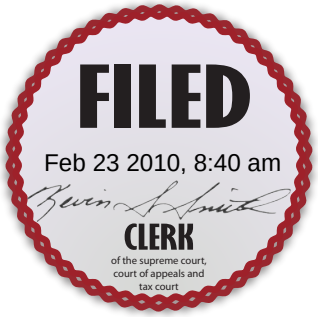

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IN THE
COURT OF APPEALS OF INDIANA

DEON RAY HARRIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A04-0910-CR-579
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0803-FA-09

February 23, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Deon Ray Harris appeals his sentence following his conviction for Dealing in Cocaine, as a Class B felony, pursuant to a plea agreement. He presents the following issues for our review:

1. Whether the trial court abused its discretion when it rejected Harris' proffered mitigating factors for consideration in sentencing.

2. Whether Harris' sentence is inappropriate under Appellate Rule 7(B) in light of the nature of the offense and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

On March 5, 2008, Harris sold cocaine to an undercover police officer. The State charged Harris with dealing in cocaine, as a Class A felony; possession of cocaine, as a Class A felony; and resisting law enforcement, as a Class A misdemeanor. The State subsequently filed an habitual substance offender enhancement. On December 23, 2008, Harris pleaded guilty to dealing in cocaine, as a Class B felony, and to the habitual substance offender enhancement in exchange for dismissal of the remaining charges. Harris' plea agreement left the sentencing terms open to the trial court's discretion.

At the sentencing hearing, the trial court found as follows:

> The Court finds as aggravating factors that the defendant has a history of criminal or delinquent behavior, the defendant has recently violated the conditions of probation, parole, pardon, community corrections or pre-trial release, and the defendant has received the benefit of reduced charges.
>
> The Court finds as mitigating factors the defendant has pled guilty and taken responsibility for his crime, and the defendant is remorseful.

> The Court further finds that the aggravating factors outweigh the mitigating factors.

Appellant's App. at 10. The trial court sentenced Harris to fifteen years on the Class B felony conviction and an additional five years for the habitual substance offender adjudication, for an aggregate term of twenty years. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Mitigating Factors

Harris first challenges the trial court's finding of mitigators. Under the sentencing statute a court may impose any sentence that is authorized by statute and permissible under the Indiana Constitution regardless of the presence or absence of aggravating or mitigating circumstances. Ind. Code § 35-38-1-7.1(d) (2007). A person who commits a Class B felony may be imprisoned for a fixed term between six (6) and twenty (20) years. I.C. § 35-50-2-5. The advisory sentence for a Class B felony is ten (10) years. Id. Indiana Code Section 35-50-2-1.3 provides, an

> [a]dvisory sentence means a guideline sentence that the court may voluntarily consider as the midpoint between the maximum sentence and the minimum sentence. . . . the court is not required to use the advisory sentence in imposing the sentence for the underlying offense.

Indiana Code Section 35-38-1-7.1 provides a non-exclusive list of mitigating and aggravating factors a trial court may consider in imposing a sentence. When the trial judge deviates from the advisory sentence, he is "required to (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance ha[d] been determined to be mitigating or aggravating; and (3) articulate the

court's evaluation and balancing of circumstances." Anglemyer v. State, 868 N.E.2d 482, 486 (Ind. 2007) clarified on other grounds on reh'g, 875 N.E.2d 218 (Ind. 2007).

Harris first contends that the trial court abused its discretion when it sentenced him because the court failed to identify two proposed mitigating factors, namely, his community service, and that incarceration would place an undue hardship on his dependents. "Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." Id. at 490. "An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn there from." Id. (citing K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006) (quoting In re L.J.M., 473 N.E.2d 637, 640 (Ind. Ct. App. 1985)).

As our supreme court explained in Anglemyer:

> One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other reasons include entering a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Under those circumstances, remand for resentencing may be appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.
>
> Because the trial court no longer has any obligation to "weigh" aggravating and mitigating factors against each other when imposing a sentence . . . a trial court cannot now be said to have abused its discretion in failing to "properly weigh" such factors. . . .
>
> * * *

> Because the trial's court's recitation of its reasons for imposing sentence included a finding of mitigating circumstances, the trial court was required to identify all significant mitigating circumstances. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the evidence is both significant and clearly supported by the record. However, "If the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist."

Id. at 490-93 (citations omitted; emphasis added).

Harris first contends the trial court abused its discretion because it failed to identify his service to the community as a mitigating factor. Again, "[a]n allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." Id. (emphasis added). Harris' community service is supported by the record. But its significance is debatable. Harris admitted he smoked both marijuana and cocaine "four times a week" between the ages of fifteen to twenty-eight. Appellant's Green Appendix at 7. During that same time, Harris volunteered at the YWCA as an aquatic instructor and as a tutor at Tecumseh Middle School. At the sentencing hearing, the trial court noted, "in considering the sentence to impose frankly I'm a little troubled by the idea of somebody who's dealing drugs having that close of contact with the children and so I'm gonna [sic] discount those recommendations." Sentencing Transcript at 10. Accordingly, we cannot say that the trial court abused its discretion in not identifying Harris' community service as a mitigator.

Harris next contends that the trial court abused its discretion when it refused to identify as a mitigating factor whether Harris' incarceration would create an undue

hardship on his dependents. But the record does not reveal the degree to which Harris' wife and children were dependent upon him for support and, thus, the extent of any hardship they would experience. Therefore, Harris has not shown that that proffered mitigator was clearly supported by the record, and we cannot say the trial court abused its discretion. See Anglemyer 868 N.E.2d at 492-93.

Issue Two: Nature of Offense and Character of Offender

Harris contends that his fifteen-year sentence is inappropriate in light of the nature of the offense and his character. Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review and revision of a sentence imposed by the trial court." Roush v. State, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007) (alteration original). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Revision of a sentence under Appellate Rule 7(B) requires the appellant to demonstrate that his sentence is inappropriate in light of the nature of his offenses and his character. See Ind. Appellate Rule 7(B); Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, "a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

We initially note that Harris has not made an argument regarding the nature of his offense. Revision of a sentence under Indiana Appellate Rule 7(B) requires the appellant to demonstrate that his sentence is inappropriate in light of both the nature of his offense and his character. Williams v. State, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008); see Ind. Appellate Rule 7(B); Rutherford, 866 N.E.2d at 873. Because Harris presents no cogent argument regarding the inappropriateness of his sentence in light of the nature of his offense, he has waived our review of this claim. Id.; see App. R. 46(A)(8)(a); Ford v. State, 718 N.E.2d 1104, 1107 n. 1 (Ind. 1999) (holding that the defendant's "argument with respect to the review and revise provision of the constitution is waived for failure to state a cogent argument").

Waiver notwithstanding, regarding his character Harris contends that his sentence is inappropriate because, "his criminal history is a less significant aggravating circumstance where that history also supports the habitual substance offender [] enhancement." Appellant's Brief at 6-7. In support of that contention, Harris refers to our supreme court's opinion in Pedraza v. State, 848 N.E.2d 1073 (Ind. 2006). In Pedraza the court held that a trial court may use "the same criminal history as an aggravator and as support for a habitual offender finding." Id. at 1080. Thus, any reliance here on the actual holding in Pedraza would be misplaced.

But Harris does not cite Pedraza as direct authority. Instead he argues, in effect, that the holding in Pedraza is permissive, not mandatory. Thus, he contends that because two of the substance offenses charged in this case are "related to one another" and two (2) of the "alleged predicate substance offenses" were misdemeanor convictions, he is

only "minimally eligible" for imposition of the habitual substance offender enhancement. We cannot agree. Harris concedes he is eligible for the enhancement based on two prior unrelated substance offenses. Ind. Code § 35-50-2-10. And the trial court imposed a mid-range habitual substance offender enhancement. Harris has not shown that his sentence is inappropriate.

Affirmed.

FRIEDLANDER, J., and BRADFORD, J., concur.