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IN THE COURT OF APPEALS OF INDIANA

PRESTON WILLIAMS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 28A04-0911-CR-674
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GREENE CIRCUIT COURT
The Honorable Erik C. Allen, Judge
Cause No. 28C01-0905-FC-74

March 25, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Preston Williams appeals his sentences for two counts of reckless homicide as class C felonies.[1] Williams raises two issues, which we revise and restate as:

I. Whether the trial court abused its discretion in sentencing Williams; and

II. Whether Williams's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

The relevant facts follow. On May 9, 2009, Williams and his fiancé Jessica Allman visited Jeff Adams, an acquaintance of theirs, in Greene County, Indiana. Both Williams and Allman were nineteen years old at the time. At some point, Adams challenged Williams to race their cars. Adams left in his vehicle first and then Williams followed in his vehicle with Allman riding as a passenger. While on a "straight-away" along State Road 43, Williams attempted to pass Adams while traveling south in the northbound lane. Transcript at 13. The road was "marked with double yellow lines indicating no passing either from the northbound or southbound lanes." Id. at 18. During the attempt to pass Adams, Williams came to a "blind hill," id. at 13, meaning that it was "very steep," and one "can't see anything coming . . . . until [one] is just virtually at the hillcrest." Id. at 18. Williams was travelling about eighty miles per hour at the time. The speed limit on the roadway was forty miles per hour.

As Williams's car crested the hill, the car crashed into a motorcycle driven by Jerry Marker, who had been traveling north in the northbound lane of the highway. After

[1] Ind. Code § 35-42-1-5 (2004).

impact, the motorcycle "basically was imbedded [sic] in past the front axle" of Williams's car. Id. at 20. According to Officer George Dallaire of the Greene County Sheriff's Department, who had investigated the accident: "It was a tremendous crash. Worse [sic] one I have ever seen." Id. at 25. Marker died instantly from the impact. Williams's car "traveled over 400 feet after impact, turned over after it left the eastside of the roadway, [and] caught on fire . . . ." Id. at 19. Williams pulled Allman from the car and used his hands to extinguish a fire which was on Allman's hip and arm. Williams also administered CPR to Allman. Despite these efforts, however, Allman also died as a result of the accident.

On May 11, 2009, the State charged Williams with two counts of reckless homicide as class C felonies and one count of reckless driving as a class B misdemeanor. On May 20, 2009, the trial court initially scheduled a jury trial for September 1, 2009. On October 19, 2009, Williams and the State entered into a negotiated plea agreement pursuant to which Williams agreed to plead guilty to both counts of reckless homicide as class C felonies, and the State agreed to dismiss the reckless driving charge. The agreement also stated that Williams's sentence would be left to the discretion of the trial court.

On November 12, 2009, the trial court held a change of plea and sentencing hearing. After Williams pled guilty to the two counts of reckless homicide as class C felonies, the trial court moved on to sentencing and the State called Officer Dallaire to

testify. During his testimony, Officer Dallaire stated that Williams had "shown lots of remorse" and that Williams had been cooperative. Id. at 27.

The trial court deemed the circumstances to be "greater than the element of recklessness necessary to prove the commission of the offense," and found them to be aggravating factors. Appellant's Appendix at 46. Specifically, in its order, the trial court found the following:

> The extreme recklessness of [Williams] in that he operated a motor vehicle on a public highway approximately 80 MPH, in the lane of oncoming traffic while attempting to pass another vehicle on a blind hill, where the road was marked with a double yellow line indicating no passing, the road was extremely narrow and hilly, he had a passenger in his car, another car operated by Jeff Adams in the right lane of the highway in close proximity, and a reasonable expectation that traffic would be oncoming. The nature and circumstances of the Defendant's actions as set forth herein display an extreme disregard for the safety and well-being of the victims and for other members of society that may have been traveling on the roadway at the time of the Defendant's actions. The Court gives great weight to the aggravating circumstances set forth in this paragraph and concludes that an enhanced sentence beyond the advisory sentence is justified.

Id.

The court also found the following as mitigating factors: (1) Williams's complete lack of criminal history; (2) Williams pled guilty, accepted responsibility, and was fully cooperative with law enforcement in their investigation; (3) Williams "displayed significant and genuine remorse;" and (4) Williams "attempted to provide aid to the victims at the accident scene." Id. at 47. At the hearing, the trial court also noted the following while discussing mitigating factors:

> [Williams was]19 at the time of the offense. [Williams is] 20 years old now. The status as a youthful offender has some mitigating weight. I don't think it has the mitigating weight that some of the others do. As young folks often people make decisions they would not make as an older adult but you were a young adult, you are a young adult and you made a very adult decision and it put lives at substantial risk and unfortunately in [Williams's] circumstance it had the ultimate outcome.

Transcript at 112-113. The trial court considered "the balance between aggravating and mitigating factors and determine[d] that the aggravating factors outweigh the mitigating factors." Appellant's Appendix at 47.

The trial court sentenced Williams to seven years on each count, and it ordered the sentences to be served consecutively because Williams's "actions resulted in the death of two human beings," and because reckless homicide is a "crime of violence." Id. at 46. The trial court suspended two years of each count to probation; thus the total aggregate sentence was fourteen years with ten years executed in the Department of Correction.

I.

The first issue is whether the trial court abused its discretion in sentencing Williams. We note that Williams's offenses were committed after the April 25, 2005 revisions of the sentencing scheme.[2] In clarifying these 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

[2] Indiana's sentencing scheme was amended effective April 25, 2005 to incorporate advisory sentences rather than presumptive sentences. See Ind. Code § 35-50-2-7 (Supp. 2005).

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 before the court." 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 that should have been found, is not subject to review for abuse of discretion. Id.

Williams argues that: (A) the trial court "found as the sole aggravating circumstance the recklessness of [Williams's] conduct," but that "the reckless nature of [Williams's] conduct was a material element of the offenses," and therefore was "improper as a matter of law;" and (B) "the trial court improperly omitted consideration" of Williams's young age as a significant mitigating circumstance. Appellant's Brief at 4. We address each argument separately.

A. Aggravating Factor

Williams argues that the facts listed by the trial court as aggravating factors "all relate to the recklessness of [Williams's] conduct," and he notes that "'recklessness' is a material element of the offense of reckless homicide." Id. at 6. Williams argues, however, that "a material element of a crime may not be used as an aggravating factor to support an enhanced sentence." Id. However, the Indiana Supreme Court has recently held that "this is no longer an inappropriate double enhancement" since the 2005 amendment to the sentencing statutes. Pedraza v. State, 887 N.E.2d 77, 80 (Ind. 2008). "[A] trial court that imposed a maximum sentence, explaining *only* that an element was the reason, would have provided an unconvincing reason that might warrant revision of sentence on appeal." Id. But "the nature and circumstances of a crime can be a valid aggravating factor." Filice v. State, 886 N.E.2d 24, 38 (Ind. Ct. App. 2008) (citing McCann v. State, 749 N.E .2d 1116, 1120 (Ind. 2001)), trans. denied.

We find footnote 2 in Pedraza particularly instructive in this case. In footnote 2, the Court noted the following in determining whether a material element may also form an aggravating circumstance: "For example, a maximum burglary sentence based solely on the opening of an unlocked screen door would be much less appropriate than one committed by obliterating a locked wooden door with a battering ram." 887 N.E.2d at 80 n.2. The implication of the Court's observation is that particularly egregious circumstances or conduct may be used to enhance a conviction. Here, the trial court detailed what it deemed Williams's "extreme recklessness" which was "greater than the

element of recklessness necessary to prove the commission of the offense . . . ." Appellant's Appendix at 46. The trial court stated that:

> [Williams] operated a motor vehicle on a public highway approximately 80 MPH [which was forty miles per hour over the speed limit], in the lane of oncoming traffic while attempting to pass another vehicle on a blind hill, where the road was marked with a double yellow line indicating no passing, the road was extremely narrow and hilly, he had a passenger in his car, another car operated by Jeff Adams in the right lane of the highway in close proximity, and a reasonable expectation that traffic would be oncoming.

Id. The trial court determined that Williams's conduct "display[ed] an extreme disregard for the safety and well-being of the victims and for other members of society that may have been traveling on the roadway at the time of the Defendant's actions." Id. The trial court enhanced Williams's sentences based upon his extreme and particularly egregious recklessness.

We agree with the trial court and find that the circumstances surrounding the crash to be more akin to "obliterating a locked wooden door with a battering ram" than "the opening of an unlocked screen door" and thus well in excess of recklessness necessary to prove that element in reckless homicide. See Pedraza, 887 N.E.2d at 80 n.2. We conclude that the trial court did not abuse its discretion by finding the nature and circumstances of the offenses to be an aggravating factor. See also Whitaker v. State, 778 N.E.2d 423, 426 (Ind. Ct. App. 2002) (noting that any "substantial departure from acceptable standards of conduct" may support a reckless homicide conviction, including any of the following: "[I]gnoring traffic signals at a high rate of speed, driving on a dark road at night without headlights, [] intentionally crossing the centerline without a

legitimate reason for doing so" or even driving at "greatly excessive speeds, such as twenty or more miles per hour over the posted limit"), trans. denied.

B. Mitigating Factor

Williams acknowledges that "a defendant's youth, although not identified as a statutory mitigating circumstance, is a significant mitigating circumstance in some circumstances." Appellant's Brief at 7 (quoting Carter v. State, 711 N.E.2d 835, 842 (Ind. 1999)). Williams argues that Williams's "young age of 19 was particularly significant because it shed light on his ability to ascertain acceptable standards of conduct and the harm that could result from his conduct." Id.

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). 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, 711 N.E.2d at 838.

Here, the trial court stated during its recitation on the mitigating factors:

> [Williams was] 19 at the time of the offense. [Williams is] 20 years old now. The status as a youthful offender has some mitigating weight. I don't think it has the mitigating weight that some of the others do. As young folks often people make decisions they would not make as an older adult but you were a young adult, you are a young adult and you made a very adult decision and it put lives at substantial risk and unfortunately in [Williams's] circumstance it had the ultimate outcome.

Transcript at 112-113. Thus, contrary to Williams's assertions, the trial court considered Williams's age but simply did not accord it significant mitigating weight. We therefore

cannot say that the trial court abused its discretion in failing to find Williams's age as a significant mitigating factor. See, e.g., Smith v. State, 872 N.E.2d 169, 178 (Ind. Ct. App. 2007) (holding that the trial court did not abuse its discretion in declining to find defendant's age to be a mitigating factor when "the trial court did not overlook [defendant's] age when making its sentencing decision, but [instead] recognized that [defendant] was young when he committed the crime and specifically declined to find his age to be a significant mitigating circumstance") (citing Anglemyer, 868 N.E.2d at 493), trans. denied. To the extent Williams complains that the trial court abused its discretion in failing to give his proffered mitigating factor greater weight, this claim is not available for appellate review. See Anglemyer, 868 N.E.2d at 494.

II.

The next issue is whether Williams'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). Williams argues that "[i]n light of the nature of the offenses and [Williams's] excellent character, the trial court's imposition of a nearly-maximum sentence in this case was inappropriate." Appellant's Brief at 8.

Our review of the character of the offender reveals that Williams was nineteen years old at the time of the offense. Williams did not have a criminal history prior to the events of May 9, 2009. Williams pled guilty and in return the State dismissed one count of reckless driving as a class B misdemeanor. Also, the trial court found that Williams "displayed significant and genuine remorse . . . ." Appellant's Appendix at 47.

Our review of the nature of the offense reveals that Williams took Allman, his nineteen-year-old fiancé, with him as he traveled to race Adams. While on a public highway, Williams attempted to pass Adams as they approached a steep "blind hill." Transcript at 13. The road was "marked with double yellow lines indicating no passing either from the northbound or southbound lanes." Id. at 18. Williams was traveling about eighty miles per hour, which was well in excess of the forty miles per hour speed limit. As Williams's car crested the hill, Williams crashed head-on into a motorcycle driven by Marker, who had been travelling in the correct direction along the roadway. The force of the collision caused the motorcycle to become embedded "past the front axle" of Williams's car. Id. at 20. Williams's car "traveled over 400 feet after impact, turned over after it left the eastside of the roadway, [and] caught on fire . . . ." Id. at 19. Both Allman and Marker died as a result of the accident.

After due consideration of the trial court's decision, we cannot say that the sentence imposed by the trial court is inappropriate in light of the nature of the offense

and the character of the offender.[3] See, e.g., Vance v. State, 860 N.E.2d 617, 620 (Ind. Ct. App. 2007) (holding that trial court did not err by imposing consecutive sentences when a single act resulted in separate harms); Sipple v. State, 788 N.E.2d 473, 484 (Ind. Ct. App. 2003) (holding that defendant's maximum sentence for involuntary manslaughter was not inappropriate even though defendant had no criminal history and had pleaded guilty), trans. denied.

For the foregoing reasons, we affirm Williams's sentences for reckless homicide as class C felonies.

Affirmed.

NAJAM, J., and VAIDIK, J., concur.

[3] We note that although Williams was sentenced to seven years on each count of reckless homicide as a class C felony, offenses for which the maximum sentence was eight years, Ind. Code § 35-50-2-6, Williams was sentenced to only five years executed in the Department of Correction for each count. We acknowledge that a split exists on this court as to whether we should consider executed time and suspended time equally in determining whether a defendant's sentence is appropriate. See Davidson v. State, 916 N.E.2d 954, 960-962 (Ind. Ct. App. 2009) (Barnes, J., concurring in result), trans. granted.