

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

DANIEL K. WHITEHEAD
Yorktown, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MATTHEW D. FISHER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

JERMAINE FOSTER,)
)
Appellant-Defendant,)
)
vs.) No. 02A05-0702-CR-127
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-0605-FC-118

August 17, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Jermaine Foster appeals his eight-year sentence for carrying a handgun without a license, a Class C felony. We affirm.

Issue

We consolidate and restate the issue as whether the trial court properly sentenced Foster.

Facts

On May 3, 2006, Fort Wayne Police Detective Christopher Furge stopped a vehicle driven by Foster when Foster changed lanes without signaling. As Detective Furge approached the vehicle, he smelled the odor of burnt marijuana. Thereafter, Fort Wayne Police Captain Kevin Corey arrived and he also smelled the odor of burnt marijuana. Captain Corey approached the vehicle and observed marijuana on the center console. Captain Corey removed Foster from the vehicle and placed him under arrest. Subsequent to Foster's arrest, Fort Wayne Police Officer Diane Rogers performed an inventory search of the vehicle. During the search, Officer Rogers found a handgun located in the center console. Foster did not have a permit for the handgun.

On May 9, 2006, the State charged Foster with Count I, carrying a handgun without a license, a Class C felony, and Count II, possession of marijuana, a Class D felony. Following a jury trial, Foster was found guilty of carrying a handgun without a license. On December 28, 2006, the trial court sentenced Foster to eight years imprisonment citing Foster's extensive criminal history, which includes prior juvenile adjudications, as an aggravating factor. Foster now appeals.

Analysis

Foster argues that the trial court abused its discretion in sentencing him because it improperly considered prior juvenile adjudications as aggravators and improperly failed to consider Foster's physical injuries and family hardship as mitigators. We note that Foster committed this crime after our legislature replaced "presumptive" sentences with "advisory" sentences in April 2005. Our supreme court recently provided an outline for the respective roles of trial and appellate courts under the 2005 amendments to Indiana's sentencing statutes. See Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). First, a trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e. to particular aggravators or mitigators, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id.

Foster asserts that the trial court improperly considered his juvenile record as an aggravating circumstance in its sentencing determination. Our supreme court has determined that prior juvenile adjudications are an exception to the requirement that all facts used to enhance a sentence over the statutory maximum must be found by a jury beyond a reasonable doubt. Ryle v. State, 842 N.E.2d 320, 321 (Ind. 2005), cert. denied. In other words, prior juvenile adjudications are proper sentencing considerations for a

trial judge and need not be submitted to a jury. Id. at 321-22.¹ In its determination of Foster's sentence, the trial court properly considered Foster's extensive criminal history that includes seven felony convictions, four misdemeanors, and nine juvenile adjudications. Specifically, Foster's adult criminal record is comprised of six Class D felony convictions including resisting law enforcement, possession of marijuana, escape, and possession of cocaine for which Foster was found guilty on three separate occasions. Foster's misdemeanor convictions include criminal trespass, false informing, false reporting, and unauthorized possession. Foster's juvenile adjudications include battery, a Class B misdemeanor and theft and escape, both of which are Class D felonies. Prior juvenile adjudications are appropriate considerations for sentencing purposes, and therefore, Foster's claim in that regard must fail.

Foster also argues that the trial court abused its discretion when it did not consider Foster's physical injuries and hardship on his newborn daughter as mitigators. Specifically, Foster claims that the trial court's failure to investigate the validity of the proffered mitigators resulted in an inappropriate sentence. "While a finding of mitigating circumstances is well within the discretion of the trial court, the trial court is not obligated to accept the defendant's assertions as to what constitutes a mitigating circumstance." Magers v. State, 621 N.E.2d 323, 324 (Ind. 1993). "Only when the trial

¹ In any event, a jury is not required to find aggravators under the "advisory" sentencing scheme. See Anglemyer, 868 N.E.2d at 488.

court fails to find a mitigator that the record clearly supports does a reasonable belief arise that the mitigator was improperly overlooked.” Id. at 324-25.

The trial court did not abuse its discretion when it did not assign mitigating weight to Foster’s physical injuries or family hardship. The record indicates that Foster is in fair medical condition and is not currently taking any medications. With regard to Foster’s family hardship claim, “many persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship.” Dowdell v. State, 720 N.E.2d 1146, 1154 (Ind. 1999). Here, there is no indication that Foster has taken any steps to establish paternity, develop a relationship with his daughter, or pay child support. Accordingly, the trial court did not abuse its discretion in failing to consider Foster’s physical condition or undue hardship on his alleged child as mitigating factors.

We independently address whether the sentence was appropriate in light of the nature of the offense and the character of the offender. See Anglemyer, 868 N.E.2d at 491. The record reveals that Foster has an extensive criminal history that includes seven felony convictions, four misdemeanors, two probation violations, and a juvenile record. In light of the nature of the offense and especially Foster’s character, as revealed by his criminal history, we find that the trial court’s sentence, eight years imprisonment, is not inappropriate.

Conclusion

Foster’s eight-year sentence is not the result of an abuse of trial court discretion and is not inappropriate. We affirm.

Affirmed.

KIRSCH, J., and ROBB, J., concur.