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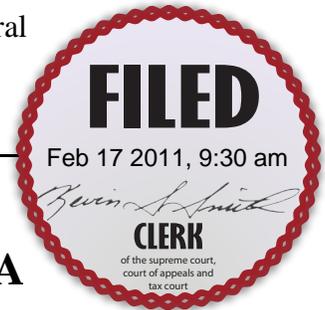
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**IN THE
COURT OF APPEALS OF INDIANA**

DAVID A. HOTTMAN, JR.,)

Appellant-Defendant,)

vs.)

STATE OF INDIANA,)

Appellee-Plaintiff.)

No. 21A04-1006-CR-439

APPEAL FROM THE FAYETTE CIRCUIT COURT
The Honorable Daniel Lee Pflum, Judge
Cause No. 21C01-0904-FA-53

February 17, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

David A. Hottman, Jr., appeals the sentence imposed following his conviction for two counts of dealing a controlled substance within 1000 feet of a public park, a Class A felony, pursuant to a guilty plea. Hottman presents two issues for review:

1. Whether the trial court abused its discretion when it did not identify Hottman's guilty plea as a mitigator.
2. Whether his sentence is inappropriate in light of the nature of the offenses and his character.

We reverse and remand with instructions.

FACTS AND PROCEDURAL HISTORY

On November 19, 2008, Hottman sold one Suboxone pill to a confidential informant for \$20. The sale took place at Hottman's home at 603 W. 33rd Street in Connersville. Hottman's home is within 1000 feet of a public park. On February 20, 2009, Hottman sold to the same informant one pill that was later confirmed to be "Hydrocodone/Acephenamine." Appellant's App. at 13. The informant paid \$10 for the pill, and the transaction took place again at Hottman's home.

On April 13, 2009, the State charged Hottman with two counts of dealing in a controlled substance, as a Class A felony. At a pretrial hearing on March 12, 2010, the trial court informed Hottman that, if he waited until the day of trial to plead guilty, the court would only accept a guilty plea to the offenses as charged. On March 15, the day set for the jury trial, Hottman pleaded guilty without the benefit of a plea agreement.

On April 1, 2010, the court held a sentencing hearing. Hottman asked the court to consider that the offenses were "relatively minor" and asked for sentencing in "the low

end of the range, with as much suspended time” as possible. April 1 Transcript at 15.¹ The court discussed Hottman’s criminal history in detail. And at a hearing on April 6, the trial court pronounced sentence, ordering Hottman to the advisory term of thirty years on each count, to be served concurrently, with credit for time served. Hottman now appeals.

DISCUSSION AND DECISION

Issue One: Identification of Mitigator

Hottman contends that the trial court abused its discretion in sentencing him because it failed to identify his guilty plea as a mitigator. Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of that discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on other grounds 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. (quotation omitted).

One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Under those circumstances, 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.

¹ We observe that the court reporter prepared two volumes of transcripts in this case and named both “Volume I of I.” In the future, for ease of reference, we ask the court reporter to include all transcripts in a single volume where permitted by size or, alternatively, to consecutively number the volumes.

Id. at 490-91. Further, “the trial court no longer has any obligation to ‘weigh’ aggravating and mitigating factors against each other when imposing a sentence.” Id. at 491.

Hottman contends that the trial court abused its discretion when it did not identify his guilty plea as a mitigating circumstance. A trial court is free to disregard mitigating factors it does not find to be significant. See Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999). And Hottman carries the burden on appeal of showing that a disregarded mitigator is significant. See id. Hottman received no benefit in exchange for his guilty plea. Cf. Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999) (no abuse of discretion in declining to give mitigating weight to guilty plea where defendant received benefits for her plea). But because the plea was entered on the first day of trial, the State was still required to spend the preceding months preparing for trial. Further, given the evidence against Hottman, which included audio recordings of the drug transactions, his guilty plea was merely pragmatic. See id. (noting guilty plea does not rise to the level of significant mitigation where the evidence against the defendant is such that the decision to plead guilty is merely a pragmatic one). Hottman has not met his burden to show that his guilty plea was a significant mitigator. Thus, the trial court did not abuse its discretion when it did not identify the guilty plea as a mitigating circumstance.

Issue Two: Appellate Rule 7(B)

Hottman next contends that his sentences are inappropriate in light of the nature of the offenses and his character. Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana

Constitution “authorize [] independent appellate review and revision of a sentence imposed by the trial court.” Roush v. State, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007) (alteration original). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Revision of a sentence under Appellate Rule 7(B) requires the appellant to demonstrate that his sentence is inappropriate in light of the nature of his offenses and his character. See App. R. 7(B); Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We assess the trial court’s recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, “a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.” Roush, 875 N.E.2d at 812 (alteration original).

The Indiana Supreme Court more recently stated that “sentencing is principally a discretionary function in which the trial court’s judgment should receive considerable deference.” Cardwell v. State, 895 N.E.2d 1219, 1222 (Ind. 2008). Indiana’s flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented. See id. at 1224. The principal role of appellate review is to attempt to “leaven the outliers.” Id. at 1225. Whether we regard a sentence as inappropriate at the end of the day turns on “our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other facts that come to light in a given case.” Id. at 1224.

We first consider the nature of the offenses. Hottman argues that the drug amounts were small, he only received a total of \$30 in the sales, “no one was personally

harmful by the drug sales,” the transactions occurred three months apart, there is no evidence of any drug use or other sale by Hottman, and there is no evidence that he possessed any weapons during the transactions. Based on these factors, Hottman maintains that the advisory sentence was inappropriate.

We must agree with Hottman that the advisory sentences appear to be extreme given the nature of the offenses. Hottman twice sold a controlled substance within 1000 feet of a public park, which is a Class A felony. And the legislature has determined that the advisory sentence for a Class A felony is thirty years. While Hottman’s conduct clearly violated the law, he sold only two pills for a total of thirty dollars. The transactions occurred at his home, which is admittedly within 1000 feet of a public park, but the sales were not on the street or sidewalk, nor were they made to someone under the age of eighteen. In light of these facts, the imposition of the advisory sentence does not seem appropriate.

We also consider whether the sentence is inappropriate in light of Hottman’s character. Hottman highlights that his criminal history contains only misdemeanors prior to the instant offenses. He also observes that the significance of a defendant’s criminal history varies based on the gravity, nature, and number of prior offenses as they relate to the current offense. See Harris v. State, 897 N.E.2d 927, 930 (Ind. 2008). He argues that his criminal history is not relevant to the instant offenses in gravity and nature of prior offenses. We must agree.

As the State points out, Hottman's criminal history is prolific. It spans thirty-five years and includes numerous offenses related to alcohol.² His record also discloses several charges for which no disposition was found and two 1975 charges of dealing in a controlled substance that were dismissed. But the drug offenses are too remote in time, and unrelated to his criminal history in the interim, to merit weight here. See id. And, again, Hottman had no prior felony convictions. The gravity and nature of his prior convictions do not support the imposition of concurrent advisory sentences here. See id.

Hottman also contends that he suffers from anxiety and depression, is disabled, has implanted hardware in his leg and needs a knee replacement, and cared for his disabled father prior to the arrest. The record does not show that those factors were before the trial court. Nor does Hottman's mention of these circumstances, without more, persuade us that his sentence is inappropriate.

Nevertheless, considering the nature of the offenses, namely, that the sale involved only two pills for thirty dollars, and his character, as shown by his dissimilar misdemeanor criminal history, we conclude that the trial court's imposition of an aggregate thirty-year term is inappropriate. Therefore, we exercise our authority to revise Hottman's sentences to twenty years, the minimum sentence for a Class A felony, with

² Hottman had 1981 convictions for driving under the influence of liquor, disorderly conduct, and carrying a concealed weapon; a 1983 conviction for driving under the influence of liquor; a 1984 conviction for failure to appear; 1997 convictions for disorderly intoxication, resisting an officer, and trespassing; 2000 convictions for disorderly conduct, and public intoxication; 2001 convictions for intimidation, resisting law enforcement (twice), disorderly conduct, criminal trespass, and public intoxication; 2002 convictions for public intoxication (twice) and disorderly conduct (twice); 2004 convictions for attempted theft and public intoxication; a 2005 convictions for public intoxication; 2006 convictions for disorderly conduct (twice), resisting law enforcement, and public intoxication (twice); a 2007 conviction for public intoxication; a 2008 conviction for intimidation; and a 2009 conviction for operating a vehicle while intoxicated endangering a person. Hottman also had numerous charges dismissed and seven probation violations.

ten years suspended on each count. The sentences are to be served concurrently. We remand and instruct the trial court, without a hearing, to issue an order and make any other docket entries necessary to sentence Hottman accordingly.

Reversed and remanded with instructions.

DARDEN, J., and BAILEY, J., concur.