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IN THE
COURT OF APPEALS OF INDIANA

LISA M. TIBBS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A04-0902-CR-111
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Salvador Vasquez, Judge
Cause No. 45G01-0710-FC-127

September 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

After stealing over $211,000 from her employer with which to gamble, Lisa M. Tibbs pled guilty to Class D felony theft and was sentenced to three years. Tibbs now appeals, arguing that the trial court abused its discretion by failing to identify her gambling addiction as a mitigator. Concluding that the trial court did not abuse its discretion in failing to identify this addiction as a mitigator because the evidence is neither significant nor clearly supported by the record, we affirm.

Facts and Procedural History

According to the stipulated factual basis, between March 2005 and July 17, 2007,[1] Tibbs, while employed by Wiseway Food Centers in Hobart, Indiana, took money from her cash register and then voided out the grocery sales in order to cover the missing funds. On September 27, 2007, the store manager discovered money missing from the sales records. The total was $211,691.00.

On October 11, 2007, the State charged Tibbs with Class C felony theft. Tibbs and the State eventually entered into a plea agreement whereby Tibbs pled guilty to theft as a Class D felony[2] and agreed to pay restitution in the amount of $211,691.00, which would be reduced to a judgment lien. As for Tibbs' sentence, the parties were "free to fully argue their respective positions as to the sentence to be imposed by the Court." Appellant's App. p. 23. The trial court accepted the plea agreement.

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[1] We note that Tibbs' crimes spanned Indiana's two sentencing schemes, the former presumptive scheme, which was amended effective April 25, 2005, and the current advisory scheme. The trial court did not point this out below, and Tibbs does not point it out on appeal. Because the amendment happened so early in Tibbs' period of criminal activity and Tibbs makes no argument on appeal, we apply the current advisory scheme.

[2] Ind. Code § 35-43-4-2(a).

At the January 22, 2009, sentencing hearing, Tibbs' attorney argued that she took the money from Wiseway because she had a gambling addiction. Counsel, however, presented no evidence in support. Tibbs' Presentence Investigation Report (PSI), which the trial court indicated it had read, contained limited information about Tibbs' gambling addiction. At the conclusion of the hearing, the trial court identified the following aggravators:

> 1. The defendant was an employee (manager) of the victim Wise Way Food Centers, and had violated a position of trust and authority.
> 2. The defendant's monetary theft of the victim substantially exceeds the statutory elements of Theft, Class D felony.
> 3. The defendant has another theft charge pending in Porter County, Case 64D01-0711-FD-10406, which involves the same victim.

Id. at 27. The court identified the following mitigators:

> 1. The defendant has no history of delinquency or criminal activity.
> 2. The defendant has pled guilty and admitted responsibility, which is minimized by the defendant receiving the benefit of a reduced charge.

Id. at 26. Concluding that each aggravating factor, standing alone, outweighed the mitigating factors, the trial court sentenced Tibbs to the maximum term of three years. The court also ordered her to pay restitution to Wiseway in the amount of $211,691.00, which was reduced to a judgment lien. Tibbs now appeals.

Discussion and Decision

Tibbs contends that the trial court erred in failing to identify her gambling addiction as a mitigator. 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, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). An abuse of discretion occurs if 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).

Tibbs contends that the trial court should have considered her gambling addiction as a mitigator. Her PSI reports that she was diagnosed with "Gambling Addiction" in 2007 and attended counseling with Dr. Parks in February, March, and April of 2008, after she had been charged in this case, but discontinued the counseling because she could not afford it. PSI p. 6, 7. No records from her counseling are included, and no information is given about the extent of her gambling addiction. At the time of Tibbs' sentencing hearing in January 2009, she was attending Gambler Anonymous four nights a week. *Id.* at 6.

Traditionally, with addictions, we have determined that a trial court does not abuse its discretion for failing to identify them as mitigators when the mitigating evidence is not both significant and clearly supported by the record. *See, e.g.*, *James v. State*, 643 N.E.2d 321, 323 (Ind. 1994) (substance abuse); *Hape v. State*, 903 N.E.2d 977, 1002 (Ind. Ct. App. 2009) (substance abuse), *trans. denied*; *Bennett v. State*, 787 N.E.2d 938, 948 (Ind. Ct. App. 2003) (alcohol), *trans. denied*. And on some occasions, we have found that

addictions are even aggravating. *See Roney v. State*, 872 N.E.2d 192, 199 (Ind. Ct. App. 2007), *trans. denied*; *Bryant v. State*, 802 N.E.2d 486, 501 (Ind. Ct. App. 2004) (holding that when a defendant is aware that a substance abuse problem exists but does not seek treatment, the failure to act indicates something aggravating rather than mitigating about his character), *trans. denied*; *Iddings v. State*, 772 N.E.2d 1006, 1018 (Ind. Ct. App. 2002), *trans. denied*. We see no reason why gambling, another type of addiction, should be treated any differently.

Here, although Tibbs was addicted to gambling, there is no evidence in the record concerning the extent of her addiction and its nexus to the theft in this case. Over a two-year period, she took money from her employer on what has to be a significant number of occasions. Each time she went to work, she had a choice not to steal from her employer but did so anyway, culminating in a loss to Wiseway of over $211,000. Despite her addiction, she did not seek treatment until she was caught. Tibbs has failed to prove that the evidence of her gambling addiction is both significant and clearly supported by the record. The trial court did not abuse its discretion in failing to identify it as a mitigator.

Affirmed.

BAILEY, J., and BRADFORD, J., concur.