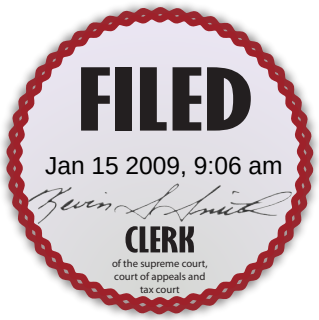

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IN THE
COURT OF APPEALS OF INDIANA

RAY CHANEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0805-CR-449
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0706-FC-00035

January 15, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Ray Chaney ("Chaney") pleaded guilty in Tippecanoe Circuit Court to Class C felony attempted robbery and admitted to being a habitual offender. He was sentenced to an aggregate sentence of twelve years. Chaney appeals and argues that the trial court improperly recognized aggravating factors when sentencing him and that his sentence was inappropriate.

We affirm.

Facts and Procedural History

Early in the morning on June 1, 2007, Chaney entered a convenience store and picked out $200 worth of lottery tickets. Chaney attempted to grab the tickets from the clerk's hand but failed. He put his hand in his pocket, pretended to have a weapon, and demanded money from the register. The clerk refused to accede to Chaney's demands, and Chaney fled. He was apprehended later that morning.

The State charged Chaney with Class C felony attempted robbery, Class D felony attempted theft, Class A misdemeanor resisting law enforcement, and alleged that he was an habitual offender. Pursuant to a plea agreement, Chaney pleaded guilty to Class C felony attempted robbery and admitted to being a habitual offender. The plea agreement restricted the sentence to a maximum of fourteen years.

The trial court sentenced Chaney to five years for the Class C felony attempted robbery and enhanced that sentence by seven years because of the habitual offender adjudication, for an aggregate sentence of twelve years, two years below the plea agreement cap of fourteen years. The trial court noted the following as mitigators: (1) that Chaney took responsibility for his actions by pleading guilty, (2) his family's

support, and (3) his history of mental illness. The trial court found the following aggravators: (1) Chaney's criminal history, (2) prior unsuccessful attempts at rehabilitation, (3) history of illegal drug and alcohol use, (4) Chaney was on probation at the time of the instant offense, and (5) a high Level of Service Inventory Revised score[1] that relates to Chaney's chance of recidivism within one year if no services are offered. Chaney appeals.

Discussion and Decision

Chaney argues that the trial court abused its discretion by improperly finding aggravators that were not supported by the record and that his sentence is inappropriate. We address these issues separately.

I. Abuse of Discretion

Sentencing decisions rest within the sound discretion of the trial court. Anglemyer v. State, 868 N.E.2d 482, 490 (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. at 490 (citations omitted). A trial court can abuse its sentencing discretion in a number of ways, including: (1) failing to enter a sentencing statement at all; (2) entering a sentencing statement that explains reasons for imposing a sentence where the record does not support the reasons; (3) entering a sentencing statement that omits reasons that are clearly supported by the record and advanced for consideration; and (4) entering a sentencing

[1] "Although the Level of Service Inventory Revised (LSI-R) score is in terms of the offender's recidivism, the actuarial instrument is the most commonly used classification tool to determine the rehabilitation needs of offenders." Rhodes v. State, 896 N.E.2d 1193, 1195 n.4 (Ind. Ct. App. 2008) (citing Colorado Division of Criminal Justice, Office of Research and Statistics, Evidence Based Correctional Practices, http://www.dcj.state.co.us/ors/pdf/docs/ CCJJ_EBP_rpt_v3.pdf).

statement in which the reasons given are improper as a matter of law. Id. at 490-91. If the trial court abuses its discretion in one of these or any other way, remand for resentencing may be the appropriate remedy "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." Id. at 491.

Chaney agrees that his criminal history is a proper aggravator but challenges the other three aggravators found by the trial court: prior unsuccessful attempts at rehabilitation, history of illegal drug and alcohol use, and his LSI-R score. He argues that these aggravators are merely subsets of the criminal history aggravator.

Chaney first argues that the trial court may not use prior unsuccessful attempts at rehabilitation as an aggravating factor. Our supreme court in Morgan v. State, concluded that "such statements, which our Court of Appeals has called "derivative" of criminal history, are legitimate observations about the weight to be given to facts appropriately noted by a judge alone under Blakely." 829 N.E.2d 12, 17 (Ind. 2005). However, since our legislature has remedied the Blakely issues in our sentencing statute, this claim of error is no longer available. Also, "even under the presumptive scheme, the 'failed to rehabilitate' statement properly adds weight to the criminal history and 'on probation at the time of the instant offense' aggravators." McMahon v. State, 856 N.E.2d 743, 751 n. 8 (Ind. Ct. App. 2006) (quoting Morgan, 829 N.E.2d at 16-18).

Chaney next argues that the trial court should not have used his history of alcohol and drug abuse as an aggravator. However, Chaney has not provided any support for this

assertion. Therefore, Chaney has waived this issue for failing to put forth a cogent argument on appeal. See Ind. Appellate Rule 46(A)(8).

Finally, Chaney argues that the trial court should have considered his LSI-R score[2] as a subset of his prior criminal history. We have previously determined that the use of the LSI-R score as an aggravating factor is improper as a matter of law. Rhodes v. State, 896 N.E.2d 1193 (Ind. Ct. App. 2008). In this situation, we will remand for resentencing if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered the sentencing factors. Anglemyer, 868 N.E.2d at 491. The trial court properly found the following aggravators: Chaney's prior criminal history, prior unsuccessful attempts at rehabilitation, that Chaney was on probation at the time of the instant offense, and Chaney's history of alcohol and drug abuse. The trial court also properly found the following mitigators: that Chaney took responsibility for his actions by pleading guilty, his family's support, and his history of mental illness. We can say with confidence that the trial court would have imposed the same sentence had it properly considered the sentencing factors.

II. Inappropriate Sentence

Second, Chaney argues that his sentence was inappropriate. A defendant may challenge his sentence under Indiana Appellate Rule 7(B) which provides: "The 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." The Anglemyer Court explained:

[2] See note 1, supra.

> It is on this basis alone that a criminal defendant may now challenge his or her sentence where the trial court has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing a particular sentence that is supported by the record, and the reasons are not improper as a matter of law, but has imposed a sentence with which the defendant takes issue.

Id. "[A] defendant must persuade the appellate court that his or her sentence has met the inappropriateness standard of review." Anglemyer, 868 N.E.2d at 494.

Chaney believes that the nature of his offense is mitigated by his intoxicated state at the time of the offense. However, "'drinking is not to be considered a mitigating circumstance.'" Hornbostel v. State, 757 N.E.2d 170, 184 (Ind. Ct. App. 2001) (quoting Robinett v. State, 563 N.E.2d 97, 102 (Ind. 1990)). Simply because Chaney does not remember the facts surrounding the attempted robbery does not change the fact that he attempted to steal $200 worth of lottery tickets and, after failing to grab them from the clerk, pretended to have a weapon and demanded money before running off.[3] Indeed, Chaney's state of intoxication could have led to a tragic end to the attempted robbery. Chaney's sentence is appropriate in light of the nature of the offense.

Chaney's sentence is also appropriate in light of his character. Since 2001, Chaney has been convicted of four felonies: attempted acquisition of a controlled substance, burglary, robbery, and receiving stolen property, and three misdemeanors: visiting a common nuisance, contributing to the delinquency of a minor, as well as possession of marijuana. PSI at 7. In addition, Chaney was on probation at the time of this offense for most of his prior offenses.

[3] Chaney claims that the clerk did not feel compelled to hand over money but does not support this assertion with reference to the record. Appellant's Br. at 12. Since Chaney apparently could not remember the incident, we find it difficult to determine the source of this assertion.

Conclusion

The trial court did not abuse its discretion in sentencing Chaney because the trial court properly found aggravators that were sufficient to support the sentence imposed. Chaney's sentence was not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

BAILEY, J., and BARNES, J., concur.