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IN THE
COURT OF APPEALS OF INDIANA

TONY DEWAYNE SPAW,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 88A01-0612-CR-556
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WASHINGTON SUPERIOR COURT
The Honorable Roger Duvall, Special Judge
Cause No. 88D01-0503-FA-73

August 7, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Tony D. Spaw appeals the sentence imposed by the trial court after his plea of guilty to possession of methamphetamine with intent to deliver over three grams, a class A felony.

We affirm.

ISSUE

> Whether the trial court erred when it ordered Spaw to serve the minimum statutory sentence, with five years suspended.

FACTS

The pre-sentence investigation report ("PSI") reveals that Spaw was arrested on March 10, 2005. The CCS states that on March 16, 2005, and December 17, 2005, the State filed charges alleging that Spaw committed five felony offenses: possession of methamphetamine with intent to deliver over three grams, a class A felony; manufacturing methamphetamine, a class A felony; maintaining a common nuisance, a class D felony; possession of precursors with intent to manufacture methamphetamine, a class D felony; and possession of cocaine, a class C felony.[1] On June 6, 2006, Spaw was released from jail to home detention.

On July 12, 2006, Spaw appeared before the trial court and tendered a plea agreement with the State whereby he would plead guilty to the first count – possession of methamphetamine with intent to deliver over three grams, a class A felony – and the State would dismiss the other four felony charges. The agreement further provided for "a

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[1] Spaw did not include the information in his Appendix.

cap of 23" years. (App. 17). The trial court advised Spaw of his rights, and "establishe[d] a factual basis" for his plea,[2] and took the matter under advisement. (App. 16).

On September 20, 2006, the trial court held the sentencing hearing. The PSI was received into evidence without objection. It reflects that Spaw was arrested in 1980 for drug possession; a 1986 arrest and subsequent conviction for reckless driving; an arrest in 1987 on two counts of conspiracy to deal cocaine, with a subsequent plea to possession of marijuana; a 1988 conviction for operating while intoxicated; a 1990 conviction for contributing to the delinquency of a minor, a class A misdemeanor; a 1992 conviction for operating while intoxicated; and convictions in 1993 for operating while intoxicated and possession of marijuana. The PSI indicated that "many of these charges ha[d] been reduced at sentencing or later dismissed," and that although Spaw had been on probation more than once and had served 120 days on home detention after his last conviction, he had "served little if any" time incarcerated. (App. 14). The PSI recommended a sentence of twenty years, with five years suspended.

Spaw testified that he had been employed since his release from jail in June of 2006, had joined a church and was attending weekly services, and became involved in activities at a saddle club. He further testified that he was providing financial support for and taking care of his elderly father. Spaw's father testified that because he suffered macular degeneration, he was unable to care for himself without assistance. Spaw's

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[2] Spaw does not include the plea hearing transcript in his Appendix.

father further testified that after his release from jail, Spaw was "all together different than what he was." (Tr. 13).

Spaw's counsel noted that this was Spaw's first felony conviction, and that the offense was "a fully suspendible offense." (Tr. 20). Counsel asserted that Spaw's acceptance of responsibility for his action, saving "the burden of a trial," should be considered a mitigating factor. *Id.* He further asserted that Spaw's employment promptly after his release from jail indicated that he was "likely to respond affirmatively to probation or short term imprisonment," and should also be considered a mitigating factor. (Tr. 21). Counsel argued that Spaw's age, forty-seven at the time of sentencing, combined with his current "attitude and outlook," indicated "that this is unlikely to happen again" and should also be considered a mitigator. *Id.* Finally, counsel asserted that the evidence had shown that Spaw's imprisonment would be a hardship to his father. Spaw's counsel then asserted that although the PSI's recitation of his criminal history was accurate, the most recent (1993) offense occurred more than twelve years "before this last incident occurred,"[3] and again noted that Spaw had no previous felony conviction. (Tr. 22). Counsel asked that Spaw "be given a time served sentence . . . with respect to the executed time," and probation. *Id.*

The State "t[ook] issue with the mitigating factors" asserted by Spaw's counsel, and suggested that the recommendation of the PSI was "too lenient." (Tr. 23). The State

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[3] The PSI in Spaw's Appendix indicates that it includes "copies of police reports" to provide the "official version" of the offense to which Spaw pleaded guilty. (App. 12). However, no such reports are included in the Appendix provided to us. Further, as already noted, the Appendix does not include the information. Also, Spaw did not provide us the transcript of the plea hearing, at which the factual basis was established. Thus, the record does not reveal when "this incident" occurred. (Tr. 22).

urged that Spaw be sentenced to serve twenty-three years. It asserted that such a term was warranted by the "nature and circumstances surrounding the crime," in that a considerable amount of meth" was involved. (Tr. 23, 24).

The trial court began by noting that methamphetamine was "a scourge on our community and our state." (Tr. 25). It further noted that twenty years was the absolute minimum sentence for a class A felony offense. It found Spaw's "prior criminal record" to be an aggravating circumstance, and that Spaw's incarceration "would be a hardship upon [his] family." (Tr. 26). The trial court then imposed the minimum sentence of twenty years at the Indiana Department of Correction, with five years suspended to probation.

DECISION

Spaw argues that the trial court "abused its discretion" by "finding only one mitigator and suspending only" five years of the twenty-year sentence imposed. We disagree.

Spaw argues that the "facts" in his case "clearly, significantly and substantially demonstrate numerous mitigators, which were overlooked or not given proper weight." Spaw's Br. at 7. As our Supreme Court most recently explained, it is those "significant" mitigating circumstances that must be identified by the trial court to explain its "reasons for imposing a particular sentence." *Anglemyer v. State*, -- N.E.2d --, No. 43S05-0506-CR-230, slip op. p. 9 (Ind. June 26, 2007). Moreover, sentencing decisions continue to "rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." *Id.*

Spaw argues that his acceptance of responsibility and guilty plea should have been found to be a mitigating circumstance. However, in return for his guilty plea, Spaw received the benefit of having four charges dismissed – one class A, one class C, and two class D felony offenses. He argues that because evidence indicated that after spending 440 days in the county jail from the date of his arrest until release on bond to home detention, he had behaved in a lawful and constructive manner, and this factor should have been recognized as a mitigating circumstance. However, we do not find the trial court's failure to identify this factor as a <u>significant</u> mitigating circumstances to be an abuse of discretion.

Spaw also argues that while his offense "can be argued to be a crime [of] moral distaste," there "was no violence or threat of violence in Mr. Spaw's actions associated with the commission of the crime." Spaw's Br. at 8. Therefore, he seems to urge, the trial court should have found that the nature of his crime was a mitigating circumstance. As noted in earlier footnotes, the record presented by Spaw provides no facts to us concerning the crime to which he pleaded guilty. Moreover, given the trial court's observation of the significant social danger posed by methamphetamine, it was not an abuse of discretion for it not to find this mitigating circumstance argued by Spaw.

Finally, Spaw suggests that although the PSI reflects "past criminal conduct," there were no prior felony convictions but "only misdemeanor convictions" – with "those all being in his youth and over twelve (12) years prior to the instant offense." Spaw's Br. at 8. At the time of his first arrest in 1980, Spaw was over age twenty; by the time of his last arrest in 1993, he was age 34. Misdemeanor offenses which are related in nature to

the current offense may be considered a valid aggravating circumstance. *Taylor v. State*, 840 N.E.2d 324, 341 (Ind. 2006). Most of Spaw's previous misdemeanor offenses were substance related, *i.e.*, they were related in nature to the instant conviction on which Spaw was being sentenced. Therefore, the trial court did not abuse its discretion in finding Spaw's criminal history to be an aggravating circumstance.

"There is no right to a suspended sentence." *Halbig v. State*, 525 N.E.2d 288, 294 (Ind. 1988); *see also Childers v. State*, 656 N.E.2d 514, 516 (Ind. Ct. App. 1995), *trans. denied* (citing *Downs v. State*, 267 Ind. 342, 369 N.E.2d 1079, 1083, (Ind. 1977), *cert. denied* 439 U.S. 849). The trial court did not sentence Spaw to the thirty-year advisory sentence for a class A felony. *See* Ind. Code § 35-50-2-4. Rather, it imposed the minimum "bare bones" sentence when it imposed the twenty-year sentence, *see id.*, and it suspended five of those years. The sentence is less than the twenty-three year "cap" specified in Spaw's signed plea agreement, which agreement benefited Spaw by resulting in the dismissal of four other felony charges. Spaw had a criminal history, albeit one somewhat dated in time, with previous convictions that were also substance-abuse related. We find nothing in the record before us that would lead us to conclude that the trial court abused its discretion when it "only" suspended five years of the statutory minimum sentence of twenty years that it imposed.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.