

Sherri Sullivan appeals her sentence for three counts of forgery as class C felonies¹ and four counts of theft as class D felonies.² Sullivan raises three issues, which we revise and restate as:

- I. Whether the trial court abused its discretion in sentencing Sullivan;
- II. Whether Sullivan's sentence is inappropriate in light of the nature of the offense and the character of the offender; and
- III. Whether Sullivan's equal protection rights were violated by her sentence.

We affirm.

The relevant facts follow. Sullivan worked as an unpaid volunteer and acted as the treasurer of the Madison County Humane Society ("the Humane Society"). Between 2004 and 2007, Sullivan wrote unauthorized checks on the Humane Society's account and used the Humane Society's credit card to make unauthorized personal purchases in excess of \$65,000.

The Humane Society confronted Sullivan about the missing money, and Sullivan admitted that "she had gotten into financial trouble and had to borrow the money." Transcript at 14. On April 10, 2007, the Humane Society's board of directors reported to the police that Sullivan had been stealing money. The Humane Society provided police with documentation supporting the allegations.

¹ Ind. Code § 35-43-5-2 (Supp. 2006).

² Ind. Code § 35-43-4-2 (2004) (subsequently amended by Pub. L. No. 158-2009, § 8 (eff. July 1, 2009)).

On February 8, 2008, the State charged Sullivan with Count I, forgery as a class C felony; Count II, theft as a class D felony; Count III, theft as a class D felony; Count IV forgery as a class C felony; Count V, theft as a class D felony; Count VI, forgery as a class C felony; and Count VII, theft as a class D felony. On May 11, 2009, Sullivan pled guilty as charged.

At the sentencing hearing, Sullivan's counsel examined David Surratt, the assistant director of the Madison County Community Corrections, who testified that Madison County did not have a work release center for women. Surratt also testified that there was a women's work release center in Henry County and one in Indianapolis called Volunteers of America. The following exchange occurred during the direct examination of Surratt:

Q Now, should a Judge be so inclined to put a lady in work release at either one of those facilities, would you be in a place where you could monitor their progress?

A If they were at either one of those facilities, we would probably transfer that over to the local facility and they would report back to the court.

Id. at 27. Sullivan testified that she could complete placement at the work release center in Henry County or Indianapolis. During closing argument, the prosecutor stated that this case was not appropriate for work release because “[i]f there's any monies available to be spent, it shouldn't be spent at a work release center, it should be spent pay [sic] back the folks that lost their money and to help these animals that have been put at jeopardy.” Id. at 55-56. During closing argument, Sullivan's counsel stated: “I have provided options

for work release. Henry County as [sic] a work release center, as does Volunteers of America.” Id. at 61.

After the sentencing hearing, the trial court found the following aggravators: (1) Sullivan abused her position of trust; (2) the donations to the Humane Society were used in a way that was not intended by the donors; (3) Sullivan liquidated her 401(k) in the amount of approximately \$25,000; (4) while Sullivan was employed she failed to save any money to make restitution; and (5) the offenses occurred between 2004 and 2007. The trial court found Sullivan’s guilty plea as a mitigator but found that it was “de minimis.” Id. at 68. The trial court also found the fact that Sullivan had “very little criminal history” as a mitigator. Id. The trial court found that Sullivan “appears remorseful” but that this factor was “de minimis.” Id. The trial court found that the aggravating circumstances outweighed the mitigating circumstances.

The trial court sentenced Sullivan to seven years for each conviction of forgery as a class C felony and two and one-half years for each conviction of theft as a class D felony. The trial court ordered that the sentences for her three convictions of forgery as class C felonies be served consecutive to each other. The trial court ordered that the sentences for the convictions of theft as class D felonies be served concurrently with each other and concurrently with the sentences for the forgery convictions. Thus, Sullivan received an aggregate sentence of twenty-one years. The trial court ordered that eight years be executed in the Department of Correction and suspended thirteen years to probation.

I.

The first issue is whether the trial court abused its discretion in sentencing Sullivan. We note that Count II alleged theft that occurred prior to the April 25, 2005 revisions to the sentencing statutes, and Count III alleged theft that occurred between January 3, 2005 and December 29, 2005. The remaining counts involved offenses that occurred after the April 25, 2005 revisions. The Indiana Supreme Court has held that we apply the sentencing scheme in effect at the time of the defendant's offense. See Robertson v. State, 871 N.E.2d 280, 286 (Ind. 2007) (“Although Robertson was sentenced after the amendments to Indiana’s sentencing scheme, his offense occurred before the amendments were effective so the pre-Blakely sentencing scheme applies to Robertson’s sentence.”); Gutermuth v. State, 868 N.E.2d 427, 432 n.4 (Ind. 2007).

Under the pre-April 25, 2005 sentencing statutes, sentencing decisions rest within the discretion of the trial court and are reviewed on appeal only for an abuse of discretion. Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002). An abuse of discretion occurs if “the decision is clearly against the logic and effect of the facts and circumstances.” Pierce v. State, 705 N.E.2d 173, 175 (Ind. 1998). In order for a trial court to impose an enhanced sentence, it must: (1) identify the significant aggravating factors and mitigating factors; (2) relate the specific facts and reasons that the court found to those aggravators and mitigators; and (3) demonstrate that the court has balanced the aggravators with the mitigators. Veal v. State, 784 N.E.2d 490, 494 (Ind. 2003).

Indiana's sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences. See Ind. Code § 35-50-2-5 (Supp. 2005). In clarifying the April 2005 revisions, the Indiana Supreme Court has held that "the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). We review the sentence for an abuse of discretion. Id. An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Id.

A trial court abuses its discretion if it: (1) fails "to enter a sentencing statement at all;" (2) enters "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;" (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration;" or (4) considers reasons that "are improper as a matter of law." Id. at 490-491. If the trial court has abused its discretion, we will remand for resentencing "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." Id. at 491. However, under the new statutory scheme, the 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. Id.

Sullivan argues that the trial court considered two improper aggravators. Specifically, Sullivan argues that the trial court improperly relied upon "the fact that [she]

liquidated her 401K, but failed to apply the money to restitution, and the fact that she was employed until May 2009, but failed to apply any of her earnings to restitution.” Appellant’s Brief at 8. Sullivan argues that “[n]either of these factors are recognized as statutory aggravators in Ind. Code § 35-38-1-7.1(a).” Id. Sullivan also argues that “the evidence showed that [she] used the 401K to live on while the case was pending.” Id.

To the extent that Sullivan suggests that the aggravators were not recognized as statutory aggravators, we note that the list of aggravators established by our legislature is not exclusive. See Ind. Code § 35-38-1-7.1(c) (stating that the enumerated aggravating and mitigating circumstances “do not limit the matters that the court may consider in determining the sentence”); Ector v. State, 639 N.E.2d 1014, 1016 (Ind. 1994) (holding that the statutory list of aggravating factors is not exclusive), reh’g denied. To the extent that Sullivan argues that she used the 401(k) to live on, the record reveals that she had about \$25,000 in her 401(k) and that she liquidated the 401(k) while the case was pending and did not make any restitution even though she testified that she could have made a partial restitution with the money. We cannot say that the trial court abused its discretion in considering the fact that Sullivan liquidated her 401(k) without making any restitution or that she was employed and failed to make any restitution as aggravators.

Sullivan also argues that her willingness to pay restitution should have been recognized as a mitigating circumstance. “The finding of mitigating factors is not mandatory and rests within the discretion of the trial court.” O’Neill v. State, 719 N.E.2d 1243, 1244 (Ind. 1999). The trial court is not obligated to accept the defendant’s

arguments as to what constitutes a mitigating factor. Gross v. State, 769 N.E.2d 1136, 1140 (Ind. 2002). “Nor is the court required to give the same weight to proffered mitigating factors as the defendant does.” Id. Further, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. Sherwood v. State, 749 N.E.2d 36, 38 (Ind. 2001), reh’g denied. However, the trial court may “not ignore facts in the record that would mitigate an offense, and a failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them.” Id. An 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. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999).

At the sentencing hearing, Sullivan stated:

I feel I am finally starting with whatever sentence I get I feel I’ll finally get to start paying back the money I wanted to pay back. Sally Wilding told me with two other board members that it could not be paid back a little bit at a time. I also asked Suzanne Pluehart if I needed a lawyer at one time and she said, “yes.” Otherwise, I could’ve started paying the monies that I paid three (3) lawyers, I could’ve been paying to the Humane Society.

Transcript at 37. When asked whether she could have made a partial restitution with her 401(k), Sullivan stated, “I could’ve make [sic] a partial restitution, but I was told that I couldn’t pay back any little sums and to get a lawyer, so I figured it had to go through the courts, instead of me paying them back little bit” Id. at 39. Richard Chandler, the Director of the Humane Society, testified as follows:

[Sullivan] had told her co-workers and several others that she had attempted to pay us back the money but we had refused to accept it. To clarify that, she did tell Mrs. Welding, our Director (inaudible) that she would pay back the money if we would agree to drop all charges against her. She was told that the matter had been given to the prosecutor and was out of our hands.

Id. at 47. We cannot say that Sullivan has established that the evidence of her willingness to pay restitution is both significant and clearly supported by the record. Thus, the trial court did not abuse its discretion by not considering Sullivan's willingness to make restitution as a mitigating circumstance.

In summary, we cannot say that the trial court abused its discretion under either the sentencing statutes in effect prior to April 25, 2005, or the revised sentencing statutes.

II.

The next issue is whether Sullivan's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute 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." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Sullivan argues that her sentence should be revised or we should remand to the trial court for further hearing.

Our review of the nature of the offense reveals that Sullivan acted as the treasurer of the Humane Society, a nonprofit organization, and wrote unauthorized checks on the

Humane Society's account and used the Humane Society's credit card to make unauthorized personal purchases in excess of \$65,000 between 2004 and 2007. The annual budget of the Humane Society was approximately \$15,000 to \$20,000 a month or close to \$200,000 a year, and contributions and fund raising events accounted for seventy-four percent of the budget. Chandler, the Director of the Humane Society, testified that Sullivan "left the remaining board members with a financial mess and a shattered reputation," and that some people told the Humane Society that they would not contribute anymore because of the way things were handled. Transcript at 47. The trial court characterized Sullivan's offenses as "one of the most egregious violations of a trusted position that the Court has seen down through the years." Id. at 66.

Our review of the character of the offender reveals that Sullivan pleaded guilty without a plea agreement and expressed remorse at the sentencing hearing. However, the record also reveals that the Humane Society provided police with documentation supporting the allegations. Sullivan does not have a prior criminal history. Sullivan told the Director of the Humane Society that she would pay back the money if the Humane Society would agree to drop all charges against her. While the case was pending, Sullivan liquidated her 401(k) account which contained \$25,000 and did not make any restitution even though she could have made partial restitution. The presentence investigation report reveals that Sullivan believes that she has a shopping addiction.

After due consideration of the trial court's decision, we cannot say that the sentence of twenty-one years with thirteen years suspended to probation is inappropriate

in light of the nature of the offense and the character of the offender. See Farris v. State, 787 N.E.2d 979, 985 (Ind. Ct. App. 2003) (holding that the defendant’s eight-year sentence for forgery was not inappropriate).

III.

The next issue is whether Sullivan’s equal protection rights were violated by her sentence. Sullivan argues that her sentence “constitutes a violation of the equal protection clauses of the United States and Indiana constitutions.” Appellant’s Brief at 11. Specifically, Sullivan argues that Ind. Code § 35-38-2.6 provides for work release as an alternative to executing a sentence in the Department of Correction, but that Madison County only provides a work release center for men. Thus, Sullivan argues that “it is a denial of equal protection for a work release center to be available to men, and not to women, in Madison County.” Id. The State argues that Sullivan does not have standing to bring an equal protection challenge in this case. We agree with the State.

To have standing to challenge the constitutionality of a statute or a government action, an appellant must establish that her rights were directly and certainly affected. See Gross v. State, 506 N.E.2d 17, 21 (Ind. 1987) (“To have standing to challenge the constitutionality of a statute, Appellant must establish that his rights were adversely affected by operation of both the statute and the particular section he is attacking.”); State v. Clark, 247 Ind. 490, 494, 217 N.E.2d 588, 590 (Ind. 1966) (“As a general rule, the constitutionality of a statute or other governmental action is to be considered in the light of the standing of the party who seeks to raise the question and its particular application. .

. . . A constitutional question may not be raised by one whose rights are not directly and certainly affected; or in a case where no attempt is being made to enforce the provision attacked.”) (quoting 16 C.J.S. Constitutional Law § 76, pp. 226-236).

Here, the record reveals that there were work release centers available to Sullivan in Henry County and in Indianapolis if the trial court had deemed work release appropriate. Sullivan testified that she could serve her sentence in either of those work release centers. The prosecutor argued that whether Madison County had a work release center for women was “totally irrelevant” because this case was not appropriate for work release. Transcript at 55. During closing argument, Sullivan’s counsel stated: “I have provided options for work release. Henry County as [sic] a work release center, as does Volunteers of America.” *Id.* at 61. Sullivan does not point to and our review of the record does not reveal any indication that the trial court did not sentence Sullivan to a work release center because of the lack of a work release center in Madison County. Under the circumstances, we conclude that Sullivan does not have standing to challenge her sentence upon equal protection grounds.

For the foregoing reasons, we affirm Sullivan’s sentence.

Affirmed.

MATHIAS, J., and BARNES, J., concur.