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ATTORNEY FOR APPELLANT:

ROBERT D. KING, JR.
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JUSTIN F. ROEBEL
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

ROBERTSON FOWLER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0701-CR-19
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jane Magnus-Stinson, Judge
Cause No. 49G06-0609-FB-181103

August 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Robertson Fowler appeals the thirty-year sentence that was imposed following his guilty plea to Unlawful Possession of a Firearm by a Serious Violent Felon,[1] a class B felony, and to being a Habitual Offender.[2] Specifically, Fowler argues that his "sentence is disproportionate in severity to the crime to which he [pleaded] guilty," appellant's br. p. 5, and that the trial court should have given greater weight to the mitigating circumstances that were supported by the record. Fowler also maintains that his sentence was inappropriate in light of the nature of the offenses and his character. Finding no error, we affirm the judgment of the trial court.

FACTS

On September 25, 2006, the State charged Fowler with unlawful possession of a firearm by a serious violent felon[3] as a class B felony, pointing a firearm as a class D felony, and resisting law enforcement as a class D felony. Thereafter, Fowler was also charged with being a habitual offender.

On November 28, 2006, Fowler negotiated a plea agreement with the State, whereby he agreed to plead guilty to possession of a firearm by a serious violent felon, and to being a habitual offender. In exchange, the State agreed to dismiss the remaining counts. The parties also agreed to a thirty-five year sentencing cap.

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[1] Ind. Code § 35-47-4-5.

[2] Ind. Code § 35-50-2-8.

[3] Fowler was classified as a serious violent felon based on a January 27, 2000, conviction for child molesting.

At the guilty plea hearing that commenced on December 5, 2006, the factual basis for Fowler's plea established that on September 20, 2006, Marion County Sheriff's deputies went to the residence of Fowler's mother to arrest him on a parole violation following his conviction for child molesting. When they arrived at the house, the officers observed Fowler standing at a window. After entering the residence, the officers ordered Fowler to show his hands. However, Fowler kept his left hand behind his back. The officers then noticed that Fowler was holding a pistol. Fowler was then ordered to drop the weapon, but he refused to comply. As a result, Officer Alan Driver "tased" Fowler. Tr. p. 19. Although Fowler fell to the ground, he continued to hold the gun. The officers again ordered Fowler to drop the pistol, but Fowler attempted to stand up. As a consequence, one of the officers unsuccessfully attempted to tase Fowler a second time. In response, Fowler fired the gun at his own head but apparently missed, and then pointed the weapon at Officer Driver. Officer Driver then shot at Fowler five times, striking Fowler with three bullets in his mid-section.

After the factual basis for the plea was established, the trial court sentenced Fowler to fifteen years on the firearm charge, which was enhanced by fifteen years on the habitual offender count. In support of the sentence, the trial court observed that even though Fowler took responsibility for his actions by pleading guilty, the circumstances of the offense were particularly heinous. The trial court also noted that Fowler was on parole when he committed the offense, and that he was being arrested on a warrant. Fowler now appeals.

DISCUSSION AND DECISION

I. Disproportionate Sentence

Fowler first claims that his sentence cannot stand because his sentence is constitutionally disproportionate to the severity of the offense. Specifically, Fowler contends that because his sentence on the firearm offense was greater than the penalty on other firearm offenses under Indiana law, his sentence must be set aside because it violates the provisions of Article I, Section 16 of the Indiana Constitution.[4]

We initially observe that Fowler did not challenge the alleged constitutionality of the penalty for the offense at the trial court level. Thus, the issue is waived. Adams v. State, 804 N.E.2d 1169, 1172 (Ind. Ct. App. 2004) (holding that the failure to challenge the constitutionality of a criminal statute by a motion to dismiss prior to trial waives the issue on appeal). Moreover, we note that as a general rule, challenges concerning the validity of a guilty plea may not be brought on direct appeal. See Prowell v. State, 687 N.E.2d 563, 564 n.1 (Ind. 1997) (declining to consider a challenge to the sufficiency of the factual basis supporting a plea on direct appeal). Indeed, only two exceptions to this rule have been recognized: (1) a challenge to the merits of a trial court's sentencing discretion; and (2) a trial court's denial of a motion to withdraw a guilty plea. Tumulty v. State, 666 N.E.2d 394, 395-96 (Ind. 1996). Here, Fowler's claim is not grounded on either of the above. Thus, his argument is also waived on this basis.

Waiver notwithstanding, this court has held that a sentence violates the proportionality clause under the Indiana Constitution only when it is so severe and entirely out of proportion

[4] In relevant part, Article I, Section 16 provides that "[a]ll penalties shall be proportioned to the nature of the offense."

to the gravity of the offense committed that it "shock[s] public sentiment and violate[s] the judgment of a reasonable people." Pritscher v. State, 675 N.E.2d 727, 731 (Ind. Ct. App. 1996).

Here, Fowler is essentially claiming that the offense to which he pleaded guilty should be treated similarly to sentences on other firearms possession offenses such as carrying a handgun without a license, pointing a handgun, possession of a machine gun, or possession of a sawed-off shotgun. Appellant's Br. p. 6. Although our legislature has deemed those offenses as lesser crimes that deserve a lighter sentence than the offense to which Fowler pleaded guilty, Fowler's offense is readily distinguishable from those crimes, inasmuch as it also requires the possessor of the firearm to have the status of being a serious violent felon. I. C. § 35-47-4-5. In our view, a substantial difference exists between this offense and the lesser class of offenses to which Fowler cites, and it was reasonable for the legislature to impose a more severe penalty for the crime with which Fowler was charged. Hence, we cannot say that this legislative decision "shock[s the] public sentiment." Id. For all these reasons, Fowler's proportionality claim fails.

II. Mitigating Circumstances

Fowler next argues that his sentence must be set aside because the trial court should have given more weight to his decision to plead guilty. Fowler also claims that the trial court should have considered the fact that he earned two educational degrees while incarcerated as a mitigating factor.

We initially observe that sentencing decisions are within the sound discretion of the trial court. Jones v. State, 790 N.E.2d 536, 539 (Ind. Ct. App. 2003). It is within the trial court's discretion to determine both the existence and weight of a significant mitigating circumstance. Creager v. State, 737 N.E.2d 771, 782 (Ind. Ct. App. 2000). An allegation that the trial court failed to identify a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Anglemyer v. State, 868 N.E.2d 482, 493 (Ind. 2007). In other words, a trial court is not obligated to find a circumstance to be mitigating merely because it is advanced as such by the defendant. Spears v. State, 735 N.E.2d 1161, 1167 (Ind. 2000). However, when a trial court fails to find a mitigator that is clearly supported by the record, a reasonable belief arises that the trial court improperly overlooked this factor. Banks v. State, 841 N.E.2d 654, 658 (Ind. Ct. App. 2006), trans. denied.

We also note that our Supreme Court has determined that a guilty plea demonstrates acceptance of responsibility for a crime and must be considered a mitigating factor. Scheckel v. State, 655 N.E.2d 506, 511 (Ind. 1995). Although Fowler acknowledges that the trial court identified his decision to plead guilty as a mitigating factor, he complains that the trial court should have attached more weight to that decision. However, in Anglemyer, our Supreme Court recently observed that a trial court "cannot be said to have abused its discretion in failing to 'properly weigh' such factors." 868 N.E.2d at 491. More specifically, Anglemyer observed that "[t]he relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse." Id. That said, to the

extent that Fowler complains that the trial court abused its discretion in failing to give his proffered mitigating factor greater weight, "this claim is not available for appellate review." See id.

Fowler also argues that the trial court erred in failing to identify the fact that he earned two educational degrees while incarcerated as a mitigating factor. However, Fowler acknowledged to the trial court that he received a significant educational credit toward his prior sentence as a result of his educational accomplishments. Tr. p. 23. Moreover, there is no suggestion in the record that Fowler applied for jobs while he was on parole, and Fowler has not had a lengthy period of employment since 1981. Appellant's App. p 7. Under these circumstances, we conclude that the trial court did not abuse its discretion by refusing to identify Fowler's educational degrees as a mitigating circumstance. See Patterson v. State, 846 N.E.2d 723, 731 (Ind. Ct. App. 2006) (holding that the trial court did not abuse its discretion in not assigning mitigating weight to the fact that the defendant earned his G.E.D. while incarcerated because the defendant received a significant benefit for the accomplishment when he was granted credit time for earning that degree). As a result, Fowler does not prevail on these claims.

III. Appropriate Sentence

Finally, Fowler contends that the sentence was inappropriate in light of the nature of the offenses and his character. Thus, Fowler maintains that the trial court abused its discretion in sentencing him to an aggregate term of thirty years.

In resolving this issue, we note that Indiana Appellate Rule 7(B) provides that this court has the constitutional authority to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is "inappropriate in light of the nature of the offense and the character of the offender." However, sentence review under Appellate Rule 7(B) is very deferential to the trial court's decision, Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003), and we refrain from merely substituting our judgment for that of the trial court. Foster v. State, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

With regard to the nature of the offenses, the record shows that the police officers were attempting to lawfully arrest Fowler on a probation violation when he attempted to shoot himself. When Fowler aimed the gun at the officers, he refused their demands to drop the weapon. Tr. p. 16, 19-20. Although one of the officers tased Fowler, he continued to defy the officers' demands to surrender by attempting to shoot himself and one of the deputies. In our view, the particularly serious nature of Fowler's crime supports the sentence that the trial court imposed. In other words, Fowler's "nature of the offense" argument does not aid his inappropriateness claim.

As for Fowler's character, the evidence shows that he has a lengthy criminal history including convictions for criminal recklessness, criminal mischief, operating a vehicle under the influence, and child molesting. Appellant's App. p. 3-4. Moreover, Fowler was on parole for child molesting when he committed the instant offenses. Id. at 5. Fowler also has

a history of alcohol, marijuana, and cocaine abuse. Id. at 8-9. In light of this evidence, it is apparent that Fowler has not been deterred from criminal conduct by his numerous contacts with the judicial system. Thus, when considering the nature of the offenses and Fowler's character, we cannot conclude that his sentence was inappropriate.

The judgment of the trial court is affirmed.

BAILEY, J., and VAIDIK, J., concur.