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IN THE
COURT OF APPEALS OF INDIANA

DAVID J. GOEHST,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A02-1001-CR-51
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable Steven M. Jessup, Judge
Cause No. 34D02-0711-FC-296

June 2, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant David J. Goehst appeals the three-year executed sentence that was imposed following his guilty plea to Theft,[1] a class D felony. Specifically, Goehst argues that the trial court abused its discretion in sentencing him because it identified several improper aggravating factors and overlooked mitigating factors that were supported by the record. Goehst also maintains that the sentence was inappropriate in light of the nature of the offense and his character. Concluding that Goehst was properly sentenced, we affirm the judgment of the trial court.

FACTS

On November 1, 2007, the State charged Goehst with fraud on a financial institution, a class C felony. Thereafter, on April 24, 2008, the State added a second count and charged Goehst with theft, a class D felony.

On April 22, 2009, Goehst pleaded guilty to theft in exchange for the dismissal of the fraud charge. The length of the sentence was left to the trial court's discretion. The parties stipulated to the allegations set forth in the probable cause affidavit (Affidavit) as the factual basis for the guilty plea. The Affidavit alleged that Goehst made three fraudulent deposits into an ATM that was operated by Transmission Builders Federal Credit Union by putting empty deposit envelopes in them and subsequently withdrawing money. It was alleged that Goehst withdrew funds totaling $785 and attempted to cash a check for $4,200 that he knew was fraudulent.

[1] Ind. Code § 35-43-4-2.

On August 20, 2009, the trial court sentenced Goehst to three years of incarceration—the maximum penalty for a class D felony.[2] In support of that sentence, the trial court identified Goehst's criminal history, including a conviction in Ohio for failure to pay child support, as an aggravating factor. The trial court also observed that Goehst received a "substantial break . . . so that he could plead guilty to a D instead of being tried on a C," and did not find any mitigating circumstances. Tr. p. 19. Goehst now appeals.

DISCUSSION AND DECISION

I. Sentencing—Abuse of Discretion

Goehst contends that his sentence must be set aside because the trial court improperly identified his "arrests" and the fact that he was arrested while on bond for the instant offense as aggravating circumstances. Appellant's Br. p. 6. Goehst also asserts that he was improperly sentenced because the trial court did not consider his guilty plea and the willingness to make restitution as mitigating factors.

A. Standard of Review

Sentencing decisions rest within the trial court's sound discretion 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. However, a trial court may be found to have abused 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

[2] Pursuant to Indiana Code section 35-50-2-7, the sentencing range for a class D felony is from six months to three years, with an advisory sentence of eighteen months.

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 statement in which the reasons given are improper as a matter of law. Id. at 490-91. Moreover, an abuse of discretion occurs where the trial court's 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.

B. Aggravating Factors

Our Supreme Court has determined that a record of an arrest, "without more, does not establish the historical fact that a defendant committed a criminal offense and may not properly considered as evidence of criminal history." Cotto v. State, 829 N.E.2d 520, 526 (Ind. 2005). However, a record of brushes with the law,

> particularly a lengthy one, may reveal that a defendant has not been deterred even after having been subject to the police authority of the State. Such information may be relevant to the trial court's assessment of the defendant's character in terms of the risk that he will commit another crime.

Id.

In this case, Goehst does not attack the validity of his criminal convictions that the trial court identified as an aggravating factor. Indeed, a criminal record, in and of itself, is sufficient to support an enhanced sentence. Nasser v. State, 727 N.E.2d 1105, 1110 (Ind. Ct. App. 2000).

As the trial court observed at the sentencing hearing, Goehst has accumulated two felony convictions and one misdemeanor conviction. Tr. p. 18. And one of the felony

convictions was for fraud on a financial institution in 2003, which is the same offense for which he was originally charged in this case. Appellant's App. p. 68. Moreover, it was established that Goehst had violated the terms of his probation on two occasions. Id. at 18-19.

When considering Goehst's argument, it is apparent that he is attempting to part and parcel out the evidence relating to his previous criminal history, which we decline to do. Bailey v. State, 923 N.E.2d 434, 439 (Ind. Ct. App. 2010). And, even assuming solely for the sake of argument that the trial court improperly identified Goehst's arrest record alone as an aggravating circumstance, his prior criminal history warranted the enhanced sentence. See Bonds v. State, 729 N.E.2d 1002, 1005 (Ind. 2000) (holding that the existence of one aggravating factor—including a defendant's prior criminal history—will support the imposition of an enhanced sentence). Thus, Goehst's claim fails.

C. Overlooked Mitigating Factors

With regard to Goehst's contention that the trial court erred in not identifying his decision to plead guilty and his willingness to make restitution to the victim as mitigating circumstances, we note that an allegation that the trial court failed to identify a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Anglemyer, 868 N.E.2d at 493. If the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist. Id. Moreover, the trial court is not obligated to weigh or credit facts proffered as mitigating

by the defendant in the way that the defendant suggests they should be weighed or credited. Abel v. State, 773 N.E.2d 276, 280 (Ind. 2002).

A trial court is not required to sua sponte recognize a mitigating circumstance that the defendant does not advance. Blixt v. State, 872 N.E.2d 149, 152 (Ind. Ct. App. 2007). Thus, a defendant who fails to raise a proposed mitigator at the trial court level is precluded from advancing it for the first time on appeal. Pennington v. State, 821 N.E.2d 899, 905 (Ind. Ct. App. 2005.

A defendant who pleads guilty deserves "some" mitigating weight be given to the plea in return. Anglemyer, 875 N.E.2d at 220. However, the significance of a guilty plea as a mitigating factor varies from case to case. Id. at 221. Indeed, a guilty plea may not be significantly mitigating when the defendant receives a substantial benefit in return for the plea, when the evidence against the defendant is such that the decision to plead guilty is merely a pragmatic one, or when the State does not benefit from the plea. Id.; see also Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005).

In this case, the evidence shows that Goehst pleaded guilty to theft, a class D felony, in exchange for the State's dismissal of the fraud charge, a class C felony. As a result, Goehst received a substantial benefit from his plea bargain, and the trial court was not obliged to extend to him another benefit in its sentencing order. Moreover, although Goehst was initially charged with the fraud offense in 2007 and theft in April 2008, he did not plead guilty until April 2009. Therefore, nothing suggests that the State significantly benefited from Goehst's decision to plead guilty. As a result, Goehst's

claim that the trial court abused its discretion in failing to identify his decision to plead guilty as a substantial mitigating factor fails.

As for Goehst's second contention, we note that he did not ask the trial court to order restitution or to consider his ability to pay as a mitigating factor at the sentencing hearing. Tr. p. 15-16. Nor did he argue that, in the event that the trial court would order restitution, the order should be considered in mitigation of his sentence. Thus, the issue is waived. Even more compelling, until Goehst actually makes restitution, his willingness to do so is of slight significance.

II. Inappropriate Sentence

Goehst also asserts that his sentence is inappropriate in light of the nature of the offense and his character. Thus, Goehst contends that a "more appropriate sentence would be the advisory sentence of eighteen months." Appellant's Br. p. 8.

Indiana Appellate Rule 7(B) provides that this court "may review 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." Although Rule 7(B) does not require us to be "very deferential" to a trial court's sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. Finally, the defendant bears the burden of persuading the appellate court that the sentence is inappropriate. Id.

Assuming without deciding that the nature of Goehst's crime is not particularly noteworthy, his character is. As discussed above, Goehst has one prior misdemeanor conviction and two prior felony convictions. One of the felonies was for fraud on a financial institution, which was one of the charges that the State lodged against him in this case. Clearly, Goehst's exposure to the criminal justice system has not deterred him from criminal activity. Goehst has established a pattern of criminal conduct with no indication that he has made a genuine attempt to rehabilitate himself. Accordingly, we cannot say that Goehst's sentence is inappropriate.

The judgment of the trial court is affirmed.

DARDEN, J., and CRONE, J., concur.