



## STATEMENT OF THE CASE

Appellant-Defendant, David Rosenthal (Rosenthal), appeals his sentence for robbery, as a Class C felony, Ind. Code § 35-42-5-1.

We affirm.

## ISSUE

Rosenthal presents the following issue for our review: Whether the trial court properly sentenced him.

## FACTS AND PROCEDURAL HISTORY

On June 28, 2005, Rosenthal and his niece entered a Pay Day Loan store located on Post Road, Indianapolis, Indiana. They requested a loan application, sat down as if to fill it out, and then returned to the store counter. Rosenthal's niece demanded that the store's manager give them the money in the store's register. The manager complied. Rosenthal then told the manager to lie down on the floor or go to the back of the store. The manager refused, and then pressed the store's security button. Rosenthal and his niece fled, taking with them approximately four hundred dollars.

On August 11, 2005, the State filed an Information charging Rosenthal with: Count I, robbery, as a Class B felony, I.C. § 35-42-5-1; Count II, theft, a Class D felony, I.C. § 35-43-4-2; and Count III, carrying a handgun without a license, a Class A misdemeanor, I.C. § 35-47-2-1. On April 4, 2006, the State filed a Motion to Amend the Information and changed Count I, robbery, as a Class B felony to robbery, as a Class C felony, I.C. § 35-42-5-1.

On January 22, 2007, a jury trial was held and Rosenthal was found guilty of Count I, robbery, as a Class C felony, and Count II, theft as a Class D felony. For sentencing purposes, the trial court merged the theft conviction into the robbery conviction. On January 31, 2007, the trial court held a sentencing hearing and found the facts that Rosenthal had taken steps towards his own rehabilitation and that long term imprisonment would cause a hardship on his dependant child to be mitigating circumstances. The trial court found two aggravating circumstances as well: (1) Rosenthal had two prior felony convictions, both for theft; and (2) Rosenthal's probation had been previously revoked. The trial court determined that, considering the mitigating and aggravating circumstances, the advisory sentence of four years was appropriate.

Rosenthal now appeals. Additional facts will be provided as necessary.

### DISCUSSION AND DECISION

Rosenthal argues that he was improperly sentenced. Specifically, he contends that the trial court failed to recognize mitigating circumstances supported by the evidence, and his sentence is inappropriate in light of his character and the nature of the offense.

#### *I. Standard of Review*

Our supreme court has clarified a defendant's right to appellate review of a trial court's sentencing decision by stating, "[s]o 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 we find the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Payne v. State*,

854 N.E.2d 7,13 (Ind. Ct. App. 2006). The trial court no longer has any obligation to weigh aggravating and mitigating factors, and therefore cannot be said to have abused its discretion in failing to properly weigh those factors. I.C. § 35-38-1-7.1(d); *see also Anglemeyer*, 868 N.E.2d at 491.

However, if the trial court includes a finding of aggravating or mitigating circumstances in its recitation of its reasons for imposing a particular sentence, then a sentencing statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be aggravating or mitigating. *Anglemeyer*, 868 N.E.2d at 490. One way in which a trial court may abuse its sentencing discretion is by omitting in its sentencing statement reasons for a sentence that are clearly supported by the record and advanced for consideration. *Id.* at 490-491.

We also have the authority to review the appropriateness of a sentence authorized by statute through Ind. Appellate Rule 7(B). That rule permits us 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. *Anglemeyer*, 868 N.E.2d at 491. Our supreme court has encouraged us to critically investigate sentencing decisions. *See, e.g. Walker v. State*, 747 N.E.2d 536, 538 (Ind. 2001). The purpose of the express authority to review and revise sentences is to ensure that justice is done in Indiana courts and to provide unity and coherence in judicial application of the laws. *Pruitt v. State*, 834 N.E.2d 90, 121 (Ind. 2005).

## II. *Abuse of Discretion*

Rosenthal argues that because he personally testified that he was remorseful, previously had been depressed and had a drug problem, the trial court abused its discretion by omitting those facts as mitigating circumstances. We disagree.

Although Rosenthal stated that he was “very humiliated and even embarrassed to be here in this position,” and blamed “nothing but myself for this,” we note that remorse, or lack thereof, by a defendant often is something that is better gauged by a trial judge who views and hears a defendant’s apology and demeanor first hand and determines the defendant’s credibility. (Transcript p. 126); *Gibson v. State*, 856 N.E.2d 142, 148 (Ind. Ct. App. 2006). As the State argues, what Rosenthal characterizes as a statement of remorse could be interpreted as a statement of embarrassment for being convicted and having been incarcerated. Rosenthal did not plead guilty, an action which we have explained demonstrates a defendant’s acceptance of responsibility for the crime. *Gibson*, 856 N.E.2d at 148. Neither has Rosenthal expressed a desire to provide restitution for his crime, another action that could show Rosenthal was motivated by a sense of remorse. Therefore, we cannot say the trial court abused its discretion by not finding Rosenthal’s remorse to be a mitigating circumstance.

Additionally, Rosenthal personally stated when being interviewed for the Pre-Sentence Investigation Report, that he had previously suffered from depression after the death of his three sisters and during his divorce. However, Rosenthal further explained his mental health to be good, and that he was not in need of any sort of mental health evaluation

or treatment. During the sentencing hearing, Rosenthal gave a thorough statement to the trial court and did not mention any possible relationship between his crime and depression, but thereafter, his trial counsel suggested that his depression is probably what led to his drug problem. We find that any connection between the robbery and his depression would be mere speculation, and therefore cannot say that the trial court abused its discretion in not finding his depression to be a mitigating circumstance.

Further, even though Rosenthal expressed that his drug abuse caused him to make a lot of bad decisions, his trial counsel explained that he was not trying to use his drug abuse as an “excuse,” but it was just some sort of explanation for what he did. (Tr. p. 134). Moreover, we have repeatedly found that a trial court’s failure to find a defendant’s drug addiction as mitigating is not an error. *See Rose v. State*, 810 N.E.2d 361, 366 (Ind. Ct. App. 2004) (citing *Iddings v. State*, 772 N.E.2d 1006, 1008 (Ind. Ct. App. 2002)). Thus, we cannot conclude the trial court abused its discretion for not finding Rosenthal’s drug abuse as a mitigating circumstance.

### III. *Propriety of Rosenthal’s Sentence*

Addressing the nature of the offense aspect of our App. R. 7(B) review, Rosenthal argues that since it was his niece that demanded the money instead of himself, the duration of the crime was short, and neither Rosenthal or his niece hit, hurt or used a weapon during the robbery, his four-year sentence is inappropriate. We disagree.

First, we note, although it was his niece who demanded the money, according to applicable accomplice liability law, Rosenthal is criminally liable for everything that his

niece did while robbing the Pay Day Loan store. *See Harden v. State*, 441 N.E.2d 215 (Ind. 1982) (holding the acts of an accomplice are imputed to all others and an accomplice is criminally liable for everything done by his confederates which was a probable and natural consequence of their common plan). Further, although no one was hit or hurt during the robbery, and a weapon was not used, Rosenthal was convicted of robbery as a Class C felony, which is distinguished from higher Class robbery felonies specifically because no bodily injury occurred during the robbery, nor was the defendant armed with a deadly weapon. *See* I.C. § 35-42-5-1. Finally, although the robbery did not involve a lengthy series of events, Rosenthal and his co-perpetrator made off with approximately four hundred dollars. When reviewing the nature of the offense, we conclude that the trial court's imposition of the advisory sentence was not inappropriate in this case.

In addressing the character of the offender aspect of our 7(B) review, Rosenthal argues that “the offense was unremarkable and revealed nothing heinous about his character.” (Appellant’s Br. p. 6). We disagree.

Despite Rosenthal’s contention, we find that our character of the offender analysis is not limited to an analysis of the specific crime before us. One way in which our supreme court has determined the character of the offender is by analysis of the offender’s prior criminal history. *See Weiss v. State*, 848 N.E.2d 1070, 1072-1073 (Ind. 2006). In doing so here, we find that Rosenthal’s prior felony convictions for theft are telling of his character. Therefore, we conclude that the trial court’s imposition of the advisory sentence was not inappropriate when considering Rosenthal’s character.

## CONCLUSION

For the foregoing reasons, we conclude that trial court did not abuse its discretion when sentencing Rosenthal, and his sentence of four years is not inappropriate when the nature of the offense and his character are considered.

Affirmed.

SHARPNACK, J., and FRIEDLANDER, J., concur.