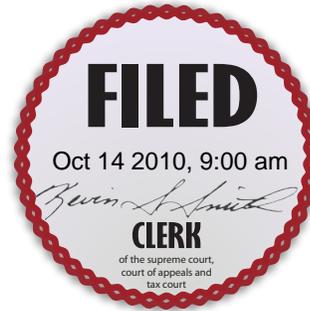


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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MARK THOMAS,

Appellant- Defendant,

vs.

STATE OF INDIANA,

Appellee- Plaintiff,

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No. 49A02-1002-CR-193

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Grant W. Hawkins, Judge  
The Honorable Christina R. Klineman, Master Commissioner  
Cause No. 49G05-0903-FC-34763

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October 14, 2010

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

### Case Summary and Issue

Mark Thomas was convicted following a bench trial of burglary, a Class C felony, attempted theft, a Class D felony, and criminal mischief, a Class B misdemeanor, and determined to be an habitual offender. The trial court ordered Thomas to serve an aggregate sentence of ten years with four years suspended. Thomas raises one issue for our review: whether the trial court abused its discretion when it failed to find Thomas's employment history and the undue hardship to his dependents as significant mitigating circumstances. Concluding the trial court properly sentenced Thomas, we affirm.

### Facts and Procedural History

On March 23, 2009, Donald Pickens was in a housing area known as the Town & Terrace Association in Marion County, Indiana, checking on four units he owns there. He heard a loud pounding noise coming from 4043 Hampshire Court which prompted him to call 911. Officer Pritchett, one of the Indianapolis Metropolitan Police Department officers dispatched to the scene, also heard loud banging noises coming from the unit.

Pickens told the officers the unit at 4043 Hampshire Court was owned by Rainbow Realty. Rainbow Realty sent Jimmy Angel in response to the officers' call. Although Angel brought a key to the unit, the officers could not open the front door because the padlock was removed and they could not open the back door because it was screwed shut.

The officers knocked on the back door and identified themselves, but no one came out. The banging inside the unit stopped, however, and the officers continued to knock and make announcements. Angel confirmed that no one was permitted inside the unit and the officers then made a forced entry through the back door. Upon searching the

house, the officers found Thomas in the attic. Drywall inside the unit was ripped or torn down in several locations. Copper pipes were ripped out of the walls and there was a pile of copper pipes on the floor of the unit. Angel testified he had been inside the unit several weeks prior to this incident and there had been no holes in the walls or piles of copper pipes on the floor.

Thomas testified he was at the property because he had made a security deposit with Rainbow Realty to purchase a unit at 4047 Essex Court but found that property was damaged and arranged with Rainbow Realty to move into 4043 Hampshire Court instead. Thomas testified that when he arrived at the unit, a man and woman were living there. He and the man got into a fight, after which the man and woman ran off. He said the padlock was gone and there was no lock on the front door so he secured the property by placing a two by four against the front door. He denied ripping out drywall and removing copper pipes. He also claimed he was in the attic using a hammer to secure some loose framing and did not hear the officers' announcements or knocking. Octavio Sebastian, leasing manager of Town & Terrace, testified Thomas did put down a deposit on 4047 Essex Court but the sale was cancelled and Thomas forfeited his deposit money because he did not sign the contract within two weeks of the sale. Sebastian also testified that if Thomas had decided to buy another property it would have been noted in their paperwork and it was not.

On January 20, 2010, the trial court found Thomas guilty of burglary, a Class C felony; attempted theft, a Class D felony; and criminal mischief, a Class B misdemeanor. Thomas then pled guilty to being an habitual offender in exchange for the State's

agreement that the additional penalty imposed on the habitual offender finding could not be greater than eight years. Thomas admitted he had been convicted in 2004 of Class D felony theft, and in 2006 for an unrelated Class C felony burglary and Class D felony theft.

At the sentencing hearing, Thomas asked the court to consider the following mitigating circumstances: (1) Thomas's employment history; and (2) the hardship incarceration would cause to Thomas's dependents. The trial court heard evidence that Thomas was working for a construction company when he was arrested for the instant offenses. The trial court also heard that Thomas had dependents whom he was helping to support. The State argued that Thomas's prior criminal history should be considered an aggravating circumstance. The trial court did not find any mitigating circumstances, including those asserted by Thomas, but considered his criminal history of fourteen arrests and numerous convictions as an aggravating circumstance.

The trial court sentenced Thomas to six years for burglary with four years suspended, enhanced by four years for the habitual offender determination. The trial court sentenced Thomas to two years for attempted theft, and 180 days for criminal mischief. The trial court ordered each sentence to be served concurrently. Thomas now appeals his sentence.

## Discussion and Decision

### I. Standard of Review

Subject to our review and revise power pursuant to Appellate Rule 7(B),<sup>1</sup> 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 do not 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. Flickner v. State, 908 N.E.2d 270, 273 (Ind. Ct. App. 2009). "If the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist." Anglemyer, 868 N.E.2d at 493 (citation omitted).

### II. Proffered Mitigating Circumstances

Thomas contends the trial court failed to consider significant mitigating circumstances clearly supported by the record in imposing his sentence. Specifically,

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<sup>1</sup> Thomas does not make a 7(B) argument.

Thomas claims his good employment history and the hardship to his wife and children from a sentence in excess of the advisory were both significant and clearly supported by the record.

Thomas's testimony at trial and the pre-sentence investigation report reflect he was working for Wilhelm Construction Company earning \$19.00 per hour at the time of these offenses and prior to that, he worked for his father's construction company for over twenty years. The defense admitted at trial a photocopy of Thomas's March 3, 2009, paycheck stub from Wilhelm Construction Company showing year-to-date earnings of \$9,324.38. Conversely, the State contends Thomas's employment was not a significant mitigating circumstance because he had worked at Wilhelm for less than two months. In addition, the State contends Thomas failed to provide support in the record regarding the years prior to his arrest when he allegedly worked for his father's company.

In Stout v. State, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005), trans. denied, we held the trial court was not required to recognize work history as a mitigating circumstance because the defendant failed to present evidence of a consistent work history. Thomas attempts to distinguish his case from Stout. However, although Thomas provided the trial court with proof that he was employed at the time of his arrest, he did not provide the court with sufficient evidence of a consistent work history. Thomas did not provide the court with a history of performance reviews or attendance records, but only with proof he had been employed for two months in 2009. A trial court does not err in failing to find a mitigating circumstance when a mitigation claim is "highly disputable in nature, weight, or significance." Smith v. State, 670 N.E.2d 7, 8 (Ind. 1996). As noted in

Newsome v. State, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003), trans. denied, “[m]any people are gainfully employed such that this would not require the trial court to note it as a mitigating factor . . . .” The trial court did not abuse its discretion by not finding Thomas’s employment a significant mitigating circumstance.

Thomas also argues the trial court failed to acknowledge his sentence would create an undue hardship for his dependents. Indiana Code section 35-38-1-7.1(b)(10) provides the trial court may consider as a mitigating circumstance whether the imprisonment of the defendant will result in an undue hardship to the defendant’s dependents.

Thomas asserts that at the time of his arrest he resided with his wife and four children. Thomas also claims he was contributing to their support and education at the time of his arrest. Lastly, he claims that his enhanced sentence would be a hardship to his wife and children because there will be additional expenses when his children attempt to obtain advanced degrees. However, as with employment, our supreme court has explained that “[m]any persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship.” Dowdell v. State, 720 N.E.2d 1146, 1154 (Ind. 1999); see also Benefield v. State, 904 N.E.2d 239, 248 (Ind. Ct. App. 2009) (holding the trial court did not abuse its discretion in declining to find undue hardship where defendant failed to show special circumstances establishing that the hardship was unusual); trans. denied.

Thomas did not offer any special circumstances that would lead us to hold the trial court abused its discretion. It is indisputably true that Thomas’s children will suffer

hardship during his absence. However, that is true of the dependents of most incarcerated persons, and the fact that Thomas's children have a mother who is willing and able to care for them coupled with the fact they are older children – the youngest child is sixteen – leads us to conclude that their hardship will not be so severe that the trial court abused its discretion by failing to consider it a mitigating circumstance. Therefore, we hold the trial court did not abuse its discretion in this regard.

#### Conclusion

The trial court did not abuse its discretion when it failed to find any significant mitigating circumstances. The sentence is therefore affirmed.

Affirmed.

MAY, J., and VAIDIK, J., concur.