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**IN THE
COURT OF APPEALS OF INDIANA**

TERRY L. BRABSON,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 90A01-0805-CR-243

APPEAL FROM THE WELLS CIRCUIT COURT
The Honorable David L. Hanselman, Sr., Judge
Cause No. 90C01-0612-MR-0001

October 21, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Terry L. Brabson was convicted of voluntary manslaughter as a Class A felony and sentenced to thirty years in the Department of Correction. On appeal, he argues that the trial court abused its discretion in failing to recognize as mitigating circumstances his guilty plea, his remorse, his mental illnesses, the existence of grounds tending to excuse or justify his crime, and that his incarceration would create an undue hardship for his mother. Brabson also contends that his sentence is inappropriate in light of the nature of the offense and his character. Concluding that the trial court did not abuse its discretion in failing to recognize significant mitigating circumstances and that Brabson's advisory sentence is not inappropriate, we affirm.

Facts and Procedural History

On October 9, 2006, Brabson visited a cousin's home in Fort Wayne and met Debra Wilson. The next day, Wilson asked Brabson to drive her to her home in Ossian. In exchange, Wilson promised to pay Brabson \$40. The two then drove to Wilson's residence in Ossian, where they proceeded to smoke crack cocaine together at least twice.

Later that evening, Wilson told Brabson to leave because company was coming to her home. She then gave Brabson \$25. Upset that he had not received the promised \$40, Brabson smoked more crack cocaine. This angered Wilson, and the two scuffled. Ultimately, Brabson pushed Wilson down onto her bed. Wilson pulled out a steak knife and approached Brabson, and he somehow took control of the knife, stabbed her, and struck her on the head. Wilson died as a result of blunt force trauma to her head.

Brabson walked back to Fort Wayne, carrying a laundry basket from Wilson's home and the knife until he disposed of them separately along the way.

Brabson was later apprehended and charged with murder.¹ He ultimately pled guilty to Class A felony voluntary manslaughter pursuant to a plea agreement.² Under the terms of Brabson's oral plea agreement with the State, his sentence was capped at thirty years and the State agreed not to make a sentencing recommendation. Guilty Plea Hrg. Tr. p. 12-13. Throughout the proceedings, Brabson, who has been stabbed in the past and professes a fear of knives, claimed that he "blacked out" and does not remember killing Wilson. During his sentencing hearing, numerous witnesses testified, and Brabson presented evidence of his history of drug abuse and mental illnesses. At the conclusion of the sentencing hearing, the trial court recognized one aggravating circumstance, Brabson's criminal history, and three mitigators: Brabson's guilty plea, his cooperation with the police investigation, and his military service. However, the court afforded these mitigating circumstances "very little weight." Sent. Tr. p. 86. The trial court then sentenced Brabson to thirty years in the Department of Correction. *Id.* at 88. Brabson now appeals.

Discussion and Decision

Brabson challenges his sentence on appeal. He argues that the trial court abused its discretion in failing to recognize as mitigating circumstances his guilty plea, his remorse, his mental illnesses, the existence of grounds tending to excuse or justify his crime, and that his incarceration would create an undue hardship for his mother. He also

¹ Ind. Code § 35-42-1-1.

² Ind. Code § 35-42-1-3.

contends that his sentence is inappropriate in light of the nature of the offense and his character.

I. Abuse of Discretion

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 can review the presence or absence of reasons justifying a sentence for an abuse of discretion, but we cannot review the relative weight given to these reasons. *Id.* at 491. One way in which a court may abuse its discretion is by entering a sentencing statement that omits mitigating circumstances that are clearly supported by the record and advanced for consideration. *Id.* at 490-91. However, a trial court is not obligated to accept a defendant's claim as to what constitutes a mitigating circumstance. *Rascoe v. State*, 736 N.E.2d 246, 249 (Ind. 2000).

Brabson contends on appeal that the trial court abused its discretion by failing to recognize the following significant mitigating circumstances: his guilty plea, his remorse, his mental illnesses, the existence of grounds tending to excuse or justify his crime, and that his incarceration would create an undue hardship for his mother. We address each in turn.

A. Guilty Plea

Brabson contends that the trial court abused its discretion in failing to recognize his guilty plea as a significant mitigating circumstance. The trial court *did* find Brabson's guilty plea as a mitigating circumstance. Sent. Tr. p. 86. However, the court afforded it "very little weight" because of the "tremendous risk[]" Brabson avoided by entering into a plea agreement with the State that capped his sentence at thirty years. *Id.* As such, Brabson's argument relating to his guilty plea is really a challenge to the mitigator's weight. Our Supreme Court made clear in *Anglemyer* that a trial court cannot be said to have abused its discretion in failing to properly weigh aggravators and mitigators. *Anglemyer*, 868 N.E.2d at 491. Accordingly, Brabson's challenge on this point fails.

B. Remorse

Brabson next contends that the trial court abused its discretion in failing to recognize his remorse as a significant mitigating circumstance. Indiana courts have recognized remorse as a valid mitigating circumstance. *Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005). On appeal, our review of a trial court's determination of a defendant's remorse is similar to our review of credibility judgments: without evidence of some impermissible consideration by the trial court, we accept its determination. *Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002).

Here, the trial court did not find Brabson's purported remorse to be a mitigating circumstance. Brabson points to no evidence that the trial court entertained an impermissible consideration in rejecting this proffered mitigator. As such, Brabson's argument fails. Additionally, although Brabson points out that he apologized to Wilson's family at his sentencing hearing, testified that he suffered anxiety attacks in jail due to his

guilt, and promised to quit using drugs and to become involved in his community, Appellant's Br. p. 13 (citing Sent. Tr. p. 79-80), we observe that Brabson's strategy throughout sentencing was to shift blame away from himself. *See* Sent. Tr. p. 77 ("Your honor, I want to air all the ways, my rights have been thrown away or stepped on since I've been incarcerated. I honestly feel that with a private lawyer things would have been different I still don't have all the evidence that I needed a year ago."), 79 ("And mistakes were made by Debra Wilson and myself and nothing can change that now. . . . No matter what situation or what happened that day that situation was two people interacting back and forth"). Because the record reflects that Brabson's remorse is disputable, the trial court did not abuse its discretion in failing to recognize it as a significant mitigating circumstance.

C. Mental Illnesses

Brabson next contends that the trial court abused its discretion in failing to recognize his mental illnesses as a significant mitigating factor. A defendant's mental illness may be a valid mitigating circumstance. *See Anglemyer*, 868 N.E.2d at 493. The following considerations are relevant when the trial court determines the significance of a defendant's mental illness for sentencing:

- (1) the extent of the defendant's inability to control his or her behavior due to the disorder or impairment;
- (2) overall limitations on functioning;
- (3) the duration of the mental illness; and
- (4) the extent of any nexus between the disorder or impairment and the commission of the crime.

Weeks v. State, 697 N.E.2d 28, 30 (Ind. 1998).

Here, the record is clear that Brabson has a number of diagnoses related to long-term mental illnesses, and the State does not contest this. Appellee's Br. p. 9. The trial

court considered Brabson's argument that his mental illnesses should be deemed a significant mitigating circumstance and rejected it, explaining:

[I]t seems to me that cocaine is your drug of choice and if I remember correctly your drug use started at age 12, that's 36 years and the drug abuse and mental illness is kind of a double edge[d] sword. On the one hand [the] defense team wants to argue that it's a mitigator and it should somehow let you out of prison earlier, but then you were always aware of your substance abuse, you were always aware of your mental illnesses and the various diagnos[e]s that were being made, but yet when there was an offer of help it wasn't always taken, sometimes it was on an emergency basis that you would be in for two or three days and then you'd leave and that would be the end of it, but you would always seem to go back to the drugs and most recently, and if you're in the drug scene you've gotta understand that there's either going to be something bad happen to you or something bad is going to happen because of you. There were losses of jobs for being angry, there were blackouts, there were tempers and all of those things and quite frankly I can't find either one [of] those situations as being mitigators, because you knew full well of what was going on and yet you continue to be in the drug culture and continue to ignore your mental health issues and so I'm not going to find that as a mitigator either.

Sent. Tr. p. 87. Thus, the trial court recognized that Brabson suffers from mental illnesses but declined to find that fact mitigating because Brabson has been given opportunities for treatment of his mental illnesses and drug addiction and has squandered them.

Turning to the factors articulated by *Weeks*, we observe first that the record reflects that Brabson's mental illnesses stem largely from his own conduct, that is, substance abuse. A psychiatric report incorporated into Brabson's presentence investigation report ("PSI") provides that Brabson's "main diagnoses [have] included cocaine dependence, alcohol dependence, nicotine dependence, substance induced mood disorder and antisocial personality disorder. He was previously diagnosed with depression, dysthymia, bipolar disorder, and personality disorder NOS. Recently anxiety

disorder NOS and cluster B personality trait was added. . . . [Brabson] was not diagnosed with PTSD.” Appellant’s App. p. 513. Brabson’s “mood problems . . . were mainly related to or created from substances he was using.” State’s Ex. 2 p. 7. As for the question of whether Brabson could control his conduct, his PSI contains a doctor’s observation that Brabson “does not accept the notion that he is responsible for changing either his substance abuse behavior or his use of anger to resolve conflicts.” Appellant’s App. p. 513. Brabson’s failure to seek and follow through with treatment for known problems weighs against recognizing his mental illnesses as a significant mitigating factor.

Next, we look at the overall limitations that Brabson’s mental illnesses have upon his functioning. Brabson’s mother and a friend with whom he occasionally resided both testified that Brabson has the ability to control his behavior. Sent. Tr. p. 40, 46. Additionally, his mother and sister testified that, even when he uses drugs, they have not witnessed him being violent. *Id.* at 44, 48-49. This factor does not weigh in favor of recognizing Brabson’s mental illnesses as a significant mitigating factor.

Third, we look at the duration of Brabson’s mental illnesses. It is undisputed that Brabson’s mental illnesses are long-standing. However, as we earlier observed, the duration of Brabson’s mental health problems has put him on notice that he needs to accept and comply with treatment. He has not, however, followed through with treatment despite his awareness that his mental health has negatively impacted numerous areas of his life. In fact, Brabson admitted during his sentencing hearing that he has long feared that his problems would lead to another person’s death:

I first told the psychiatrist in 1998, I told them I'm in fear that some day I am going to kill somebody, not murder, but kill somebody because I know out there in the drugs you put yourself in a position where life and death situations come up and if you put yourself in harms [sic] way I mean you can't sit back and cry you know because you know I can't cry because I'm here today, if I wasn't out there doing drugs I wouldn't be here today

Id. at 78-79. This factor does not weigh in favor of recognizing Brabson's mental illnesses as a significant mitigating circumstance.

Finally, we examine the nexus between Brabson's impairment and his crime. Brabson admits to using cocaine shortly before killing Wilson. He argues that he "blacked out" and does not remember killing Wilson but that he knows that he reacted to provocation, that is, her approaching him with a knife. Appellant's App. p. 508. Presuming that this is true, there appears to be a nexus between Brabson's impairment and the crime he committed against Wilson.

However, to the extent that Brabson's mental condition was affected by his voluntary act of using crack cocaine, we cannot conclude that committing a crime while under the influence of a drug somehow mitigates the offense. As for Brabson's history of "blacking out" due to anger, State's Ex. 2 p. 7, given his long-time awareness of his problems and numerous opportunities to follow through with treatment, we cannot conclude that this nexus warrants a finding that Brabson's mental illnesses are significantly mitigating. The trial court did not abuse its discretion in failing to recognize this mitigator.

D. Existence of Grounds Tending to Excuse or Justify the Crime

Brabson next argues that the trial court should have recognized in mitigation the existence of grounds tending to excuse or justify his crime. In this regard, Brabson's appellate brief contends:

Wilson contributed to this offense in a substantial way. Wilson provided the drugs which the pair used that evening. She reneged on an earlier deal with Brabson, prompting an argument. She initiated the attack and threatened Brabson with a deadly weapon in a small, confined space. Her weapon of choice happened to be the very one for which Brabson was particularly fearful. . . . [T]his offense likely would not have happened, absent these actions by Wilson.

Appellant's Br. p. 15-16 (citations omitted). This argument is simply one that Brabson acted under provocation or sudden heat. Brabson was initially charged with murder, but he pled guilty to voluntary manslaughter. Thus, his conviction and sentence have *already* been mitigated because the trial court accepted his version of the events leading up to Wilson's death; that is, that Brabson killed Wilson while acting under sudden heat. I.C. § 35-42-1-3(b) ("The existence of sudden heat is a mitigating factor that reduces what otherwise would be murder under section 1(1) of this chapter to voluntary manslaughter."). Thus, the trial court did not abuse its discretion in failing to recognize provocation as a significant mitigating circumstance when sentencing him for voluntary manslaughter.

E. Undue Hardship on Dependent

Brabson contends that the trial court abused its discretion in failing to recognize the undue hardship that his imprisonment will have upon his mother. Undue hardship upon a dependent caused by a defendant's imprisonment is a valid mitigating circumstance. Ind. Code § 35-38-1-7.1(b)(10). However, where the record is absent of

evidence that the defendant has supported a dependent, this is not a significant mitigator. *See Johnson v. State*, 734 N.E.2d 242, 247 (Ind. 2000).

Here, there is absolutely no evidence that Brabson's mother is dependent upon him. Prior to this offense, he did not reside with her, and she did not rely upon him financially or otherwise, except for occasional minor household chores. Sent. Tr. p. 43 (Brabson's mother testified, "He would come by sometime [sic] . . . he used to come by [and] clean the refrigerator out for me, and I didn't see him that often, but he used to come by and do little stuff around the house for me."). Indeed, Brabson's mother runs her own household of several adopted foster children, *id.*, while Brabson was homeless before his incarceration for this crime, *see id.* at 38 (a friend describing allowing Brabson to sleep on her couch or dining room floor). In fact, a friend of Brabson testified that Brabson could not stay at his mother's home because he refused to comply with her rules:

Q. [W]hy would [Brabson] come stay at your house as opposed to staying at mom's house?

A. I believe his mom had a restriction on the time when he has to be in where he didn't have an actual, he did, but he didn't have an actual time because he can come and knock to get in my house. But I think at her house he had a time.

Q. She had house rules that he didn't want to comply with, is that what you're talking about?

A. Yes.

Id. at 41-42. Brabson's mother is clearly not dependent upon him.

Brabson contends that his mother, who was sixty-five years old at the time of his sentencing, will need his help as she ages and that his lengthy incarceration will impose an undue hardship upon her. This is purely speculative and unpersuasive. Brabson's

mother testified that she has high blood pressure and needs a knee replacement. *Id.* at 43. However, there is no evidence that she has ever relied upon Brabson, and we observe that the record reflects that Brabson has a history of neglecting his relationship with her due to his substance abuse. Def.'s Ex. D³ (VAMC Discharge Summary noting that Brabson “totally alienated himself from his mother and ignores his children to use drugs and drink”). Further, Brabson’s mother has other adult children living in the Fort Wayne area. Sent. Tr. p. 45. The trial court did not abuse its discretion in failing to recognize this proposed mitigator.

II. Inappropriateness

Finally, Brabson argues that his thirty-year advisory sentence is inappropriate. Although a trial court may have acted within its lawful discretion in imposing a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a 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.” *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer*, 868 N.E.2d at 491). The burden is on the defendant to persuade us that his sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

As an initial matter, we note that the advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed. *Anglemyer*,

³ Brabson did not number the pages in his exhibit volume.

868 N.E.2d at 494. Therefore, when the trial court imposes the advisory sentence, the defendant bears a heavy burden in persuading us that his or her sentence is inappropriate. *See McKinney v. State*, 873 N.E.2d 630, 647 (Ind. Ct. App. 2007) (discussing presumptive sentence), *trans. denied*. Here, Brabson pled guilty to a Class A felony and received a thirty-year sentence. Indiana Code § 35-50-2-4 provides that a person convicted of a Class A felony “shall be imprisoned for a fixed term of between twenty (20) and fifty (50) years, with the advisory sentence being thirty (30) years.”

Regarding the nature of the offense, Brabson killed a new acquaintance following a dispute over \$15. At the time he committed the offense, he was under the influence of cocaine. He stabbed his victim several times, leaving lacerations on her head, neck, and hands, and he killed her with blunt force trauma to the head. Nothing about the nature of the offense warrants downward revision of the sentence. As for Brabson’s character, he has a history of drug abuse and mental health problems, and he is aware of their risks but has squandered opportunities for treatment. In fact, Brabson testified at sentencing that he knew for a long time that he risked killing another person if he continued using drugs. Sent. Tr. p. 78-79. In addition, Brabson has a lengthy criminal history dating back to 1978. Appellant’s App. p. 504-507. His character does not render his sentence inappropriate. Given the nature of the offense and the character of this offender, Brabson’s advisory sentence of thirty years for voluntary manslaughter is not inappropriate.

Affirmed.

KIRSCH, J., and CRONE, J., concur.

