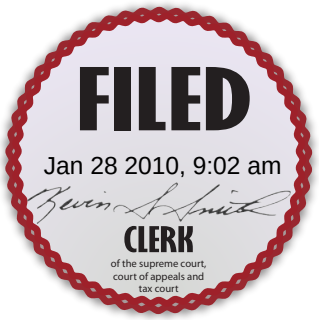

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IN THE
COURT OF APPEALS OF INDIANA

GARY L. DOZIER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 22A01-0906-CR-293
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FLOYD SUPERIOR COURT
The Honorable Susan L. Orth, Judge
Cause No. 22D01-0803-FC-178

January 28, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Gary L. Dozier appeals his sentence following his plea of guilty to robbery as a class C felony,[1] and the trial court's enhancement of his sentence for being an habitual offender.[2]

We affirm.

ISSUES

1. Whether the trial court abused its sentencing discretion when it failed to identify Dozier's entry of a guilty plea as a mitigating circumstance.

2. Whether Dozier's sentence is inappropriate pursuant to Indiana Appellate Rule 7(B).

FACTS

On October 25, 2007, Dozier entered a Family Dollar store, grabbed the cash drawer from the store clerk, and fled. On March 26, 2008, the State charged him with class C felony robbery. On May 5, 2008, the State amended the charging information to include Count II, an allegation that Dozier was an habitual offender.[3] On March 12, 2009, Dozier tendered a "blind plea"[4] to both counts. In exchange, the State agreed to

[1] Ind. Code § 35-42-5-1.

[2] I.C. § 35-50-2-8.

[3] The State's amended information alleged that Dozier had accumulated two or more prior unrelated felony convictions, including convictions for robbery (1997); battery (1998); theft/receiving stolen property (1998); and robbery (2005).

[4] The term "blind plea" refers to a plea agreement in which the issue of sentencing is left to the discretion of the trial court. *State v. Cozart*, 897 N.E.2d 478, 483 (Ind. 2008).

dismiss a petition to revoke his probation regarding Dozier's conviction in 2005 for class C felony robbery.

On May 6, 2009, the trial court conducted a sentencing hearing. Counsel for Dozier presented evidence "by summary." (Tr. 8). Counsel stated that on October 25, November 1, and November 14 of 2007, respectively, Dozier had committed three robberies. On each occasion, Dozier had posed as a customer preparing to make a purchase and then grabbed cash or the cash drawer when the store clerk opened the cash register. Citing the pre-sentence investigation report, counsel acknowledged Dozier's "extensive criminal record," but referenced Dozier's cooperation with police as follows:

> He-he, being in and out of the system he knows his rights. He knew he could have exercised his right to remain silent. But if you'll note through the [pre-sentence investigation] report, in the first interrogation he did own up to not only the robbery where they had his DNA, had pretty conclusive evidence that it was him, but he also owned up and accepted responsibility for two other robberies[5] here in Floyd County that they did not have evidence we believe to charge him with at that time.

(Tr. 9). Defense counsel asked the trial court to consider Dozier's "robberies"[6] to constitute a single episode of criminal conduct under Indiana Code 35-50-1-2, and to impose concurrent sentences. (Tr. 8). Immediately following counsel's summary,

[5] According to the pre-sentence investigation report, in the late fall of 2007, Dozier committed several robberies within the same geographic area in Floyd County. On October 25, 2007, he entered a Family Dollar store, grabbed the cash drawer from the store clerk, and fled. On November 1, 2007, he entered an Uptown Liquor store and grabbed cash from the cash drawer. On November 14, 2007, he robbed a Swifty's gas station. During the Swifty's robbery, he crashed into a glass door and left behind a print of his face. He was subsequently identified using DNA evidence, from surveillance video footage, and after a witness selected his image from a photographic array.

[6] Dozier was only charged with a single count of class C felony robbery herein.

Dozier told the trial court, "I was wrong for what I done [sic] and I owe . . . Floyd County an apology." (Tr. 11).

After the State presented its evidence by summary, the trial court found Dozier's extensive criminal history to be the lone aggravating circumstance and found no mitigating circumstances. It imposed an eight-year sentence on Count I, as well as a twelve-year habitual offender enhancement under Count II, for a total aggregate sentence of twenty years. Dozier now appeals.

Additional facts will be provided as necessary.

DECISION

Dozier argues that the trial court abused its sentencing discretion. Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g,* 875 N.E.2d 218, 220 (Ind. 2007). "An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court." *Weis v. State*, 825 N.E.2d 896, 900 (Ind. Ct. App. 2005).

1. Overlooked Mitigating Circumstance

Dozier argues that the trial court overlooked his entry of a guilty plea as a mitigating circumstance. Specifically, he asserts that "the trial court did not take [his] guilty plea or cooperation with law enforcement into account at sentencing." Dozier's Br. at 8. We cannot agree.

Inasmuch as Dozier challenges the weight afforded to his guilty plea, we initially note that our supreme court has held that "[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 [of discretion]." *Anglemyer*, 868 N.E.2d at 491 (Ind. 2007). Thus, the weight assigned to Dozier's entry of a guilty plea is not subject to review for abuse of discretion.

Our supreme court has held that "a defendant who pleads guilty deserves some mitigating weight to be given to the plea in return." *Cotto v. State*, 829 N.E.2d 520, 525 (Ind. 2005). Here, the trial court's sentencing colloquy, with respect to the mitigating circumstances, was as follows:

> In looking at the mitigating factors there are certain ones the Court may consider, and frankly, the Court did not find any that applied.
>
> [Indiana Code section 35-38-1-7.1(b)(1) provides] that the crime neither caused nor threatened serious harm to persons or property or the person did not contemplate it would do so.
>
> The robbing of a busy convenien[ce] store has to be one of the most dangerous situations to place yourselves or other people in. This robbery was committed in front of other people including a good Samaritan who had lent you money. Your actions certainly caused serious threat of harm to other people.
>
> Number two [Indiana Code section 35-38-1-7.1(b)(2) provides that] the crime was a result of circumstances unlikely to reoccur. Based upon your prior criminal history and the way that the seriousness and the violence has escalated, the Court finds it's very likely that the criminal history will continue and will reoccur.
>
> Number six [Indiana Code section 35-38-1-7.1(b)(6) provides that] the person has no history of delinquency or criminal activity. I've already discussed the prior criminal history and find that not to be a mitigating factor here either.

> Number seven [Indiana Code section 35-38-1-7.1(b)(7) provides that] the person is likely to respond affirmatively to probation or short term imprisonment. You have been on probation in the past and that obviously has not made a difference nor curtailed this twenty year span of criminal activity. So I find that this is not a mitigating factor either, including the fact that you were on probation at the time of this arrest.
>
> Number eight [Indiana Code section 35-38-1-7.1(b)(8) provides that] the character and attitude of the person indicate[s] the person is unlikely to commit another crime. I also find this not to be a mitigating factor.
>
> The character and attitude that you've demonstrated along the way shows one that is choosing to commit these additional criminal offenses. And so I find that not to be a factor either.
>
> You, I am considering the fact that you did cooperate with the police all be it [sic] after the DNA match was made and <u>you did show responsibility here today which the Court is considering as well</u>.
>
> But in weighing the mitigating and aggravating factors here today, the Court finds that the aggravating factors . . . certainly outweigh any mitigating factors that have been demonstrated here today . . . .

(Tr. 17-19) (emphasis added).

It is apparent from the trial court's colloquy that it did, in fact, consider Dozier's entry of a guilty plea as a <u>potential</u> mitigating circumstance, but ultimately deemed it not to be significantly so. *See Sensback v. State,* 720 N.E.2d 1160, 1165 (Ind. 1999) (entry of guilty plea is not necessarily significantly mitigating). *See also Cotto,* 829 N.E.2d at 525 (while defendant who pleads guilty generally deserves to have some mitigating weight extended to his guilty plea, trial court is not required to find defendant's guilty plea to be significant mitigating circumstance). Moreover, Dozier received a significant benefit from his entry of his guilty plea when the State declined to charge him with three separate

counts of robbery and also dismissed a petition to revoke probation[7] in a prior case. *See Hines v. State*, 856 N.E.2d 1275, 1282 (Ind. Ct. App. 2006) (entry of guilty plea may be regarded as pragmatic decision where defendant receives benefit as result of plea, and considerable evidence exists of his guilt). We find no abuse of discretion.

2. Inappropriateness of Sentence

Dozier also asserts that his maximum sentence and maximum habitual offender enhancement are inappropriate in light of the nature of his offenses and his character. We disagree.

Indiana Appellate Rule 7(b) provides that a 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." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer*, 868 N.E.2d at 491. The burden is on the defendant to persuade us that his sentence is inappropriate. 876 N.E.2d at 1116 (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

In determining whether a sentence is inappropriate, the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Childress*, 848 N.E.2d at 1081. Dozier was convicted of a class C felony. The advisory sentence for a class C felony is four years, with a minimum sentence of two

[7] The maximum sentence that Dozier could have received under the petition to revoke was two and one-half years to be served consecutively to the underlying sentence herein. *See* I.C. 35-50-1-2(d).

years and a maximum sentence of eight years. I.C. § 35-50-2-6. Here, the trial court imposed an eight-year sentence for Count I, class C felony robbery.

Indiana Code section 35-50-2-8(h) provides that "the court shall sentence a person found to be a habitual offender to an additional fixed term that is not less than the advisory sentence for the underlying offense nor more than three (3) times the advisory sentence for the underlying offense. Given Dozier's eight-year sentence on Count I, the maximum habitual offender enhancement when the underlying crime is a class C felony was twelve years. Here, the trial court imposed a twelve-year habitual offender enhancement.

Regarding the nature of the offenses, Dozier admitted at the sentencing hearing to three separate robberies in October and November of 2007. On each occasion, Dozier entered the business establishment posing as a legitimate customer and then grabbed cash or the cash drawer from the cash register.

Regarding the character of the offender, Dozier's extensive and serious criminal history spans a twenty-year period, including prior robbery convictions in 1997 and 2005. His juvenile criminal history includes adjudications in 1988 for burglary, theft, and two battery offenses. His adult criminal history includes convictions for class B felony robbery (1997); class C felony battery (1998); class D felony theft/receiving stolen property (1998); battery (1998); and class C felony robbery (2005).[8]

[8] The pre-sentence investigation report also includes charges of resisting law enforcement, possession of stolen property, operating while intoxicated, possession of paraphernalia, and possession of cocaine; however the nature of disposition for these offenses is unclear from the record.

The trial court remarked at the sentencing hearing that nearly twenty years after being adjudicated a juvenile delinquent for committing burglary and two battery offenses, Dozier continues to commit "the same types of offenses," indicating "that nothing has changed, that [he] ha[s] not learned anything from those initial arrests . . . and that the behavior itself certainly has not changed." (Tr. 15, 16). The trial court further remarked, and we agree, that Dozier's pattern of criminal behavior "is likely to continue" and poses a danger to the community, as evidenced by the escalating level of violence and seriousness of his offenses. (Tr. 16). Lenity from courts and prior attempts at rehabilitation have failed to deter Dozier from criminal behavior. Nor does he appear to be an appropriate candidate for probation, as he violated the terms of his "probation, parole or pretrial release" with his commission of the instant robberies. (Tr. 16).

We cannot find that Dozier's total aggregate twenty-year sentence is inappropriate in light of the nature of his offenses and his character.

Affirmed.

MAY, J., and KIRSCH, J., concur.