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IN THE
COURT OF APPEALS OF INDIANA

JOSEPH PREWITT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 36A05-1004-CR-314
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE JACKSON CIRCUIT COURT
The Honorable William E. Vance, Judge
Cause No. 36C01-0901-FB-3

December 16, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Joseph Prewitt appeals his sentence of two and a half years for Class D felony theft. Prewitt contends that the trial court abused its discretion by failing to identify his guilty plea and desire to make restitution as significant mitigating circumstances, that his sentence is inappropriate, that the trial court erred in calculating his credit time, and that the written sentencing order is erroneous in several respects. We conclude that the trial court did not abuse its discretion and that Prewitt's sentence is not inappropriate. However, we conclude that the trial court erred in calculating his credit time and that the written sentencing order and chronological case summary contain clerical errors. We therefore affirm Prewitt's sentence of two and a half years and remand with instructions for the court to award the proper amount of credit time and to correct the clerical errors.

Facts and Procedural History

In January 2009, Prewitt stole items from Robert Jenkins, his brother-in-law at the time, from Jenkins' residence in Seymour, Indiana. The State initially charged Prewitt with Class B felony burglary. Ind. Code § 35-43-2-1(1). After Jenkins admitted that Prewitt had been living at the residence, however, the State amended the information in February 2010 to add a count of Class D felony theft. Ind. Code § 35-43-4-2(a).

That same day, Prewitt entered an open plea of guilty to Class D felony theft. He also pled guilty to Class D felony operating a motor vehicle as a habitual traffic violator under unrelated cause number 36C01-0810-FD-341 ("FD-341").[1] The trial court accepted the guilty pleas.

[1] Prewitt appeals his sentence in FD-341 as well. We are issuing an opinion in that case today. *Prewitt v. State*, No. 36A01-1004-CR-238 (Ind. Ct. App. Dec. 16, 2010).

At his sentencing hearing, Prewitt stated that he wanted to make restitution, he has been successful on probation in the past, and he has a dependent child. The State offered and the court admitted into evidence a victim impact statement, a list of the stolen items and their values, and a request for $1907 in restitution.

Before pronouncing Prewitt's sentence, the trial court noted Prewitt's extensive criminal history and multiple probation violations:

> [I]n looking at the Defendant's prior criminal history, I noticed that today's convictions will be the, I believe, the fourteenth and 15th convictions that the Defendant has, maybe, maybe, no 13th and 14th, I suppose. Defendant prior to this has nine misdemeanor convictions and three felony convictions. I suppose umm he, after today has five felony convictions. I have heard both sides talking about probation. I've even heard the Defendant answer a question that his counsel, when his counsel asked him "have you been successful on probation in the past?", the Defendant answered that he has. That's a curious answer when one considers that nine times, nine times in the past petitions have been filed to revoke the Defendant's probation and five times of those the Defendant has been found to have violated the terms of probation. Three of those petitions were dismissed and there was one petition from what I can tell is still pending for probation revocation. In one particular case, [a]n auto theft case, the Defendant had four petitions to revoke probation filed in one action. Three of those he admitted to violating probation. Three different times, matters were done and probation continued.

Sent. Tr. p. 15. The trial court added that Prewitt was out on bond and on probation at the time he committed this offense.

The trial court also stated that there was nothing in the record that would support a finding that Prewitt has the ability to make restitution:

> I've also heard nothing at today's hearing which gives me any reason to believe that the Defendant would make restitution. I've heard nothing about his ability to pay restitution and if I can't make the finding that shows the Defendant has the ability to pay restitution, I'm going to have a very difficult time revoking probation for failure to pay restitution when that hasn't been established.

Id. at 16.

The trial court sentenced Prewitt to two and a half years, to be served consecutive to his sentence in FD-341, and awarded him 433 days for time served and 433 days of good time credit.

Prewitt now appeals.

Discussion and Decision

Prewitt contends that the trial court abused its discretion by failing to identify his guilty plea and desire to make restitution as significant mitigating circumstances and that his sentence is inappropriate. Prewitt also contends that the trial court erred in calculating his credit time and that the written sentencing order contains clerical errors.

I. Sentence

A. Abuse of Discretion

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer 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.* One way in which a trial court may abuse its discretion is by entering a sentencing statement that omits mitigating circumstances that are clearly supported by the record and advanced for consideration. *Id.* at 490-91. 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).

Prewitt contends that the trial court abused its discretion by failing to identify his guilty plea as a significant mitigating circumstance. A defendant who pleads guilty generally deserves "some" mitigating weight to be afforded to the plea. *Anglemyer*, 875 N.E.2d at 220 (citing *McElroy v. State*, 865 N.E.2d 584, 591 (Ind. 2007)). However, our Supreme Court has recognized that a trial court does not necessarily abuse its discretion by failing to recognize a defendant's guilty plea as a significant mitigating circumstance. *See id.* at 221. Instead, a trial court is required only to identify mitigating circumstances that are both significant and supported by the record. *See id.* at 220-21. 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 the defendant 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), *trans. denied*.

The State's evidence against Prewitt, which included his recorded confession, was substantial. We do acknowledge that Prewitt was not promised a sentencing cap, that he pled guilty the day the State added the theft charge, and that he received no substantial benefit from the dismissal of the Class B felony burglary charge since Prewitt lived at Jenkins' residence at the time of the theft. Nevertheless, in light of the substantial evidence of Prewitt's guilt, his decision to plead guilty was merely pragmatic. The trial court did not abuse its discretion by not identifying his guilty plea as a significant mitigating circumstance.

Prewitt also claims that the trial court abused its discretion by failing to identify his desire to make restitution as a significant mitigating circumstance. A trial court need

not give a defendant's desire to make restitution the same significance as he or she would like. *See Creekmore v. State*, 853 N.E.2d 523, 530 (Ind. Ct. App. 2006) (finding no abuse of discretion where trial court did not identify defendant's desire to make restitution as significantly mitigating), *clarified on denial of reh'g*, 858 N.E.2d 230 (Ind. Ct. App. 2006). Here, the trial court noted that there was nothing in the record that would support a finding that Prewitt has the ability to make restitution. Indeed, the pre-sentence investigation report reflects a sparse employment history:

> The defendant was not employed at the time of his arrest. The last job he had was at Aisin through a temporary agency. He worked there for almost one year and earned $9.50 an hour. This was back in 2007 or 2008. The job assignment ended so he lost his job there. His longest employment was at Kruwell Block. He worked there for a little over one year as a temporary worker through Manpower.

Appellant's App. p. 55. Moreover, there is no evidence in the record that Prewitt had paid Jenkins any restitution before the sentencing hearing. Prewitt's desire to make restitution means little where he neither has made restitution nor has any foreseeable means of making restitution. Under these circumstances, we cannot say that the trial court abused its discretion by not identifying Prewitt's desire to make restitution as a significant mitigating circumstance.

B. Inappropriate Sentence

Prewitt also contends that his sentence of two and a half years is inappropriate.

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)).

Prewitt pled guilty to a Class D felony. The statutory range for a Class D felony is between six months and three years, with the advisory sentence being one and a half years. Ind. Code § 35-50-2-7(a).

As for the nature of the offense, Prewitt argues that no one was at the residence when he committed the theft and that he wanted to make restitution. The fact remains, however, that Prewitt stole nearly $2000 worth of items from his then-brother-in-law.

As for Prewitt's character, the trial court noted that Prewitt has three prior felony convictions and nine prior misdemeanor convictions, that he has violated the terms of probation multiple times, and that he was out on bond and on probation at the time he committed this offense. Prewitt does not contest any of these facts. In addition, Prewitt has a history of substance abuse, including the abuse of alcohol, methamphetamine, Xanax, Percocet, and Oxycontin. Although Prewitt attempts to support his character by noting that he has a dependent child, he pled guilty, and he wanted to make restitution, these facts do little to temper his extensive criminal record and history of substance abuse.

Prewitt has failed to persuade us that his sentence of two and a half years is inappropriate.

II. Credit Time

Prewitt next contends that the trial court erred in calculating his credit time. He claims he should have received 452 days of credit time instead of 433 days of credit time.

Each inmate in Indiana is placed into a class for the purpose of earning credit time. *Neff v. State*, 888 N.E.2d 1249, 1250 (Ind. 2008). A person who is not a credit-restricted felon and who is imprisoned for a crime or imprisoned awaiting trial or sentencing is initially assigned to Class I. Ind. Code § 35-50-6-4(a). A person in Class I earns one day of credit time for each day the person is imprisoned for a crime or confined awaiting trial or sentencing. *Id.* § 35-50-6-3(a); *Payne v. State*, 838 N.E.2d 503, 510 (Ind. Ct. App. 2005), *trans. denied*.

Both parties agree that Prewitt was arrested on January 16, 2009, incarcerated during the pendency of the case, and sentenced on April 13, 2010. This constitutes a total of 452 days. Prewitt is thus entitled to 452 days for time served awaiting sentencing and 452 days of good time credit. Further, because Prewitt's sentence in this case was ordered consecutive to his sentence in FD-341, his credit time is to be applied to the aggregate of his consecutive sentences. *See Payne*, 838 N.E.2d at 510 ("If a person incarcerated awaiting trial on more than one charge is sentenced to concurrent terms for the separate crimes, he or she is entitled to receive credit time applied against each separate term. However, if the defendant receives consecutive terms, he or she is only allowed credit time against the total or aggregate of the terms." (citations omitted)).

We therefore remand with instructions for the trial court to award Prewitt 452 days for time served awaiting sentencing and 452 days of good time credit to be applied to his aggregate sentence.

III. Written Sentencing Order

Prewitt finally contends that the written sentencing order contains clerical errors. He claims that the written sentencing order indicates that he is guilty of Count I, the trial court sentenced him to one and a half years, and the State agreed to dismiss Count II, when instead Prewitt is guilty of Count II, the trial court sentenced him to two and a half years, and the State agreed to dismiss Count I.

We may remand the case for correction of clerical errors if the trial court's intent is unambiguous. *See Willey v. State*, 712 N.E.2d 434, 445 n.8 (Ind. 1999) ("Based on the unambiguous nature of the trial court's oral sentencing pronouncement, we conclude that the Abstract of Judgment and Sentencing Order contain clerical errors and remand this case for correction of those errors.").

Regarding which count was pled and which count was dismissed, the State's amended information establishes that the burglary charge is Count I and the theft charge is Count II. Prewitt pled guilty to theft, Count II. Thus, the only count the State could have agreed to dismiss was the burglary charge, Count I.

Regarding the length of Prewitt's sentence, other parts of the written sentencing order state that his sentence is two and a half years. Further, the trial court ordered a sentence of two and a half years in its oral sentencing statement:

> I find the Defendant is guilty of the offense of Theft. Judgment of conviction of a Class D Felony is entered against the Defendant. I sentence

> the Defendant to the appropriate penal facility for a period of two and a half years.

Sent. Tr. p. 17; *see Hoeppner v. State*, 918 N.E.2d 695, 699 n.4 (Ind. Ct. App. 2009) ("When oral and written sentencing statements conflict, we should examine them together to discern the intent of the sentencing court.").

The intent of the trial court is unambiguous. We agree with Prewitt's claims of clerical errors in the written sentencing order, and we further find these errors in the chronological case summary. We therefore remand with instructions to correct the written sentencing order and the chronological case summary to reflect that Prewitt is guilty of Count II, his sentence is two and a half years, and the State agreed to dismiss Count I.

Affirmed in part and remanded with instructions for the court to award the proper amount of credit time and to correct the clerical errors consistent with this opinion.

BAKER, C.J., and BARNES, J., concur.