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IN THE
COURT OF APPEALS OF INDIANA

GUILLERMO TOLEDO,	)	
	)	
Appellant/Defendant,	)	
	)	
vs.	)	No. 02A03-1006-CR-360
	)	
STATE OF INDIANA,	)	
	)	
Appellee/Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause 02D04-0502-FB-25

December 6, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

In this belated appeal, Appellant/Defendant Guillermo Toledo appeals the twenty-year sentence imposed after he pled guilty to operating a vehicle while intoxicated causing death as a Class B felony[1] and to being a habitual controlled substance offender.[2] Concluding the trial court did not abuse its discretion in sentencing Toledo, we affirm.

FACTS AND PROCEDURAL HISTORY

On February 19, 2005, Toledo drank alcohol, got into his truck with a passenger, disregarded a stop sign, and collided with another vehicle. Toledo's passenger was killed in the accident. Toledo's BAC at the time of the accident was 0.29. The State charged him with six counts. In July 2005, Toledo pled guilty to operating a vehicle while intoxicated causing death as a class B felony and to being a habitual controlled substance offender, and the State dismissed the additional counts. In the plea agreement, Toledo "waive[d] any claim of any constitutional right to have a jury determine, beyond a reasonable doubt, the existence of the aggravating factors used to support his sentence." Appellant's App. 46.

Following a sentencing hearing, the court found the following aggravating factors: 1) Toledo's prior criminal history, including a 1999 misdemeanor conviction for operating while intoxicated and a 2002 felony conviction for operating while intoxicated; and 2) Toledo's prior efforts at rehabilitation had failed, including short jail sentences, suspended jail sentences, community service, counseling, treatment, probation, and an Antabuse program. Specifically, the trial court explained as follows to Toledo: "You were on

[1] Ind. Code § 9-30-5-5 (2004).

[2] Ind. Code § 35-50-2-10 (2004).

probation for a period of time on the Felony matter and apparently were released thirty-eight (38) days from probation prior to committing this offense. I would have to say Mr. Toledo, you learned absolutely nothing from the prior efforts of the courts to get you to stop drinking and driving and it's terribly unfortunate that the results of your drinking and your driving are the death of this young man." Sentencing Tr. 19. The trial court found the following mitigating circumstances: 1) Toledo's remorse; 2) Toledo's guilty plea; and 3) Toledo's acceptance of responsibility for his actions. The trial court concluded the aggravating factors outweighed the mitigating factors and sentenced Toledo to fifteen years for the class B felony to be enhanced five years by the sentence for the habitual offender adjudication, for a total sentence of twenty years. Toledo appeals this sentence.

DISCUSSION AND DECISION

The sole issue for our review is whether the trial court erred in sentencing Toledo. At the outset we note that because the offense in this case occurred before the April 25, 2005, revisions to the sentencing statutes, we review Toledo's sentence under the presumptive sentencing scheme. *See Gutermuth v. State*, 868 N.E.2d 427, 432 n.4 (Ind. 2007). Under the presumptive sentencing scheme, sentencing determinations are within the trial court's discretion. *Padgett v. State*, 875 N.E.2d 310, 315 (Ind. Ct. App. 2007), trans. *denied.* It is within the trial court's discretion to determine whether a presumptive sentence will be enhanced due to aggravating factors. *Id.* When the trial court does enhance a sentence, it must: 1) identify significant aggravating and mitigating circumstances; 2) state the specific reasons why each circumstance is aggravating or mitigating; and 3) evaluate and balance the

mitigating against the aggravating circumstances to determine if the mitigating offset the aggravating factors. *Id.* It is generally inappropriate for us to substitute our judgment or opinions for those of the trial judge. *Id.*

A. Overlooked Mitigating Circumstances

Toledo first argues the trial court erred in sentencing him because the court overlooked certain mitigating factors. A finding of mitigating circumstances, like sentencing decisions in general, lies within the trial court's discretion. *Wilkie v. State*, 813 N.E.2d 794, 798 (Ind. Ct. App. 2004), *trans. denied*. When a defendant alleges that the trial court failed to identify or find a mitigating circumstance, the defendant must establish that the mitigating evidence is both significant and clearly supported by the record. *Hillenburg v. State*, 777 N.E.2d 99, 109 (Ind. Ct. App. 2002), *trans. denied*. The trial court is not required to make an affirmative finding expressly negating each potentially mitigating circumstance. *Id.*

Here, Toledo argues that the trial court erred in considering mitigating evidence that he was gainfully employed. However, we have previously explained that "[m]any people are gainfully employed such that this would not require the trial court to note it as a mitigating factor or afford it the same weight as [the defendant] proposes." *Newsome v. State*, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003), *trans. denied*. We find no error.

B. Aggravating Factors

Toledo further argues that the trial court erred in considering his criminal history and prior failed rehabilitation efforts as aggravating circumstances. Courts are granted broad discretion in the consideration of aggravating circumstances. *Glass v. State*, 801 N.E.2d 204,

207 (Ind. Ct. App. 2004). A trial court may enhance a presumptive sentence based upon the finding of only one valid aggravating factor. *Id.*

Here, Toledo first contends the trial court "gave no details and/or explanation as to what of Mr. Toledo's prior efforts had failed." Appellant's Br. 17. However, our review of the transcript of the sentencing hearing reveals that the trial court described Toledo's failed rehabilitation efforts as short jail sentences, suspended jail sentences, community service, counseling, treatment, probation, and an Antabuse program. We further observe that Toledo's commission of these offenses is persuasive proof that previous efforts to rehabilitate Toledo have failed. Toledo also argues the trial court erred in using his criminal history as an aggravating factor. However, criminal history is a statutory aggravating factor. Ind. Code Section 35-38-1-7.1(a)(2). The trial court did not err in considering these aggravating factors.[3]

C. Inappropriate Sentence

Lastly, Toledo argues that his sentence is inappropriate.[4] Indiana Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds the sentence is inappropriate in light of the nature of

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[3] Citing *Blakely v. Washington*, 542 U.S. 296 (2004), Toledo also argues that the trial court sentenced him in violation of the Sixth Amendment of the United States Constitution because the jury did not find the aggravating circumstances beyond a reasonable doubt. Toledo, however, waived appellate review of this issue in his plea agreement where he "waive[d] any claim of any constitutional right to have a jury determine, beyond a reasonable doubt, the existence of the aggravating factors used to support his sentence." Appellant's App. 46.

[4] Toledo states the issue as whether his sentence is "manifestly unreasonable." Appellant's Br. 19. However, the State correctly points out that effective January 1, 2003, Indiana Appellate Rule 7(B) no longer

the offense and the character of the offender." The defendant bears the burden of persuading us that his sentence is inappropriate. *Sanchez v. State*, 891 N.E.2d 174, 176 (Ind. Ct. App. 2008).

With respect to the character of the offender, Toledo has prior convictions for misdemeanor operating while intoxicated and felony operating while intoxicated and was released from probation just 38 days before the accident and death occurred in this case. Toledo's prior contacts with the law have not caused him to reform himself.

With respect to the nature of Toledo's offense, with two prior operating while intoxicated convictions, Toledo drank enough alcohol to register a 0.29 BAC, got into his truck with a passenger, and had an accident that killed the passenger. Toledo's prior convictions show a disregard for the law as well as an escalation in the injury to others. *See Ruiz v. State*, 818 N.E.2d 927, 929 (Ind. 2004) (holding that the significance of prior criminal history varies based on the gravity, nature, and number of prior offenses as they relate to the current offense).

Based upon our review of the evidence, we see nothing in the character of this offender or in the nature of this offense that would suggest that Toledo's sentence is inappropriate.

The judgment of the trial court is affirmed.

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

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contains the phrase "manifestly unreasonable." *Polk v. State*, 783 N.E.2d 1253, 1260 (Ind. Ct. App. 2003), *trans. denied*. Rather, sentences reviewed on appeal after this date may be revised if they are inappropriate in light of the nature of the offense and the character of the offender. *Id.*