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IN THE
COURT OF APPEALS OF INDIANA

AARON B. CHERRY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 31A04-0904-CR-232
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HARRISON SUPERIOR COURT
The Honorable Roger D. Davis, Judge
Cause No. 31D01-0709-FA-673

December 16, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Aaron B. Cherry, Jr. (Cherry), appeals his sentence following a guilty plea for burglary, a Class A felony, Ind. Code § 35-43-2-1(2); rape, a Class B felony, I.C. § 35-42-4-1; and a determination to be an habitual offender, I.C. § 35-50-2-8.

We affirm.

ISSUE

Cherry raises one issue on appeal which we restate as follows: Whether the trial court abused its discretion in failing to consider his guilty plea as a mitigating factor.

FACTS AND PROCEDURAL HISTORY

Cherry had been living off and on with his wife at his mother-in-law's house in Georgetown, Indiana, for the past nine years. On August 28, 2007, Cherry and his wife were involved in a domestic dispute and Cherry left the residence to hide from police. On September 3, 2007, Cherry returned to his mother-in-law's residence and attempted to enter the house through a window; however, he became scared and decided to disconnect the phone line and entered through the front door. Cherry intended to steal money from his mother-in-law, and in the process, he held her down and raped her twice. Before he left, he threatened to kill her or burn her house down with her inside if she told the authorities.

On September 28, 2007, the State filed an Information charging Cherry with: Count I, burglary, a Class A felony, I.C. § 35-42-2-1; Counts II and III, rape, a Class B felony, I.C. §

35-42-4-1; Count IV, robbery, a Class C felony, I.C. § 35-42-5-1; and Count V, intimidation, a Class D felony, I.C. § 35-45-2-1. On October 1, 2007, the trial court held an initial hearing. On October 22, 2007, the State added Count VI, habitual offender, I.C. § 35-50-2-8. On February 25, 2009, Cherry entered into a plea agreement whereby he agreed to plead guilty to: Count I, burglary; Count III, rape; and Count VI, being a habitual offender. The State agreed to dismiss all remaining charges, including all charges in an unrelated cause, 31D01-0709-FD-614. The plea agreement also provided that there would be a cap of 75 years on all counts.

On March 26, 2009, during the sentencing hearing, the trial court found as aggravating factors: (1) his extensive criminal history, including nine misdemeanor convictions and six felony convictions, consisting of many convictions similar in nature to the current offense; (2) the fact that he was on felony probation at the time of the offense; and (3) the fact that he threatened to harm the victim if she contacted the authorities. The trial court did not find any mitigating factors. The trial court sentenced Cherry to 40 years for burglary, 16 years for rape, and 30 years for the habitual offender enhancement. The trial court ordered the sentences for burglary and rape to run concurrently and consecutively to the habitual offender enhancement for an aggregate sentence of 70 years.

Cherry now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

Cherry was convicted of a Class A felony, a Class B felony, and determination to be an habitual offender. A person who commits a Class A felony shall be imprisoned for a fixed term of between twenty and fifty years, with the advisory sentence being thirty years. I.C. § 35-50-2-4. A person who commits a Class B felony shall be imprisoned for a fixed term of between six and twenty years, with the advisory sentence being ten years. I.C. § 35-50-52-5. Cherry's sentence was enhanced to an additional thirty years which is the required term of enhancement because the underlying offense was the Class A felony burglary. *See* I.C. § 35-50-2-8(h).

As long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 491 (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*.

Because the trial court no longer has any obligation to "weigh" aggravating and mitigating factors against each other when imposing a sentence, a trial court cannot now be said to have abused its discretion by failing to properly weigh such factors. *Id*. at 491. This is so because once the trial court has entered a sentencing statement, which may or may not include the existence of aggravating and mitigating factors, it may then "impose

any sentence that is . . . authorized by statute; and . . . permissible under the [Indiana Constitution]." *Id*.

II. *Guilty Plea as a Mitigating Circumstance*

Cherry asserts that the trial court abused its discretion because it did not consider his guilty plea to be a mitigating circumstance in sentencing him. Specifically, he argues the trial court ignored his willingness to plead guilty as a mitigating circumstance, especially since "the State reaped a substantial benefit from [his] willingness to plead guilty." (Appellant's Br. p. 8).

"The finding of mitigating factors is not mandatory and rests within the discretion of the trial court." *Ellis v. State*, 736 N.E. 731, 736 (Ind. 2000). Our supreme court has held that "a defendant who pleads guilty deserves 'some' mitigating weight be given to the plea in return." *Flickner v. State*, 908 N.E.2d 270, 273 (Ind. Ct. App. 2009) (citing *Anglemyer Rehearing*, 875 N.E.2d at 220). However, the trial court is not obligated to explain why it does not find a proffered mitigator to be significant, and a guilty plea "is not automatically a significant mitigating factor." *Brown v. State*, 907 N.E.2d 591, 593 (Ind. Ct. App. 2009) (citing *Sensback v. State*, 720 N.E.2d 1160, 1165 (Ind. 1999)). The significance of a guilty plea as a mitigating factor varies from case to case. *Francis v. State*, 817 N.E.2d 235, 238 n. 3 (Ind. 2004). For example, a guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence

against him is such that the decision to plead guilty is merely a pragmatic one. *Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005).

Here, the trial court did not abuse its discretion when it did not recognize Cherry's guilty plea as a mitigating circumstance. Cherry's criminal history includes nine misdemeanors and six felony convictions involving crimes similar to the current offense. When sentencing Cherry, the trial court acknowledged his past and stated, "It is also notable that your criminal history is directly, [], related to the offense here, specifically armed burglary before, previous violent offenses and rape, specifically." (Transcript p. 73).

Given his extensive criminal history and the fact that he committed the crime while he was on probation, the trial court need not give Cherry's guilty plea significant weight because he exchanged his guilty plea for a substantial benefit – the dismissal of a Class B felony, a Class C felony, and all charges in another cause, which included two Class A misdemeanors and prohibited the State from pursuing an habitual offender charge in that cause as well. Cherry's sentence was capped at 75 years, whereas without the benefit of a plea agreement, he could have faced a much greater sentence. Because Cherry's plea agreement reduced his potential sentencing exposure; this claimed mitigating circumstance is not significant. With respect to his argument that he "spared the State the significant expense of a trial" he pled

guilty two weeks before his jury trial was to begin, likely after the State was required to expend resources in order to prepare for trial.[1] (Appellant's App. p. 8).

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion when it failed to consider Cherry's guilty plea as a mitigating circumstance.

Affirmed.

VAIDIK, J., and CRONE, J., concur.

[1] Cherry also asserts that it would have been difficult for the State to prove the charges against him. We will not address this issue as it is mere speculation.