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IN THE
COURT OF APPEALS OF INDIANA

CHARMIN WILSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A05-0703-CR-168
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0508-FA-27

December 3, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a guilty plea, Charmin Wilson appeals her sentence for dealing in cocaine, a Class A felony. On appeal, Wilson raises one issue, which we restate as whether her sentence of thirty years, with twenty-five years executed and five suspended, is inappropriate based on the nature of the offense and her character. Concluding that Wilson's sentence is not inappropriate, we affirm.

Facts and Procedural History

On three occasions in July and August 2005, Wilson sold cocaine to a confidential police informant. Based on these sales, police officers from the Tippecanoe County Drug Task Force obtained and executed a warrant to search Wilson's residence. The officers' search resulted in the seizure of drugs, drug paraphernalia, and money, as well as the arrest of Wilson and four others.

The State charged Wilson with four counts of dealing in cocaine, all Class A felonies; conspiracy to deal in cocaine, a Class A felony; three counts of possession of cocaine, one as a Class A felony and two as Class B felonies; maintaining a common nuisance, a Class D felony; and possession of paraphernalia, a Class A misdemeanor. Wilson entered into a plea agreement where she agreed to plead guilty to one count of dealing in cocaine. In exchange for Wilson's guilty plea, the State agreed to dismiss the remaining charges. Sentencing was left to the trial court's discretion, except that the executed portion of Wilson's sentence could not exceed twenty-five years.

The trial court took Wilson's plea under advisement until it reviewed the presentence investigation report ("PSI") and heard evidence on sentencing. At the sentencing hearing, the trial court made the following observations:

> The thing, Charmin, that I like about you is I looked at your, your [PSI]. As people do get older, they're more apt to want to change and straighten up cause health becomes more of a problem and your heart's just not gonna take being, using this coke like you've been using it. Nine out of ten people I see do not have a high school degree, but you got one. And you not only have a high school degree, you got a [Certified Nursing Assistant] license and you've gone to some other schools to better yourself. And so you have, you have all the skills to be a useful member of society and you worked seventeen (17) years at one job, which is to your credit.
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> Yet at the same time, you had – and that's a mitigating factor the Court considers. On the aggravating side, there have been prior attempts at rehabilitation and, and it just hasn't took [sic]. You just didn't get it. . . .
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> You didn't get it. And everybody has to find the time when they're gonna get it, if they're ever going to. And then you came to the community to try to change your life but you brought your addiction with you and, and that's one thing. Then you started getting involved in, in the sale of it. That's why it's an A Felony. You, you sold. You have allowed drugs, for one reason or another, to almost destroy your life. You could not have been a good example for those children you were raising. You can't hide that from little kids.
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> And then you are out dealing, [il]legally dealing. You're pinching. And you're passing it on to others. And you're tearing down the fabric of society when you do that. That's why the, that's why it's such a serious thing.

Transcript at 42-43. The trial court accepted Wilson's guilty plea and entered a sentencing order that included the following findings:

> The Court finds the following aggravating factors: The defendant has a long term history of substance abuse, prior attempts for rehabilitation have not been successful due to the severity of her drug use, and she is at risk for re-offending. The Court finds as mitigating factors: The defendant was steadily employed for 17 [years] and has no prior convictions. The Court finds that the aggravating factors outweigh the mitigating factors.

Appellant's Appendix at 126. Based on these findings, the trial court sentenced Wilson to thirty years, with twenty-five years executed and five suspended. Wilson now appeals.

Discussion and Decision[1]

I. Imposition of Sentence

A. Standard of Review

This court has authority to revise a sentence "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 may "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). In determining whether a sentence is inappropriate, we examine both the nature of the offense and the character of the offender. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When making this examination, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. However, "a defendant must persuade the appellate court that his or her

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[1] In her reply brief, Wilson argues the trial court abused its discretion in imposing her sentence because it failed to consider her guilty plea, her statement of remorse, her "desire to reform," and the "relatively minor nature of her offense" as mitigating factors. Appellant's Reply Brief at 3. Wilson did not make this argument in her initial brief, however, and her failure to do so results in waiver. See Ind. Appellate Rule 46(C) ("No new issues shall be raised in the reply brief."); Douglas v. State, 800 N.E.2d 599, 604 (Ind. Ct. App. 2003) ("[A]ppellants are not permitted to 'reserve the right to present argument' at a later point; rather, they are obliged to present all their arguments in their initial briefs to this court. Because [Appellant] did not present arguments, the issues are waived for appellate review.") (citations omitted), trans. denied.

We recognize that in Anglemyer v. State, 875 N.E.2d 218, 220 (Ind. 2007) (quoting Francis v. State, 817 N.E.2d 235, 237 n.2 (Ind. 2004)), our supreme court recently clarified on rehearing that a defendant can challenge the trial court's failure to consider a guilty plea as a mitigating factor regardless of whether the defendant offered the plea as a mitigating factor at the sentencing hearing "'[b]ecause a sentencing court is inherently aware of the fact that a guilty plea is a mitigating circumstance . . . .'" However, our conclusion that Wilson waived her right to argue that the trial court abused its discretion is based on her failure to raise

sentence has met this inappropriateness standard of review." Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

B. Nature of the Offense and Character of the Offender

The trial court sentenced Wilson to thirty years, with twenty-five years executed and five suspended. Thus, Wilson received the advisory sentence. See Ind. Code § 35-50-2-4 ("A person who commits a Class A felony shall be imprisoned for a fixed term of between twenty (20) and fifty (50) years, with the advisory sentence being thirty (30) years."); Weaver v. State, 845 N.E.2d 1066, 1072 n.4 (Ind. Ct. App. 2006) (explaining that a defendant's total sentence includes both the executed and suspended portion of the sentence).

Regarding the nature of the offense, Wilson relies on Frye v. State, 837 N.E.2d 1012 (Ind. 2005), and Evans v. State, 725 N.E.2d 850 (Ind. 2000), to support her argument that her sentence is inappropriate. In Frye, our supreme court concluded that the defendant's sentence of fifteen years for burglary and twenty-five years for being an habitual offender, resulting in a total executed sentence of forty years, was inappropriate. 837 N.E.2d at 1014. In Evans, our supreme court concluded that the defendant's maximum allowable sentence of fifty years for dealing in cocaine was manifestly unreasonable.[2] 725 N.E.2d at 851.

Although we agree with Wilson that the offenses in Frye and Evans are similar to her offense in that they did not involve violence, Wilson overlooks that in both Frye and Evans,

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the issue in her initial brief, see App.R. 46(C), not on her failure to offer the plea as a mitigating factor to the trial court.

[2] Under former Indiana Appellate Rule 17(B), the predecessor to Indiana Appellate Rule 7(B), this court could not revise a sentence unless it was "manifestly unreasonable" in light of the nature of the offense

our supreme court reasoned that the nonviolent nature of the offenses justified sentence revision to the presumptive term.[3] In other words, Frye and Evans stand for the proposition that the defendant's commission of a nonviolent offense is a factor reviewing courts consider when determining whether a sentence above the advisory (formerly presumptive) term is inappropriate. Wilson has not explained how the reasoning in Frye and Evans justifies sentence revision below the advisory term. For this reason, we agree with the State that "Frye and Evans are neither controlling nor instructive" in determining whether the nature of the offense renders Wilson's sentence inappropriate. Appellee's Brief at 4.

Nor does our review of the record indicate that Wilson's sentence is inappropriate based on the nature of the offense. We emphasize again that Wilson received the advisory sentence, and the record suggests, as Wilson herself does, that the offense was "run-of-the-mill." Appellant's Brief at 6. The record indicates that the drug transactions were routine, involving monetary amounts ranging from twenty to one hundred dollars. At the same time, however, Wilson has not presented evidence indicating that the nature of the offense was less serious than a typical offense of dealing in cocaine. Thus, we are not convinced that Wilson's thirty-year advisory sentence is inappropriate based on the nature of the offense.

Regarding the nature of Wilson's character, we note, as did the trial court, that Wilson has no prior convictions and was employed from 1977 to 1994. These facts comment

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and the character of the offender. Sanders v. State, 825 N.E.2d 952, 957 n.1 (Ind. Ct. App. 2005), trans. denied.

[3] Frye and Evans involved sentences imposed under our "presumptive" sentencing statutes. Effective April 25, 2005, the legislature responded to Blakely v. Washington, 542 U.S. 296, 303-04 (2004) (holding that facts used to increase a defendant's sentence beyond the statutory maximum must be admitted by the

favorably on Wilson's character. Cf. Ind. Code § 35-38-1-7.1(b)(6) (recognizing that a defendant's lack of "criminal activity" may constitute a mitigating factor); Scheckel v. State, 620 N.E.2d 681, 686 (Ind. 1993) (indicating that a defendant's employment history may constitute a mitigating factor). However, the positive nature of Wilson's lack of criminal history is diminished because her long-term drug addiction indicates she has not led a law abiding life. See Roney, 872 N.E.2d at 207 ("[W]e also note that [the defendant] admitted to using illegal drugs throughout his life, indicating that despite his minor criminal history, he was not leading a law-abiding life."). We also note that Wilson pled guilty, but do not believe her plea necessarily comments favorably on her character because it resulted in the dismissal of nine pending charges. Cf. Fields v. State, 852 N.E.2d 1030, 1034 (Ind. Ct. App. 2006) (noting the defendant "received a significant benefit from the plea, and therefore it does not reflect as favorably on his character as it might otherwise"), trans. denied.

There also is evidence in the record that comments negatively on Wilson's character. The PSI indicates Wilson has a history of drug and alcohol abuse that spans over three decades. To her credit, Wilson sought substance abuse treatment a half-dozen times from 1987 to 1995. However, Wilson relapsed on each occasion. The PSI also states that for an unspecified time period, Wilson "reported receiving [a] $1,700.00 'subsidy for [her] children' each month but used it to purchase cocaine." Appellant's App. at 134. Finally, Wilson urges us to look favorably on her character because "[h]er motivation for selling cocaine was to satisfy her addiction, and not for any monetary gain" and because the support letters her

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defendant or found by a jury beyond a reasonable doubt), by amending our sentencing statutes to replace

family members wrote and "her role as a family caregiver" indicate she is not "a depraved, hardened criminal." Appellant's Br. at 6. We fail to see how Wilson's motive for selling cocaine comments favorably on her character, as an addict may resort to more desperate means to feed her addiction than one who deals for the purpose of monetary gain. Moreover, although we agree Wilson is not a "depraved, hardened criminal," we hesitate to look favorably on her character based on her role as an alleged caregiver because the record indicates that instead of spending her $1,700 monthly subsidy on her children, she chose to spend it on cocaine.

The burden was on Wilson to demonstrate that her sentence is inappropriate based on the nature of the offense and her character. After due consideration of the trial court's sentencing decision, we are convinced Wilson has not carried this burden. Therefore, we conclude Wilson's sentence is not inappropriate.

Conclusion

Wilson's sentence is not inappropriate in light of the nature of the offense and character of the offender.

Affirmed.

KIRSCH, J., and BARNES, J., concur.

"presumptive" sentences with "advisory" sentences. Weaver, 845 N.E.2d at 1070.