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IN THE COURT OF APPEALS OF INDIANA

BRANDON RUTHERFORD,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

No. 49A04-0705-CR-241

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable John R. Barney Jr., Senior Judge
Cause No. 49F09-0606-FD-113529

December 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Brandon Rutherford was convicted of class D felony theft.[1] Specifically, he was found in possession of a stolen Honda scooter. The trial court sentenced him to one and one-half years, with six months executed on home detention and one year on probation. He appeals his sentence. We affirm.

Sentencing decisions rest within the sound discretion of the trial court and are reviewed only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances, or the reasonable probable, and actual deductions to be drawn therefrom. *Id*. A trial court may abuse its discretion in the following ways: (1) failing to enter a sentencing statement; (2) entering a sentencing statement that includes reasons not supported by the record; (3) entering a sentencing statement that omits reasons clearly supported by the record and advanced for consideration; or (4) entering a sentencing statement that includes reasons that are improper as a matter of law. *Id*. at 490-91.

Rutherford notes that the trial court imposed the sentence recommended by the State, except that it ordered six months of the sentence to be served on home detention instead of ordering probation for the entire term. He contends that "the trial court abused its discretion when it failed to set forth a detailed recitation of its reasons for the sentence and considered factors that were improper as a matter of law." Appellant's Br. at 4.

To provide meaningful appellate review, the trial court is required to provide a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing

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[1] Ind. Code § 35-43-4-2.

a particular sentence that is supported by the record. *Anglemyer*, 868 N.E.2d at 491. Here, Rutherford claimed that he had rented the scooter. In sentencing Rutherford, the trial court noted that the person from whom Rutherford had supposedly rented the scooter did not appear to testify, and further, that Rutherford failed to provide details regarding the rental of the scooter, such as how and when it would be returned to its owner, both of which would have lent credibility to his story that he "rented" the scooter.[2] To the extent Rutherford argues that this factor is not included in the list of aggravators set forth in Indiana Code Section 35-38-1-7.1, we note that the list is not all inclusive. *See* Ind. Code § 35-38-1-7.1(c) (specifying that the listed criteria "do not limit the matters that the court may consider in determining the sentence").

Rutherford also claims that the trial court should have considered as a mitigating factor that this conviction was his first adult conviction. A trial court is not required to find the presence of mitigating factors or to confer the same weight to those factors as does the defendant. *Smith v. State*, 770 N.E.2d 818, 822 (Ind. 2002). In addition, the trial court is not obligated to explain why it has found that the factor does not exist. *Id.* at 822-23. Rutherford

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[2] The State concedes that the record does not support the trial court's comment that Rutherford testified that he would not have rented the scooter if he had known it had been *reported* stolen (as opposed to knowing only that it had been stolen). While the consideration of this factor was improper, the error is harmless in light of the totality of the trial court's reasons for imposing the sentence it did.

concedes that he has "a few prior juvenile convictions." Appellant's Br. at 6. We find no abuse of discretion here.[3]

Rutherford also argues that his sentence is inappropriate. Indiana Appellate Rule 7(B) provides: "The Court may revise a sentence authorized by statute 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." The defendant must persuade the appellate court that his or her sentence is inappropriate. *Anglemyer*, 868 N.E.2d at 494.

Rutherford was convicted of a class D felony. The penalty for a class D felony is between six months and three years, with the advisory sentence being one and one-half years. Ind. Code § 35-50-2-7. Our supreme court has stated, "[T]he advisory sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Anglemyer*, 868 N.E.2d at 494. Here, Rutherford received the advisory sentence. While Rutherford is correct that his offense was not violent, that alone does not persuade us that the advisory sentence is inappropriate. As to his character, Rutherford has previous juvenile convictions indicating that he has difficulty obeying the law. In sum, Rutherford has failed to carry his burden to demonstrate that his sentence is inappropriate in light of the nature of the offense and his character.

Affirmed.

DARDEN, J., and MAY, J., concur.

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[3] Rutherford also claims that the trial court "refused to allow Rutherford the benefit of alternate misdemeanor sentencing under Ind. Code § 35-50-2-7." Appellant's Br. at 6. Indiana Code Section 35-50-2-7 provides in relevant part that "if a person has committed a Class D felony, the court *may* enter judgment of conviction of a Class A misdemeanor and sentence accordingly." (Emphasis added.) Thus, alternative

misdemeanor sentencing is discretionary. The trial court indicated that it would reduce Rutherford's conviction if he complies with the terms of his probation. Tr. at 54-57.