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IN THE
COURT OF APPEALS OF INDIANA

GARY S. MOORE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 47A01-1001-CR-31
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAWRENCE SUPERIOR COURT
The Honorable William G. Sleva, Judge
Cause No. 47D02-0602-FA-144

OCTOBER 1, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Appellant Gary S. Moore appeals the sentence the trial court imposed after he pleaded guilty to dealing in methamphetamine as a class B felony.[1] We affirm.

ISSUES

Moore raises two issues, which we restate as:

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

II. Whether Moore's sentence is inappropriate in light of the nature of the offense and the character of the offender.

FACTS AND PROCEDURAL HISTORY

On February 13, 2006, an Indiana State Trooper pulled Moore over in Bedford because Moore was driving without a seatbelt. During the stop, the trooper saw a rifle and what appeared to be part of a methamphetamine smoking pipe in plain view in Moore's van. The trooper searched the van and found two rifles, digital scales, and sixty-one grams of methamphetamine.

The State charged Moore with dealing in methamphetamine as a class A felony, maintaining a common nuisance, a class D felony,[2] and operating as a habitual traffic violator, a class D felony.[3] Moore pleaded guilty to dealing in methamphetamine as a class B felony and the State dismissed the other two charges. The trial court sentenced Moore to twenty years, with five and a half years suspended. This appeal followed.

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[1] At the time Moore was arrested and charged, the offense of dealing in methamphetamine was governed by Ind. Code § 35-48-4-1. *See* Ind. Code § 35-48-4-1 (West 2004). While Moore's case was pending, the statute was amended and the offense of dealing in methamphetamine is currently governed by Ind. Code § 35-48-4-1.1.

[2] Ind. Code § 35-48-4-13.

[3] Ind. Code § 9-30-10-16.

DISCUSSION AND DECISION

A sentencing decision rests within the sound discretion of the trial court and, if the sentence is within the statutory range, is reviewed on appeal for an abuse of discretion. *See 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.* (quotation omitted). Our Supreme Court has explained:

> One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering 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, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law.

Id. at 490-491.

In this case, Moore first contends that the trial court abused its discretion because it cited an element of the offense at issue as an aggravating circumstance. Specifically, at the sentencing hearing the trial court discussed at length the nature of methamphetamine dealing and its destructive impact on society. Based on the trial court's discussion, Moore argues that the trial court implicitly, and improperly, considered his commission of the crime itself to be an aggravating factor.

We disagree with Moore's reasoning. In the sentencing order and at the sentencing hearing, the trial court found that the sole aggravating factor was Moore's criminal history. During the sentencing hearing, the trial court described the many ways

in which methamphetamine dealing negatively impacts society, but we do not read the trial court's discussion of those negative impacts as identifying an aggravating circumstance. Instead, the trial court's discussion was a response to Moore's request for a minimum sentence based on his history of substance abuse. Moore, through his counsel, argued at length that Moore has a serious and longstanding substance abuse problem, and that Moore's criminal history was caused by his addictions. Thus, Moore asked for the minimum executed sentence of six years served, with additional time to be served on suspension and probation.

In response to Moore's argument, the trial court pointed out that Moore pleaded guilty to dealing methamphetamine, which is a more serious crime than possession of methamphetamine. The trial court stated, "I'm not sentencing you as because [sic] you're a drug addict. I deal with drug addicts all the time. . . . You're not being sentenced because you're a drug addict, you're being sentenced because you dealt methamphetamine." Tr. p. 119. The trial court repeated this distinction several times. The trial court also stated, after discussion of the harm caused by methamphetamine dealing, "That's what I'm sentencing you for, that's what I'm focusing on, not because you're an addict. Now, you are an addict and I understand that, but this is an incredibly serious offense." Tr. p. 120.

We conclude that the trial court's discussion of the harm that results from methamphetamine dealing was an explanation for why Moore's history of substance abuse did not merit a lesser sentence. The trial court acted within its discretion by declining to agree with Moore that his history of substance abuse was a mitigating factor.

See James v. State, 643 N.E.2d 321, 323 (Ind. 1994) (noting that a trial court is not obligated to consider an allegation of substance abuse as a mitigating circumstance).

Moore's second sentencing challenge is governed by Indiana Appellate Rule 7(B), which provides, in relevant part, "[t]he 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." We may look to any factors appearing in the record to conduct the examination. *Schumann v. State*, 900 N.E.2d 495, 497 (Ind. Ct. App. 2009). The burden is on the defendant to persuade us that his sentence is inappropriate. *Major v. State*, 873 N.E.2d 1120, 1130 (Ind. Ct. App. 2007), *transfer denied*.

The "nature of the offense" portion of the standard articulated in Appellate Rule 7(B) speaks to the statutory advisory sentence for the class of crimes to which the offense belongs. *Id.* Our Supreme Court in *Anglemyer v. State*, *supra*, noted that the advisory sentence is the "starting point" the Legislature has selected as an appropriate sentence for the crime committed. 868 N.E.2d at 494. However, this Court has held that although the advisory sentence may be the appropriate sentence, it is not a "mandatory starting point." *Richardson v. State*, 906 N.E.2d 241, 243 (Ind. Ct. App. 2009). For our purposes of review under Appellate Rule 7(B) we will first look to the advisory sentence to guide us in determining whether the sentence imposed is appropriate given the nature of the offense and the character of the offender. At the time Moore committed his crime, the sentence for a class B felony was a fixed term of between six years and twenty years, with the advisory sentence being ten years. *See* Ind. Code § 35-50-2-6.

The character of the offender portion of the standard set forth in Appellate Rule 7(B) refers to the general sentencing considerations and the relevant aggravating and mitigating circumstances. *Major*, 873 N.E.2d at 1131.

In this case, the trial court sentenced Moore to twenty years, which was the maximum authorized by statute, but suspended five and a half years of the sentence.

Regarding the nature of the offense, Moore concedes that he was caught with sixty-one grams of methamphetamine, which was far in excess of the minimum amount that would have been required to convict him of dealing in methamphetamine as a class A felony. *See* Ind. Code § 35-48-4-1 (West 2004) (requiring a minimum amount of three grams of methamphetamine to qualify as a class A felony). If Moore had distributed that amount of methamphetamine he could have caused great harm to his community.

Turning to the character of the offender, Moore has a substantial criminal history, including three prior felony convictions and four misdemeanor convictions. We note that one of Moore's prior convictions is for dealing marijuana as a class D felony. It is troubling that Moore has continued to deal in illegal substances despite his prior conviction and opportunity to reform. Furthermore, while the charges were pending in this case, Moore was charged with additional drug-related offenses in a separate case and agreed to plead guilty to possession of methamphetamine and marijuana. Moore has not been deterred from criminal behavior despite numerous contacts with the justice system. Under these circumstances, we cannot say that Moore's sentence is inappropriate.

CONCLUSION

For these reasons, we affirm the judgment of the trial court.

MATHIAS, J., and CRONE, J., concur.