



## **Case Summary**

Sean Michael Scott appeals his aggregate sentence of eight years for two counts of Class C felony forgery. Specifically, he contends that the trial court abused its discretion in failing to consider several mitigators and that his sentence is inappropriate in light of the nature of the offenses and his character. Finding no abuse of discretion in sentencing and that Scott has failed to persuade us that his sentence is inappropriate, we affirm.

## **Facts and Procedural History**

On February 26, 2009, the State charged Scott with four counts of Class C felony forgery. In December 2009 the State and Scott entered into a plea agreement whereby Scott agreed to plead guilty to Counts I and II, and the State agreed to dismiss Counts III and IV as well as charges under another cause number. As for Scott's sentence, the plea agreement provided, "cap of 4 years each count – consecutive (total – maximum 8 years)." Appellant's App. p. 45. As for a civil judgment, the plea agreement provided, "per agreement." *Id.*

At the guilty plea hearing, the State offered the probable cause affidavit in order to lay the factual basis for Counts I and II, and Scott agreed that the statements contained in the affidavit concerning Counts I and II were true. Specifically, Scott, who was friends with Thomas and Melissa Wright, took two checks from the Wrights, executed them, and then cashed them, all without the Wrights' permission. Specifically, on January 19, 2009, Scott cashed a check in the amount of \$9,945.00, and on February 1, 2009, Scott cashed a check in the amount of \$3,948.00. Scott received the cash from both checks and

then spent the money for his own use. Tr. p. 54. Scott entered into a stipulation that he owed the following restitution:

1. Thomas Wright, \$41,223.00
2. State Farm Insurance, \$1,000.00
3. Wells Fargo Bank, \$2,975.00

Appellant's App. p. 53.

In sentencing Scott, the trial court found his prior criminal history, which consisted of five misdemeanors and one felony (receiving stolen property), to be aggravating.<sup>1</sup> The court also found aggravating that Scott was on bail at the time of these offenses and that he violated a position of trust with the Wrights. The trial court sentenced Scott to the advisory sentence of four years on each count and ordered the sentences to be served consecutively, for an aggregate sentence of eight years. Scott now appeals his sentence.

### **Discussion and Decision**

Scott makes two arguments on appeal. First, he contends that the trial court abused its discretion by failing to consider several mitigators. Second, he contends that his sentence is inappropriate in light of the nature of the offenses and his character.

#### *A. Abuse of Discretion*

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal 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). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances

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<sup>1</sup> Scott failed to include his presentence investigation report in his appendix. We therefore take his criminal history from the trial court's comments.

before the court or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.* We 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. *Id.* at 491. When an allegation is made that the trial court failed to find a mitigating factor, the defendant is required to establish that the mitigating evidence is both significant and clearly supported by the record. *Id.* at 493. However, a trial court is not obligated to accept a defendant's claim as to what constitutes a mitigating circumstance. *Rascoe v. State*, 736 N.E.2d 246, 249 (Ind. 2000). "If the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist." *Anglemyer*, 868 N.E.2d at 493 (quotation omitted).

Scott first appears to argue that the trial court abused its discretion in failing to find his criminal history as a mitigating circumstance and instead finding it as an aggravating circumstance. However, Scott had five misdemeanors and one felony conviction for receiving stolen property, which is similar to the offenses here as it involves dishonesty. As such, the trial court did not abuse its discretion in identifying Scott's criminal history as an aggravator.

Scott next argues that the trial court abused its discretion in failing to find his expression of remorse and offer to pay restitution as mitigators. Scott testified at sentencing that he would

like to apologize to the victim and the families, mine included. My actions were way out of line and not really normal for me, but, um, I just want you to know that when I do, when I am released, I will make all efforts to pay back all the restitution and to make amends to the family[.]

Appellant's App. p. 64. The trial court is in the best position to judge the sincerity of a defendant's remorseful statements. *Stout v. State*, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005), *trans. denied*. Scott's expression of remorse was not so compelling that we can say the trial court abused its discretion in failing to identify it as a mitigator. And as for Scott's offer to pay restitution, this was already covered in both his plea agreement and stipulation. He received a significant benefit in his plea agreement in that two felonies were dismissed in this case, charges under another cause number were dismissed, and his sentence was capped at eight years. The trial court did not abuse its discretion in failing to find Scott's offer to pay restitution as a separate mitigator when he already received a benefit for agreeing to pay this in his plea agreement.

Finally, Scott argues that the trial court abused its discretion in failing to find as a mitigator that imprisonment would result in an undue hardship to his dependent. However, Scott has failed to prove that this alleged mitigator is clearly supported by the record. We first point out that Scott did not advance this as a mitigator at sentencing. Rather, the trial court asked him if he had any children who relied on him for support, and Scott replied that he had one child who lived with her mother. Scott also said that he currently did not have a job. This brief colloquy in response to the trial court's own question falls short of proving undue hardship to Scott's daughter. The trial court did not abuse its discretion in failing to find undue hardship to Scott's dependent as a mitigator.

#### *B. Inappropriate Sentence*

Although a trial court may have acted within its lawful discretion in imposing a sentence, Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent

appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a 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.” *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer*, 868 N.E.2d at 491). The burden is on the defendant to persuade us that his or her sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

Scott pled guilty to two Class C felonies. The trial court sentenced him to four years for each count and ordered the sentences to be served consecutively. “A person who commits a Class C felony shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years.” Ind. Code § 35-50-2-6(a).

As for the nature of the offenses, Scott concedes their “severity.” Appellant’s Br. p. 10. That is, Scott breached the trust of his friends by stealing their checks, forging them, and cashing them for significant amounts of money. He then “wasted” the money. Tr. p. 54. Scott acknowledged that his actions “devastated” the Wrights. *Id.* at 56.

As for the character of the offender, Scott had five misdemeanors and one felony for receiving stolen property, which is similar to the present offenses as it involves dishonesty. Scott was also on bail at the time of these offenses. Although Scott did plead guilty, he received a significant benefit in that two felonies in this case were dismissed as well as charges in another cause number. Moreover, the evidence against Scott was strong, as the probable cause affidavit shows that Scott presented his driver’s license

when cashing the checks. Scott has failed to persuade us that his two advisory sentences run consecutively are inappropriate. We therefore affirm.

Affirmed.

NAJAM, J., and BROWN, J., concur.