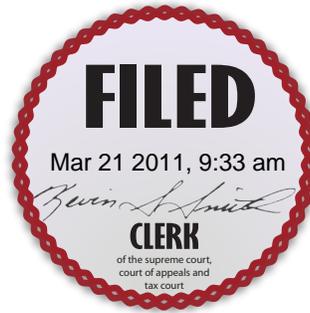


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

BRUCE E. WILSON,)

Appellant- Defendant,)

vs.)

STATE OF INDIANA,)

Appellee- Plaintiff,)

No. 48A05-1007-CR-435

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Rudolph R. Pyle, III, Judge
Cause No. 48C01-0807-FD-419

March 21, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issues

Following a guilty plea, Bruce Wilson was convicted of dealing in marijuana, a Class D felony, and sentenced to three years. Wilson appeals his sentence, raising two issues for our review: 1) whether the trial court abused its discretion in sentencing him and 2) whether the maximum three-year sentence is inappropriate in light of the nature of the offense and character of the offender. Concluding the trial court did not abuse its discretion in its identification of aggravating and mitigating factors and the three-year sentence is not inappropriate, we affirm.

Facts and Procedural History

Based upon an incident occurring on June 24, 2008, in Madison County, Wilson was charged with several counts, including dealing in marijuana as a Class D felony for possessing more than thirty grams of marijuana with intent to deliver. A jury trial was scheduled for April 27, 2010. On April 19, 2010, the parties appeared in court and Wilson was prepared to plead guilty to an amended charge of possession of marijuana, a Class A misdemeanor. The trial court rejected the plea and the case remained set for jury trial on April 27, 2010. On that date, after a jury was selected, the parties entered into a plea agreement in which the State dismissed all pending charges except the Class D felony dealing charge and Wilson pleaded guilty with sentencing left to the discretion of the trial court. The trial court took the plea under advisement, scheduled a sentencing hearing, and dismissed the jury.

Following a sentencing hearing on June 21, 2010, the trial court accepted the plea agreement and issued the following sentencing order:

Court finds aggravation: The defendant's prior criminal history; repeat behavior; amount of money seized and lack of remorse. The Court finds the following mitigation: defendant plead [sic] guilty.

(1) For Count I: Dealing in Marijuana, Class D Felony, thirty-six (36) months executed to the Indiana Department of Correction.

Appendix of the Appellant at 15. Wilson now appeals his sentence.

Discussion and Decision

I. Abuse of Discretion

Wilson first contends the trial court abused its discretion in relying on improper aggravating factors and failing to acknowledge a significant mitigating factor. A sentencing decision rests within the sound discretion of the trial court and, as long as the sentence is within the statutory range, is 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. An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the trial court or the reasonable, probable, and actual deductions to be drawn therefrom. Id. We review the presence or absence of reasons justifying a sentence for an abuse of discretion, but we do not review the relative weight given to these reasons. Id. at 491.

The trial court must enter a sentencing statement that includes reasonably detailed reasons for imposing a particular sentence. Id. The reasons given, and the omission of reasons arguably supported by the record, are reviewable on appeal for abuse of discretion. Id. The trial court may abuse its discretion if the record fails to support the reasons given for imposing a sentence, if the statement omits reasons that are clearly supported by the record and advanced for consideration, or if the reasons are improper as a matter of law. Id. at 490-91.

Wilson contends the trial court abused its discretion in finding the “amount of money seized” as an aggravating factor. The State presented the following factual basis at the guilty plea hearing: Wilson “was the operator of an automobile that was stopped. He . . . officers stopped the vehicle, detected the odor of marijuana and after an inventory search was done, three (3) bags of marijuana were found in the glove box. They belonged to [Wilson]. They were in an amount greater than 30 grams. [Wilson], in fact, possessed that marijuana with the intent to deliver it to other individuals which was evidenced by the large amount of cash that he had on him.” Transcript at 116. Wilson agreed the factual basis was accurate. The total weight of the marijuana was 57.1 grams. Wilson was also in possession of \$3,900.00 in cash. The trial court considered the amount of cash Wilson had at the time of his arrest to be part of the nature and circumstances of the crime warranting consideration as an aggravating factor. Although a trial court may not use elements of a crime to enhance a sentence, the particularized circumstances of the crime may be considered aggravating. Gellenbeck v. State, 918 N.E.2d 706, 712 (Ind. Ct. App. 2009). Although Wilson argues there is no nexus between his crime and the money, while establishing the factual basis for the charge the State specifically referred to the money as proof of his intent to deal the large quantity of marijuana he possessed and Wilson agreed the factual basis presented by the State was accurate. Although during the sentencing hearing, Wilson claimed the money was not his, the trial court was under no obligation to credit his statement. Under these circumstances, we cannot say the trial court abused its discretion in finding this aggravating circumstance.

Wilson also contends the trial court abused its discretion in “affording any weight to [his] criminal history as an aggravating circumstance.” Brief of the Appellant at 6. The weight afforded a particular aggravating factor is not subject to review. Deloney v. State, 938 N.E.2d 724, 732 (Ind. Ct. App. 2010). To the extent Wilson intends to challenge the identification of his criminal history as an aggravating factor at all, a defendant’s criminal history is a valid aggravating factor for sentencing. Id. The significance of a criminal history depends upon the gravity, nature, and number of prior offenses as they relate to the current offense. Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). Wilson’s criminal history consists of a juvenile true finding of criminal trespass, a Class A misdemeanor if committed by an adult, and adult misdemeanor convictions of false informing, leaving the scene of an accident, possession of marijuana on two occasions, and driving while suspended on three occasions. We acknowledge that Wilson has no prior felony convictions. However, Wilson has two prior drug offenses. While on probation for his false informing conviction, he admitted to violating probation by using marijuana. During the pre-sentence investigation, he reported to the probation department that he had been using marijuana since he was eighteen, and used marijuana while on bond in this case. Wilson’s criminal history demonstrates an escalation of his drug involvement from possession to dealing. The trial court did not abuse its discretion by identifying his criminal history as an aggravating factor under these circumstances.

Finally, Wilson contends the trial court abused its discretion in not identifying as a mitigating factor that he would respond affirmatively to probation or short-term imprisonment. When the defendant alleges the trial court failed to find a certain mitigating factor, he must establish the mitigating evidence is both significant and clearly

supported by the record. Anglemyer, 868 N.E.2d at 490. “Although a failure to find mitigating circumstances clearly supported by the record may imply that the trial court improperly overlooked them, the court is not obligated to explain why it has chosen not to find mitigating circumstances[,]” Roush v. State, 875 N.E.2d 801, 811 (Ind. Ct. App. 2007), nor is it obligated to accept the mitigating factors offered by the defendant, Hape v. State, 903 N.E.2d 977, 1000 (Ind. Ct. App. 2009), trans. denied. Wilson contends that because he testified at the sentencing hearing that he had successfully completed probation in the past and believed he could successfully complete any alternative sentence imposed in this case, the trial court erred in failing to find this mitigating factor. However, Wilson’s probation was extended on one occasion due to his marijuana use, and he admitted to continuing to use marijuana even after previous possession convictions and his arrest for dealing in this case. Therefore, we find no abuse of discretion in the trial court’s failure to find Wilson’s likelihood of responding affirmatively to probation as a mitigating factor.

II. Inappropriate Sentence

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. Childress v. State, 848 N.E.2d 1073, 1079-80 (Ind. 2006). This court has authority to revise a sentence “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). In determining whether a sentence is inappropriate, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied; see

also McMahon v. State, 856 N.E.2d 743, 750 (Ind. Ct. App. 2006) (“[I]nappropriateness review should not be limited . . . to a simple rundown of the aggravating and mitigating circumstances found by the trial court.”). The burden is on the defendant to demonstrate that his or her sentence is inappropriate. Childress, 848 N.E.2d at 1080. “[W]hether we regard a sentence as appropriate 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 factors that come to light in a given case.” Cardwell v. State, 895 N.E.2d 1219, 1224 (Ind. 2008).

Wilson entered a plea of guilty to Class D felony dealing in marijuana and received a three-year sentence. The sentencing range for a Class D felony is six months to three years, with an advisory sentence of one and one-half years. Ind. Code § 35-50-2-7. He argues his maximum three-year sentence is inappropriate because his offense was non-violent and caused no specific harm and because he accepted responsibility by pleading guilty and has had only misdemeanor convictions in the past.

Our review of the nature of the offense reveals Wilson had nearly twice the amount of marijuana required to elevate his offense from a Class A misdemeanor to a Class D felony, but it was on the low end of the Class D felony range. See Ind. Code § 35-48-4-10(b)(1)(B) (“The offense is a Class D felony if . . . the amount involved is more than thirty (30) grams but less than ten (10) pounds of marijuana . . .”). He testified at the sentencing hearing that he does not believe marijuana causes him harm. We do not agree with Wilson’s assessment for two reasons: one, the legislature has identified possession and dealing of marijuana to be a crime, and two, Wilson was not charged with

possession, in which any harm would be only to himself, but with dealing, in which he is harming his community by distributing an illegal substance.

Our review of the nature of Wilson's character reveals Wilson did plead guilty to the offense, but he did so after a jury had been selected.¹ To the extent pleading guilty demonstrates acceptance of responsibility for his crime, we also note he denied profiting from selling drugs in the community, testified he did not believe he "deserve[d]" to go to prison for his crime, tr. at 126, and, as noted above, does not think marijuana hurts anyone. The trial court specifically noted Wilson's lack of remorse as an aggravating factor in its sentencing order. We also note Wilson's contacts with the criminal justice system go back at least twenty years; Wilson was twenty-eight at the time of his plea. Even while faced with this charge, Wilson continued to use marijuana.

In sum, although nothing about Wilson's crime particularly warrants aggravation of his sentence, his character is such that an enhanced sentence is warranted and we cannot say Wilson has met his burden to show the three-year sentence is inappropriate.

Conclusion

The trial court did not abuse its discretion in sentencing Wilson and his three-year sentence for Class D felony dealing in marijuana is not inappropriate. Wilson's sentence is therefore affirmed.

Affirmed.

RILEY, J., and BROWN, J., concur.

¹ We do acknowledge he attempted to plead guilty a week prior to the jury trial date, but the trial court rejected the plea agreement.