

STATEMENT OF THE CASE

Defendant-Appellant Jessica F. Sargent (“Sargent”) appeals from the trial judge’s sentencing order after she pled guilty to Class B felony neglect of a dependent, and to Class C felony reckless homicide.

We affirm.

ISSUES

Sargent presents the following issues for our review:

- I. Whether the trial court erred by sentencing Sargent to twenty years for Class B felony neglect of a dependent, and to eight years for Class C felony reckless homicide, fully executed to be served concurrently, by using improper aggravating circumstances; and
- II. Whether the sentence was inappropriate in light of Sargent’s character.

FACTS AND PROCEDURAL HISTORY

On September 14, 2004, S.N.W., an eleven-month-old girl, was left in Sargent’s care. According to the factual basis established for Sargent’s guilty plea, Sargent went in the bedroom to check on S.N.W. and found her on the floor and unresponsive. Sargent admits to shaking the infant at least two times, and that the act of shaking the infant ultimately led to S.N.W.’s death.

On November 15, 2004, the State charged Sargent with Class B felony neglect of a dependent and Class B felony battery. On December 9, 2004, the State amended its charging information to charge Sargent with Class A felony neglect of a dependent, Class A felony battery, Class B felony aggravated battery, and Class C felony reckless homicide. On June 26, 2006, Sargent pled guilty to Class B felony neglect of a

dependent and Class C felony reckless homicide. Sargent's sentencing hearing was held on September 11, 2006. The trial court sentenced Sargent to twenty years executed for neglect of a dependent and to eight years executed for the reckless homicide conviction, to be served concurrently with the sentence for neglect. It is from the trial court's sentencing order that Sargent now brings this appeal.

DISCUSSION AND DECISION

I. AGGRAVATING CIRCUMSTANCES

Sargent argues that the trial judge abused his discretion when he sentenced her to a term of twenty years executed for neglect of a dependent, and to eight years executed for the reckless homicide conviction to be served concurrently. Sargent claims that a number of invalid or improper aggravating circumstances were used to enhance her sentence. She concludes that the circumstances were, therefore, improperly balanced.

Under the terms of Sargent's plea agreement, the parties were free to argue sentencing, and whether the sentences would be served concurrently or consecutively. The sentence imposed was left to the trial court's discretion within the parameters of a six-year minimum sentence and a twenty-eight year maximum sentence.

In imposing the sentence the trial judge found as aggravating circumstances 1) the harm and injury suffered by the victim was significant and greater than necessary to prove commission of the neglect; 2) Sargent's criminal history consisting of two misdemeanor convictions; 3) S.N.W.'s age, eleven months old; and, 4) S.N.W.'s injuries were the result of shaken baby syndrome. The trial court found as mitigating circumstances 1) Sargent's cooperation with law enforcement and the Department of

Family and Children; 2) Sargent's guilty plea; 3) the hardship for her children; and, 4) Sargent's acceptance of responsibility for her actions.

On April 25, 2005, the Indiana Legislature's amendment of sentencing statute Ind. Code §35-38-1-7.1(d) became effective. Ind. Code §35-38-1-7.1(b) provides that the trial court may consider mitigating circumstances. However, a court may impose any sentence that is authorized by statute and permissible under the Constitution of the State of Indiana, regardless of the presence or absence of aggravating circumstances or mitigating circumstances. Ind. Code §35-38-1-7.1(d). The trial court may impose any sentence within the sentencing range without regard to the presence or absence of such circumstances. *Fuller v. State*, 852 N.E.2d 22, 26 (Ind. Ct. App. 2006). Because the new sentencing statute provides for a range with an advisory sentence rather than a fixed or presumptive sentence, a lawful sentence would be one that falls within the sentencing range for the particular offense. *Id. citing Samaniego-Hernandez v. State*, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005).

However, in cases such as the case at bar, where the crimes occurred prior to the effective date of the sentencing statute amendments, application of the amendments to the sentencing statutes to the sentences of those defendants would violate the constitutional protections against *ex post facto* laws. *See Creekmore v. State*, 853 N.E.2d 523, 528-529 (Ind. Ct. App. 2006). Therefore, we will review Sargent's sentence according to the version of the sentencing statutes applicable at the relevant time, the date of commission of the crimes.

Sargent argues that the trial judge assigned too much weight to Sargent's criminal history. Sargent had two prior convictions; one for criminal conversion, and the other for check deception. The trial judge stated that the convictions were relevant because they were crimes of dishonesty. Appellant's App. p. 266-67. Sargent claims that the trial judge failed to explain how that record was relevant to the current offenses.

The significance of a criminal history varies based on the gravity, nature and number of prior offenses as they relate to the current offense. *Bryant v. State*, 841 N.E.2d 1154, 1156-57 (Ind. 2006). In the present case, Sargent maintained consistently from the date of the offense including the date of her sentencing hearing, that S.N.W. died as the result of a failed attempt by Sargent to resuscitate the infant. Sargent did admit to shaking S.N.W., but maintained that she shook her just enough to try to rouse her. The trial judge specifically stated as follows at the sentencing hearing when considering the mitigating circumstance of Sargent's acceptance of responsibility for her actions:

The Defendant has accepted responsibility for her actions. However, I think they have been minimized to the extent of the nature of the shaking. The pre-sentence report has copies of the original doctors' evaluations and exams, and one was of Dr. Laskey who indicated that the injuries that [S.N.W.] sustained were most consistent with a violent acceleration/deceleration injury, the most common cause of injuries such as these of the shaking, with or without an impact. The injuries included bleeding around the brain, bleeding in the eye, and an apparent spinal cord injury. There was no prior history of trauma, and that the trauma sustained was most consistent with head trauma. The brain and spinal cord injury were immediately life threatening and that's what led to her death.

Appellant's App. p. 268.

It is apparent from the record that the trial judge assessed Sargent's credibility, and arrived at the conclusion that Sargent was being dishonest about the particular

circumstances of S.N.W.'s death. The prior convictions involving crimes of dishonesty would then be relevant to the trial judge's sentencing decision. The trial court properly considered Sargent's criminal history, albeit minimal, as an aggravator. Furthermore, because there were other valid aggravating circumstances found, there is little likelihood that the trial judge committed reversible error in his assignment of weight to this particular circumstance.

Sargent attacks the trial judge's statement of other aggravating circumstances as "a perfunctory recitation of the statutory aggravators." Appellant's Br. p. 12. Sargent argues that there is no explanation of why those other circumstances justify an enhanced sentence, and that some of the circumstances currently listed in the sentencing statute were not in existence at the time the offense was committed.

While there have been amendments to the sentencing statute, the statute has consistently stated that the list of aggravating and mitigating circumstances to be considered is not an exclusive or exhaustive list. *See* Ind. Code §35-38-1-7.1(c) and historical notes to the statute. Therefore, there is nothing improper about a trial judge considering circumstances included in the current statutory language, that were not in existence at the time of the offense as long as the circumstances are supported by the record.

The remaining aggravating factors are that 1) the harm and injury suffered by the victim was significant and greater than necessary to prove commission of the neglect; 2) S.N.W.'s age, eleven months old; and, 3) S.N.W.'s injuries were the result of shaken baby syndrome. The above-cited portion of the trial judge's sentencing statement is a

more than adequate explanation of why these circumstances are aggravating in this situation. The fact that this explanation came at the end of the trial court's evaluation of the mitigating circumstances is of no moment. The trial court's sentencing statement is proper. Therefore, because all of the aggravating circumstances are proper, Sargent's basis for attacking the trial court's balancing of the aggravating and mitigating circumstances fails here.

II. CHARACTER OF THE OFFENDER

Sargent also urges this Court to use its authority pursuant to Article VII, Section 6 of the Indiana Constitution to revise her sentence. This Court will revise a sentence only if it concludes that the sentence is inappropriate in light of the nature of the offense and the character of the offender. App. R. 7(B). Sargent argues that the sentence imposed is inappropriate in light of her character and that she should have received a six-year sentence instead.

As for the character of the offender, the Court is guided by the sentencing considerations in Ind. Code §35-38-1-7.1 which contains general sentencing considerations, as well as aggravating and mitigating factors to consider, and factors within the court's discretion. *Prowell v. State*, 787 N.E.2d 997, 1005 (Ind. Ct. App. 2003).

S.N.W., an eleven-month-old girl, left in Sargent's care suffered bleeding around the brain, bleeding in the eye, and an apparent spinal cord injury. Sargent admitted to shaking S.N.W. at least two times, but minimized the degree of the shaking. The injuries S.N.W. sustained at Sargent's hands ultimately led to her death. We agree that Sargent's

prior criminal history, two misdemeanor convictions, is minimal. Sargent also points to her efforts at rearing her children and her employment history caring for elderly people, in addition to, requests from relatives for a lenient sentence, to support a reduction in her sentence. However, we cannot say that Sargent's sentence, the maximum yet concurrent, for each conviction is inappropriate in light of the nature of the offense and character of the offender. S.N.W.'s injuries, the result of shaken baby syndrome while in Sargent's care, ultimately led to S.N.W.'s death. We decline the invitation to override the trial court's sentencing decision.

CONCLUSION

The trial judge did not abuse his discretion when considering the aggravating and mitigating circumstances in this case. Sargent's sentence is not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

SHARPNACK, J., and MATHIAS, J., concur.