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ATTORNEY FOR APPELLANT:

ERNEST P. GALOS
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

NICOLE DONGIEUX WIGGINS
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

KEVIN KIRK,	)	
	)	
Appellant/Defendant,	)	
	)	
vs.	)	No. 71A03-0909-CR-422
	)	
STATE OF INDIANA,	)	
	)	
Appellee/Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH CIRCUIT COURT
The Honorable Michael G. Gotsch, Judge
The Honorable Larry L. Ambler, Magistrate
Cause No. 71C01-9910-CF-3

December 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Kevin Kirk appeals following his convictions, pursuant to a guilty plea, for two counts of Class C felony Nonsupport of a Dependent Child.[1] Upon appeal, Kirk challenges the sufficiency of the evidence to establish the factual basis for his plea. He further claims that the trial court abused its discretion in sentencing him and also that his sentence is inappropriate. We affirm.

FACTS AND PROCEDURAL HISTORY

According to the factual basis entered during the April 20, 2007 plea hearing, Kirk was ordered to pay fifty dollars per week in child support for two of his children, Z.K. and K.K., on or about December 15, 1986. Kirk was subsequently ordered to pay fifty dollars per week in child support for two additional children, Ta.H. and Te.H., on or about April 15, 1992. Kirk failed to make regular child support payments and as of March 25, 2005, had amassed arrearages of $36,792.84 for his obligation to support Z.K. and K.K. and $29,093.13 for his obligation to support Ta.H. and Te.H.

As a result of his failure to meet his child support obligations, Kirk was charged with one count of Class C felony nonsupport of a dependent child with respect to Z.K. and K.K., and one count of Class D felony nonsupport of a dependent child with respect to Ta.H. and Te.H. The charging information was subsequently amended to include two counts of Class C felony nonsupport of a dependent child. On April 20, 2005, Kirk pled guilty to two counts of Class C felony nonsupport of a dependent child.

For approximately three years, Kirk, who had allegedly moved to Tennessee, failed to

[1] Ind. Code § 35-46-1-5 (1997).

appear before the trial court for sentencing. On May 6, 2009, Kirk finally appeared before the trial court and was sentenced on each count to eight years, with four years executed and four years suspended to probation. The trial court ordered that the executed portions of Kirk's sentences be served concurrently and the portions suspended to probation be served consecutively, for an aggregate sentence of four years executed and eight years suspended to probation. Kirk now appeals.

DISCUSSION AND DECISION

I. Convictions

Upon appeal, Kirk challenges his convictions by claiming that there was insufficient evidence to support the factual basis for his plea. As the State points out, Kirk is precluded from raising this challenge. It is well-settled that a person who pleads guilty cannot challenge the propriety of the resulting conviction on direct appeal; he or she is limited on direct appeal to contesting the merits of a trial court's sentencing decision, and then only where the sentence is not fixed in the plea agreement. *Alvey v. State*, 911 N.E.2d 1248, 1249 (Ind. 2009) (citing *Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004)). It is inconsistent to allow defendants both to plead guilty and to challenge evidence supporting the underlying conviction. *Id.* (citing *Norris v. State*, 896 N.E.2d 1149, 1153 (Ind. 2008)). "'A defendant's plea of guilty is [] not merely a procedural event that forecloses the necessity of trial and triggers the imposition of sentence. It also, and more importantly, conclusively establishes the fact of guilt, a prerequisite in Indiana for the imposition of criminal punishment.'" *Id.* (quoting *Norris*, 896 N.E.2d at 1152). We therefore decline to address Kirk's challenge to

his convictions.

II. Sentence

Kirk also challenges his sentence on appeal, claiming both that the trial court abused its discretion in sentencing him and that his sentence is inappropriate.

A. Abuse of Discretion

With respect to his claim that the trial court abused its discretion in sentencing him, we acknowledge that Kirk's offenses occurred prior to the April 25, 2005 revisions to the sentencing statutes. "The Indiana Supreme Court has held that we apply the sentencing scheme in effect at the time of the defendant's offense." *Upton v. State*, 904 N.E.2d 700, 702 (Ind. Ct. App. 2009) (citing *Robertson v. State*, 871 N.E.2d 280, 286 (Ind. 2007); *Gutermuth v. State*, 868 N.E.2d 427, 432 n.4 (Ind. 2007)), *trans. denied*. Consequently, the pre-April 25, 2005 presumptive sentencing scheme applies to Kirk's convictions.

Under the pre-April 25, 2005 sentencing statutes, sentencing decisions rest within the discretion of the trial court and are reviewed on appeal "only for an abuse of discretion, including a trial court's decision[] to increase or decrease the presumptive sentence because of aggravating or mitigating circumstances and to run the sentences concurrently or consecutively." *Henderson v. State*, 769 N.E.2d 172, 179 (Ind. 2002).

> If a trial court relies upon aggravating or mitigating circumstances to enhance or reduce the presumptive sentence, it must (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate the court's evaluation and balancing of the circumstances.

Id. "An abuse of discretion occurs only if 'the decision is clearly against the logic and effect

of the facts and circumstances.'" *Upton*, 904 N.E.2d at 702 (quoting *Pierce v. State*, 705 N.E.2d 173, 175 (Ind. 1998)).

Kirk argues that the trial court abused its discretion in failing to consider his guilty plea and his obligation to provide both financial and emotional support to at least four additional minor children to be significant mitigating circumstances. However, although a sentencing court must consider all evidence of mitigating circumstances offered by a defendant, the finding of mitigating circumstances rests within the court's discretion. *Henderson*, 769 N.E.2d at 179. "A court does not err in failing to find mitigation when a mitigation claim is highly disputable in nature, weight, or significance." *Id*. (internal quotations omitted). While a failure to find mitigating circumstances clearly supported by the record may imply that the sentencing court improperly overlooked them, "[T]he court is obligated neither to credit mitigating circumstances in the same manner as would the defendant, nor to explain why he or she has chosen not to find mitigating circumstances." *Id*. Further, although it is well-established that a defendant who pleads guilty deserves to have mitigating weight extended to the guilty plea in return, *Francis v. State*, 817 N.E.2d 235, 238 (Ind. 2004), a guilty plea is not automatically a significant mitigating factor. *Sensback v. State*, 720 N.e.2d 1160, 1065 (Ind. 1999).

Here, the record reveals that after pleading guilty, Kirk fled the state prior to sentencing, and only returned to Indiana after having been arrested on unrelated charges in Tennessee. Such flight suggests that Kirk's guilty plea was more of a pragmatic decision to avoid trial and an attempt to avoid punishment than an acceptance of responsibility for his

failure to support his children. The record also reveals that Kirk failed to make consistent child support payments, even after securing employment. Therefore, in light of the record revealing Kirk's apparently willful failure to support four of his minor dependent children, his flight, and his approximately three-year absence from Indiana following his guilty plea but prior to sentencing, we conclude that the trial court did not abuse its discretion in failing to recognize these two proposed mitigating circumstances as significant.

Kirk also argues that the trial court abused its discretion in failing to properly weigh the mitigating circumstances found by the trial court against the aggravating circumstances, and in failing to provide a written detailed explanation for why the court imposed the particular sentence. The trial court must issue a sentencing state that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *modified on other grounds on reh'g*, 875 N.E.2d 218 (Ind. 2007). "When reviewing a sentencing statement, this court is not limited to the written sentencing order but may examine the record as a whole to determine that the trial court made a sufficient statement of its reasons for selecting the sentence imposed." *Mata v. State*, 866 N.E.2d 346, 349 (Ind. Ct. App. 2007).

With respect to Kirk's argument that the trial court failed to properly balance the mitigating and aggravating circumstances found by the trial court and that the trial court failed to provide a detailed explanation for why it imposed the particular sentence, we observe that the trial court presented a detailed oral explanation for its decision regarding Kirk's sentence. The trial court noted Kirk's flight from Indiana, his failure to appear for

sentencing for over three years, Kirk's "horrendous" arrearage of nearly $80,000 to four separate victims, and his failure to make meaningful support payments while working as evidence that Kirk did not intend to fulfill his child support obligation. Sent. Tr. pp. 11-12. The trial court found that these circumstances "totally outweigh the two mitigating circumstances that says you're working and that you don't have a felony record." Sent. Tr. p. 12. The trial court further noted that these circumstances reveal that Kirk has "no responsibility to [himself]." Sent. Tr. p. 11. The trial court explained that the executed portions of Kirk's sentences were concurrent, but that the probationary periods were consecutive so as to give Kirk the opportunity to fulfill his support obligations. In light of Kirk's actions following his guilty plea but prior to sentencing which include fleeing the state and failing to fulfill his child support obligation, which we believe demonstrates a willful failure to support his dependent children, we conclude that these aggravating factors outweigh the mitigating factors that Kirk did not have a felony record and is employed. We further conclude that the trial court sufficiently considered and balanced the aggravating and mitigating circumstances at issue and provided a detailed explanation for imposing Kirk's sentence. The trial court did not abuse its discretion in sentencing Kirk.

B. Appropriateness

Kirk contends that his sentence is inappropriate in light of the nature of his offenses and his character. We "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." Ind. Appellate Rule 7(B).

"Although appellate review of sentences must give due consideration to the trial court's sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." *Shouse v. State*, 849 N.E.2d 650, 660 (Ind. Ct. App. 2006), *trans. denied* (citations and quotation marks omitted).

Our review of the nature of Kirk's offenses reveals that Kirk failed to provide for four of his children as ordered by the court and, at the time of his conviction, had amassed an enormous arrearage of nearly $66,000. Moreover, our review of Kirk's character reveals that Kirk appears reluctant to support his children and has made little or no attempt to fulfill his child support obligation. Indeed, even after pleading guilty, Kirk allowed his arrearage to grow to nearly $80,000 at the time he was sentenced. In addition, Kirk's criminal record includes four misdemeanor convictions for writing bad checks and numerous driving offenses. In light of Kirk's apparent disregard for his support obligation for the support of four of his children, his egregious arrearage of nearly $80,000, and his criminal record which includes numerous misdemeanor convictions for writing bad checks, we cannot say that Kirk's aggregate sentence of four years executed and eight years suspended to probation is inappropriate.[2]

[2] To the extent that Kirk contends that the trial court's imposition of two separate eight-year sentences, with four years of each suspended to probation, the executed potions to be served concurrently, and the probationary periods to be served consecutively amounts to a "maximum" sentence for the purposes of Appellate Rule 7(B), we conclude that Kirk's aggregate sentence of four years executed and eight years suspended to probation is appropriate regardless of whether it is considered to be a maximum sentence. Further, in *Davidson v. Davidson*, 916 N.E.2d 954 (Ind. Ct. App. 2009), *not yet certified*, we recently held that in reviewing a sentence under Appellate Ruel 7(B), we consider the sentence actually imposed and where, as

The judgment of the trial court is affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.

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here, some or all of the sentence is suspended to probation, we do not review a partially suspended advisory sentence the same as if it were a fully-executed advisory sentence. *Id*. at 957.