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IN THE
COURT OF APPEALS OF INDIANA

EVERETT L. CLAIR III, Appellant-Defendant, vs. STATE OF INDIANA, Appellee-Plaintiff.	)))))))))	No. 03A01-0706-CR-261

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Roderick D. McGillivray, Judge
Cause No. 03D02-0603-FD-492

October 23, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Everett Clair, III, appeals his sentence for his conviction for Operating a Vehicle While Intoxicated, as a Class D felony, following a bench trial. He presents a single issue for our review, namely, whether the trial court abused its discretion when it sentenced him.

We affirm.

FACTS AND PROCEDURAL HISTORY

On March 26, 2006, an officer with the Columbus Police Department arrested Clair after he failed three field sobriety tests and registered a BAC of .16. The State charged Clair with operating a vehicle while intoxicated ("OVWI"), as a Class D felony, and operating a vehicle with an alcohol concentration equivalent of .08 or more, as a Class D felony. The OVWI charge was enhanced to a Class D felony based upon Clair's conviction for OVWI in 2005. See Ind. Code § 9-30-5-3. Following a bench trial, the trial court found him guilty on both counts.

At sentencing, the trial court identified the following aggravators: his two prior OVWI convictions; the likelihood that the crime would reoccur; and that he was on probation at the time of the instant offense. The trial court found no mitigators and sentenced Clair to two years, with eighteen months suspended to probation.[1] This appeal ensued.

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[1] Under Indiana Code Section 35-50-2-2, because this was Clair's third such conviction, six months of his sentence is non-suspendible.

DISCUSSION AND DECISION

Clair's offense was committed after the April 25, 2005, revisions to Indiana's sentencing scheme. Under this new scheme, "the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007). We review the sentence for an abuse of discretion. Id. An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Id.

A trial court abuses its discretion if it (1) fails "to enter a sentencing statement at all[,]" (2) enters "a sentencing statement that explains reasons for imposing a sentence--including a finding of aggravating and mitigating factors if any--but the record does not support the reasons," (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration," or (4) considers reasons that "are improper as a matter of law." Id. at 490-91. If the trial court has abused its discretion, we will 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. at 491. However, under the new statutory scheme, the relative weight or value assignable to reasons properly found, or to those which should have been found, is not subject to review for abuse of discretion.[2] Id.

Clair first contends that the trial court erred when it identified his criminal history as an aggravator. In particular, he asserts that his two prior OVWI convictions cannot be

[2] Although Clair asks this court to revise his sentence to one we deem "appropriate in light of the nature of this offense and Mr. Clair's character," he does not cite to Indiana Appellate Rule 7(B). Nor does he develop any independent argument based on that rule. Consequently, we will not review Clair's sentence for appropriateness.

used both to enhance his conviction from a misdemeanor to a Class D felony and as an aggravator at sentencing. In support of that contention, Clair cites to Davis v. State, 851 N.E.2d 1264 (Ind. Ct. App. 2006), trans. denied. In Davis, we held that the defendant's prior OVWI conviction could not be both the basis for enhancing the offense to a Class D felony and the stated basis for the trial court's finding as an aggravator that "there was a risk that Davis would offend again." 851 N.E.2d at 1267. We held that that was an "improper double enhancement based on Davis's prior conviction." Id.

Here, however, Clair admitted to two prior OVWI convictions, one in 2005 and one in 2000. So, even though the 2005 conviction was improperly used to enhance Clair's conviction to a Class D felony, the 2000 conviction was not, and it is, therefore, a valid aggravator. And while both prior convictions rendered six months of Clair's sentence non-suspendible, we reject his contention that the mandatory executed sentence results in a double enhancement. Indeed, Clair does not cite to any authority in support of that contention. We do not find Davis dispositive of the issue. See Pedraza v. State, 2007 WL 2754045, slip op. at *10 n.4 (Ind. Ct. App. September 24, 2007) (distinguishing Davis because Davis had a single previous conviction and Pedraza had two previous convictions, and because Davis was decided under the old sentencing scheme).

Clair also contends that the trial court's finding as an aggravator that the crime would reoccur is invalid. In particular, citing Neff v. State, 849 N.E.2d 556, 560 (Ind. 2006), he contends that that aggravator cannot stand as a separate aggravator "when the factual basis that supports the conclusion also serves as an aggravator." But that holding in Neff is based on a defendant's rights under Blakely v. Washington, 542 U.S. 296

(2004). Because Clair was sentenced under the advisory sentencing scheme, Blakely is not implicated here, and the holding in Neff does not apply. Clair's contention on this issue must fail.[3] The trial court was justified in finding this aggravator given Clair's admission that he was still drinking alcohol at the time of sentencing, that he was on probation at the time of the instant offense, and that he did not report the instant offense to his probation officer.

Even without considering the 2005 OVWI conviction, the existence of the 2000 OVWI conviction is, by itself, a valid aggravator. But Clair also admitted that he was on probation at the time of the instant offense, which "'stands on its own'" as a "significant aggravator." Barber v. State, 863 N.E.2d 1199, 1208 (Ind. Ct. App. 2007), trans. denied. We hold that those two aggravators are sufficient to support Clair's sentence.

Still, Clair contends that the trial court should have found two mitigating circumstances, namely: that "the crime neither caused nor threatened serious harm to persons or property, or the person did not contemplate that it would do so;" and that his incarceration will result in undue hardship to his parents. It is well settled that the finding of mitigating circumstances is within the discretion of the trial court. Hackett v. State, 716 N.E.2d 1273, 1277 (Ind. 1999). The trial court is not obligated to explain why it did not find a factor to be significantly mitigating. Chambliss v. State, 746 N.E.2d 73, 78 (Ind. 2001). An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and

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[3] Clair does not make any other argument to support his contention that that is an invalid aggravator.

clearly supported by the record. Matshazi v. State, 804 N.E.2d 1232, 1239 (Ind. Ct. App. 2004), trans. denied.

In support of the first proffered mitigator, Clair argues that when he was arrested, he had parked his car and "had not committed any illegal driving offenses or infractions." Brief of Appellant at 12. We are not persuaded by this "no harm, no foul" argument. Operating a vehicle while intoxicated is, in itself, unlawful and inherently dangerous. The trial court did not abuse its discretion when it did not identify this proffered mitigator.

In support of the second proffered mitigator, Clair asserts that he "provide[s] assistance to his aging parents" and will "lose his job" if he is incarcerated for a long period of time. Id. But the evidence regarding Clair's support of his parents is scant. Clair testified only that his mother is in ill health and that he helps his father with yard work. Clair has not demonstrated that this proffered mitigator is both significant and clearly supported by the record. The trial court did not abuse its discretion when it did not identify this mitigator.

When a court has relied on valid and invalid aggravators the standard of review is whether we can say with confidence that, after balancing the valid aggravators and mitigators, the sentence enhancement should be affirmed. See, e.g., Trusley v. State, 829 N.E.2d 923, 927 (Ind. 2005). Again, the trial court did not abuse its discretion when it did not identify any mitigators. When we exclude from consideration the invalid aggravator of the 2005 OVWI conviction, and we consider the valid aggravators of the 2000 OVWI conviction, the risk that the crime will reoccur, and that Clair was on

probation at the time of the instant offense, we can say with confidence that the trial court would have imposed the same sentence even without the improper aggravator.

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.