

STATEMENT OF THE CASE

Appellant Kareen Dunn appeals the sentences imposed by the trial court following his plea of guilty to possession of cocaine as a class D felony, Indiana Code section 35-48-4-6, and criminal recklessness as a class D felony, Indiana Code section 35-42-2-2. We affirm.

ISSUE

Dunn raises one issue, which we restate as whether the trial court abused its discretion in the course of sentencing him.

FACTS

On August 28, 2008, at approximately 1:30 a.m., William Suffield was walking to a friend's house in Kokomo when Dunn approached him and pulled out a handgun. Dunn pointed the handgun at Suffield's face and asked Suffield what he had in his pockets. Suffield attempted to grab the gun and the two men struggled. A neighbor came out and intervened. Dunn fired a shot slightly over Suffield's head and fled.

In Cause Number 34C01-0808-FB-174 ("FB-174"), the State charged Dunn with attempted robbery as a class B felony and with criminal recklessness as a class D felony as a result of Dunn's altercation with Suffield.

On February 2, 2009, officers arrested Dunn at an apartment. The officers searched the apartment and found a substance that was later confirmed to be cocaine.

In Cause Number 34D01-0902-FB-102 ("FB-102"), the State charged Dunn with possession of cocaine as a class D felony in relation to the post-arrest search of Dunn's

apartment. The State subsequently amended the charge to possession of cocaine within 1000 feet of a school, a class B felony.

Dunn and the State entered into a plea agreement for both cases. Dunn pleaded guilty to criminal recklessness as a class D felony in FB-174 and possession of cocaine as a class D felony in FB-102. The trial court held one sentencing hearing for both cases. At the conclusion of the hearing, the trial court sentenced Dunn to three years with six months suspended to probation for each conviction, to be served consecutively. Subsequently, Dunn sought and received permission from the trial court to pursue this belated appeal of his sentences in FB-174 and FB-102.

DISCUSSION AND DECISION

Sentencing decisions rest within the sound discretion of the trial court and, if the sentence is within the statutory range, are reviewed on appeal for an abuse of discretion. *See Anglemeyer 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.* (quotation omitted). Our Supreme Court has explained:

One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that explains reasons for imposing a sentence-including a finding of aggravating and mitigating factors if any-but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law.

Id. at 490-491.

Dunn contends that the trial court erred by citing his juvenile criminal record as an aggravating factor and by overlooking mitigating factors that Dunn believes are clearly supported by the record. We will address each claim in turn.

I. JUVENILE CRIMINAL HISTORY

Indiana courts have recognized that criminal behavior reflected in delinquent adjudications can serve as the basis for enhancing an adult criminal sentence. *Ryle v. State*, 842 N.E.2d 320, 321 (Ind. 2005). Our Supreme Court has emphasized that it is the criminal behavior reflected in earlier proceedings rather than the adjudications that is the proper proof of a prior history of criminal behavior. *Id.*

In this case, Dunn, who was nineteen years old at the time of his sentencing hearing, does not dispute that he has a lengthy, detailed history of juvenile criminal activity. Instead, Dunn contends that his juvenile record should not have been considered at all during sentencing in light of the United States Supreme Court's recent opinion in *Graham v. Florida*, __ U.S. __, 130 S.Ct. 2011, 176 L.Ed.2d. 825 (2010). Specifically, Dunn argues that our society's "standards of decency," as discussed in *Graham*, have evolved and we should recognize that children do not understand the consequences of decisions to commit crimes. Appellant's Br. at 7. Consequently, Dunn reasons, it is unfair to continue to punish offenders for crimes they committed as juveniles by citing a juvenile criminal record to aggravate a sentence for an offense committed as an adult.

In *Graham*, a Florida court sentenced a juvenile to life without parole for armed burglary. *Graham*, 130 S.Ct. at 2020. The Supreme Court held that for a juvenile offender who did not commit homicide, the Eighth Amendment forbids a sentence of life

without parole. *See id.* at 2030. With respect to the sentence of life without parole, the Supreme Court stated:

[L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender’s life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence.

id. at 2027. Thus, the Supreme Court concluded that a sentence of life without parole imposed on a juvenile for a non-homicide offense is categorically disproportionate to the offense because the sentence violates a “national consensus” on sentencing in those circumstances and fails to serve legitimate penological goals. *See id.* at 2026, 2030.

In this case, we first note that any change in the law regarding the use of a juvenile criminal record in an adult offender’s sentencing hearing is a matter for our Supreme Court, which has established the standard set forth in *Ryle* and other decisions. *See Ryle*, 842 N.E.2d at 321. In any event, Dunn’s circumstances are quite different from the circumstances in *Graham*. Dunn was sentenced for offenses he committed as an adult, unlike the appellant in *Graham*. Furthermore, the Supreme Court’s holding in *Graham* focused on the unique nature of a sentence of life without parole and does not appear to apply to the fixed, relatively short sentence that Dunn is serving. For these reasons, *Graham* is not controlling authority here, and Dunn’s claim is without merit. The trial court did not abuse its discretion by considering Dunn’s juvenile criminal record during sentencing and identifying Dunn’s history of juvenile criminal conduct as an aggravating factor.

II. MITIGATING FACTORS

A trial court is not required to find mitigating factors or to accept as mitigating the circumstances proffered by the defendant. *Mead v. State*, 875 N.E.2d 304, 309 (Ind. Ct. App. 2007). Furthermore, the trial court is not obligated to explain why it did not find a factor to be mitigating. *Plummer v. State*, 851 N.E.2d 387, 391 (Ind. Ct. App. 2006).

In this case, the court identified Dunn's guilty plea as the only mitigating factor and did not give that circumstance much weight, finding that Dunn received a substantial benefit from his guilty plea because the State dismissed other charges.

Dunn asserts that the court should have found as a mitigating factor that he expressed remorse for his crimes. 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. *Hape v. State*, 903 N.E.2d 977, 1002-1003 (Ind. Ct. App. 2009), *trans. denied*.

In this case, at the sentencing hearing Dunn apologized to Suffield, Suffield's family, and his own family for his criminal conduct. However, assessing whether Dunn meant what he said and truly expressed remorse is a question of credibility, and the trial court was not obligated to believe Dunn. We find no abuse of discretion on this issue.

Next, Dunn contends that the trial court should have considered the hardship that his incarceration will cause to his dependent, his grandfather. Many persons convicted of crimes have dependents and, absent special circumstances showing that the hardship to them is undue, a trial court does not abuse its discretion by not finding this to be a

mitigating factor. *Benefield v. State*, 904 N.E.2d 239, 247 (Ind. Ct. App. 2009), *trans. denied*.

In this case, the record demonstrates that Dunn helped his grandfather around the house and took him places, but there is no indication that Dunn is the only one in his family who assists his grandfather. Furthermore, Dunn's grandfather testified that he has little income, but there is no evidence that Dunn provided financial support to his grandfather. The trial court did not abuse its discretion by failing to find that the harm to Dunn's grandfather from Dunn's imprisonment was a mitigating circumstance.

CONCLUSION

For the reasons stated above, we affirm the judgment of the trial court.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.