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IN THE
COURT OF APPEALS OF INDIANA

NEXUS D. TURNER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-1103-CR-96
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-0809-FB-83

November 1, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Nexus D. Turner appeals his below-advisory sentence of three years for Class C felony robbery. He contends that the trial court abused its discretion in failing to identify certain mitigators and that his sentence is inappropriate in light of the nature of the offense and his character. Finding neither an abuse of discretion nor that Turner's sentence is inappropriate, we affirm the trial court.

Facts and Procedural History

On September 28, 2008, Turner and an unknown individual approached Kim Sams, who was sitting in her vehicle at a CVS in Merrillville, Indiana. They demanded that Sams give them her wallet. Turner then took Sams's wallet from her. Sams surrendered her wallet because of the threat of force used against her. Appellant's App. p. 25 (Stipulated Factual Basis).

The State initially charged Turner with Class B felony robbery. Turner posted a cash bond and was released. The State later amended the charging information to add Class C felony robbery. In April 2009, Turner and the State entered into a plea agreement in which Turner pled guilty to Class C felony robbery, and the State dismissed the Class B felony robbery. As for sentence, "[t]he parties agree[d] that they are free to fully argue their respective positions as to the sentence to be imposed by the Court." *Id.* at 23.

Turner failed to appear at his July 2009 sentencing hearing. In April 2010, the trial court received notice that Turner was in custody in St. Cloud, Minnesota. *Id.* at 4 (CCS). It was later determined that Turner committed aggravated robbery in Minnesota

in July 2008 and was "picked up" for that charge while he was out on bond awaiting sentencing in this case. Tr. p. 17. In April 2010, Turner was sentenced in Minnesota to five years and ten months. *Id.* at 19.

In September 2010, Turner requested disposition of this case. A sentencing hearing was held on February 9, 2011. The trial court identified one aggravator: Turner has a criminal history and was currently serving a nearly six-year sentence in Minnesota for aggravated robbery with an anticipated release date of March 18, 2013. The court identified one mitigator: Turner admitted his guilt by pleading guilty, thus saving the court and taxpayers the time and expense of a trial. Concluding that the aggravator outweighed the mitigator, the trial court sentenced Turner to three years. The court specifically noted that Turner "crossed two states after having committed a robbery up there [in Minnesota], and two months later you're here and commit a robbery." *Id.* at 25. In accordance with Indiana Code section 35-50-1-2, the court ordered this sentence to be served consecutive to Turner's Minnesota sentence. Appellant's App. p. 40. The trial court left Turner with the following parting words:

> I am just very bothered about the fact pattern here. So you are very young, and you need to understand at this age that you're at now, that you pay when you break the law. Okay? I want that to hit home with you, if you're ever tempted again, that you don't get a slap on the wrist for doing something like this. It's supposed to hurt. It's supposed to make you feel bad. I hope you do, and I hop[e] you don't do it again.

Tr. p. 27.

Turner now appeals his sentence.

Discussion and Decision

Turner raises two issues on appeal: (1) whether the trial court abused its discretion in failing to identify certain mitigators and (2) whether his below-advisory sentence of three years is inappropriate in light of the nature of the offense and his character.

I. Abuse of Discretion

Turner contends the trial court abused its discretion by failing to identify certain mitigating circumstances.

Sentencing decisions rest within the sound discretion of the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). So long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Id.* An abuse of discretion will be found where 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 cannot 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. *Rascoe v. State*, 736 N.E.2d 246, 249 (Ind. 2000). "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 (quotation omitted).

Turner argues that the trial court abused its discretion in failing to identify as mitigators his post-offense conduct, namely, a completed course in chemical dependency, regular church attendance, and a college course in business management while incarcerated in Minnesota. We, however, note that Turner makes this claim without any analysis of the issue or citation to authority. *See* Appellant's Br. p. 5. Although this alone justifies finding waiver, we nevertheless proceed to address the issue. *See* Ind. Appellate Rule 46(A)(8)(a).

Turner, who was the only defense witness at sentencing, stated that after he bonded out for this offense, he started "going to Jehovah Witness, going to Kingdom Hall." Tr. p. 21. And while he was incarcerated, Turner said that he completed a course in chemical dependency, was "a regular in church station," and was currently taking college-level business management courses. *Id.* Turner asserts these are "evidence of his remorse and commitment to change." Appellant's Br. p. 5. The trial court, however, is in the best position to judge whether activities undertaken while incarcerated have had a positive effect on a defendant or whether the defendant was simply "going through the motions" in an effort to receive a reduced sentence. *Patterson v. State*, 846 N.E.2d 723, 730 (Ind. Ct. App. 2006). Accordingly, we cannot say that the trial court abused its discretion in refusing to assign significant mitigating weight to Turner's activities and accomplishments while out on bond and incarcerated.

II. Inappropriate Sentence

Turner next contends that his below-advisory sentence of three years is inappropriate. He asks us to "modify his sentence by suspending it and giving him a chance to prove his rehabilitation on probation." Appellant's Br. p. 6.

Although a trial court may have acted within its lawful discretion in imposing a sentence, Article 7, 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 defendant has the burden of persuading us that his sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

Turner pled guilty to a Class C felony. A person who commits a Class C felony shall be imprisoned for a fixed term of between two and eight years, with the advisory sentence being four years. Ind. Code § 35-50-2-6(a). The trial court sentenced Turner to three years, which is one year less than the advisory sentence.

The nature of this offense is not especially aggravating. Turner and his confederate approached Sims in a CVS parking lot and took her wallet by threatening force. Turner acknowledged that his crime was "scary" and "terrifying" and also stated that it was "absolutely stupid," "completely spontaneous," and "a completely random thing." Tr. p. 22, 23.

As for Turner's character, Turner committed an aggravated robbery in Minnesota a mere two months before committing the September 2008 robbery in this case. In 2010, Turner was sentenced to five years and ten months for that aggravated robbery. The significance of a criminal history varies based on the gravity, nature, and number of prior offenses as they relate to the current offense. *Bryant v. State*, 841 N.E.2d 1154, 1156-57 (Ind. 2006). Like the trial court, we are especially bothered by the timing of Turner's robbery when compared to his aggravated robbery in Minnesota. This shows a pattern of committing this type of violent crime. In addition, we note that Turner, who was twenty-four years old at the time of sentencing in this case, has three misdemeanor convictions in Minnesota from 2005, 2006, and 2008 for which he did not receive any jail time. We recognize that Turner pled guilty in this case and has taken steps to better himself while on bond and incarcerated. However, these considerations fail to outweigh Turner's criminal history – specifically his aggravated robbery conviction in Minnesota. He has therefore failed to persuade us that his below-advisory sentence of three years is inappropriate.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.