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IN THE
COURT OF APPEALS OF INDIANA

TERESA M. VINSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A04-0903-CR-128
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0611-FA-18

October 7, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Teresa M. Vinson appeals her sentence for Class A felony possession of cocaine.[1] We affirm.

FACTS AND PROCEDURAL HISTORY

Vinson was arrested on June 20, 2005, and charged with Class B felony dealing in cocaine, Class D felony possession of cocaine, Class A misdemeanor possession of marijuana, and Class A misdemeanor possession of paraphernalia. Vinson posted bond on July 1, 2005. She was arrested again on September 13, 2005. She was charged under a separate cause number with Class A felony dealing in cocaine, Class B felony possession of cocaine, Class A felony conspiracy to commit dealing in cocaine, Class D felony maintaining a common nuisance, and two counts of Class D felony neglect of a dependent. Vinson again posted bond on February 26, 2006.

On November 14, 2006, a confidential informant purchased drugs from Andrew Smith, who was Vinson's boyfriend. Vinson was present during the transaction. Vinson and Smith were arrested shortly thereafter, and a search warrant was obtained for Vinson's apartment. In her apartment, police found $280 that had been used in a previous controlled buy, fifteen grams of a substance that field-tested positive for cocaine, three grams of a substance that field-tested positive for heroin, thirty-three pills that field-tested positive for ecstasy, and a semi-automatic handgun. The transaction occurred within 1000 feet of a child care center, and Vinson's apartment was also located within 1000 feet of the facility.

[1] Ind. Code § 35-48-4-6(a) and (b)(3)(B).

Vinson was charged under a third cause number with thirteen new charges: two counts of Class A felony dealing in cocaine, two counts of Class A felony possession of cocaine, two counts of Class A felony dealing in a narcotic drug (heroin), Class A felony possession of a narcotic drug, Class B felony possession of a narcotic drug, Class B felony dealing in a Schedule I controlled substance (ecstasy), Class C felony possession of a Schedule I controlled substance, conspiracy to commit dealing in cocaine, conspiracy to commit dealing in a narcotic drug, and conspiracy to commit dealing in a Schedule I controlled substance.

On March 14, 2008, Vinson entered a plea agreement that disposed of all twenty-three charges pending under the three cause numbers. Vinson pled guilty to one count of Class A felony possession of cocaine, and the State dismissed the rest. The parties agreed to a cap of twenty years on the executed portion of Vinson's sentence, but the sentence was otherwise left to the trial court's discretion.

A sentencing hearing was held on January 23, 2009. Vinson called Dr. Jeffrey Wendt, a clinical psychologist. Dr. Wendt determined Vinson has an IQ of 58, which is in the lower .2 percentile of the general population. Vinson has "extremely low cognitive functioning . . . consistent with mental retardation." (Sentencing Tr. at 4.) Dr. Wendt described her functioning as follows:

> Because of her mental retardation, her IQ of fifty-eight is at the level of a pre-teen and an estimate of a ten to twelve year old. She, in my opinion, has very poor judgment and lowered capacity to appreciate the severity and long-term consequences of her behavior. Not to say that, you know, as in a sanity [sic] defense that she doesn't appreciate what she is doing is wrong but her capacity is much lower than the average adult. In addition, her low IQ leaves her . . . socially naive and much more vulnerable to manipulation

> by others and by her self-report that was one element of the charges against her that she was influenced by people who she was in relationships with.

(*Id*. at 5.)

Vinson made a brief statement in which she requested a second chance so that she could be with her two teenage children and her mother, who has cancer.

The State called Detective Daniel Shumaker. On September 12, 2005, Detective Shumaker took a statement from Vinson in which she went "into quite a bit of detail" about her involvement with Phillip Spratt, whom she described as the "main dealer." (*Id*. at 15.) Spratt was charged, and the State intended to call Vinson as a witness. On November 14, 2006, Detective Shumaker attended a witness conference in preparation for Spratt's trial, and Vinson refused to speak. Vinson's counsel was present and claimed Vinson was "mentally incapable of saying anything." (*Id*. at 17.) As a result, the charges against Spratt were dropped, and the Drug Task Force had to build a new case against him by making controlled buys.

As aggravating circumstances, the trial court found her criminal history, her violation of the conditions of her pre-trial release, her lack of remorse, her lack of cooperation in Spratt's case, the benefit she received from her plea, and the seriousness of her offense. The trial court found her plea was a mitigation circumstance and also found her mental retardation was a "strong mitigating factor." (*Id*. at 34.) The trial court found the factors balanced each other, and therefore imposed the thirty-year advisory sentence, with twenty years in the Department of Correction, two years on home detention, and eight years on supervised probation.

DISCUSSION AND DECISION

Vinson argues: (1) the trial court abused its discretion by recognizing improper aggravators, and (2) her sentence is inappropriate in light of her character and the nature of her offense.

1. Aggravators

Sentencing decisions are reviewed for abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g on other grounds*, 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 trial court. *Id*. A trial court may abuse its discretion by recognizing aggravators that are not supported by the record or that are improper as a matter of law. *Id*. at 490-91.

Vinson first argues the trial court erred by recognizing her criminal history as an aggravator. Vinson does not dispute that she has prior convictions of criminal conversion, false reporting, failure to stop after an accident, and operating a vehicle while suspended. She argues the trial court should not have recognized her criminal history as an aggravator because her prior convictions are all misdemeanors and did not involve drugs. The "significance of a defendant's prior criminal history in determining whether to impose a sentence enhancement will vary 'based on the gravity, nature and number of prior offenses as they relate to the current offense.'" *Prickett v. State*, 856 N.E.2d 1203, 1209 (Ind. 2006) (quoting *Ruiz v. State*, 818 N.E.2d 927, 929 (Ind. 2004)). However, we no longer review the trial court's weighing of aggravating factors, *Anglemyer*, 868

N.E.2d at 491, and the trial court was not required to ignore her criminal history just because it was relatively minor.

Next, Vinson argues the trial court's finding she lacked remorse is not supported by the record. She contrasts her case with *Deane v. State*, 759 N.E.2d 201 (Ind. 2001). Deane was found guilty of the murder of his mother and brother. At sentencing, the trial court found Deane lacked remorse, noting Deane had called the prosecutor a "prick" and claimed he was being "persecuted" by the trial court. *Id*. at 205. Our Supreme Court found the aggravator was properly supported. *Id*.

Vinson argues the lack of remorse aggravator was an abuse of discretion in her case because she did not display the sort of disrespectful behavior found in *Deane*. However, nothing in *Deane* requires behavior to rise to that level before a court may find a defendant lacks remorse. On the contrary, we give substantial deference to a trial court's evaluation of remorse because it has the ability to directly observe the defendant. *Corralez v. State*, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004). Without evidence of some impermissible consideration by the trial court, we accept its determination regarding remorse. *Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002). We note that in her brief statement to the court, Vinson did not apologize for her actions or acknowledge the wrongfulness of her conduct. We therefore cannot say the trial court abused its discretion by finding she lacked remorse.

Vinson also argues the trial court abused its discretion by finding as an aggravator the benefit she received from her plea. She relies on *Farmer v. State*, 772 N.E.2d 1025, 1027 (Ind. Ct. App. 2002). Farmer's sentence was enhanced based on facts that

supported charges that were dismissed pursuant to a plea agreement. On appeal, he argued the enhancement was improper because it circumvented his plea agreement. We agreed, holding that if he were sentenced more harshly in reliance on those facts, he would not receive the full benefit of his plea agreement. *Id*.

The State argues the trial court was not punishing her for the dismissed charges, as in *Farmer*, but was offsetting the mitigator it recognized in her plea agreement. We agree that this was likely what the trial court intended. Pursuant to Vinson's plea agreement, twenty-two charges were dropped, most of which were felonies. We have frequently recognized that a guilty plea may not be entitled to significant mitigating weight when the defendant receives a substantial benefit. *See, e.g.*, *Rogers v. State*, 878 N.E.2d 269, 273 (Ind. Ct. App. 2007), *trans. denied*. Therefore, we find no abuse of discretion here. However, we encourage trial courts to avoid characterizing the benefit of a plea agreement as an aggravator, as that characterization might suggest the type of error identified in *Farmer*.

Finally, Vinson argues the trial court abused its discretion by treating her lack of cooperation in Spratt's case as an aggravator. In September 2005, Vinson implicated Spratt as the "main dealer." (Sentencing Tr. at 15.) However, at the witness conference prior to Spratt's trial, she refused to speak. The trial court recognized her refusal to cooperate may have been due to her mental retardation:

> . . . I'm not a psychologist and Doctor Wendt is a very good one and I accept his opinion. And one of the things that I remember from when we were dealing with you[r] competency examination before was that some of the lack of cooperation you showed when you were being examined by Dr.

> Abbert is probably related to your mental problems.[2] That --- whether that was employed when you were getting ready to prepare for [Spratt's] trial or whether you were more afraid of what would happen if you testified th[a]n you were of what would happen if you didn't I don't know, but that really is related to that first situation.

(*Id*. at 33.) Nevertheless, the trial court found she "blew that chance by not cooperating." (*Id*.)

While we understand the State's and the court's frustration with Vinson's behavior in the Spratt case, the record does not support treating that behavior as an aggravator. Vinson had no obligation to provide information about Spratt. Her plea agreement required her to testify truthfully on request, but that agreement was entered into in 2008. Apparently, Vinson's statement to Detective Shumaker in 2005 was voluntary. Vinson refused to testify against Spratt in 2006, but the trial court acknowledged that may have been because of her mental disability. While the State had to rebuild its case against Spratt, the record does not reflect that the information Vinson provided was useless to its investigation. In light of the fact that Vinson voluntarily provided some information about Spratt and the trial court was uncertain that she could continue cooperating, we conclude the lack of cooperation aggravator was an abuse of discretion.

Even if the trial court abuses its discretion in finding an aggravating factor, we may affirm if we can say with confidence that the trial court would have imposed the same sentence had it considered only the proper aggravators. *Taylor v. State*, 891 N.E.2d 155, 162 (Ind. Ct. App. 2008), *trans. denied*, *cert. denied*. The trial court presumably gave little weight to the lack of cooperation aggravator, as it acknowledged the possibility

[2] Dr. Wendt and Dr. Abbert evaluated Vinson to determine whether she was competent to stand trial. Vinson had been declared incompetent to stand trial for a period of time during 2007.

that Vinson's mental retardation played a role. The trial court found her mental retardation to be a "strong mitigating factor," and that appears to be the factor that received the most weight. (Sentencing Tr. at 34.) The trial court noted several aggravators but imposed the advisory sentence, and we conclude the trial court would have imposed the same sentence even if it had not treated Vinson's behavior in the Spratt case as an aggravator.

2. Appropriateness of Sentence

Vinson argues her sentence is inappropriate. We may revise a sentence if it is "inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We give deference to the trial court, recognizing its special expertise in making sentencing decisions. *Barber v. State*, 863 N.E.2d 1199, 1208 (Ind. Ct. App. 2007), *trans. denied*. The defendant bears the burden of persuading us the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

As to the nature of the offense, Vinson pled guilty to one count of possessing at least three grams of cocaine within 1000 feet of a child care center. The record reveals little else about the offense.

As to her character, the record reflects Vinson has a low IQ and functions approximately on the level of a ten- to twelve-year-old. Vinson has difficulty understanding the long-term consequences of her behavior and the severity of those consequences. However, Dr. Wendt testified Vinson is able to appreciate the wrongfulness of her actions, and she has nevertheless failed to conform her behavior to the law. Twice she was released on bond, and both times she returned to dealing drugs.

Therefore, we cannot say the advisory sentence is inappropriate.

Affirmed.

CRONE, J., and BROWN, J., concur.