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IN THE
COURT OF APPEALS OF INDIANA

JONATHAN SCOTT DERENSKI,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 24A01-0704-CR-154
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FRANKLIN CIRCUIT COURT
The Honorable J. Steven Cox, Judge
Cause Nos. 24C01-0307-FB-361, 24C01-0310-FD-669

September 24, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant, Jonathan Scott Derenski, appeals following his guilty plea and conviction in Cause Number 24C01-0307-FB-361 ("361") for Class B felony Dealing in Methamphetamine,[1] and, in Cause Number 24C01-0310-FD-669 ("669"), for Class A misdemeanor Visiting a Common Nuisance.[2] Derenski was sentenced to an aggregate sentence of sixteen years, with three years suspended to probation. Upon appeal, Derenski challenges the adequacy of the trial court's sentencing statement as well as its weighing of aggravators and mitigators. Derenski further challenges the appropriateness of his sentence. We reverse and remand to the trial court with instructions.

FACTS

The factual basis entered at the time of Derenski's guilty plea in Cause No. 361 indicated that on or about June 7, 2003, in Franklin County, Indiana, Derenski knowingly, unlawfully, or intentionally possessed the intent to manufacture methamphetamine. Additionally, the factual basis entered at the time of Derenski's guilty plea in Cause No. 669 indicated that on or about October 10, 2003, in Franklin County, Indiana, Derenski knowingly, unlawfully, or intentionally visited a building structure that was used one or more times by a person to unlawfully manufacture controlled substances.

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[1] Ind. Code § 35-48-4-1(a)(2)(A) (2003).

[2] Ind. Code §§ 35-48-4-13(b)(2)(A) (2003) and 35-38-1-1.5(a) (2003).

On July 1, 2003, the State charged Derenski under Cause No. 361 with dealing methamphetamine, possession of methamphetamine, possessing an illegal drug laboratory, maintaining a common nuisance, possession of paraphernalia, and improper handling of anhydrous ammonia. On October 28, 2003, the State charged Derenski under Cause No. 669 with possession of an illegal drug laboratory and maintaining a common nuisance. On September 6, 2006, Derenski pled guilty to one count of visiting a common nuisance and one count of dealing in methamphetamine. Derenski and the State had reached no formal plea agreement and sentencing was left to the discretion of the trial court.

Following a November 8, 2006, sentencing hearing, the trial court sentenced Derenski to an aggregate sixteen-year sentence, with three years suspended to probation. On February 15, 2007, Derenski filed a petition for permission to file a belated notice of appeal, which the trial court granted on February 28, 2007. This appeal follows.

DISCUSSION AND DECISION

Adequacy of Sentencing Statement

Derenski first claims that the trial court's sentencing statement was inadequate. In making this argument, Derenski contends that the trial court failed to adequately justify its imposition of the enhanced and consecutive sentences, and further, that it failed to properly weigh the aggravating and mitigating factors. We observe that Derenski's

challenge is to a sentence imposed under the "presumptive" sentencing scheme, which permits review of the trail court's weighing of aggravators and mitigators.[3]

In Indiana, sentencing decisions generally lie within the discretion of the trial court, and we only review sentencing decisions for abuse of discretion. *Jackson v. State*, 728 N.E.2d 147, 154 (Ind. 2000). The trial court's discretion includes the ability to determine whether the presumptive sentence for a crime will be increased or decreased because of aggravating or mitigating circumstances, and whether sentences on different counts will be served concurrently or consecutively. *Archer v. State*, 689 N.E.2d 678, 683 (Ind. 1997).

When the trial court imposes a sentence other than the presumptive sentence, or imposes consecutive sentences, the sentencing court must reveal its rationale for doing so, and we will examine the record to ensure that the court explained its reasons for selecting the sentence it imposed. *Archer*, 689 N.E.2d at 683; *Morgan v. State*, 675 N.E.2d 1067, 1073 (Ind. 1996). The trial court's statement of reasons must include the following three elements: (1) identification of all significant mitigating and aggravating circumstances found; (2) specific facts and reasons which lead the court to find the existence of each such circumstance; and (3) articulation demonstrating that the mitigating and aggravating circumstances have been evaluated and balanced in determination of the sentence. *Archer*, 689 N.E.2d at 683; *see also*, *Ruiz v. State*, 818

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[3] The amended version of Indiana Code section 35-50-2-5 (2007) references the "advisory" sentence, reflecting the April 25, 2005 changes made to the Indiana sentencing statutes. Since Derenski committed the crimes in question in 2003, before the effective date of the amendments, we apply the version of the statutes then in effect and refer instead to the presumptive sentence. *See* Ind. Code §§ 35-50-2-5 (2003).

N.E.2d 927, 928 (Ind. 2004); *Bacher v. State*, 722 N.E.2d 799, 801 (Ind. 2000). The requirement for such specificity in sentencing statements serves as a guard against arbitrary sentences and also provides an adequate basis for appellate review. *Anglemyer v. State*, 868 N.E.2d 482, 489 (Ind. 2007); *Bacher*, 722 N.E.2d at 801. Where, upon review, we find an irregularity in the trial court's sentencing decision, "we have the option to remand to the trial court for a clarification or new sentencing determination, to affirm the sentence if the error is harmless, or to reweigh the proper aggravating and mitigating circumstances independently at the appellate level." *Merlington v. State*, 814 N.E.2d 269, 273 (Ind. 2004).

At sentencing, Derenski proffered mitigating factors, including his plea, his remorse, and his alleged law-abiding lifestyle. Derenski stated that he had successfully stayed out of trouble since the initial 2003 arrests, and also claimed that he no longer abused methamphetamine. The trial court then issued the following sentencing statement upon imposing Derenski's sentencing:

> [W]e are left with the B Felony, which the – the Court is here today to sentence on, once the Motion to Dismiss was granted, and it was granted, because by statute it has to be. So on the B Felony, in FB-361, the Court will sentence the Defendant to fifteen (15) years with the Department of Correction, citing again to the Pre-Sentence Investigation Report. Its clear on – on what the prior use and history has been. The prior records, criminal history. And of those fifteen (15) years, we'll suspend three (3) of those to probation and assess a five hundred dollar ($500.00) fine, one fifty-nine ($159.00) court costs, five hundred dollar ($500.00) countermeasure fee, one hundred dollar ($100.00) initial user fee, one hundred dollar ($100.00) administrative fee, fifteen dollar ($15.00) monthly fee. We'll order that Mr. Derenski comply within a – or enroll in, or be evaluated for any kind of substance abuse, and that he comply with any other recommendations that come out of that evaluation for rehabilitation. In FD-669, which again is A misdemeanor … Visiting a Common Nuisance, as A misdemeanor, the

> Court will sentence Mr. Derenski to one (1) year in the Franklin County Security Center, uh, con – consecutive fines, costs and fees, un, to be concurrent.

Sentencing Tr. at 38-39.

Derenski argues that the sentencing statement issued by the trial court does not adequately state the reasons for imposing Derenski's enhanced and consecutive sentences. We agree. The trial court's sentencing statement failed to specifically identify any significant aggravating or mitigating circumstances it considered when imposing the aggravated and consecutive sentences, although it did allude to Derenski's "criminal history" and "prior use" as aggravating circumstances that support the imposition of the sentence. The trial court failed to expand upon the specific facts and/or reasons why it found Derenski's relatively minor criminal history, which includes one fifteen-year-old driving-while-intoxicated charge from Ohio and one "pay-out ticket[4]" for marijuana possession from Ohio, dating back to sometime in the 1990s, to be an aggravating factor in support of his aggravated and consecutive sentences.

Indiana precedent suggests that such minor far-removed offenses do not merit great aggravating weight. In *Ruiz v. State*, 818 N.E.2d 927, 929 (Ind. 2004), the Indiana

[4] Under Ohio law, possession of less than 100 grams of marijuana is a minor misdemeanor, meaning that police officers can only issue the possessor a $150.00 citation or a "pay-out ticket." Ohio Rev. Code § 2925.11(C)(3)(a) (2007) (the law was changed in 2004 to enhance the fine to $150.00, prior to January 1, 2004, the maximum fine that could be imposed on minor misdemeanors was $100.00). Also, it is not clear whether or not a minor misdemeanor even constitutes a criminal offense under Ohio law. The Ohio Revised Code includes many violations which constitute minor misdemeanors under state law. Some of these violations include, but are not limited to, violations of regulations pertaining to the size and placement of drive-in theater screens, storage of junk motor vehicles, engine noise and vehicle parking, and hours and access to cemeteries. *See* Ohio Rev. Code §§ 505.171, 505.173, 505.12, 505.17. Therefore, we discount any weight that Derenski's "pay-out ticket" may have as a part of his alleged criminal history. As a result, we will only consider Derenski's admitted fifteen-year-old driving-while-intoxicated charge when considering the aggravating weight of his criminal history.

Supreme Court concluded that "convictions for alcohol-related offenses are at best marginally significant as aggravating circumstances in considering a sentence for a Class B felony" and also that "[s]ignificance varies based on the gravity, nature and number of prior offenses as they relate to the current offense." The *Ruiz* court also concluded that "Ruiz's criminal history of alcohol-related misdemeanors is not a significant aggravator in relation to a Class B felony. Although alcohol was involved in these offenses and also in the current crime [child molestation], the latter is manifestly different in nature and gravity from the misdemeanors." *Id*. Likewise, in *Bacher v. State*, 722 N.E.2d 799, 804 (Ind. 2000), the Indiana Supreme Court concluded that "[a] sentencing court may consider as a mitigating circumstance that the defendant has no history of delinquency or criminal activity or the person has led a law-abiding life for a substantial period before the commission of the crime." The Indiana Supreme Court's conclusions in *Ruiz* and *Bacher* lead us to the conclusion that, in order to serve as a significant aggravator, prior criminal history should in some way relate to the crime at hand and not be far removed and noticeably less egregious than the instant crime. Here, Derenski's alleged criminal history consists of a minor, far-removed offense, for which we have no records. We therefore conclude that it does not merit the great aggravating weight it received in this case.

Likewise, the trial court failed to expand upon the specific facts and reasons which supported its finding of Derenski's "prior use"[5] to be a significant aggravating factor. The trial court did not discuss Derenski's prior drug use in the sentencing statement, but rather incorporated the PSI, in which Derenski admitted to using marijuana on a regular basis when he was sixteen years old and also admitted that he continued to use marijuana until becoming addicted to methamphetamine. Under Indiana law, a history of substance abuse may sometimes be found to be an aggravating factor by trial courts when making sentencing determinations. *See generally*, *Iddings v. State*, 772 N.E.2d 1006, 1018 (Ind. Ct. App. 2002). However, after reviewing the record in the instant case, we conclude that Derenski's admission to a history of marijuana use, in and of itself, similarly does not merit significant aggravating weight.

Further, the trial court's sentencing statement failed to mention any of the mitigating factors offered by Derenski at the sentencing hearing. Although a sentencing court must consider all evidence of mitigating circumstances offered by the defendant, the finding of a mitigating factor rests within the court's discretion. *Bacher*, 722 N.E.2d at 804. The sentencing court is not required to credit or weigh a possible mitigating circumstance as a defendant suggests it should be credited or weighted. *Archer*, 689 N.E.2d at 684. A sentencing court need not list all mitigating circumstances in its sentencing report, just those it considers significant. *See*, *Bacher*, 722 N.E.2d at 801 (sentencing statement must identify all *significant* aggravating and mitigating factors

[5] Even though the trial court fails to clarify what it means by the term "prior use," our review of the record suggests that the court is referring to Derenski's prior drug use as outlined in the PSI.

(emphasis added)). However, failure to mention any proffered mitigators can suggest that the trial court overlooked these mitigating factors when imposing the sentence. *See Gillem v. State*, 829 N.E.2d 598, 604 (Ind. Ct. App. 2005).

Derenski claims that the trial court failed to consider his proffered mitigators, which include: (1) his relatively minor criminal history and the fact that he led a law-abiding life until the age of forty and has managed to keep himself out of trouble in the three years since the initial arrests; (2) that he is remorseful for his actions; and (3) that he pled guilty. With respect to Derenski's claim to leading a law-abiding life, considering Derenski's criminal history and his admitted use of marijuana and methamphetamine, we are not convinced that this is a mitigating factor in the instant case. Additionally, while the record supports a finding that Derenski was remorseful for his actions, the trial court did not assign it significant mitigating weight and we are not convinced it merits more than minimal mitigating weight. *See*, *Corralez v. State*, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004) (noting that the trial court is in the best position to judge remorse). Lastly, while we acknowledge that Derenski took responsibility for his actions and pled guilty, we do not consider this factor of significant mitigating weight because Derenski benefited by the dismissal of additional charges in exchange for his guilty plea. *See, Ruiz*, 818 N.E.2d at 929 (trial court free to conclude that guilty plea was not entitled to great mitigating weight).

Upon considering the aggravating and mitigating circumstances advanced by the parties, we conclude that the minimal aggravating weight of Derenski's criminal history and prior drug use is offset by the minimal mitigating weight assigned to Derenski's

remorse and plea. Because these aggravating and mitigating circumstances stand in equipoise, the presumptive ten-year sentence should apply. Having found no significant aggravating circumstances, we further conclude that the sentences should be served concurrently. We therefore reduce Derenski's sentence for Cause No. 361 and impose the presumptive sentence of ten years to be served in the Department of Correction. Additionally, having found no aggravating circumstance to justify the imposition of consecutive sentences, we conclude that the one-year sentence imposed in Cause No. 669 should be served concurrent with the sentence imposed above. Further, upon a review of Derenski's character and the nature of his offense, as reflected by the above considerations, we are convinced that a ten-year aggregate sentence is appropriate. We remand to the trial court to impose such sentence.

The judgment of the trial court is reversed, and the cause is remanded with instructions.

NAJAM, J., and MATHIAS, J., concur.