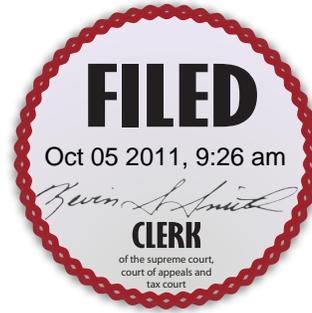


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

RAYMOND COX, JR.,)
)
Appellant-Defendant,)
)
vs.) No. 73A04-1101-CR-116
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE SHELBY CIRCUIT COURT
The Honorable Charles D. O'Connor, Judge
Cause No. 73C01-0909-FD-119

October 5, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Raymond Cox, Jr., appeals his sentence for possession of marijuana as a class D felony. Cox raises two issues, which we revise and restate as:

- I. Whether the court abused its discretion in sentencing him; and
- II. Whether his sentence is inappropriate.

We affirm.

The relevant facts follow. On November 4, 2010, Cox pled guilty to possession of marijuana as a class D felony. At his guilty plea hearing, Cox admitted that police discovered marijuana in his residence on September 18, 2009, and that he had a prior conviction for possession of marijuana on or about August 27, 2008.

At the sentencing hearing, Cox testified that he lived with his girlfriend and her children and that he had his own children with him every other weekend. Cox testified that he had seven biological children and that three of them were minors; that he worked making metal panes and freezer panels; and that he paid \$245 a week in child support. Cox testified that he had a criminal history, that he “was young and dumb,” and that he “enrolled [himself] in Gallahue” because he “noticed [he] had a drinking problem . . . and it was tearing [him] up inside.” Transcript at 21. Cox also stated: “I had problems, inner problems, that I’m dealing with through Gallahue, learning how to cope with things in life and I just want to keep my job and to support my family, don’t want to get behind in child support and I’m just begging the Judge for a little leniency, not you know I’m owning up to my mistakes but just to keep my job so I won’t lose everything again.” *Id.* at 23. In addition, Cox presented letters from his employer indicating that he was a good employee and that the employer intended to keep him employed. Cox’s counsel argued

that Cox “realize[s] the issues that he suffers with from alcohol and probably drug use” and that Cox’s criminal history was “silly stuff” and “not violent and it’s not [] perpetual violence.” Id. at 29. Cox’s counsel stated that he hoped for a sentence which would allow Cox some type of work release eligibility or the ability to keep working.

The trial court noted that it listened carefully to the arguments and read the presentence investigation report (“PSI”) and the letters Cox and his girlfriend submitted. The court recognized that Cox would be unable to meet his support obligation while incarcerated. The court stated that “had [Cox] not gone forward with the two arrests after [he] pled guilty” it was going to give “some serious consideration to doing what [Cox’s] attorney had suggested in spite of [Cox’s] thirteen prior misdemeanor convictions, one prior felony conviction, [and] three petitions to revoke probation that were granted” Id. at 31. The court further stated: “It gives me pause and [] some hope that if you’ve been truthful in what you’ve stated to me about seeking help for [] those substance abuse issues . . . the amount of time that I’m about to give you is not going to be [] as excessive as it could be or might seem” Id. The court noted that Cox was “arrested again not once but twice” and stated that it understood that “the first arrest [] for the driving while suspended charge was ultimately reduced to a no operating license and I’m not as concerned about that as I obviously am about the arrest that just occurred in [] November . . . and the charge of operating while [] dangerous operating a vehicle while intoxicated with [] the allegation of the [] significant blood alcohol content.” Id. The court discussed marijuana use and stated that “in view of your substance abuse issues, I have to find that [] the nature and circumstances of [] that crime are serious and [] probably more serious

for you because of your particular situation and [] your prior arrest [] for possession of marijuana and your admission that you have [] substance abuse issues that you're trying to meet head on.” Id. at 32. The court also noted that some of Cox’s prior misdemeanors involved substance abuse issues and included at least one battery conviction. The court found Cox’s prior criminal history to be a significant aggravating factor and the fact that he was arrested two different times while this case was pending to be an aggravating factor. The court found Cox’s guilty plea and the fact that the financial impact of his incarceration will be significant on his family to be mitigating factors. The court found that the aggravating circumstances outweighed the mitigating circumstances and sentenced Cox to two years to be served in the Indiana Department of Correction.

I.

The first issue is whether the court abused its discretion in sentencing Cox. The Indiana Supreme Court has held that “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), clarified on reh’g, 875 N.E.2d 218 (Ind. 2007) (“Anglemyer Rehearing”). 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 before the court.” 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 490-491. 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, the relative weight or value assignable to reasons properly found, or those which should have been found, is not subject to review for abuse of discretion. Id.

Cox argues that the court “abused its discretion by finding as an aggravating circumstance that [he] had two arrests subsequent to entering his guilty plea in this matter” and that while “the record is clear that Cox was arrested for Operating a Vehicle While Intoxicated in November 2010, it does not support a finding of a second arrest.” Appellant’s Brief at 4. Cox argues that “[t]he other incident wherein Cox admitted to the infraction of No Operator’s License did not involve an arrest nor a criminal conviction.” Id. at 4-5. Cox further argues that “[t]he court failed to find as mitigating circumstances that [his] crime neither caused nor threatened serious harm to persons or property and that [he] had sought treatment for his drug and alcohol addictions both of which are supported by the record.” Id. at 5.

With respect to Cox’s proposed mitigators, we note that “[t]he finding of mitigating factors is not mandatory and rests within the discretion of the trial court.” Ellis v. State, 736 N.E.2d 731, 736 (Ind. 2000). The trial court is not obligated to accept the defendant’s arguments as to what constitutes a mitigating factor. Gross v. State, 769 N.E.2d 1136, 1140 (Ind. 2002). “Nor is the court required to give the same weight to

proffered mitigating factors as the defendant does.” Id. Further, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. Sherwood v. State, 749 N.E.2d 36, 38 (Ind. 2001). However, the trial court may “not ignore facts in the record that would mitigate an offense, and a failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them.” Id. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999).

The record reveals that Cox’s counsel presented arguments related to Cox’s substance abuse and the non-violent nature of his criminal history. The court stated: “It gives me pause and [] some hope that if you’ve been truthful in what you’ve stated to me about seeking help for [] those substance abuse issues . . . the amount of time that I’m about to give you is not going to be [] as excessive as it could be or might seem” Transcript at 31. The court further stated that “in view of your substance abuse issues, I have to find that [] the nature and circumstances of [] that crime are serious and [] probably more serious for you because of your particular situation and [] your prior arrest [] for possession of marijuana and your admission that you have [] substance abuse issues that you’re trying to meet head on.” Id. at 32. The court also noted that some of Cox’s prior misdemeanors involved substance abuse issues and that included at least one battery conviction. We cannot say that the court abused its discretion in failing to find Cox’s proposed mitigating circumstances.

With respect to the aggravating circumstances, in March 2010 Cox was charged with driving while suspended and pled guilty to “No Operator’s License.” Appellant’s Appendix at 79. We note that Cox testified on cross-examination that he was not arrested in connection with this offense. Cox indicated that he was arrested in November 2010 and that he “tested .15.” Transcript at 25. The PSI shows that Cox was charged with “Dangerous Operating a Vehicle While Intoxicated (MA),” “OVWUI with a BAC of .15% or More (MA),” and “Habitual Substance Offender” in connection with the offense. Id. at 80. The court ultimately found Cox’s prior criminal history and the fact that he was arrested two different times while this case was pending to be aggravating factors. Further, the court found that Cox’s “criminal history includes 13 prior misdemeanor convictions, several involving substance abuse,” that “he also has one felony,” and that Cox’s “prior criminal history is a significant factor.” Appellant’s Appendix at 54.

We note that “a single aggravating circumstance may be sufficient to support the imposition of an enhanced sentence.” Deane v. State, 759 N.E.2d 201, 205 (Ind. 2001). As previously noted, the court identified aggravating circumstances which are not challenged by Cox including his criminal history, which included a number of misdemeanor convictions and a felony conviction. Further, the trial court found Cox’s criminal history to be a significant factor. In addition, Cox does not challenge that he was arrested in November 2010 in connection with driving while intoxicated. We can say with confidence that the court would have imposed the same sentence if it considered only the aggravating circumstances not challenged by Cox. We conclude that the court did not abuse its discretion in sentencing Cox. See Shafer v. State, 856 N.E.2d 752, 758

(Ind. Ct. App. 2006) (affirming the defendant's sentence and holding that even if the court erred in finding one aggravator the court found other aggravators which the defendant did not challenge), trans. denied.

II.

The next issue is whether Cox's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Cox argues that the amount of marijuana he possessed "was limited to a 'roach' located in an ashtray and some marijuana found in a baggy in Cox's dresser drawer." Appellant's Brief at 6. Cox asserts that he was fully cooperative with police, that he accepted responsibility for his behavior by pleading guilty, and that his history and admissions indicate that the "primary, if not exclusive, reason for committing crimes was his addiction to drugs and alcohol." Id. at 7. Cox also argues that he was an active father who paid his child support and maintained relationships with his children and that he was employed and his work ethic was valued by his employers.

Our review of the nature of the offense reveals that Cox possessed marijuana in his residence on September 18, 2009, and that he had a prior conviction for possession of marijuana on or about August 27, 2008. Our review of the character of the offender

reveals that Cox pled guilty in this case and that the financial impact of his incarceration will be significant on his family. The PSI indicates that Cox's criminal history consists of battery by bodily waste as a class D felony in 2000 and a number of misdemeanor convictions, including, among others, no operator's license in 1989, three counts of battery in 1993, 2003, and 2004, criminal trespass in 1996, driving while suspended in 1999, check deception in 2000, operating a vehicle while intoxicated with a BAC of .08% or more in 2002, two counts of possession of marijuana in 2006 and 2008, driving while suspended in 2007, and domestic battery in 2007. The PSI also shows that Cox's probation was revoked in 1996, 2007, and 2008. Following the date of the offense in this case, Cox was charged with driving while suspended and later pled guilty to no operator's license. Also, Cox acknowledged that he was picked up in November 2010, that the officer said that he "tested for .15%," Transcript at 25, and the PSI shows that Cox was charged with Dangerous Operating a Vehicle While Intoxicated, Ovwui with a BAC of .15% or More, and being a Habitual Substance Offender. Based upon the record, our review of the nature of the offense and the character of the offender does not lead us to conclude that Cox's sentence is inappropriate.

For the foregoing reasons, we affirm Cox's sentence for possession of marijuana as a class D felony.

Affirmed.

BAKER, J., and KIRSCH, J., concur.