ATTORNEY FOR APPELLANT:

**STEVEN C. LITZ**
Monrovia, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**
Attorney General of Indiana

**J.T. WHITEHEAD**
Deputy Attorney General
Indianapolis, Indiana

# IN THE
# COURT OF APPEALS OF INDIANA

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| DAVID GARDNER, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 47A04-0707-CR-418 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE LAWRENCE CIRCUIT COURT
The Honorable Richard D. McIntyre, Sentencing Judge
Cause No. 47C01-8903-CF-27

**December 4, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Chief Judge**

This decision resolves a husband's belated appeal of the sixty-year sentence he received for murdering his estranged wife and burying her body in her father's backyard. Appellant-defendant David Gardner appeals the sentence he received for Murder,[1] a felony. Specifically, Gardner argues that (1) the trial court erroneously found four aggravating factors; (2) the trial court abused its discretion when imposing the sentence; and (3) his sentence is inappropriate in light of the nature of the offense and his character. Finding no reversible error, we affirm the judgment of the trial court.

## FACTS

Gardner and his wife, Paula, were married in June 1982. After the couple separated in 1988, Paula moved in with her father, Jerry Reynolds, who lived in Bedford. On March 1, 1989—the day before the Gardners' pending divorce was to become final—Gardner brought a knife to Reynolds's home and confronted Paula in the driveway as she was exiting her vehicle. Gardner and Paula struggled over the knife, Gardner sustained a deep cut to his hand, and Paula fell to the ground. Gardner restrained Paula, tied socks around her neck, and stabbed her in the neck, killing her.

After Paula was dead, Gardner tied her hands together with rope and moved her body to the railroad tracks behind Reynolds's house. Gardner retrieved a shovel from his vehicle and buried Paula's body 150 feet behind her father's home. Gardner moved Paula's vehicle and sought treatment at the Bedford Medical Clinic for the wound on his hand. After learning that he would need further treatment at a hospital, Gardner asked his sister to drive

[1] Ind. Code § 35-42-1-1.

him to Indianapolis and abandoned Paula's vehicle on Highway 37.

Gardner was charged with murder and the State sought the death penalty. On August 15, 1990, Gardner and the State entered into a plea agreement, pursuant to which Gardner agreed to plead guilty to murder in exchange for the State's dismissal of its death penalty request. The sentencing court accepted the plea agreement and sentenced Gardner to sixty years imprisonment on September 17, 1990.

As we reported in the memorandum decision stemming from Gardner's appeal of the post-conviction court's dismissal of his petition for leave to file a belated notice of appeal,

> On August 15, 2004, Gardner filed, pro se, a Petition for Leave to File a Belated Notice of Appeal. He alleged that his sentence was the result of an open plea, and that he was "specifically instructed that he would be waiving his right to pursue a direct appeal.". . .
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> On February 6, 2006, one month prior to the scheduled hearing, the State filed a motion to dismiss Gardner's petition. The State argued only that Gardner's sentence was not imposed under an open plea agreement, but rather was for a determinate term of sixty years. On February 14, 2006, the post-conviction court granted the State's motion and summarily dismissed Gardner's petition. On March 6, 2006, Gardner filed a motion treated as a Motion to Correct Error, which was denied the following day. This appeal ensued.

Gardner v. State, No. 47A01-0603-CR-118, slip op. at 2 (Ind. Ct. App. Sept. 27, 2006).

On appeal, we concluded that "the ultimate decision of a term between thirty and sixty years was left to the discretion of the sentencing court [and, as] such, Gardner is not foreclosed from pursuing leave to file a belated notice of appeal." Id. at 4. Thus, we reversed and remanded for the post-conviction court to hold a hearing on Gardner's motion. On June 5, 2007, the post-conviction court granted Gardner's petition and this belated appeal

ensued.

## DISCUSSION AND DECISION

Gardner argues that the trial court improperly sentenced him. The sentencing statute in effect when Gardner murdered Paula provided that a person convicted of murder faced a presumptive sentence of forty years imprisonment "with no more than twenty (20) years added for aggravating circumstances, or not more than ten (10) years subtracted for mitigating circumstances." Ind. Code § 35-50-2-3(a) (1989).

We review a trial court's sentencing decision for an abuse of discretion. White v. State, 847 N.E.2d 1043, 1045 (Ind. Ct. App. 2006). If a trial court uses aggravating or mitigating circumstances to modify the presumptive sentence, the trial court must (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate its evaluation and balancing of the circumstances. Id. It is within the trial court's discretion to assign weight to the aggravators and mitigators, and it is under no obligation to assign the same weight as the defendant. Covington v. State, 842 N.E.2d 345, 348 (Ind. 2006). Additionally, one valid aggravator is sufficient to enhance a sentence. Dixon v. State, 825 N.E.2d 1269, 1272 (Ind. Ct. App. 2005), trans. denied.

At sentencing, the trial court identified Gardner's lack of criminal history as a mitigating factor. It also found four aggravating factors: (1) Gardner's need for correctional or rehabilitative treatment best provided by a penal facility; (2) the imposition of a reduced sentence would depreciate the seriousness of the crime; (3) Gardner's offense resulted in the

death of a twenty-five-year-old woman and caused undue hardship on her family; and (4) Gardner violated a restraining order to commit the crime. The trial court found that the aggravating factors "do indeed outweigh" the mitigating factors and imposed sixty years of imprisonment. Tr. p. 55. Gardner challenges each of the aggravating factors found by the trial court and argues that his sentence is inappropriate in light of the nature of the offense and his character.

Gardner pursues this belated appeal pursuant to Post-Conviction Rule 2(1), which states that a belated notice of appeal "shall be treated for all purposes as if filed within the prescribed period." Our Supreme Court recently reaffirmed the principle that "a new constitutional rule of criminal procedure is generally not applicable to cases on collateral review." Gutermuth v. State, 868 N.E.2d 427, 432 (Ind. 2007) (emphasis added) (citing Daniels v. State, 561 N.E.2d 487, 488-89 (Ind. 1990)). However, Gardner primarily challenges the trial court's finding of aggravating and mitigating factors, an issue that does not involve the formulation of new constitutional rules. Thus, when we review aggravating and mitigating factors on collateral review, we still apply caselaw that was decided after the defendant's sentence was entered. See Roney v. State, 872 N.E.2d 192, 199-206 (Ind. Ct. App. 2007) (applying post-2001 caselaw to the collateral review of aggravating and mitigating factors found by the trial court in a 2001 sentencing hearing).

## I. Aggravating Factors

### A. Need for Rehabilitative Treatment

Without elaborating further, the trial court concluded that Gardner "is in need of

correctional or rehabilitative treatment which can best be provided by commitment to a penal facility." Tr. p. 55. This aggravator is only proper when the trial court articulates the reasons why the defendant requires treatment for a period of time in excess of the presumptive sentence. Beason v. State, 690 N.E.2d 277, 281-82 (Ind. 1998); see, e.g., Jones v. State, 675 N.E.2d 1084, 1087-88 (Ind. 1996) (holding that trial court's reasoning that previous sentencing courts tried a wide range of probationary programs to which defendant had not responded was sufficient to support aggravating factor that defendant was in need of penal rehabilitative treatment). Because the trial court did not articulate its reasons and Gardner had no prior criminal history for which other methods of corrective rehabilitative treatment could have been provided, the trial court abused its discretion by finding Gardner's need for correctional or rehabilitative treatment to be an aggravating factor.

B. Seriousness of Crime

The trial court found that "the imposition of a reduced sentence or a suspension of a sentence and imposition of probation would depreciate the seriousness of this crime." Appellant's App. p. 109. Our Supreme Court has held that

> [a]s for finding that a given sentence might "depreciate the seriousness" of a crime, courts speak about this factor in two different ways. Indiana Code § 35-38-1-7.1(b)(4) says it is an aggravating circumstance that the "[i]mposition of a reduced sentence . . . would depreciate the seriousness of the crime." Stated this way, the aggravator may only be used when mitigators might otherwise call for a sentence shorter than the presumptive one. See Ector v. State, 639 N.E.2d 1014, 1016 (Ind. 1994). By contrast, judges sometimes say that a sentence less than an enhanced term sought by the prosecution would depreciate the seriousness of the crime, and this is an appropriate aggravator. Id.

Johnson v. State, 725 N.E.2d 864, 868 (Ind. 2000).

Gardner argues that "[i]f a trial court is not considering imposing a reduced sentence, this factor cannot justify an enhanced sentence." Appellant's Br. p. 4 (citing Ector, 639 N.E.2d at 1016). There is no evidence the trial court found the "alternative form"[2] of this aggravator because it did not mention the enhanced sentence sought by the prosecution as its reasoning. See Ajabu v. State, 722 N.E.2d 339, 343 (Ind. 2000) (holding that the trial court's statement that it was finding the alternative form of the aggravator because imposing less than an enhanced sentence would reduce the seriousness of the crime was proper). Because there is no evidence establishing that the trial court considered imposing less than the presumptive sentence, we find that the trial court abused its discretion by finding this aggravator. See Jones v. State, 675 N.E.2d 1084, 1088 (Ind. 1996) (holding that because "the trial court was not considering imposing a sentence of less duration than the presumptive sentence, the court's use of the depreciate the seriousness of the crime aggravator was improper").

C. Hardship on Paula's Family

The trial court found the fact that Gardner's crime "resulted in the death of a 25 year old woman and also an undue hardship to the victims [sic] family" was an aggravating factor. Appellant's App. p. 109. Gardner argues that this was improper because the victim's death was an element of the crime and the trial court did not elaborate on the undue hardship the crime caused Paula's family.

[2] Our Supreme Court has referred to the non-statutory version of the depreciate the seriousness aggravator as the "alternative form." Jones v. State, 675 N.E.2d 1084, 1088 (Ind. 1996).

It is well established that the trial court cannot justify the imposition of an enhanced sentence by citing an element of the crime. McCann v. State, 749 N.E.2d 1116, 1120 (Ind. 2001). Furthermore, our Supreme Court has held that

> [b]ecause the terrible loss that accompanies the loss of a family member accompanies almost every murder, this impact on the family is encompassed within the range of impact which the presumptive sentence is designed to punish. The impact on others may qualify as an aggravator but the defendant's actions must have had an impact on other persons of a destructive nature not normally associated with the commission of the offense in question and must be foreseeable to the defendant.

Pickens v. State, 767 N.E.2d 530, 535 (Ind. 2002) (emphasis added).

While the State admits that Paula's age and gender were not valid aggravating factors, appellee's br. p. 9, it argues that Gardner's crime had a unique impact on Paula's family that is not typically associated with the offense of murder. We agree. Gardner killed Paula in the front yard of her father's home and buried her body 150 feet behind his house in an effort to conceal the crime. Paula's brother was at Reynolds's home when they found Paula's makeshift grave, and he helped the police identify his sister. Appellant's App. p. 68. At the time of sentencing, Reynolds still lived in the home and testified that he is bothered by memories of the crime "each time [he] . . . pull[s] up in front of the house." Id. at 64. Because Gardner murdered Paula at her father's home and buried her body in the backyard, it was foreseeable that his actions would have a greater impact on Paula's family than the effects typically associated with murder. Thus, it was proper for the trial court to find the impact of the crime on Paula's family to be an aggravating factor.

## D. Restraining Order

Gardner argues that the trial court erred by finding that there was a restraining order in place against him when he murdered Paula.[3] Specifically, he argues that he only admitted at the sentencing hearing that he "had previously been under a restraining order to stay away," appellant's app. p. 43 (emphasis added), not that there was a restraining order in place on March 1, 1989, when he murdered Paula. However, in addition to Gardner's statement, Reynolds testified that "about a week [after December 31, 1988, Paula] got a restraining order against [Gardner]." Id. at 66. Gardner's and Reynolds's statements were ample evidence to support the trial court's conclusion that Paula had a restraining order in effect against Gardner at the time of the murder. Because it is well settled that the defendant's violation of a restraining order is a valid aggravating factor, Beason v. State, 690 N.E.2d 277, 281-82 (Ind. 1998), the trial court's finding of this factor was not an abuse of discretion.

## E. Sentence

In sum, we find that the trial court correctly found two aggravating factors: (1) the crime caused undue hardship on Paula's family and (2) Gardner violated a restraining order to commit the crime. As previously noted, one valid aggravator is sufficient to enhance a sentence. Dixon, 825 N.E.2d at 1272. While Gardner argues that the trial court did not give

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[3] Gardner acknowledges that our Supreme Court recently held that the rule announced by the Supreme Court in Blakely v. Washington[3] is not to be applied retroactively to belated appeals sought under Post-Conviction Rule 2. Appellant's Br. p. 7 (citing Gutermuth, 868 N.E.2d at 435). However, Gardner argues that our Supreme Court "did not go far enough in its review of Teague[ v. Lane, 489 U.S. 288 (1989)]" and urges us to apply Blakely to his belated appeal. Appellant's Br. p. 8. We remind Gardner that we are bound by the decisions of our Supreme Court and are without authority to overrule those decisions. Meeks v. State, 759 N.E.2d 1126, 1128 (Ind. Ct. App. 2001). Therefore, we apply Gutermuth and will not apply Blakely retroactively to Gardner's belated appeal.

enough weight[4] to his lack of criminal history when it imposed the maximum sixty-year sentence, it is well established that we give great deference to the trial court's assessment of the proper weight of mitigating and aggravating circumstances. Bocko v. State, 769 N.E.2d 658, 667 (Ind. Ct. App. 2002). We will set aside a sentence only upon a showing of a manifest abuse of that discretion. Id. In light of our discussion regarding the properly-found aggravators, we cannot conclude that the trial court abused its discretion by sentencing Gardner to sixty years imprisonment.

## II. Appropriateness

Gardner also argues that his sentence is inappropriate in light of the nature of the offense and his character. 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." However, sentence review under Appellate Rule 7(B) is deferential to the trial court's decision, Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003), 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).

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[4] We note that pursuant to the amended sentencing statutes, "a trial court [cannot] be said to have abused its discretion in failing to properly weigh such factors." Anglemyer, 868 N.E.2d at 491. However, because Gardner committed the crime more than sixteen years before the amended sentencing statutes became effective, we address his argument pursuant to the guidelines in effect at the time he committed the crime. Gutermuth, 868 N.E.2d at 431 n.4.

Regarding the nature of the offense, as we have already detailed, Gardner murdered his estranged wife in her father's front yard the day before the couple's pending divorce was to become final, violating a restraining order in the process. In an attempt to conceal his crime, Gardner buried Paula's body 150 feet behind her father's home and abandoned her vehicle on Highway 37. While Gardner argues that he only brought a knife to Reynolds's home for his own protection, he acknowledged at the guilty plea hearing that he went to Reynolds's home to talk to Paula about their impending divorce. Appellant's App. p. 43. The estranged couple did not even enter Reynolds's home before the encounter became violent and Gardner murdered Paula in the front yard. All things considered, we do not find the nature of the offense to provide even remote support for Gardner's inappropriateness argument.

Turning to Gardner's character, we acknowledge that he had no prior criminal history before murdering Paula. However, the brutal nature of this crime reveals Gardner's true character. Faced with an impending divorce, Gardner allowed his anger to overcome his rational judgment when he murdered Paula. Subsequently, instead of taking responsibility for his actions, Gardner attempted to conceal his crime. While Gardner argues that there was "no history of domestic violence or any indication whatsoever that the crime was something other than a passionate aberration of character," appellant's br. p. 11, Paula had obtained a protective order against Gardner to prevent him from contacting her. Nevertheless, Gardner chose to violate the protective order and confront Paula. In sum, Gardner's decisions before and after Paula's murder show his true character and do not aid his inappropriateness

argument. Therefore, we cannot find Gardner's sixty-year 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.