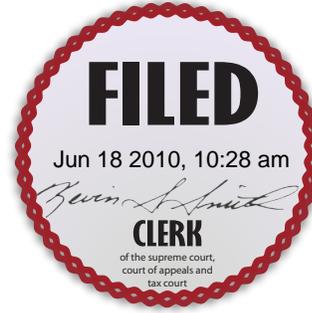


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ADRIAN COLE,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A02-0912-PC-1183

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant Hawkins, Judge
Cause No. 49G05-0402-PC-32235

JUNE 18, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Adrian Cole appeals the sentence he received for his convictions of four Class C felonies.

We affirm.

ISSUES

Cole presents two issues for our review which we restate as:

- I. Whether the trial court abused its discretion by imposing an enhanced sentence without having found that the aggravating circumstances outweighed the mitigating circumstances.
- II. Whether Cole's sentence is inappropriate.

FACTS AND PROCEDURAL HISTORY

During 2003 and 2004, Cole was involved in a check fraud ring in Indianapolis. At the time, Cole was also serving as a confidential informant ("CI") for the Lawrence Police Department. In February 2004, Cole was charged with ten counts of conspiracy to commit forgery, all Class C felonies. Pursuant to a written plea agreement, Cole pleaded guilty to four counts of conspiracy to commit forgery, as Class C felonies, on October 27, 2005. Cole agreed in his written plea to a minimum executed sentence of four years and a maximum executed sentence of eight years. The trial court sentenced Cole to six years on each count, to be served concurrently. It is from this sentence that Cole now appeals.

DISCUSSION AND DECISION

We must first note that courts sentence a defendant under the sentencing statutes in effect at the time the defendant committed the offense. *Robertson v. State*, 871 N.E.2d

280, 284 (Ind. 2007). In the instant case, Cole committed these offenses in 2003 and 2004. The statutory sentencing scheme in effect at that time included presumptive sentences. In addition, *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) was decided during the time that Cole was committing the instant offenses. In short, *Blakely* held that, with the exception of a defendant's prior convictions, any fact that is used to enhance a defendant's sentence must either be found by a jury beyond a reasonable doubt, admitted by the defendant, or, in the course of a guilty plea where the defendant has waived his rights, stipulated to by the defendant or found by judicial fact-finding upon consent of the defendant. 124 S.Ct. at 2537, 2541. Here, in his plea agreement, Cole waived his right to have a jury determine the aggravating factors affecting his sentence and consented to a judicial determination of these factors. See ¶8 of Plea Agreement, Appellant's Appendix at 249-50. We now turn to Cole's assertions of error.

I. WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES

Cole first contends that the trial court abused its discretion in sentencing him by imposing an enhanced sentence without having found that the aggravating circumstances outweigh the mitigating circumstances.

Sentencing is a determination within the sound discretion of the trial court, and we will not reverse the trial court's decision absent an abuse of discretion. *Allen v. State*, 722 N.E.2d 1246, 1250 (Ind. Ct. App. 2000). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances of

the case. *Groves v. State*, 823 N.E.2d 1229, 1231 (Ind. Ct. App. 2005). The broad discretion of the trial court includes whether to increase the presumptive sentence. *Jones v. State*, 807 N.E.2d 58, 68-69 (Ind. Ct. App. 2004), *trans. denied*.

If a trial court exercises its discretionary authority to impose an enhanced sentence, it must include in the record a statement of its reasons for selecting a particular sentence. Ind. Code § 35-38-1-3; *Johnson v. State*, 785 N.E.2d 1134, 1143 (Ind. Ct. App. 2003), *trans. denied*. The following elements must be included in the court's sentencing statement: (1) all significant aggravating and mitigating circumstances; (2) the reason why each circumstance is determined to be mitigating or aggravating; and (3) a demonstration that the mitigating and aggravating circumstances have been evaluated and balanced. *Allen*, 722 N.E.2d at 1250-51.

Here, Cole asserts that the trial court did not fulfill the third element of its sentencing statement. Specifically, he states that the court cannot impose an aggravated sentence unless it finds that the aggravating circumstances outweigh the mitigating circumstances.

The requirements for enhancing a sentence have been sufficiently met if the trial court's reasons for enhancement are clear from a review of the sentencing transcript. *Saintignon v. State*, 734 N.E.2d 711, 715 (Ind. Ct. App. 2000), *overruled on other grounds*, *Saintignon v. State*, 749 N.E.2d 1134, 1135 (Ind. 2001). Moreover, the trial court is not required to articulate whether aggravating factors outweighed mitigating factors where the transcript and materials on appeal reveal that the court thoughtfully

evaluated the facts and circumstances before it, and the aggravating factors cited are supported by evidence. *Id.*

At the sentencing hearing in the present case, the trial court cited Cole's acceptance of responsibility by pleading guilty and his assistance to law enforcement as mitigating circumstances. As aggravating circumstances, the court found Cole's previous probation violation, his prior convictions, and the fact that he was on probation at the time he committed the instant offenses. The court considered these aggravating and mitigating factors and stated, "I'm going to balance everything, give him six years on the, on each count . . ." Tr. at 91.

It is clear from the context of the court's sentencing statement that the court meant it was *weighing* the factors when it used the term "balance." *See* Tr. at 91. Further, it is apparent that the trial court engaged in an evaluative process and properly considered and weighed the aggravating and mitigating circumstances. It was not necessary that the court explicitly state that the aggravators outweigh the mitigators. *See Saintignon, supra.* Thus, the trial court did not abuse its discretion by imposing an enhanced sentence.

II. INAPPROPRIATE SENTENCE

Cole next alleges that his sentence is inappropriate. We have the authority to revise a sentence if, after due consideration of the trial court's decision, we determine that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B).

Under the heading of “nature of the offense,” the presumptive sentence is the starting point in our consideration of the appropriate sentence for the crime committed. *Hildebrandt v. State*, 770 N.E.2d 355, 361 (Ind. Ct. App. 2002), *trans. denied*. Cole was convicted of four Class C felonies. At the time he was sentenced, the presumptive term for a Class C felony was four years, with a maximum sentence of eight years and a minimum sentence of two years. *See* Ind. Code § 35-50-2-6. The court imposed six years for each Class C felony conviction, to be served concurrently.

With regard to Cole’s character, we note that Cole has a lengthy criminal history. Prior to the instant offenses, Cole had one A misdemeanor conviction and at least three felony convictions, including a conviction for attempted murder. Cole has also previously had his probation revoked. In addition, Cole was on probation at the time he committed the current offenses, which is a “substantial consideration” in our assessment of his character. *See Rich v. State*, 890 N.E.2d 44, 54 (Ind. Ct. App. 2008), *trans. denied* (citing *Barber v. State*, 863 N.E.2d 1199, 1208 (Ind. Ct. App. 2007), *trans. denied*, for its holding that even if other aggravating circumstance was insignificant, trial court would have acted within its discretion in ordering maximum sentences based on fact that defendant committed crime while on probation). Further, through the testimony of Detective Toy at the sentencing hearing, the State presented evidence of Cole’s attempts to intimidate witnesses, as well as his violations of the court’s no-contact order while he was in jail.

The trial court considered as a mitigating circumstance that Cole had accepted responsibility for his actions by pleading guilty. Further, the court also found as mitigating Cole's assistance to the law enforcement agencies. However, the court diminished this finding by saying that although Cole supplied law enforcement with information that lead to arrests, "there's some who could argue that by getting them arrested [Cole] was clearing away the competition." Tr. at 91. The court was referring to Cole's involvement in the check fraud scheme while at the same time acting as a CI and providing information to authorities about the check fraud operation and the people involved.

Additionally, Cole presented the deposition testimony of Officer Larry Jones. Officer Jones testified that in 2002, he met Cole through Cole's probation officer, and he "threw a bluff" at Cole. Defense Exhibit A, Deposition of Officer Jones at 9. He explained that this meant: "We have something on you. What can you do for us?" Defense Ex. A, Depo. of Officer Jones at 9. Officer Jones further explained that by saying this to Cole, he was attempting to gain information about narcotics deals. He gave his card to Cole, and Cole contacted him. He testified that Cole became a CI for the Lawrence Police Department and that he was told "to do what you have to do [to] get the information." Ex. A, Depo. of Officer Jones at 26. However, Officer Jones clarified that he did not and would not encourage Cole to commit a criminal offense (i.e., forgery) in order to implicate other people. He also explained that the Lawrence Police Department

had a simple one-page form for confidential informants that required name, address and a listing of relatives but that there was no formal set of rules for confidential informants.

Based upon Officer Jones' deposition testimony, Cole argued at sentencing that he was forced into participating in the check fraud ring by the pressure to provide more information to authorities. Cole's counsel further speculated that the opportunity existed for authorities to treat Cole poorly or to take advantage of him because there were no rules governing his participation as a CI. However, no evidence was presented that Cole was treated in this manner. The trial court rejected this argument:

Looking at the mitigating factors, I'm not going to accept that his choice to cross the line was a result of law enforcement coercion. While certainly the Lawrence standards for determining who they're going to use and how they're going to use them could be more clear, the detective in his deposition made it clear that he never authorized the violation of the law, and there was never any discussion about violating the law between himself and Mr. Cole.

Tr. at 90-91. Like the trial court, we are not persuaded that Cole committed these offenses due to police coercion.

Thus, in light of Cole's continuing refusal to abide by the law, as evidenced by his criminal history, probation violation, and commission of the current offenses while on probation and while acting as a CI, we cannot say the sentence was inappropriate for the nature of the crime and the character of the offender.

Based upon the foregoing discussion and authorities, we conclude that the trial court did not abuse its discretion by enhancing Cole's sentence, and Cole's sentence is not inappropriate.

Affirmed.

FRIEDLANDER, J., and BAILEY, J., concur.