

STATEMENT OF THE CASE

Levonuia Riley, Jr. appeals his sentence following a plea of guilty to class D felony theft¹ and class A misdemeanor resisting law enforcement.²

We affirm.

ISSUE

Whether the trial court erred in sentencing Riley.

FACTS

According to the probable cause affidavit filed in this case, Allen County Police Department Officer Brian Sandberg was providing security for a grocery store during the night of April 29, 2009, when he observed Riley enter the store. Riley proceeded to the liquor section; removed three bottles of gin from the shelf; and placed the bottles inside his coat. Riley then walked toward the exit, without stopping at a cash register. As Officer Sandberg approached Riley, Riley ran back into the store. Riley removed the bottles from his coat and placed the bottles back on a shelf.

Officer Sandberg identified himself as a police officer and produced his badge. He informed Riley that he was under arrest and instructed him to turn around and place his hands behind his back. Riley refused and began to yell. When Officer Sandburg placed his hand on Riley's arm in an attempt to handcuff him, Riley pulled away from him. Officer Sandberg then attempted to restrain Riley by grabbing the back of his

¹ Ind. Code § 35-43-4-2.

² I.C. § 35-44-3-3.

jacket; Riley, however, “spun around,” and broke free of Officer Sandberg’s grasp. (App. 11). Officer Sandberg subsequently subdued Riley and placed him under arrest.

On May 5, 2009, the State charged Riley with Count I, class D felony theft; and Count II, class A misdemeanor resisting law enforcement. On June 23, 2009, the State filed an amended information, alleging Riley to be an habitual offender.

On September 11, 2009, Riley pleaded guilty to Counts I and II. The State, subsequently filed a motion to dismiss the habitual offender allegation, which the trial court granted.

The trial court ordered a pre-sentence investigation report (“PSI”) and held a sentencing hearing on October 5, 2009. The PSI indicated that Riley had been adjudicated a juvenile delinquent two times: once in 1976 for committing an act that would constitute burglary if committed by an adult, and once in 1978 for committing an act that would constitute resisting law enforcement if committed by an adult. According to the PSI, Riley also had twenty-seven convictions, including thirteen felony convictions, over a twenty-six year period. The convictions included several for felony theft, robbery, resisting law enforcement, criminal conversion, and possession of paraphernalia. The PSI further indicated that he had had his probation revoked twice, violated parole on two occasions, and had a suspended sentence revoked.

During the sentencing hearing, Riley proffered his guilty plea and “history of physical illness,” due to diabetes, as mitigating circumstances. (Tr. 8). The trial court found as follows:

Certainly, aggravators are fourteen misdemeanor and thirteen felony convictions; and prior attempts at rehabilitation have failed. The fact that the majorities [sic] of these prior convictions involved a similar kind of crime as we have here is also an aggravating circumstance. I don't know how much, if any, to give mitigating circumstance [sic] to his plea of guilty. Somewhere along the line, his jury trial got cancelled and we just set it for status; plus the fact that he got . . . a substantial benefit by pleading guilty by having the habitual dismissed certainly takes away any mitigating factor that he gets for pleading guilty.

(Tr. 10). In considering Riley's health, the trial court recognized that "[t]hey have medical facilities in the D.O.C." (Tr. 10). "Finding no mitigators," the trial court sentenced Riley to concurrent sentences of three years on Count I and one year on Count II. (Tr. 10).

DECISION

Riley asserts that the trial court erred in sentencing him. Specifically, he contends that the trial court failed to consider mitigating circumstances and that his sentence is inappropriate.

A sentence that is within the statutory range is subject to review 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 (Ind. 2007). A trial court may abuse its discretion if the sentencing statement

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.

Id. at 490-91. However, the relative weight or value assignable to reasons properly found, or to those which should have been found, is not subject to review for abuse of discretion. *Id.*

1. Mitigating Circumstances

Riley argues that the trial court failed to consider as mitigating circumstances the fact that he had “obtained his GED and was gainfully employed up until the time he incurred medical bills”; his “diagnosis of diabetes”; and that he is the father of one. Riley’s Br. at 6.³

The failure to find a mitigating circumstance clearly supported by the record may imply that the trial court overlooked the circumstance. The trial court, however, is not obligated to consider “alleged mitigating factors that are highly disputable in nature, weight, or significance.” The trial court need enumerate only those mitigating circumstances it finds to be significant. On appeal, a defendant must show that the proffered mitigating circumstance is both significant and clearly supported by the record.

Rawson v. State, 865 N.E.2d 1049, 1056 (Ind. Ct. App. 2007) (internal citations omitted), *trans. denied*.

Riley failed to propose his education, past employment, and fatherhood as mitigating circumstances to the trial court. He therefore is precluded from advancing them on appeal. *See Samaniego-Hernandez v. State*, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (declining to acknowledge the defendant’s proffered mitigators where he failed to propose them at the trial court level).

³ Riley’s brief fails to adhere to Indiana Appellate Rule 43(F), which provides that briefs’ “pages shall be numbered at the bottom.” The brief also fails to comply with Appellate Rule 46(A), in that it does not contain a table of contents or table of authorities.

Waiver notwithstanding, Riley has failed to show these mitigating circumstances are significant. He committed numerous offenses subsequent to obtaining his GED while incarcerated in 1985; and according to the PSI, he last was employed in 2005. Furthermore, his only child is an adult; he does not claim her to be a dependent; and he makes no showing that his incarceration will impose an undue hardship on his family. Accordingly, we find no abuse of discretion in failing to consider these as mitigating circumstances.

Regarding Riley's poor health, he did not present any evidence that he cannot or will not be treated while incarcerated or that incarceration would constitute an undue hardship due to his illness. We therefore cannot say the trial court abused its discretion in declining to find Riley's poor health to be a significant mitigating circumstance. *See Henderson v. State*, 848 N.E.2d 341, 345 (Ind. Ct. App. 2006) (finding no abuse of discretion in failing to consider poor health to be a mitigator where the defendant failed to establish that her health problems should be a factor in determining an appropriate period of incarceration).

2. Inappropriate Sentence

Riley also asserts that his sentence is inappropriate. We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). It is the defendant's burden to "persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." *Anglemeyer*,

868 N.E.2d at 494 (Ind. 2007) (quoting *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. Indiana Code section 35-50-2-7 provides that a person who commits a class D felony “shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 1/2) years.” Indiana Code section 35-50-3-2 provides that a person who commits a class A misdemeanor “shall be imprisoned for a fixed term of not more than one (1) year[.]”

As to the nature of Riley’s offense, he went into the store for the sole purpose of stealing alcohol. When confronted by Officer Sandberg, he twice attempted to resist arrest, putting himself and Officer Sandberg in harm’s way.

As to Riley’s character, the record indicates that he has amassed thirteen prior felony convictions and fourteen prior misdemeanor convictions. Several of these convictions were for theft and resisting law enforcement. Furthermore, he has violated probation and had his parole revoked. Riley’s record reveals a blatant and almost life-long disregard for the law.

While Riley did accept responsibility for his crime by pleading guilty, we cannot say that this is a significant reflection of his character. He received a significant benefit when the State dismissed the habitual offender allegation. Moreover, the evidence

against Riley indicates that his guilty plea was pragmatic. We therefore are not persuaded that his sentence is inappropriate.

We affirm.

BAKER, C.J., and CRONE, J., concur.