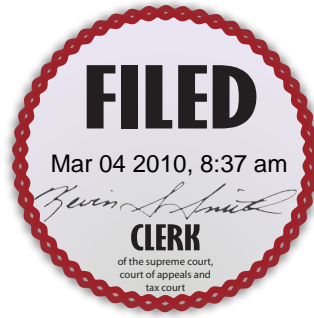


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

P. JEFFREY SCHLESINGER
Appellate Public Defender
Crown Point, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

JAMES E. PORTER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

WILFREDO ALMODOVAR,)

Appellant-Defendant,)

vs.)

No. 45A04-0908-CR-461

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 49G02-0808-FA-27

March 4, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Wilfredo Almodovar challenges his convictions and sentence, following a guilty plea, to two counts of class A felony attempted murder.

We affirm.

ISSUES

1. Whether Almodovar may challenge the factual basis underlying his guilty plea on direct appeal.
2. Whether the trial court abused its sentencing discretion in failing to find significant mitigating circumstances.

FACTS

On August 8, 2008, Michael Kinsey and his passenger, Shannon White, drove to Almodovar's residence. White waited in the car as Kinsey knocked at the door. When Almodovar answered the door, Kinsey asked to speak with "Candy." Almodovar said that Candy was not at home and began to argue with Kinsey. Kinsey returned to his vehicle to wait for Candy to return. Almodovar approached the vehicle and fired multiple gunshots inside, striking White in the face, shoulder, and buttocks. Kinsey managed to escape from the vehicle, falling to the ground next to the car. Almodovar walked over and shot Kinsey as he lay on the ground. Kinsey suffered gunshot wounds to his face, neck, and shoulder.

On August 9, 2008, the State charged Almodovar with the following offenses: two counts of class A felony attempted murder; two counts of class B felony aggravated battery; one count of class D felony resisting law enforcement; and one count of class D

misdemeanor reckless driving. On June 4, 2009, the parties tendered a written plea agreement and stipulated factual basis with the trial court. Pursuant to the plea agreement, Almodovar agreed to plead guilty to two counts of class A felony attempted murder. In exchange, the State agreed to dismiss the remaining counts and also agreed not to file a habitual offender count. Almodvar also agreed not to challenge the convictions by direct appeal. The trial court took the plea agreement under advisement.

The stipulated factual basis provided, in pertinent part, as follows:

3. On August 8, 2008, Michael Kinsey went to the trailer of a subject known to him as Fred (later identified as Wilfredo Almodovar)
4. Michael Kinsey knocked on the door and was met by Wilredo [sic] Almodovar.
5. Michael Kinsey asked for a female named Candy.
6. Wilrefo [sic] Almodovar stated Candy was not at home and then began to argue with Michael Kinsey.
7. Michael Kinsey went to his vehicle to wait for the female.
8. Wilfredo Almodovar approached the vehicle and began to shoot at Michael Kinsey and Shannon White who was also in the vehicle.
9. Shannon White was struck with a bullet in the face, shoulder, and buttocks and went to the hospital for treatment.
10. Michael Kinesy attempted to get out of the car and while he was on the ground, Wilfredo Almodovar walked up to him and shot him again.
11. Michael Kinsey was struck with a bullet in the face, shoulder, and still has a bullet lodged in his neck.
12. All of these events occurred in Lake County, Indiana.

(App. 26).

During the guilty plea hearing, the following colloquy occurred between Almodovar, the trial court, and Almodovar's counsel:

COURT: You've been charged in Count I with attempted murder. That charged alleges that you, while acting with the intent to kill, did

intentionally attempt to kill Shannon White by shooting at Shannon White with a gun, a deadly weapon. Do you understand that charge?

[Almodovar]: Yes, I do.

Court: In Count II you're charged with attempted murder, a Class A felony. That charge alleges that on that same date, August 8th of 2008, that you, while acting with the intent to kill, did intentionally attempt to kill Michael Kinsey, by shooting at Michael Kinsey with a gun, a deadly weapon. Do you understand that charge?

[Almodovar]: Yes, I do.

Court: Before you can be found guilty of those charges, evidence must be presented that establishes beyond a reasonable doubt that you did in fact commit the offenses. Attached to the plea agreement is a document entitled stipulated factual basis, it's marked exhibit A and it also has a signature that purports to be your signature. Is that in fact your signature?

[Almodovar]: Yes, it is.

Corut: Did you read this stipulated factual basis before you signed it?

[Almodovar]: Yes, I did.

Court: Are you telling the Court under oath that the statements contained in the stipulated factual basis are true?

[Almodovar]: Yes.

Court: Are you telling the Court under oath that you did in fact commit the acts that are described in the stipulated factual basis?

[Almodovar]: Yes, I did.

* * *

Court: Do you understand that by pleading guilty you're admitting as true the allegations against you?

[Almodovar]: Would you repeat that, your Honor?

Court: Yes. Do you understand that by pleading guilty, you're admitting the allegations against you?

[Almodovar]: Yes.

(Guilty Plea Tr. 9-11, 17).

The trial court held a sentencing hearing on July 9, 2009. The trial court found the following aggravating circumstances: (1) Almodovar's criminal history; (2) that he violated his parole for murder when he committed the instant shootings; and (3) the nature and circumstances of the offenses, essentially, Almodovar attacked Kinsey and White by ambush. The court identified one mitigating circumstance -- Almodovar's entry of a guilty plea which had spared the State the expense of a trial. The trial court concluded that the aggravating circumstances far outweighed the mitigating circumstance and imposed two forty-year sentences, to be served consecutively, for an aggregate sentence of eighty years.

Additional facts will be provided as necessary.

DECISION

First, Almodovar attempts to challenge the factual basis underlying his convictions. The State counters, and we agree, that direct appeal is not the appropriate vehicle for Almodovar's claim.

It is well-settled that "a direct appeal is not the proper procedural avenue for a defendant to attack a plea agreement." *Mapp v. State*, 770 N.E.2d 332, 333 (Ind. 2002). Our Supreme Court has held that a person who pleads guilty cannot challenge the

propriety of any resulting convictions on direct appeal; he or she is limited on direct appeal to contesting the merits of a trial court's sentencing decision where the sentence is not fixed by the plea agreement. *Starr v. State*, 874 N.E.2d 1036, 1037 (Ind. Ct. App. 2007) (citing *Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004)). Stated plainly, "It is only a sentence -- not the conviction itself -- that may be challenged on direct appeal following a guilty plea." *Id.*

The appropriate vehicle for Almodovar's challenge to the adequacy of the factual basis and other like challenges to the conviction itself is the post-conviction proceeding; thus, we conclude that his claim is not properly before us. *See Prowell v. State*, 687 N.E.2d 563 n.1 (Ind. 1997). Accordingly, we do not reach the merits of his claim.

Next, Almodovar challenges the propriety of his aggregate eighty-year sentence. Specifically, he argues that the trial court abused its sentencing discretion in failing to recognize (1) his expression of remorse; and (2) the fact that "he was provoked before the incident" as significant mitigating circumstances. Almodovar's Br. at 6. We disagree.

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. 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 therefrom. We can review the presence or absence of reasons justifying a sentence for an abuse of discretion, but we cannot review the relative weight given to these reasons. One way in which a court may abuse its discretion is by entering a sentencing statement that omits mitigating circumstances that are clearly supported by the record and advanced for consideration. However, a trial court is not obligated to accept a defendant's claim as to what constitutes a mitigating circumstance.

Anglemyer v. State, 868 N.E.2d 482, 490-91 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007); *Rascoe v. State*, 736 N.E.2d 246, 249 (Ind. 2000) (internal citations omitted).

Our supreme court has recognized remorse as a valid mitigating circumstance. *Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005). “On appeal, however, our review of a trial court's determination of a defendant’s remorse is similar to our review of credibility judgments: without evidence of some impermissible consideration by the trial court, we accept its determination.” *Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002).

Here, at the sentencing hearing, Almodovar initially apologized for shooting Kinsey and White: “I did shoot Michael Kensey [sic] and Shannon White. I used poor judgment. I am sorry for what I did. I know now that it would have been best for all concerned if I would have called the police instead of doing what I did.” (Sent. Tr. 34). Almodovar’s initial expression of remorse is, however, belied by his subsequent attempts to blame others, the condition of his neighborhood, stress, and even Kinsey, for his predicament. *See* Sent. Tr. 34 (“I was provoked. I live in a bad neighborhood. I got fellahs running in my house at will, just forcing their way in. I got people pointing guns at me. I don’t know if I was stressed out or what.”); (“And the girl, Candy, she never lived at my house. They knew this. Michael Kensey [sic] knew that she didn’t live there.”)

In light of the foregoing testimony, and absent any evidence that the trial court engaged in any impermissible considerations, we conclude that the trial court did not

abuse its discretion in failing to recognize Almodovar's expression of remorse as a significant mitigating circumstance. *See Hape v. State*, 903 N.E.2d 977, 1003 (Ind. Ct. App. 2009) (finding no abuse of discretion from trial court's failure to recognize defendant's alleged remorse as a significant mitigating circumstance where defendant followed his apology with reasons why others were to blame).

Almodovar also argues that the trial court should have recognized, as mitigating, the existence of grounds tending to excuse or justify his conduct -- namely that he "was provoked before the incident." Almodovar's Br. at 6.

Given that the only support for the existence of this alleged mitigating circumstance is a vague inkling from the stipulated factual basis that Almodovar argued with Michael Kinsey before the incident and Almodovar's own self-serving contention that he was provoked, we conclude that it was within the trial court's discretion to decline to find provocation to be a significant mitigating circumstance because it was not clearly supported by the record. *See Powell v. State*, 751 N.E.2d 311, 317 (Ind. Ct. App. 2001) (trial court is not required to find mitigating factors or to accept as mitigating circumstances proffered by defendant.); *see also Bacher v. State*, 722 N.E.2d 799, 803 (Ind. 2000) (sentencing court need not agree with defendant as to weight or value to be given to proffered mitigating facts).

Affirmed.

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