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**IN THE
COURT OF APPEALS OF INDIANA**

BILLY FOX,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 45A05-0703-CR-152

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas P. Stefaniak, Jr., Judge
Cause No. 45G04-0502-FB-14

October 10, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Billy Fox appeals the sixteen-year sentence he received after pleading guilty to class B felony burglary.¹ He asserts that the trial court erred in enhancing his sentence based on “prior substantial criminal history where [Fox] had no prior criminal convictions for at least three years prior to the date of the offense.” Appellant’s Br. at 3. We disagree.

Discussion and Decision

We review sentencing decisions, “including a trial court’s decision to increase or decrease the presumptive sentence because of aggravating or mitigating circumstances,” for an abuse of discretion. *Henderson v. State*, 769 N.E.2d 172, 179 (Ind. 2002).² “When enhancing a sentence, a trial court must: (1) identify significant aggravating and mitigating circumstances; (2) state the specific reasons why each circumstance is aggravating or mitigating; and (3) evaluate and balance the mitigating against the aggravating circumstances to determine if the mitigating offset the aggravating circumstances.” *Vazquez v. State*, 839 N.E.2d 1229, 1232 (Ind. Ct. App. 2005) (citing *Bailey v. State*, 763 N.E.2d 998, 1004 (Ind. 2002)), *trans. denied*. A single aggravating circumstance is adequate to justify an enhanced sentence. *Moon v. State*, 823 N.E.2d 710, 717 (Ind. Ct. App. 2005), *trans. denied*.

¹ According to the guilty plea and stipulated facts, in September 2004, Fox, without permission, knowingly and intentionally broke and entered the home of Kenneth and Maryann Larson, and took a safe, which contained money, jewelry, and other valuables. App. at 42.

² Because he committed the offense before the April 25, 2005 effective date of the recent amendments to Indiana’s criminal sentencing statutes, Fox was sentenced under the presumptive sentencing scheme. *See Jacobs v. State*, 835 N.E.2d 485, 491 n.7 (Ind. 2005) (“courts must sentence defendants under the statute in effect at the time the defendant committed the offense”). For a discussion regarding sentencing for crimes committed *after* the amendments took effect, see *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), and *McDonald v. State*, 868 N.E.2d 1111 (Ind. 2007).

“Generally, the weight assigned to a mitigator is at the trial judge’s discretion[.]” *Covington v. State*, 842 N.E.2d 345, 348 (Ind. 2006). Here, the court noted Fox’s guilty plea, but did not give it much weight because Fox’s DNA was recovered, making conviction likely. Tr. at 66. Moreover, Fox received a substantial benefit for pleading guilty. Pursuant to the plea agreement, the State dismissed a habitual offender enhancement, which could have added up to thirty more years to his sentence. App. at 7, 40; *see McElroy v. State*, 865 N.E.2d 584, 591 (Ind. 2007) (stating that while guilty plea deserves “some” mitigating weight, it may not be significant where the defendant receives a substantial benefit in return). The court also acknowledged family hardship as a mitigating circumstance, but did not assign it overwhelming weight. *See Gillem v. State*, 829 N.E.2d 598, 604-05 (Ind. Ct. App. 2005) (noting court may decline to assign significant weight to proffered family hardship mitigator), *trans. denied*.

On the flipside, the court commented that Fox had been “given breaks in the past,” but to no avail. Tr. at 66. In its thoughtful and lengthy sentencing statement,³ the court catalogued Fox’s prior criminal convictions, which are numerous and substantial. As a juvenile, Fox admitted to possession of alcohol and battery in 1989 and 1990 respectively. He spent time at the juvenile center and received probation, from which he was released in 1993. In 1994, Fox was charged with and pled guilty to possession of cocaine, and received a twenty-month sentence with all but sixty days suspended to be served as eighteen months in jail. In 1995, Fox violated probation, failed to appear, and was discharged unsatisfactorily

³ Tr. at 62-67; *see also* App. at 4-11 (pre-sentencing investigation report).

from probation. In 1996, Fox was charged with B felony burglary, and thereafter pled guilty to C felony burglary and received a four-year community corrections sentence. Eventually, Fox was expelled from the community corrections program and ordered to serve the balance of the four-year sentence in the Department of Correction. Thereafter, Fox failed to appear again, had his driver's license suspended, pled guilty to driving while suspended, failed to appear once more, and was twice charged with marijuana possession.⁴ In 1999, Fox pled guilty to D felony failure to return to lawful detention, received a three-year sentence with eighteen months suspended, and had his probation revoked. In 2002, two days after being discharged from probation, Fox was arrested for criminal recklessness. He pled guilty to criminal recklessness, was discharged from probation in May 2004, and committed the instant offense in February 2005. Scattered throughout Fox's record are countless driving infractions.

Our supreme court has emphasized that “the extent, if any, that a sentence should be enhanced [based upon prior convictions] turns on the weight of an individual's criminal history.” *Duncan v. State*, 857 N.E.2d 955, 959 (Ind. 2006). “This weight is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability.” *Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006).

We are sympathetic to the plight of Fox's family while he is incarcerated. However, given the gravity, nature, and number of prior offenses, as well as the fact that this is not

⁴ The notation after each marijuana charge states, “Six Months Deferred Prosecution.” App. at 8, 9.

Fox's first burglary conviction, we cannot say that the court abused its discretion when, in balancing the aggravating and mitigating circumstances, it concluded that the former outweighed the latter.

Affirmed.

BAKER, C. J., and FRIEDLANDER, J., concur.