

Case Summary

Corina Y. Smith (“Smith”) appeals her sentence and ordered restitution for four counts of Arson; two counts as Class B felonies¹ and two counts as Class D felonies.² We affirm.

Issues

Smith raises two issues on appeal, which we restate as follows:

- (1) Whether the trial court abused its discretion in sentencing Smith to a fifteen-year term of imprisonment; and
- (2) Whether the trial court committed fundamental error in ordering her to pay \$341,256 in restitution.

Facts and Procedural History

While employed by CFM U.S. Corporation (“CFM”), Smith set fires “inside the company” on November 11, 2005, March 15, 2006, and two separate fires on March 28, 2006. Transcript at 13. The State charged her with two counts of Arson as Class B felonies, two counts of Arson as Class D felonies, and Criminal Mischief as a Class B misdemeanor.³ On behalf of CFM, Laura Williams filed a Restitution Claim Form, seeking \$341,256 in restitution for various types of damage. Smith moved to plead guilty, admitting that the first two fires each caused “well over \$5,000.00” of damage and that the third and fourth fires caused a total of \$1,974.17 of damage. Appendix at 58. The State agreed to a maximum fifteen-year executed sentence and dismissed the charge of Criminal Mischief.

The trial court accepted the plea agreement. It found four aggravating circumstances: committing multiple acts against the same victim, holding a position of trust as an employee,

¹ Ind. Code § 35-43-1-1(a)(3).

² Ind. Code § 35-43-1-1(d).

causing damages amounting to \$341,256, and being paid by the victim while committing the acts; and two mitigating circumstances: lacking a criminal record and pleading guilty. The trial court found that the aggravating circumstances outweighed the mitigating circumstances, reasoning that Smith gained a benefit from pleading guilty, the damages were great, and Smith committed multiple acts against her employer. Per the plea agreement, the trial court sentenced Smith to fifteen years imprisonment for each of the Class B felonies and two and a half years imprisonment for each of the Class D felonies, all of which were to run concurrently. The trial court suspended five years of the sentence.⁴ Finally, the trial court also ordered Smith to pay \$341,256 in restitution.

Smith now appeals.

Discussion and Decision

I. Sentence

On appeal, Smith argues that the trial court abused its discretion in sentencing her and that her sentence is inappropriate.

A. Abuse of Discretion Standard

On appeal, Smith challenges the trial court's findings of aggravating and mitigating circumstances. The General Assembly enacted a series of amendments to Indiana's sentencing statutes, including the following provision, effective April 25, 2005:

³ Ind. Code § 35-43-1-2.

⁴ The suspension was not referenced in the written Sentencing Order. However, during the sentencing hearing, the trial court stated, "I am going to suspend five years which means you will serve ten years in jail." Transcript at 45. Ten months later, in signing a Probation Order, the trial court noted that five years of the sentences for the Class B felonies had been suspended. Furthermore, the State acknowledged the suspension. Accordingly, the omission in the Sentencing Order appears to have been an oversight.

A court may impose any sentence that is:

- (1) authorized by statute; and
- (2) permissible under the Constitution of the State of Indiana; regardless of the presence or absence of aggravating circumstances or mitigating circumstances.

Ind. Code § 35-38-1-7.1(d) (emphasis added).

“So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion.” Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007). “An abuse of discretion occurs if the decision is ‘clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.’” Id. (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)). When imposing sentence for a felony, the trial court must enter “a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing a particular sentence.” Id. at 491. Its reasons must be supported by the record and must not be improper as a matter of law. Id. However, a trial court’s sentencing order may no longer be challenged as reflecting an improper weighing of sentencing factors. Id. Where a sentence fails to meet the above standards, we may remand for resentencing “if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.” Id.

The trial court found four aggravating circumstances, two of which emphasized Smith’s relationship to CFM: being paid by the victim and holding a position of trust with the victim. The trial court may consider as an aggravating circumstance the defendant’s being “in a position having care, custody, or control of the victim of the offense.” Ind. Code

§ 35-38-1-7.1(a)(8). Smith argues that “there is no evidence as to the relationship between the corporation and [her] other than she was an employee.” Appellant’s Brief at 10. Position of trust has been relevant in several cases involving crimes against children. See, e.g., Estes v. State, 827 N.E.2d 27, 28 (Ind. 2005); Serino v. State, 798 N.E.2d 852, 857 (Ind. 2003). Meanwhile, in Carrico v. State, the defendant murdered another adult with whom he intended to buy drugs. Carrico v. State, 775 N.E.2d 312 (Ind. 2002). On appeal, he argued that the trial court abused its discretion in finding an aggravating circumstance in the fact that he held a position of trust with the victim. Our Supreme Court declined to resolve the issue, concluding that the trial court had not found their relationship to be a separate aggravating factor. Id. at 315. Since that decision, this Court upheld a finding of position of trust as an aggravating circumstance where the defendant used his relationship to gain access to the victim’s home where the crime occurred. Reyes v. State, 828 N.E.2d 420, 424 (Ind. Ct. App. 2005), aff’d in relevant part, vacated in part, 848 N.E.2d 1081, 1083 (Ind. 2006).

There was no evidence that Smith had care or custody of CFM. However, she enjoyed at least some degree of control. As an employee, she had regular access to co-workers, CFM’s factory, and its inventory. While we consider the two aggravating circumstances essentially duplicative, we cannot say that the trial court’s finding that Smith held a position of trust was improper.

The trial court also found that Smith committed multiple acts over the course of almost five months and that the amount of damage, \$341,256, was much greater than the \$5000 threshold for establishing Arson as a Class B felony. These findings were supported

by the record and were not improper as a matter of law.

Smith also argues that the trial court should have found her history of mental illness to be a mitigating circumstance. However, a trial court is not obligated to credit a proffered mitigating circumstance in the manner suggested by a defendant. Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005). At the guilty plea hearing, Smith indicated that after committing the crimes she had been in a mental institution for approximately one week, that she had been in another institution for two days, and that she went to counseling as a child. Further, the pre-sentence investigation report notes that she was taking Prozac at the time of sentencing. However, Smith presented no testimony from any physicians or other experts supporting the assertion that she had a mental illness. We conclude that the trial court did not abuse its discretion in sentencing Smith.

B. Independent Appellate Review

Smith argues that her sentence is inappropriate. Under Indiana Appellate Rule 7(B), this “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.” Ind. Appellate Rule 7(B). “[A] defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.” Anglemyer, 868 N.E.2d at 494 (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)).

Smith set four different fires in as many months, causing collectively more than half a

million dollars in damage⁵ and remedial security measures⁶ implemented while the offender's identity was unknown. The fires endangered Smith's co-workers. As to her character, we note that Smith was victimized sexually by her father and physically by her ex-husband. Also, she spent one week in a mental institution approximately six months after setting the last of the fires. Smith stated at the sentencing hearing that she did not remember setting the fires. However, at some point in the investigation, she signed a statement that read in part, "I don't mean to hurt anybody. I like to watch people run." App. at 24.

If served consecutively, Smith's sentences would have amounted to a thirty-five-year aggregate term of imprisonment. Instead, the trial court ordered the sentences to be served concurrently and suspended five years of the fifteen-year sentence. Based upon our review of the record, the offense, and Smith's character, we are not persuaded that her sentence is inappropriate.

II. Restitution

Smith argues that the trial court committed fundamental error in ordering her to pay \$341,256 in restitution. During the sentencing hearing, the State presented evidence regarding damages. The following exchanged occurred.

Public Defender ("P.D."): Your Honor just for the record, again, we were requesting you to consider doing this at a separate hearing.

Judge: Why?

P.D.: I'll go ahead and go forward today but I don't believe I'm in a position to act with, based on conversations with my client, as to what she

⁵ The total damages amounted to \$554,739.66. However, as CFM received \$213,482.93 in insurance benefits, CFM sought only \$341,256.73 in restitution.

⁶ It appears that the cameras installed by CFM provided significant evidence in the case.

believes or doesn't believe restitution is and I'll be able to cross-examine, but I'll continue forward today.

Judge: With that note let me ask you a question. . . . [D]o you feel that i[f] you had a separate hearing that you could gain more than the [\$213,482.93 or amount paid by insurance] that they aren't even asking for?

P.D.: O.K., your Honor, after talking with her, she's fine with this amount that's been proposed for restitution.

Judge: So the amount that [is] being requested and let me make sure I'm correct is the \$341,256.

Witness: Correct.

Judge: And your client's fine with that Mr. Clifton?

P.D.: (to Smith) Are you fine with that amount as to restitution?

Smith: Yeah.

Judge: So there's no need to have a hearing? Is that correct?

P.D.: That's fine your Honor. There'll be no necessity for the hearing.

Judge: Thank you ma'am.

Tr. at 44-45. Smith stipulated to paying \$341,256 in restitution. Accordingly, she has waived any objection. See Ware v. State, 816 N.E.2d 1167, 1179 (Ind. Ct. App. 2004) (concluding that argument regarding restitution was waived where defendant did not object during sentencing hearing).

Smith acknowledges her waiver, arguing that the restitution order constituted fundamental error because it included damages not authorized by statute.

Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue. It is error that makes "a fair trial impossible or

constitute[s] clearly blatant violations of basic and elementary principles of due process . . . present[ing] an undeniable and substantial potential for harm.”

Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006) (quoting Benson v. State, 762 N.E.2d 748, 756 (Ind. 2002)).

The trial court shall base its restitution order upon, among other things, lost earnings and the actual cost of repairing or replacing property damage. Ind. Code § 35-50-5-3(a); Judge v. State, 659 N.E.2d 608, 613 (Ind. Ct. App. 1995) (upholding restitution order that included cost of upgraded security system). CFM sought restitution for property damage, damaged merchandise, lost wages, and the deductible required for securing insurance benefits. CFM subtracted from its claim the amount actually received from its insurance company. The State presented written descriptions and the testimony of the company’s human resources specialist to support the claim.

Given the evidence presented on the issue of restitution, we do not conclude that the trial court’s order violated basic and elementary principles of due process. The trial court did not commit fundamental error in ordering restitution.

Conclusion

The trial court neither abused its discretion in sentencing Smith nor committed fundamental error in ordering her to pay \$341,256 in restitution. Furthermore, we do not find her sentence to be inappropriate.

Affirmed.

BAKER, C.J., and VAIDIK, J., concur.