ATTORNEY FOR APPELLANT:

J.D. LUX
Lux & Lux, P.A.
Shelbyville, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General Of Indiana

GARY DAMON SECREST
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JASON MIDDLETON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 70A01-0702-CR-92
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE RUSH SUPERIOR COURT
The Honorable David W. Northam, Judge
Cause No. 70D01-0503-FB-72

September 4, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a guilty plea, Jason Middleton appeals his twenty-year sentence, with six years suspended to probation, for dealing methamphetamine, a Class B felony. Middleton raises two issues, which we restate as whether the trial court abused its discretion in sentencing Middleton and whether the twenty-year sentence is inappropriate given the nature of the offense and Middleton's character. Concluding that the trial court acted within its discretion and that the sentence is not inappropriate, we affirm.

Facts and Procedural History

On March 29, 2005, Middleton sold methamphetamine to an undercover police dispatcher in Rush County, Indiana. The State charged Middleton with dealing methamphetamine, a Class B felony; resisting law enforcement, a Class A misdemeanor; possession of chemical reagents with the intent to manufacture methamphetamine, a Class D felony; and with being an habitual substance offender. On January 6, 2006, Middleton entered into a plea agreement under which he agreed to plead guilty to dealing methamphetamine, a Class B felony. In exchange, the State agreed to dismiss the remaining charges. The agreement left sentencing to the discretion of the trial court. On January 24, 2006, the trial court held a guilty plea and sentencing hearing, at which it accepted the plea agreement. After hearing arguments regarding sentencing, the trial court sentenced Middleton to the maximum twenty-year term, with six years suspended to probation. In reaching this decision, the trial court found that Middleton's criminal history and the fact that he was on probation at the time of the offense constituted aggravating circumstances, that

Middleton's acceptance of responsibility constituted a mitigating circumstance, and that the aggravating circumstances outweighed the mitigating circumstance. Middleton now appeals his sentence.

Discussion and Decision

I. Propriety of Middleton's Sentence

Middleton committed his crime on March 29, 2005, before the Indiana general assembly amended our sentencing scheme to replace "presumptive sentences" with "advisory sentences." See Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), trans. denied. Therefore, the "presumptive" scheme applies to Middleton's case. Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007).

A. Standard of Review

Under the former sentencing scheme, if the trial court imposes a sentence in excess of the statutory presumptive sentence, it must identify and explain all significant aggravating and mitigating circumstances and explain its balancing of the circumstances. Rose v. State, 810 N.E.2d 361, 365 (Ind. Ct. App. 2004). We will not modify the trial court's sentence unless it is clear that the trial court's decision was clearly "against the logic and effect of the facts and circumstances before the court." Id. Although the trial court has an obligation to consider all mitigating circumstances identified by a defendant, it is within the trial court's sound discretion whether to find mitigating circumstances. Newsome v. State, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003), trans. denied. We will not remand for reconsideration of alleged mitigating factors that have debatable nature, weight, and significance. Id. The trial court need not give a mitigating factor the same weight as would the defendant. Smallwood

v. State, 773 N.E.2d 259, 263 (Ind. 2002).

B. Finding and Weighing of the Aggravating and Mitigating Circumstances[1]

Middleton does not argue that the aggravating circumstances found by the trial court are improper. Both a defendant's criminal history and the fact that he committed the crime while on probation constitute valid aggravating circumstances. See Ind. Code §§ 35-38-1-7.1(a)(2) (trial court may consider defendant's history of criminal behavior), (6) (trial court may consider that defendant has recently violated a term of probation). However, he argues that the trial court afforded too much weight to his criminal history.

In regard to a defendant's criminal history, our supreme court has explained that the weight given to a defendant's criminal history "is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability." Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006). Previous drug-related convictions carry substantial aggravating weight when sentencing a defendant for a drug-related crime. See Baysinger v. State, 854 N.E.2d 1211, 1215-16 (Ind. Ct. App. 2006), trans. denied, abrogated on other grounds, Gutermuth, 868 N.E.2d 427 (criminal history of single

[1] In his brief, Middleton points out that he sold drugs to an undercover agent of the State and argues: "Middleton does not allege he was 'entrapped,' but the Court should have used this information in its weighing of appropriateness of sentencing Middleton." Appellant's Brief at 10. As Middleton concedes that he is not arguing that he was entrapped, it is difficult to see what he is arguing the trial court should have considered. In any regard, to the extent that the circumstances surrounding Middleton's act of selling methamphetamine could have resembled entrapment, Middleton did not raise this issue at sentencing. Therefore, the trial court cannot be said to have abused its discretion in failing to find this purported mitigating circumstance. See Creekmore v. State, 853 N.E.2d 523, 530 (Ind. Ct. App. 2006), clarified on reh'g, 858 N.E.2d 230 (holding that when a defendant does not submit a mitigating circumstance at the

conviction for possession of marijuana was considered significant aggravating factor in sentencing defendant convicted of a murder that stemmed from a drug-related dispute); cf. Winbush v. State, 776 N.E.2d 1219, 1227 (Ind. Ct. App. 2002), trans. denied (concluding that defendant's enhanced sentences for dealing cocaine and possession of cocaine were not manifestly unreasonable based on defendant's criminal history consisting of two substance-related convictions within the previous four years). Here, Middleton has three previous convictions for possession of marijuana, all Class A misdemeanors. Although Middleton's previous three convictions were all misdemeanor offenses, all three involve an illegal substance and occurred in relatively close proximity to the instant offense. Therefore, Middleton's criminal history constitutes an aggravating circumstance entitled to substantial weight.

The trial court also found as an aggravating circumstance the fact that Middleton was on probation when he committed the instant offense. Middleton has made no argument regarding this factor on appeal. The fact that a defendant committed a crime while on probation is a factor distinct from the defendant's criminal history. See Barber v. State, 863 N.E.2d 1199, 1207-08 (Ind. Ct. App. 2007), trans. denied. "Probation further aggravates a subsequent crime because the defendant was still serving a court-imposed sentence [at the time he committed the instant offense.]" Ryle v. State, 842 N.E.2d 320, 325 n.5 (Ind. 2005), cert. denied, 127 S.Ct. 90 (2006). This aggravating factor is considered significant and can support enhanced sentences standing alone. See Barber, 863 N.E.2d at 1208 (holding that

---

sentencing hearing, "this court will presume that the factor is not significant, and the defendant is precluded

even if the other aggravating circumstance was insignificant, trial court would have acted within its discretion in ordering maximum sentences based on the fact that the defendant committed the crime while on probation); but see Prickett v. State, 856 N.E.2d 1203, 1209 (Ind. 2006) (where defendant had an insignificant criminal history, and weak evidence supported trial court's finding that defendant used force to commit his crime, defendant's probationary status did not support a ten-year sentence enhancement). Here, Middleton sold methamphetamine while on probation for another substance offense, possession of marijuana. Under these circumstances, Middleton's probationary status clearly constitutes a significant and weighty aggravating circumstance.

Middleton argues that the trial court abused its discretion in failing to give any weight to his guilty plea. Initially, we note that the trial court found as a mitigating circumstance that Middleton had "accepted responsibility for his actions." Appellant's Appendix at 5. Although the trial court did not specifically mention the fact that Middleton had pled guilty as a mitigating circumstance, part of the reason that a guilty plea is considered a mitigating factor is that "a guilty plea demonstrates acceptance of responsibility for a crime." Felder v. State, 870 N.E.2d 554, 558 (Ind. Ct. App. 2007). Indeed, if a defendant does not demonstrate acceptance of responsibility, a guilty plea may not be considered a significant mitigating circumstance. See McElroy v. State, 865 N.E.2d 584, 591 (Ind. 2007). As the trial court's sentencing order recognizes that Middleton had pled guilty,[2] we interpret the trial court's

---

from advancing it as a mitigating circumstance for the first time on appeal").

[2] The trial court's order begins: "Comes now the Court on the Defendant's plea of guilty . . . ." Appellant's App. at 5.

order to have encompassed Middleton's guilty plea in the mitigating circumstance of acceptance of responsibility.

Even if the trial court's mitigating circumstance did not encompass Middleton's guilty plea, we conclude that the trial court would have acted within its discretion in declining to find that the plea constituted a significant mitigating circumstance. Our supreme court has held 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). However, a guilty plea is not inherently considered a significant mitigating circumstance. Id. at 238 n.3; Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999). When a defendant has already received a benefit in exchange for the guilty plea, the weight of a defendant's guilty plea is reduced. See Sensback, 720 N.E.2d at 1165. The plea will also be considered less significant if there was substantial admissible evidence of the defendant's guilt. Scott v. State, 840 N.E.2d 376, 383 (Ind. Ct. App. 2006), trans. denied.

Here, the State dropped a felony charge, a misdemeanor charge, and an habitual substance offender enhancement in exchange for the plea. Because Middleton received a substantial benefit in return for his guilty plea, the significance of this mitigating circumstance is reduced. See Fields v. State, 852 N.E.2d 1030, 1034 (Ind. Ct. App. 2006), trans. denied. Also, there appears to be substantial evidence of Middleton's guilt, as he sold methamphetamine directly to a police dispatcher. Based on the evidence against him and the benefit he received in exchange for the plea, the trial court could have viewed Middleton's plea as a pragmatic decision and would have acted within its discretion in determining that

the plea was not a significant mitigating circumstance. See Wells v. State, 836 N.E.2d 475, 479-80 (Ind. Ct. App. 2005), trans. denied (where State dismissed a charge and substantial evidence existed of defendant's guilt, trial court acted within its discretion in declining to give guilty plea significant weight).

The trial court found two valid and substantially weighty aggravating circumstances and a single mitigating circumstance. We cannot say that the trial court abused its discretion in finding that the aggravating circumstances outweighed the mitigating circumstance and in sentencing Middleton to twenty years.

II. Indiana Appellate Rule 7(B)

A. Standard of Review

When reviewing a sentence imposed by the trial court, we "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." Ind. Appellate Rule 7(B). We have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). When determining whether a sentence is inappropriate, we recognize that the presumptive sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). We must examine both the nature of the offense and the defendant's character. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied.

B. Appropriateness of Middleton's Sentence

We recognize that the trial court sentenced Middleton to the maximum sentence,[3] and that maximum sentences should generally be reserved for the worst offenses and offenders. See Bacher v. State, 686 N.E.2d 791, 802 (Ind. 1997). However, as we have explained,

> If we were to take this language literally, we would reserve the maximum punishment for only the single most heinous offense. . . . We should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character.

Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), trans. denied.

In regard to the nature of the offense, the record contains few details about the offense. In short, nothing in the record distinguishes Middleton's transgression from the garden-variety act of dealing methamphetamine.

In regard to Middleton's character, as discussed above, Middleton has three previous substance-related offenses, all possession of marijuana, committed within three years and one month of the instant offense. The similar and recent nature of these offenses comments negatively on Middleton's character as it relates to his respect for this State's drug laws. Additionally, Middleton was on probation at the time of the instant offense. This probationary status indicates Middleton's lack of respect for the justice system in general. Although Middleton did plead guilty, thereby demonstrating that he is taking responsibility for his actions, the fact that he received a substantial benefit in return for his plea reduces the extent to which the plea comments positively upon his character. See Fields, 852 N.E.2d at

---

[3] We note that the trial court did not require Middleton to execute the maximum sentence, as it suspended six years of the sentence to probation.

1034 (noting that the defendant "received a significant benefit from the plea, and therefore it does not reflect as favorably upon his character as it might otherwise"). Although we recognize that the twenty-year sentence, with six years suspended, is indeed a harsh punishment, we conclude that the sentence is not inappropriate given Middleton's character as evidenced by his criminal history and failure to take advantage of alternative forms of punishment. See Ashba v. State, 816 N.E.2d 862, 867-68 (Ind. Ct. App. 2004) (maximum sentence for OWI was not inappropriate, because defendant's previous alcohol-related convictions and fact that defendant committed immediate offense while on probation indicated that "with respect to alcohol-related crimes, [defendant] is among the 'worst offenders.'")

Conclusion

We conclude that the trial court did not abuse is discretion in sentencing Middleton and that his sentence is not inappropriate given his character and the nature of the offense.

Affirmed.

VAIDIK, J., and BRADFORD, J., concur.