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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL E. KIRTS, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0702-CR-138
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald Johnson, Judge
Cause Nos. 79D01-0503-FA-9, 79D01-0409-FD-20

July 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Michael E. Kirts, Jr., appeals the sentence imposed after he agreed to plead guilty to dealing in cocaine, a Class A felony, and operating while intoxicated, a Class A misdemeanor.

We reverse and remand.

FACTS AND PROCEDURAL HISTORY

On March 25, 2005, police executed a search warrant at Kirts' home and found six grams of cocaine in his possession. They found a surveillance camera focused on the front door; a glass table holding a cup that had been used to prepare crack cocaine; a mirror with a razor blade and a white powdery substance; a safe containing $4,000; a metal tin containing approximately one-fourth ounce of cocaine; two electronic scales; a number of twist ties; and several boxes of baggies.[1]

While police were at Kirts' house, the answering machine recorded a message from "Brenda," advising she would come by to pick something up. A short time later, Brenda Humphrey arrived and bought cocaine from an undercover police officer. Humphrey told police she had bought cocaine from Kirts before.

In exchange for Kirts' plea of guilty to dealing cocaine and operating a motor vehicle while intoxicated,[2] the State agreed to dismiss counts of possession of cocaine as a Class A felony, possession of cocaine as a Class C felony, possession of paraphernalia as a Class A misdemeanor, maintaining a common nuisance as a Class D felony, and conspiracy to commit dealing in cocaine as a Class A felony. The court would determine

[1] Twist ties and baggies are commonly utilized by dealers of controlled substances.
[2] Kirts was arrested for operating a motor vehicle while intoxicated on July 31, 2002, but charges were not filed until May 5, 2005.

Kirts' sentence, but the executed portion would be capped at twenty-five years. The trial court sentenced Kirts to the presumptive[3] sentence of thirty years, with twenty-five years executed.

DISCUSSION AND DECISION

At the sentencing hearing, the trial court considered Kirts' health, lack of a criminal history, and education as mitigating circumstances. The trial court did not explicitly find or mention any aggravating circumstances. However, the sentencing order states: "The Court finds the aggravating factors outweigh the mitigating factors . . . ." (App. at 78.)

In a sentencing statement, a trial court must identify all significant aggravating and mitigating factors, explain why such factors were found, and balance the factors in arriving at the sentence. *Henderson v. State*, 769 N.E.2d 172, 180 (Ind. 2002). The case before us is governed by *Eaton v. State*, 825 N.E.2d 1287, 1289 (Ind. Ct. App. 2005), *disapproved on other grounds by Childress v. State*, 848 N.E.2d 1073 (Ind. 2006), where the sentencing court found the mitigating factors outweighed the aggravating factors, but then imposed the presumptive sentence, which was the maximum Eaton could receive under the terms of the plea agreement. We found that sentence erroneous: "The judge's

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[3] After the decision in *Blakely v. Washington*, 542 U.S. 296, 303 (2004), *reh'g denied* 542 U.S. 961 (2004), which held facts supporting an enhanced sentence must be admitted by the defendant or found by a jury, our Legislature amended the sentencing statutes by replacing presumptive sentences and fixed terms with "advisory" sentencing schemes. Indiana Code § 35-50-2-4 was amended effective April 25, 2005, to read: "A person who commits a Class A felony shall be imprisoned for a fixed term of between twenty (20) and fifty (50) years, with the advisory sentence being thirty (30) years . . . ." Kirts' crimes were committed before that amendment. He does not assert a *Blakely* violation.

weighing of the aggravators and mitigators in this case demonstrates that the imposition of the presumptive sentence was erroneous because the judge expressly found that the mitigators outweigh the aggravators. Undoubtedly this was so because the judge found two mitigators and no aggravators." *Id*.

Kirts' sentencing court, unlike Eaton's, did not explicitly find the mitigators outweighed the aggravators. Rather, it stated the aggravating factors outweighed the mitigating factors, yet it identified only mitigating factors and no aggravators. As the trial court did not identify aggravating circumstances that could balance the mitigators, it was improper to sentence Kirts to the presumptive sentence. We must reverse and remand for a new sentencing hearing.

Reversed and remanded.

SHARPNACK, J., and BAILEY, J., concur.