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IN THE
COURT OF APPEALS OF INDIANA

KENNETH HURT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 65A05-0704-CR-207
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE POSEY SUPERIOR COURT
The Honorable S. Brent Almon, Judge
Cause No. 65D01-0604-FC-190

December 4, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Kenneth Hurt appeals the sentence he received for pleading guilty to Operating a Vehicle After a Lifetime Suspension,[1] a class C felony. Specifically, Hurt argues that the trial court abused its discretion by not considering his guilty plea to be a mitigating factor. Finding that any error was harmless in light of our ultimate conclusion that Hurt's sentence is not inappropriate, we affirm the judgment of the trial court.

FACTS

On April 10, 2006, Hurt drove a vehicle less than one mile to and from his ex-wife's house after having his license suspended for life. Tr. p. 13-15. The next day, the State charged Hurt with class C felony operating a vehicle after a lifetime suspension, and he pleaded guilty to that charge on March 8, 2007. The parties' plea agreement provided that Hurt would serve a two-year sentence but that the trial court would determine "how the sentence is served." Appellant's App. p. 12.

After a sentencing hearing, the trial court found Hurt's prior criminal history[2] and the fact that he committed the offense while on parole to be aggravating factors. The trial court found the possible hardship Hurt's mother would suffer as a result of his incarceration, the fact he had been sober since 2004, and his employment status to be mitigating factors. After weighing these factors, the trial court found that Hurt should "serve his time" and sentenced him to two years imprisonment. Tr. p. 38. Hurt now appeals.

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[1] Ind. Code § 9-30-10-17.

[2] Hurt's prior criminal history consists of three convictions for class A misdemeanor driving while intoxicated, two convictions for class D felony operating a vehicle while intoxicated, and one conviction for class D felony operating a vehicle after being adjudged a habitual offender. PSI p. 25.

DISCUSSION AND DECISION

Hurt committed the offense at issue herein after the April 2005 amendments to the Indiana sentencing statutes; thus, we apply the amended versions thereof. Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007). Indiana Code section 35-38-1-7.1(d) provides that a trial court "may impose any sentence that is . . . authorized by statute . . . regardless of the presence or absence of aggravating circumstances or mitigating circumstances." We review challenges to the trial court's sentencing process for an abuse of discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007). While a trial court must enter a sentencing statement whenever imposing a felony conviction, sentencing statements are not required to contain a finding of aggravators or mitigators. Id. Rather, they need include only a "reasonably detailed recitation of the trial court's reasons for imposing a particular sentence." Id. If the statement does, however, include a finding of aggravators or mitigators, then it must "identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." Id.

I. Guilty Plea

Hurt's sole contention on appeal is that the trial court abused its discretion by not finding his guilty plea to be a mitigating circumstance.[3] We review sentence-process-based

[3] The gravamen of the State's response focuses on its erroneous interpretation of the terms of the plea agreement. Specifically, the State argues that "[b]ecause the court was bound by the plea agreement, which set a definite sentence, its sole discretion laid in how to have [Hurt] serve his two years of incarceration. The [trial] court had no need to address aggravators and mitigators, as [Hurt's] sentence was already determined." Appellee's Br. p. 4. However, the plea agreement specifically gave the trial court discretion regarding how to impose the two-year sentence—e.g., whether to suspend a portion of it to probation, place Hurt on home detention, etc. The State cites no authority for its proposition that the trial court was not required to provide a sentencing statement detailing its reasons for imposing the manner in which the two-year sentence would be

challenges for an abuse of discretion. See Mendoza v. State, 869 N.E.2d 546, 556 (Ind. Ct. App. 2007) (distinguishing between sentence-process-based challenges and result-based challenges on appeal), trans. denied. Our Supreme Court recognized that a trial court can abuse its discretion during the sentencing process by, among other things, "omit[ting] reasons [from the sentencing statement] that are clearly supported by the record and advanced for consideration." Anglemyer, 868 N.E.2d at 491. Under those circumstances, it may be proper for us to remand for resentencing if we cannot confidently conclude that the trial court would have imposed the same sentence had it properly considered the reasons supported in the record. Id.

Hurt proffered his guilty plea as a mitigator and that mitigator is clearly supported by the record. Tr. p. 35. However, Hurt received a substantial benefit for pleading guilty—instead of being exposed to a potential sentence of eight years imprisonment,[4] the plea agreement capped Hurt's exposure at the statutory minimum of two years imprisonment. Furthermore, Hurt waited more than one year after he was charged to plead guilty and, in fact, pleaded guilty the day before his trial was scheduled to begin. Appellant's App. p. 5. Where a defendant waits until the proverbial eleventh hour to make a pragmatic decision to plead guilty, no real benefit has been conferred on the State because it still expended judicial resources to bring the defendant to trial. Gray v. State, 790 N.E.2d 174, 178 (Ind. Ct. App.

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served, as is required by Anglemyer, simply because the length of the sentence was provided for in the plea agreement.

[4] Indiana Code section 35-50-2-6 provides that a person who commits a class C felony "shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years."

2003).

Although our Supreme Court has previously held that a defendant who pleads guilty deserves to have some mitigating weight extended to his guilty plea in return, Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005), it is well settled that the significance of a guilty plea varies from case to case, Francis v. State, 817 N.E.2d 235, 238 n.3 (Ind. 2004). And under the new sentencing scheme, "[t]he relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse." Anglemyer, 868 N.E.2d at 491 (emphasis added). Therefore, even if we assume that the trial court abused its discretion by not finding Hurt's guilty plea to be a mitigating factor, any error was harmless in light of the substantial benefit Hurt received pursuant to the plea agreement and our ultimate conclusion that his sentence is not inappropriate.

II. Appropriateness

Even after finding that a trial court abused its discretion in the process it used to sentence the defendant in Windhorst v. State, our Supreme Court ultimately affirmed the trial court's judgment after summarily affirming our court's conclusion that the sentence was not inappropriate pursuant to Appellate Rule 7(B). 868 N.E.2d 504, 507 (Ind. 2007). Therefore, while Hurt does not explicitly argue that his sentence is inappropriate, we take this opportunity to exercise our authority to review the appropriateness of his sentence.

Pursuant to Indiana Appellate Rule 7(B), our court has the constitutional authority 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." We defer to the trial court during appropriateness review, Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007), and we refrain from merely substituting our judgment for that of the trial court, Foster v. State, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Regarding the nature of the offense, Hurt drove a vehicle after his license had been suspended for life. Even though he is "in good physical condition," tr. p. 38, Hurt chose to drive the one mile it takes to get to and from his ex-wife's house instead of walking, riding a bicycle, or finding other means of transportation. While Hurt informed the trial court that he received a call from "somebody" that his ex-wife was dying, which he claims prompted his decision to drive to her house, id. at 14, the trial court was in the best position to evaluate witness credibility. Therefore, we do not find that the nature of the offense renders Hurt's sentence inappropriate.

Turning to Hurt's character, as noted above, Hurt has a laundry list of vehicle-related offenses that, ultimately, resulted in his license being suspended for life. Nonetheless, Hurt decided to drive a short distance without a license, demonstrating his disrespect for the law and a lack of self-discipline. Furthermore, Hurt was on parole for another driving-related offense when he committed the instant offense. And his eleventh-hour decision to plead guilty was largely pragmatic because of the favorable terms of the plea agreement.

Therefore, we do not find Hurt's two-year executed[5] sentence to be inappropriate in light of the nature of the offense and his character.

The judgment of the trial court is affirmed.

BAILEY, J., and VAIDIK, J., concur.

[5] We note that we recently held that, as a practical matter, the trial court is in the best position to know the feasibility of alternative placements in particular counties or communities. Fonner v. State, No. 49A05-0703-CR-161, slip op. at 5-6 (Ind. Ct. App. Nov. 5, 2007). Therefore, "it will be quite difficult for a defendant to prevail on a claim that the placement of his or her sentence is inappropriate." Id. at 5 (emphasis added).