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**IN THE
COURT OF APPEALS OF INDIANA**

JESSE TATE,)
)
Appellant-Defendant,)
)
vs.) No. 29A02-0610-CR-839
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE HAMILTON CIRCUIT COURT
The Honorable Judith Proffitt, Judge
Cause No. 29C01-0110-CF-68

July 12, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Jesse Tate appeals his sentence of fifteen years for his conviction for Class B felony dealing in cocaine. We affirm.

Issue

The sole issue Tate raises on appeal is whether he was properly sentenced.

Facts

On March 21, 2001, Tate sold 2.5 grams of crack cocaine to a confidential informant. Tate was arrested, and an additional 9.2 grams of cocaine was seized from him. The State charged Tate on October 12, 2001, with Class A felony dealing in cocaine and Class B felony dealing in cocaine. On October 16, 2003, Tate pled guilty to Class B felony dealing in cocaine pursuant to a plea agreement. The agreement provided that the State would dismiss the Class A felony charge and the trial court would sentence Tate to a maximum of fifteen years. At the sentencing hearing, Tate's fiancée and his minister testified about the positive change in attitude that Tate had during the previous year. Also at the hearing, Tate acknowledged responsibility for the offense and stated that he had changed as a man. Tate was sentenced to fifteen years, with twelve years executed. Tate now appeals.

Analysis

Tate asserts that the trial court improperly enhanced his sentence. Tate committed this offense on March 21, 2001, prior to our legislature's change in the sentencing statute from "presumptive" sentences to "advisory" sentences. We apply the previous

sentencing statute when the offense occurred prior to the change in statute. See Weaver v. State, 845 N.E.2d 1066, 1072 (Ind. Ct. App. 2006) trans. denied.

In determining whether a trial court properly enhanced a defendant's sentence, we consider whether the trial court issued a sentencing statement that (1) identified all significant mitigating and aggravating circumstances; (2) stated the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulated the court's evaluation and balancing of the circumstances. Perry v. State, 845 N.E.2d 1093, 1096 (Ind. Ct. App. 2006), trans. denied. In the presence of an irregularity in a trial court's sentencing decision, we have the option to remand to the trial court for a clarification or new sentencing determination, to affirm the sentence if the error is harmless, or to reweigh the proper aggravating and mitigating circumstances independently at the appellate level. Id.

At Tate's sentencing hearing, the trial court found two aggravating circumstances: Tate's prior criminal history and Tate's subsequent arrest and conviction for Class C felony possession of cocaine in 2002. The court found that there were no mitigating circumstances. The presumptive sentence for a Class B felony was ten years, with not more than ten years added for aggravating circumstances and not more than four years subtracted for mitigating circumstances. See Ind. Code § 35-50-2-5 (2001). The trial court sentenced Tate to the maximum permissible sentence under the plea agreement, which was fifteen years.

Tate argues that the trial court failed to find as a mitigating factor that he was unlikely to commit another crime. The finding of mitigating factors is within the

discretion of the trial court. Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005). A trial court is not obligated to weigh the mitigating factors in the manner a defendant suggests they should be weighed. Id. However, when a trial court fails to find a mitigator that the record clearly supports, a reasonable belief arises that the mitigator was improperly overlooked. Id.

Under the applicable statute, the trial court had the discretion to consider as a mitigating circumstance whether “[t]he character and attitudes of the person indicate that the person is unlikely to commit another crime.” See I.C. § 35-38-1-7.1(c)(8) (2001). We conclude that the trial court was justified in refusing to accord this factor mitigating weight. Although Tate and two character witnesses testified that he had changed, Tate had been convicted for a drug offense prior to the instant offense and another drug offense subsequent to the instant offense. He had additionally been convicted for robbery, battery, and carrying a handgun without a license. We cannot conclude that it was unlikely that Tate would commit another crime when he had accrued four felony and three misdemeanor convictions in ten years.

Tate also argues that the trial court should have considered his expression of remorse as a mitigating factor. At Tate’s sentencing hearing, he acknowledged that he had made poor choices in his life and stated that he had learned from his mistakes. “Remorse, or lack thereof, by a defendant often is something that is better gauged by a trial judge who views and hears a defendant’s apology and demeanor first hand and determines the defendant’s credibility.” Gibson v. State, 856 N.E.2d 142, 148 (Ind. Ct. App. 2006). Tate does not argue that his guilty plea should be accorded mitigating

weight; however, he cites Antrim v. State, 745 N.E.2d 246, 248 (Ind. Ct. App. 2001), in which our court noted that a defendant's guilty plea shows a willingness to accept responsibility for his actions. Generally, a defendant's guilty plea is accorded mitigating weight, although the mitigating weight of the plea varies from case to case. See Cotto, 829 N.E.2d at 525; Francis v. State, 817 N.E.2d 235, 238 n.3 (Ind. 2004). Tate has already received a benefit from his guilty plea in that the Class A felony charge was dismissed and he received a sentencing cap of fifteen years. We conclude, therefore, that Tate's guilty plea and expression of remorse are entitled to some, but not substantial, mitigating weight. Although the trial court should have accorded these factors some mitigating weight, we conclude that the error is harmless. A single valid aggravating circumstance may be sufficient to sustain an enhanced sentence. Caron v. State, 824 N.E.2d 745, 756 (Ind. Ct. App. 2005) trans. denied. Tate's significant criminal history justifies the enhancement of his sentence.

Tate also argues that his sentence is inappropriate in light of the nature of the offense and the character of the offender under Indiana Appellate Rule 7(B). He claims that the sentence is inappropriate because his only prior drug-related conviction was for a misdemeanor charge of possession of marijuana more than ten years earlier, and he has recently taken positive steps to improve his life. However, Tate was charged with possession of cocaine less than two years later, while the instant offense was pending. Tate also had a conviction for robbery, two convictions for carrying a handgun without a license, and two convictions for battery between 1992 and 2002. Tate's character demonstrates a significant criminal history.

Tate also argues that a maximum sentence should be reserved for the worst offenders. We note that although he received the maximum sentence permitted under his plea agreement, the agreement called for five years less than the maximum penalty permitted statutorily. Dealing cocaine is a serious offense and Tate has a long criminal history. A sentence of fifteen years, with twelve years executed, is not inappropriate in light of Tate's character and the nature of the offense.

Conclusion

The trial court's failure to find Tate's guilty plea and remorse as mitigating factors was harmless, and Tate's sentence of fifteen years is not inappropriate. We affirm.

Affirmed.

NAJAM, J., and RILEY, J., concur.