ATTORNEY FOR APPELLANT:

ANTHONY C. LAWRENCE
Anderson, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MAUREEN ANN BARTOLO
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JEAN PAUL NATHAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A05-0611-CR-670
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0506-FB-257

July 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Jean Paul Nathan appeals the sentence imposed following his conviction of Dealing in Cocaine,[1] a class B felony. Nathan presents the following restated issues for review:

1. Did the trial court improperly weigh aggravating and mitigating circumstances?

2. Is the sentence inappropriate?

We affirm.

The facts favorable to the judgment are that on June 7, 2005, Nathan was charged with dealing cocaine as a class B felony. A jury trial was set for August 8, 2005. On July 11, trial was reset for August 18, 2005. Nathan requested a continuance on July 29, but that request was denied on August 4, 2005. On August 15, 2005, the parties advised the court they had arrived at a plea agreement. Pursuant to the agreement, Nathan would plead guilty as charged and would serve at least the minimum eight-year sentence, but sentencing was otherwise left to the trial court's discretion.

At the plea hearing, the State established a factual basis, which was that on June 6, 2005, Nathan sold cocaine to a confidential informant working with the Madison County Drug Task Force. Shortly after the drug transaction was completed, police executed a traffic stop of Nathan and the marked purchase money was found on his person.

At the August 29 sentencing hearing, the State introduced evidence about Nathan's past contacts with law enforcement, including: (1) a 1996 complaint from a

---

[1] Ind. Code Ann. § 35-48-4-1 (West, PREMISE through 2006 Second Regular Session).

hotel proprietor that Nathan had rented a room there and was receiving numerous phone calls and many visitors, all of which was suspicious for drug activity; (2) in 1999, Nathan was found in a house along with several other people and fifteen baggies of marijuana, and charged with visiting a common nuisance; and (3) in 2000, Nathan was identified by a confidential informant as someone who was "bringing a lot of cocaine in from the Detroit area to this area."[2] *Transcript* at 16. In addition to the above, the State presented evidence that Nathan (4) received a 1989 felony conviction in Michigan for possession of cocaine; and (5) was charged in 1994 with carrying a concealed weapon – a charge that was later dismissed because Nathan completed a diversion program.

At the conclusion of the hearing, the court imposed an enhanced, fifteen-year sentence, with the following comments:

> Well, the bottom line is, he was dealing cocaine or he was involved in the dealing of cocaine, regardless the amount or whether it was on him or not, but it was – the whole scenario was dealing cocaine, and that continues to be a (inaudible) in our community and it's wrong and here he is thirty-five (35) years old and he's still behaving like this. Still hasn't received a GED; hasn't taken any opportunities that society presents to people out there to get an education, to get a vocation. He's dealing cocaine, he's involved in dealing cocaine. And he knew it was wrong cause he's been there before. He's served time for it. And it's not fifteen (15) years, it's seven and a half (7 ½) and he'll go down there and he'll get a GED and he'll get a time cut and he'll get some other time cuts and so it is – the sentence is fifteen (15) years executed based upon his prior criminal history. No probation time.

---

[2] Apparently, Nathan lived in the Detroit area.

Transcript at 22. In June 2006, the trial court denied Nathan's request for sentence modification. Thereafter, the trial court granted Nathan's request to file a belated appeal, and this appeal ensued.

Nathan contends the trial court improperly weighed the aggravating and mitigating circumstances, and imposed a sentence that is inappropriate in light of the nature of the offense and the character of the offender.

The issue of sentencing for Indiana criminal convictions has recently been in a state of flux. On April 25, 2005, the General Assembly amended Indiana's felony sentencing statutes to provide for sentences within a range of years, with an "advisory sentence" somewhere between the minimum and maximum terms. *See* Ind. Code Ann. §§ 35-50-2-3 to –7 (West, PREMISE through 2006 Second Regular Session). When determining the sentence to impose on a defendant, the trial court "may consider" certain enumerated aggravating and mitigating circumstances in addition to other matters not listed in the statute. I.C. §§ 35-38-1-7.1(a) to -7.1(c). Our Supreme Court recently concluded that this new statutory scheme requires trial courts to enter sentencing statements whenever imposing sentences for felony convictions. *Anglemyer v. State*, No. 43S05-0606-CR-230, --- N.E.2d ---, (Ind. June 26, 2007).

In *Anglemeyer's* wake, a defendant who receives a felony sentence may now challenge that sentence on two bases – one procedural and the other concerning the appropriateness of the particular sentence imposed. We review the first category, concerning the sentencing process, for an abuse of discretion. *Anglemyer v. State*, *slip*

op. at 10 ("[s]o long as the sentence is within the statutory range, it is subject to review only for abuse of discretion"). The Supreme Court clarified that a process-oriented abuse of discretion may occur in the following ways: (1) Failing to enter a sentencing statement; (2) entering a sentencing statement that includes reasons not supported by the record; (3) entering a sentencing statement that omits reasons clearly supported by the record and advanced for consideration; or (4) entering a sentencing statement that includes reasons that are improper as a matter of law. *Anglemyer v. State*, --- N.E.2d ---, No. 43S05-0606-CR-230. On the other hand, a defendant who challenges the appropriateness of the sentence itself must do so via Appellate Rule 7(B), which provides that the "[c]ourt 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." The defendant bears the burden to persuade us that his or her sentence is inappropriate. *Anglemyer v. State*, --- N.E.2d --- , No. 43S05-0606-CR-230.

1.

In the instant case, Nathan contends "[t]he trial court abused its discretion when it failed to correctly weigh the aggravating and mitigating factors when it afforded too much aggravating weight to the defendant's criminal history and where it failed to recognize his plea of guilty as having any mitigating weight." *Appellant's Brief* at 8. Our Supreme Court has determined that a claim of improper weighing is no longer available, viz.,

> Because the trial court no longer has any obligation to "weigh" aggravating and mitigating factors against each other when imposing a sentence, unlike the pre-*Blakely* statutory regime, a trial court can not now be said to have abused its discretion in failing to "properly weigh" such factors. *See, e.g., Jackson v. State*, 728 N.E.2d 147, 155 (Ind. 2000) (finding that the Court could not determine from the sentencing statement whether the trial court "properly weighed" the aggravating and mitigating factors).

Id., slip op. at 9. This claim is no longer viable as an abuse of the trial court's discretion.

2.

Although there was no abuse of discretion here, article 7, sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of the sentence imposed by the trial court. *Anglemyer v. State*, --- N.E.2d ---, No. 43S05-0606-CR-230. This authority is implemented through App. R. 7(B), which provides, "Court may revise 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." Our Supreme Court determined

> [i]t is on this basis alone that a criminal defendant may now challenge his or her sentence where the trial court has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing a particular sentence that is supported by the record, and the reasons are not improper as a matter of law, but has imposed a sentence with which the defendant takes issue.

Anglemyer v. State, --- N.E.2d ---, No. 43S05-0606-CR-230, *slip op.* at 11. "We recognize, however, the special expertise of the trial courts in making sentencing decisions; thus, we exercise with great restraint our responsibility to review and revise sentences." *Scott v. State*, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006), *trans. denied*.

As the Supreme Court observed about the trial court in *Anglemeyer*, without the benefit of the analysis provided in *Anglemeyer*, it is not surprising that the trial court here did not include a "reasonably detailed recitation" of its reasons for imposing a fifteen-year term. The sentencing statement does, however, outline the court's reasoning and identify the aggravating circumstance upon which the enhancement of Nathan's sentence was based. Therefore, it is sufficient for this court to conduct meaningful appellate review.

The trial court did not cite Nathan's guilty plea as a mitigating factor, but Nathan contends it is a valid mitigator. We agree. In fact, our Supreme Court has stated that trial courts should be "inherently aware of the fact that a guilty plea is a mitigating circumstance." *Francis v. State*, 817 N.E.2d 235, 237 n.2 (Ind. 2004). A guilty plea, however, is not inherently considered a *significant* mitigating circumstance. *Francis v. State*, 817 N.E.2d 235. For instance, a guilty plea's significance is diminished if it is made on the eve of trial, after the State has already expended significant resources preparing for trial. *See Primmer v. State,* 857 N.E.2d 11 (Ind. Ct. App. 2006), *trans. denied*. In this case, Nathan advised the court of the plea agreement a mere three days before the scheduled trial date. The plea's significance may also be reduced if there was substantial admissible evidence of the defendant's guilt. *See Scott v. State*, 840 N.E.2d 376. Although the guilty plea obviated the need to present evidence at trial, the fact that Nathan's charges stemmed from a controlled buy and involved marked money strongly suggests the State's evidence of guilt was substantial. Accordingly, the guilty plea was

not so much a positive reflection on Nathan's character (e.g., remorse and acceptance of responsibility) as it was a pragmatic decision; thus, it is not entitled to significant mitigating weight in determining the appropriate sentence.

Nathan's criminal history was the sole aggravating factor cited by the trial court. Nathan contends his criminal history was minimal and that it does not reflect so poorly on his character as to justify the fifteen-year sentence. The significance of criminal history as a sentencing consideration varies based upon the gravity, nature, and number of prior offenses as they relate to the current offense. *Wooley v. State*, 716 N.E.2d 919 (Ind. 1999).

Nathan was convicted of possession of cocaine in 1989. He was charged in 1994 with carrying a concealed weapon, but that charge was dismissed upon his successful completion of a diversion program. In 1995, he received a misdemeanor conviction for false informing. In 1999, he was charged with visiting a common nuisance. That charge was dismissed after he satisfied the condition of avoiding further arrests within an agreed-upon period of time. He committed the instant offense in 2006. The presentence report reflects that Nathan was, at the time of sentencing, thirty-five years old and had fathered children with five different women. He was collecting disability benefits, not working, and not supporting any of his children. He did not have a high school diploma or a GED. He as much as acknowledged that he supported himself by selling drugs (i.e., "I just ask, your Honor, that you give me another chance to show you that I can be a productive member of society, and make money without selling drugs"). *Appellant's*

Appendix at 13. He admitted occasionally using marijuana and cocaine. He also admitted that he has never received substance abuse education or treatment.

In summary, Nathan's brushes with the law over the fifteen-year period preceding sentencing were the types of activities typically associated with a life of drug use and drug trafficking. He was not gainfully employed at the time of his arrest and it appears he has not been employed at any time during his adult life. Nevertheless, he claimed he would obtain his GED and could attain gainful employment "if given another chance." *Id*. At thirty-five years of age, he admitted he continued to use drugs and clearly insinuated he made money by selling them. Yet, he had not received treatment for his substance abuse problem, nor did he provide financial support for his children. We are not persuaded that his character or the nature of the offense he admitted committing justifies revising Nathan's sentence.

Judgment affirmed.

BAKER, C.J., and CRONE, J., concur.