. The trial court has discretion in the imposition of consecutive sentences. I.C. § 35-50-1-2(c). We have found that the same aggravating circumstance may be used both to enhance a sentence and to impose a consecutive sentencing. *Beer v State*, 885 N.E.2d 33, 36 (Ind. Ct. App. 2008). In order to impose consecutive sentences, a trial court must find at least one aggravating circumstance. *Ortiz v. State*, 766 N.E.2d 370, 377 (Ind. 2002).

Hubble cites *Pedraza v. State*, 887 N.E.2d 77, 81 (Ind. 2008) for the proposition that "where enhancements of separate counts are based on the same prior conviction, ordering sentences to run consecutively does constitute an improper double enhancement[.]" Hubble's Br. at 11-12. In *Pedraza*, the trial court used the same prior conviction as the reason for elevating Pedraza's operating a motor vehicle while intoxicated charge to a class C felony, and as an aggravating circumstance in imposing an enhanced sentence on the same count. In the case of *Sweatt v. State*, 887 N.E.2d 81 (Ind. 2008), the trial court used the same prior conviction as the reason for elevating Sweatt's possession of a handgun by a serious violent felon charge to a class B felony, and, as an

underlying felony for an habitual offender determination. In both cases, the trial court used the same prior conviction as the aggravator warranting the imposition of consecutive sentences.

Here, the facts and circumstances differ significantly from those found in either *Pedraza* or *Sweatt*, as there is neither the use of the same prior conviction to elevate a count, nor the use of the same prior conviction to support an habitual offender finding, or an enhanced sentence on an elevated count. Thus, neither case is applicable.

Hubble also contends that the trial court used victim impact as an aggravator. The trial court did comment that Weck's child would no longer have a father, but that Hubble would be there for his daughter, even though he would be in prison. However, there is nothing in the record to indicate that the court used this comment as an aggravating circumstance to justify the sentence. In addition, the trial court found that Hubble's extensive criminal history relating to alcohol consumption and abuse was the aggravating circumstance. Thus, the court did not abuse its discretion in the manner of sentencing Hubble.

2. Inappropriate Sentence

Hubble also asserts that his sentence is inappropriate. "The 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." Ind. Appellate Rule 7B. When reviewing a sentence for appropriateness, the appellate court may not simply substitute its judgment for the judgment of the trial court and must give the trial court's decision due diligence.

Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). The defendant carries the burden of proof to show that his sentence is inappropriate in the nature of the offense and his character. *Cardwell*, 895 N.E.2d at 1219. The “nature of the offense” portion of the appropriateness review concerns the advisory sentence for the class of crimes to which the offense belongs; therefore, the advisory sentence is the starting point in the appellate court's sentence review. *Anglemeyer*, 868 N.E.2d at 491. The “character of the offender” portion of the sentence review involves consideration of the aggravating and mitigating circumstances and general considerations. *Williams v. State*, 840 N.E.2d 433, 439–40 (Ind. Ct. App. 2006).

Hubble pleaded guilty to operating a motor vehicle with an A.C.E of .15 or more resulting in death. Hubble had a significant history of alcoholism and knew that he should not be drinking. According to Hubble, he was so intoxicated that he did not remember running over the victims or hitting a house. Even after he was arrested, his B.A.C. was .14 several hours after the incident. Hubble ran over two people, killing one, injuring the other and proceeded to cause damage to someone's house. Hubble's sentence is not appropriate in light of the nature of his offense.

Further, we find that Hubble's sentence is not inappropriate in light of his character. We acknowledge that Hubble has had a limited history of stable employment; involvement within his community; pays weekly child support; and is involved heavily in his daughter's life. However, Hubble has been convicted ten times in the past fifteen years for alcohol related offenses. He has been in alcohol and drug treatment multiple

times and promised not to drink anymore, but he did anyway, and the result was that a person died. Hubbles sentence is not inappropriate.

We affirm

RILEY, J., and BARNES, J., concur.