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# IN THE
# COURT OF APPEALS OF INDIANA

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| BREOND YARBROUGH, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 71A03-1002-CR-50 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable William T. Means, Judge
Cause No. 71D01-0003-CF-176

**June 4, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BRADFORD, Judge**

In this belated appeal, Appellant-Defendant Breond Yarbrough challenges the trial court's imposition of a maximum sixty-five-year sentence following his guilty plea to Murder, a felony.[1] Yarbrough claims that the trial court abused its discretion in considering certain sentencing factors and argues that his sentence is inappropriate. We affirm.

## FACTS AND PROCEDURAL HISTORY

According to the factual basis entered at the time of Yarbrough's guilty plea hearing, at approximately 11:00 p.m. on March 1, 2000, Yarbrough met up with Earnest Samuels, Jr., in South Bend. Yarbrough entered Samuels's vehicle, and, at some point on March 2, 2000, attacked Samuels by choking and strangling him. Yarbrough also hit Samuels repeatedly in the head and neck area with a tire iron. Samuels died of massive head injuries and strangulation. Yarbrough disposed of Samuels's body in an alleyway and drove Samuels's car away. Yarbrough went through Samuels's belongings in his car and took Samuels's cell phone, wallet, and certain papers. Yarbrough later disposed of Samuels's wallet in a trash barrel.

On March 23, 2000, the State charged Yarbrough with murder (Count I), felony murder (Count II), and Class A felony robbery (Count III). On March 12, 2001, Yarbrough entered into a plea agreement whereby he agreed to plead guilty to Count I, and the State agreed to dismiss Counts II and III. At the March 12, 2001 plea hearing, the trial court accepted Yarbrough's guilty plea and entered judgment of conviction.

[1] Ind. Code § 35-42-1-1 (1999).

At his April 11, 2001 sentencing hearing, Yarbrough faced the full forty-five to sixty-five-year sentencing range, with no cap on executed time, and the State recommended the full sixty-five-year executed term.[2] Consistent with the State's recommendation, the trial court sentenced Yarbrough to sixty-five years executed in the Department of Correction. In doing so, the court named as an aggravator the brutal nature and circumstances of the crime and found that the aggravators outweighed the mitigators.

Following the filing of various motions, on June 13, 2006, Yarbrough filed a petition for permission to file a belated appeal. This petition was initially denied, but following appeal to and reversal and remand by our court, Yarbrough filed a subsequent petition for permission to file a belated appeal. After transfer of the cause to a different judge, the trial court granted Yarbrough's petition. This appeal follows.

## DISCUSSION AND DECISION

Upon appeal, Yarbrough claims that the trial court abused its discretion in its consideration of certain sentencing factors and that his maximum sixty-five-year sentence is inappropriate.

[2] As an additional term of the plea agreement, Yarbrough had agreed to participate in a polygraph examination. In the event that the results of the polygraph showed "no deception indicated," the State would recommend a fifty-five-year cap on the executed portion of Yarbrough's sentence and make no further recommendation. App. p. 81. In the event that the polygraph results showed deception, the State would not recommend a cap on the executed portion of Yarbrough's sentence and was entitled to make a sentencing recommendation, subjecting Yarbrough to the full forty-five to sixty-five-year sentencing range. At his April 11, 2001 sentencing hearing, Yarbrough conceded that his polygraph had shown some indication of deception.

## I. Abuse of Discretion

With respect to Yarbrough's consideration of the aggravators and mitigators, it is noteworthy that Yarbrough committed his crime in 2000, so we apply the presumptive sentencing scheme in effect prior to the 2005 sentencing amendments creating advisory sentences. *See Gutermuth v. State*, 868 N.E.2d 427, 431 n.4 (Ind. 2007) ("[T]he sentencing statute in effect at the time a crime is committed governs the sentence for that crime."). We specifically observe that the rule articulated in *Anglemyer v. State (Anglemyer I)*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007), that the relative weight of aggravators and mitigators is not reviewable for abuse of discretion, does not apply here.

Sentencing determinations, including whether to adjust the presumptive sentence, are within the discretion of the trial court. *Ruiz v. State*, 818 N.E.2d 927, 928 (Ind. 2004). Based upon the law applicable to Yarbrough at the time of his sentence, if a trial court relied on aggravating or mitigating circumstances to modify the presumptive sentence, it was required to do the following: (1) identify all significant aggravating and mitigating circumstances; (2) explain why each circumstance is aggravating or mitigating; and (3) articulate the evaluation and balancing of the circumstances. *Id.*

When a defendant offers evidence of mitigators, the trial court has the discretion to determine whether the factors are mitigating, and the trial court is not required to explain why it does not find the proffered factors to be mitigating. *Stout v. State*, 834 N.E.2d 707, 710 (Ind. Ct. App. 2005), *trans. denied*. The trial court is not required to give the same weight as the defendant does to mitigating evidence. *See Fugate v. State*, 608

N.E.2d 1370, 1374 (Ind. 1993). A single aggravating circumstance is sufficient to justify an enhanced sentence. *McNew v. State*, 822 N.E.2d 1078, 1082 (Ind. Ct. App. 2005). 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. *Matshazi v. State*, 804 N.E.2d 1232, 1239 (Ind. Ct. App. 2004), *trans. denied*. Further, a trial court is not required to include within the record a statement that it considered all proffered mitigating circumstances, but rather only those that it considered significant. *Id.*

### A. Remorse

Yarbrough claims that the trial court abused its discretion in failing to find his remorse to be a significant mitigator. Yarbrough stated that he was remorseful at the sentencing hearing. The trial court, which had the ability to observe Yarbrough, was in a better position than we to assess Yarbrough's sincerity in expressing remorse. *See Corralez v. State*, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004). We find no abuse of discretion in the trial court's refusal to consider remorse to be a significant mitigating circumstance.

### B. Lack of Criminal History

Yarbrough argues that he lacked significant criminal history and that the trial court overlooked this mitigating factor. A defendant's lack of criminal history is generally recognized as a substantial mitigating factor. *See Loveless v. State*, 642 N.E.2d 974, 976 (Ind. 1994). While Yarbrough's criminal history, which consisted of a misdemeanor conviction for disorderly conduct resulting in a suspended sentence and probation, was

certainly minor, it did not constitute a lack of criminal history. In addition, Yarbrough's Pre-sentence Investigation Report indicated his frequent marijuana use. Given Yarbrough's contact with the criminal justice system and his drug use, suggesting that he had not led an entirely law-abiding life, the trial court was within its discretion in refusing to consider Yarbrough's minor criminal history to be a substantial mitigating factor. *See Bostick v. State*, 804 N.E.2d 218, 225 (Ind. Ct. App. 2004) (concluding that lack of criminal history was not a significant mitigator where defendant's substance abuse and relationship with minor demonstrated that she had led a "less than law-abiding life").

### C. Provocation

Indiana Code sections 35-38-1-7.1(c)(3) and (5) (1999) provide that the trial court may consider the victim's facilitation of the offense and/or provocation as mitigating factors. At the sentencing hearing, defense counsel informed the trial court that, according to Yarbrough, Samuels provoked Yarbrough's attack by drugging and sexually assaulting him. In sentencing Yarbrough, the trial court did not find Yarbrough's provocation allegation particularly credible. It nevertheless concluded that even if such provocation had occurred, it did not outweigh the brutal nature of the attack.

Yarbrough contends on appeal that the trial court dismissed this mitigating factor without considering certain evidence tending to support it, including the fact that Samuels was found to have drugs in his system. Contrary to Yarbrough's contention, the trial court *did* consider his allegation of provocation but concluded it was not particularly weighty given the brutal nature of the crime. To the extent Yarbrough suggests that other evidence tends to strengthen his provocation claim, he is merely requesting that we

reweigh the evidence supporting this factor, which, given our deference to the trial court's evaluation of the evidence, we decline to do. *See Ousley v. State*, 807 N.E.2d 758, 763 (Ind. Ct. App. 2004) (concluding that facts did not require trial court to find provocation and attribute mitigating weight on that basis). We find no abuse of discretion in the trial court's determination that provocation did not constitute a significant mitigating factor.

### D. Guilty Plea

Yarbrough contends that the trial court abused its discretion by failing to give significant mitigating weight to his guilty plea. The Indiana Supreme Court has held that a defendant who pleads guilty deserves "some" mitigating weight be given to the plea in return. *Anglemyer v. State (Anglemyer II)*, 875 N.E.2d 218, 220 (Ind. 2007). The significance of a guilty plea as a mitigating factor varies from case to case. *Id.* at 221. For example, a guilty plea may not be significantly mitigating when it does not demonstrate the defendant's acceptance of responsibility or when the defendant receives a substantial benefit in return for the plea. *Id.* Here, Yarbrough received a significant benefit from his plea,[3] namely the State's dropping its robbery charge against him.[4]

[3] It is of note that, while not charged, an intentional killing committed during the commission of a robbery is an aggravator which could give rise to a sentence of death or life without parole. *See* Ind. Code § 35-50-2-9 (1999).

Yarbrough does not contest that he took Samuels's possessions after attacking him, demonstrating that Yarbrough's decision to plead guilty was as much a pragmatic decision as an effort at taking responsibility. We find no abuse of discretion in the trial court's failure to consider Yarbrough's guilty plea to be a significant mitigating factor.

## II. Appropriateness

Yarbrough additionally claims that his sixty-five-year sentence is inappropriate. Article VII, Sections 4 and 6 of the Indiana Constitution "'authorize[] independent appellate review and revision of a sentence imposed by the trial court.'" *Anglemyer I*, 868 N.E.2d at 491 (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006) (emphasis and internal quotations omitted)). Such appellate authority is implemented through Indiana Appellate Rule 7(B), which provides that the "Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." We exercise deference to a trial court's sentencing decision, both because Rule 7(B) requires that we give "due consideration" to that decision and

[4] Arguably, the State could no longer seek a Class A felony robbery conviction against Yarbrough because it was based upon the same act (beating causing severe head wounds) that served as an act element for the murder charge. *See Moore v. State*, 652 N.E.2d 53, 60 (Ind. 1995) ("A defendant may not be convicted and sentenced for both Murder and Robbery (Class A) where the act that is the basis for elevating Robbery to a Class A felony is the same act upon which the murder conviction is based."). On the other hand, Yarbrough admitted to *two* acts underlying the murder conviction (strangulation and beating), only one of which (beating causing severe head wounds) served as the basis for the elevated Class A felony robbery. Accordingly, it is also arguable that Yarbrough could have been convicted of both Class A felony robbery and murder without violating double jeopardy principles. In any event, at the very least, the State could have sought a Class B felony robbery conviction against Yarbrough based upon the admitted fact that he used a deadly weapon. *See id.* at n.8 (subsequently observing, in directing entry of judgment for Class C felony robbery and murder, that the only reason the defendant could not be convicted of robbery reduced to a Class B felony was that he was not charged with committing robbery while armed with a deadly weapon).

because we recognize the unique perspective a trial court has when making sentencing decisions. *Stewart v. State*, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). It is the defendant's burden to demonstrate that his sentence is inappropriate. *Childress*, 848 N.E.2d at 1080.

Yarbrough was convicted of murder, which carries a sentence of from forty-five to sixty-five years, with the presumptive sentence being fifty-five years. *See* Ind. Code § 35-50-2-3 (1999). With respect to the nature of his offense, Yarbrough went far beyond the statutory act of knowingly killing Samuels. Indeed, he used a number of methods to achieve his result, including choking, strangling, and methodically beating Samuels to death by inflicting massive head injuries with a tire iron. If these acts did not adequately demonstrate Yarbrough's cruelty and utter disregard for human life, his subsequent acts of dumping Samuels's body in an alleyway and taking his possessions for personal gain certainly do. To the extent that Yarbrough's guilty plea, minimal criminal history, and previous efforts at a productive life might otherwise reflect positively upon his character, they are entirely overshadowed by the instant acts, which by themselves refute any claim Yarbrough has to good character. We are convinced that Yarbrough's sixty-five-year maximum sentence is appropriate.

The judgment of the trial court is affirmed.

RILEY, J., and MATHIAS, J., concur.