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IN THE
COURT OF APPEALS OF INDIANA

THOMAS VICTOR GONGORA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A04-0805-CR-293
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0709-FB-28

November 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Having pled guilty to class B felony armed robbery and to being a habitual offender, Thomas Victor Gongora now appeals his forty-three-year sentence. We affirm.

Issues

Gongora raises the following issues for review:

I. Did the trial court abuse its discretion in assessing certain mitigating and aggravating circumstances?

II. Is his sentence inappropriate in light of the nature of the offense and his character?

Facts and Procedural History

Just after midnight on September 25, 2007, Gongora entered a Lafayette Village Pantry store, brandished a butcher knife, ordered the clerk to give him the money in the cash register, and fled with the money. Later that day, police received a report of an armed robbery at a clothing store. Again, the perpetrator had brandished a knife and demanded money. On September 27, 2007, the State charged Gongora with two counts of class B felony armed robbery, two counts of class D felony theft, and a habitual offender count. On January 5, 2008, Gongora pled guilty to one count of class B felony armed robbery pursuant to an open plea agreement. He also admitted to being a habitual offender. The remaining charges were dismissed, although Gongora admitted to committing both robberies. On March 21, 2008, the trial court sentenced him to consecutive terms of sixteen years for armed robbery and twenty-seven years for the habitual offender adjudication, with forty-two years executed and one year suspended. This appeal ensued. Additional facts will be provided as necessary.

Discussion and Decision

I. Aggravating and Mitigating Factors

Gongora contends that the trial court abused its discretion in its consideration of aggravating and mitigating circumstances. Sentencing decisions rest within the 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. As long as a sentence is within the statutory range, we review it only for an abuse of discretion. *Id*. An abuse of discretion occurs when 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 from it. *Id*. In sentencing, a trial court may abuse its discretion by relying on reasons not supported by the record, disregarding reasons clearly supported by the record and advanced for consideration, or relying on reasons that are improper as a matter of law. *Id*. at 490-91.

Indiana Code Section 35-50-2-5 provides for a fixed term of imprisonment of six to twenty years, with an advisory sentence of ten years, for a class B felony conviction. Indiana Code Section 35-50-2-8(h) provides that the court shall sentence a habitual offender to an additional fixed term not to exceed the lesser of three times the advisory sentence for the underlying offense or thirty years. Here, Gongora received a sentence of sixteen years for armed robbery, plus twenty-seven years for the habitual offender enhancement.

The trial court listed as mitigating factors Gongora's guilty plea, remorse, and cooperation with law enforcement. Gongora asserts that the trial court improperly disregarded certain additional mitigating circumstances. "An allegation that the trial court failed to identify or find a mitigating circumstance requires the defendant to establish that the

mitigating evidence is both significant and clearly supported by the record." *Forgey v. State*, 886 N.E.2d 16, 23 (Ind. Ct. App. 2008). To the extent Gongora touts his recent work history, we note that he worked for just over a year before returning to a life of drugs and crime. Moreover, the record reflects that the court considered reference letters from Gongora's former employer and co-workers. Tr. at 67. As Gongora's work history was not a significant mitigating factor, the trial court did not abuse its discretion in failing to identify it as such.

Next, Gongora asserts that the lack of physical harm resulting from the robbery commands consideration as a mitigator. *See* Ind. Code § 35-38-1-7.1(b)(1) (providing that a sentencing court may consider that the crime neither caused *nor threatened* serious harm to persons). However, the record indicates that Gongora brandished a knife and threatened the clerk, putting him in apprehension of harm if he did not cooperate with Gongora's demands. Thus, the lack of physical harm could just as easily be attributable to the clerk's cooperation as to any self-proclaimed magnanimous intent on Gongora's part. We find no abuse of discretion here.

Gongora also contends that the trial court improperly considered as aggravating circumstances his past gang involvement and use of aliases. To the extent that he relies on *Carmona v. State*, 827 N.E.2d 588 (Ind. Ct. App. 2005), we note that this Court clearly indicated that past gang membership generally is not an improper aggravator where it is close in time or linked to the instant offense. *Id*. at 597. In *Carmona*, over fourteen years had elapsed between the defendant's gang membership and the commission of the crime, and the defendant had demonstrated a concerted effort to extricate himself from further gang

involvement. *Id*. Here, only two years had elapsed between the time Gongora left his gang and the time he committed the instant offense. With regard to the use of aliases, the record indicates that Gongora used at least three different aliases in his various encounters with police. He fails to cite any authority to support his assertion that the use of aliases is improper for consideration in sentencing. Moreover, we note that gang membership and use of aliases were but two among a long list of aggravators supported by the record. Gongora's lengthy criminal history indicates that he had eight prior felony convictions, including theft, firearms, and drug convictions and a felony conviction stemming from a gang-related drive-by shooting. He also has an extensive history of drug and alcohol abuse.

Finally, to the extent Gongora argues that the trial court improperly weighed mitigators and aggravators, we note that "[T]he trial court no longer has any obligation to 'weigh' aggravating and mitigating factors against each other when imposing a sentence." *Anglemyer*, 868 N.E.2d at 491. Therefore, "a trial court can not now be said to have abused its discretion in failing to 'properly weigh' such factors." *Id*. In sum, we find no abuse of discretion.

II. Appropriateness of Sentence

Next, Gongora asks that we revise his allegedly inappropriate sentence. Indiana Appellate Rule 7(B) provides this Court with authority to revise a defendant's sentence "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." In conducting our review under Appellate Rule 7(B), we give deference to the trial court's decision, recognizing its special expertise in making sentencing decisions. *Taylor v. State*,

891 N.E.2d 155, 162 (Ind. Ct. App. 2008). A defendant bears the burden of persuading the appellate court that his or her sentence has met the inappropriateness standard of review. *Anglemyer*, 868 N.E.2d at 494.

We conclude that Gongora has failed to meet his burden. Regarding the nature of the offense, Gongora robbed the store clerk at knifepoint, placing him in apprehension of immediate and serious bodily harm. As discussed, the lack of actual physical harm can be attributed to the store clerk's cooperation with his demand for the money. In addition, the record indicates that, at the time of the robbery, Gongora had been on a one-week drug binge. Moreover, Gongora admitted to police that he committed another armed robbery immediately after he committed the instant offense.

Finally, the record indicates that Gongora is a man of unsavory character, unwilling to conform his conduct to the laws of society. His extensive criminal history indicates a propensity to use dangerous weapons to achieve his ends, whether they be to steal, to intimidate, or to injure. His decades-long abuse of alcohol and illegal drugs as well as his numerous parole violations defy rehabilitation and underscore his need for an extended term of incarceration. Gongora's forty-three-year sentence is appropriate. Accordingly, we affirm.

Affirmed.

KIRSCH, J., and VAIDIK, J., concur.