

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Appellant Bradford Drake appeals his sentence for two convictions for attempted murder, both class A felonies.¹ We affirm.

ISSUES

Drake raises two issues, which we expand and restate as:

- I. Whether the trial court abused its discretion by imposing consecutive sentences;
- II. Whether the trial court abused its discretion by overlooking mitigating factors; and
- III. Whether Drake's sentence is unreasonable in light of the nature of the offense and the character of the offender.

FACTS

On July 7, 1987, Kathleen Drake ("Kathleen") and her children, David Drake ("David") and Suzanne Drake ("Suzanne"), returned to their house. Kathleen is Drake's stepmother, and David and Suzanne are Drake's half-siblings, but Drake did not live with them. Drake had broken into their house and was waiting for them to return. Drake brought a rifle with him to the house. He had attached a silencer to the rifle. In addition, to conceal the rifle as he traveled to the house, Drake had placed the rifle in a box that was covered with gift wrap.

When Kathleen, David, and Suzanne came inside the house, Drake shot David four times, including three shots to his chest. Next, Drake shot Kathleen in the head as

¹ Ind. Code §§ 35-42-1-1 (murder), 35-41-5-1 (attempt).

she attempted to shield Suzanne with her body. Kathleen, David and Suzanne fled from the house and obtained help from a nearby hospital.

The State charged Drake with three counts of attempted murder and one count of burglary. Drake pleaded guilty to two counts of attempted murder, and the State dismissed the other charges. On August 4, 1988, the trial court sentenced Drake to an aggregate sentence of sixty years. Drake did not file a direct appeal.

On April 24, 1989, Drake filed a Petition for Post-Conviction Relief. The trial court denied Drake's Petition, and he appealed. This Court dismissed Drake's appeal. *See Drake v. State*, Cause No. 55A04-9306-PC-222 (Ind. Ct. App. Nov. 29, 1993), *transfer denied*. Subsequently, Drake filed numerous successive petitions for post-conviction relief with this Court. On October 11, 2007, this Court permitted one of Drake's successive petitions to proceed, limited to the question of "whether the aggravating circumstances that the trial court identified at sentencing were legally permissible and supported by the record." *See Drake v. State*, 55A01-0708-SP-386 (Ind. Ct. App. Oct. 11, 2007).

On remand, the trial court held a hearing on Drake's successive petition, determined that his petition had merit, and scheduled a new sentencing hearing. The State appealed the trial court's grant of Drake's successive petition for post-conviction relief but later dismissed the appeal.

On October 29, 2009, the trial court held a new sentencing hearing. The trial court sentenced Drake to twenty-seven years on each count, to be served consecutively for an aggregate sentence of fifty-four years. The trial court identified the following

aggravating factors in support of consecutive sentences: (1) there were multiple victims; (2) Drake was lying in wait and was in a place he had no right to be when the crimes occurred; and (3) Drake used a silencer on his rifle. Tr. p. 150.

DISCUSSION AND DECISION

I. AGGRAVATING FACTORS

The law that was in effect at the time Drake committed his crimes is the law that applies to his sentence. *See Williams v. State*, 891 N.E.2d 621, 631 (Ind. Ct. App. 2008). Furthermore, because Drake committed his crimes prior to April 25, 2005, we review the trial court's identification of aggravating and mitigating circumstances pursuant to the presumptive sentencing scheme that was in effect prior to that date. *See Padgett v. State*, 875 N.E.2d 310, 316 (Ind. Ct. App. 2007), *transfer denied*.

Deciding whether a presumptive sentence will be enhanced because of aggravating circumstances and whether terms will be served concurrently or consecutively is within the discretion of the trial court. *McCollum v. State*, 582 N.E.2d 804, 817 (Ind. 1991), *reh'g denied*. A trial court may enhance a sentence or impose consecutive terms or both. *Id.* When it does, however, the record must show the sentence was based on consideration of the facts of the specific crime, aggravating and mitigating circumstances, and the relation of the sentence to the objectives to be served by that sentence. *Id.* To impose consecutive sentences, there must be at least one aggravator. *Mitchem v. State*, 685 N.E.2d 671, 680 (Ind. 1997).

In this case, Drake contends that his consecutive sentences are improper because none of the aggravating factors the trial court cited at resentencing were argued at the

original sentencing hearing, and that the State should have been barred from presenting evidence regarding new aggravating factors at the resentencing hearing. Drake does not identify a constitutional or statutory provision to support his contention.

The discussion in *Taylor v. State*, 840 N.E.2d 324 (Ind. 2006), is applicable here. In that case, Taylor, who had been convicted of murder, filed a petition for post-conviction relief. *Id.* at 328. The trial court denied Taylor's petition, and he appealed. *Id.* at 329. Our Supreme Court held that some of the aggravating factors cited by the trial court were improper, and others were weak. *Id.* at 342. Therefore, Taylor received ineffective assistance of direct appeal counsel for failing to challenge his sentence. *Id.* Our Supreme Court remanded to the trial court for a new sentencing order. *Id.* The Court determined that the trial court could issue a new sentencing order without holding a new hearing, but the trial court could also hold a new sentencing hearing and permit additional factual submissions prior to issuing a new sentencing order. *See id.*

In this case, as in *Taylor*, Drake prevailed in post-conviction proceedings, and the basis for his successful claim was the trial court's erroneous determination of aggravating factors. Consequently, a new sentencing order was required, and pursuant to the holding in *Taylor*, the trial court had the authority to hold a new sentencing hearing and consider evidence related to new aggravating factors.

Drake cites *Neff v. State*, 849 N.E.2d 556 (Ind. 2006), in support of his claim that the State was barred from presenting evidence relating to new aggravating circumstances, but that case is distinguishable. In *Neff*, on direct review this Court concluded that all of the aggravating factors except Neff's criminal history were invalid. *Id.* at 559. Instead of

remanding for a resentencing hearing, a panel of this Court reweighed the mitigating factors against Neff's criminal history and revised Neff's sentence. *Id.* On transfer, the State contended that the appropriate remedy for the sentencing error was remand so that the State could prove additional aggravators before a jury. *Id.* Our Supreme Court disagreed, noting that there is no single determinative practice in deciding whether or not to remand a case to allow the State to prove additional aggravators. *Id.* at 560. Under the circumstances of that case, our Supreme Court concluded that the State should not be afforded a second bite at the apple. *Id.* at 561.

By contrast, in this case we are not asked to consider whether the State can present new evidence on remand from a direct appeal. Instead, we are reviewing a resentencing order following the trial court's grant of post-conviction relief, which is a different procedural circumstance. As the Court noted in *Neff*, there is no single method to determine when a new sentencing hearing is necessary. We conclude that Drake's case more closely resembles *Taylor* than *Neff*, and the trial court did not abuse its discretion by permitting the State to present evidence as to new aggravating factors prior to imposing consecutive sentences upon Drake.

II. IDENTIFICATION OF MITIGATING FACTORS

Whether a basic sentence will be increased or decreased due to aggravating or mitigating circumstances is within the trial court's discretion. *Robinson v. State*, 446 N.E.2d 1287, 1292 (Ind. 1983). When a trial court increases or decreases a basic sentence, suspends a sentence, or imposes consecutive terms of imprisonment, the record should disclose what factors were considered by the trial judge to be mitigating or

aggravating circumstances. *Wagner v. State*, 474 N.E.2d 476, 496 (Ind. 1985). The trial court is not obligated to credit or weigh the defendant's evidence of mitigating circumstances the same way the defendant does. *Hammons v. State*, 493 N.E.2d 1250, 1255 (Ind. 1986), *reh'g denied*.

In this case, Drake contends that the trial court rejected two mitigating factors that he submitted at the resentencing hearing, specifically: (1) Drake has been a model prisoner during his incarceration; and (2) he assigned his interest in a life insurance policy to Kathleen and David as partial compensation for harming them. We disagree with Drake's reading of the transcript. During the resentencing hearing, the trial court explained as follows:

Any of the three aggravators alone outweigh the two mitigators proven in court and accepted by judicial notice during the hearing and outweigh any of the mitigators the Court heard today including the good conduct while in prison as well as restitution payment on a civil judgment that quite simply hold little weight if, again, this Court is to act as if it were still in 1987. Therefore, the sentences below to be handed out for Counts I and II shall be served consecutively as each of the aggravators listed outweigh the mitigators.

* * *

The defendant raised two other mitigating factors as well, that being good conduct while in prison over the past 22 years and the fact that he paid restitution to the victims after they filed a civil lawsuit. The Court has struggled and continues to struggle with permitting these last two admissions as aggravators [sic] in light of the fact that if the Court truly is to act like it is again 1987, then how can it consider his good conduct and payment since that time. The Court gave no weight to testimony heard today in regards to pain and suffering of this family beyond the previous sentencing date despite some discussions and presentation of that by the State. As such, this defendant still has the right to present those mitigators. However, due to the fact that it took place only after the sentencing before, they will be given almost no weight.

Tr. pp. 150, 151-152. Thus, the trial court accepted Drake's proposed mitigators but chose not to give them much weight. This decision was within the trial court's discretion and we find no reversible error.

III. APPROPRIATENESS OF SENTENCE

Drake's last sentencing challenge is governed by Indiana Appellate Rule 7(B), which provides, in relevant part, "[t]he 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."² We may look to any factors appearing in the record to conduct the examination. *Schumann v. State*, 900 N.E.2d 495, 497 (Ind. Ct. App. 2009). The burden is on the defendant to persuade us that his sentence is inappropriate.³ *Major v. State*, 873 N.E.2d 1120, 1130 (Ind. Ct. App. 2007), *transfer denied*.

The "nature of the offense" portion of the standard articulated in Appellate Rule 7(B) speaks to the statutory advisory sentence for the class of crimes to which the offense belongs. *Id.* That is, the presumptive sentence is intended to be the starting point for the court's consideration of the appropriate sentence for the particular crime committed. *Id.*

² We note that Indiana Appellate Rule 7(B) had not been promulgated when Drake committed his crimes. Instead, Rule 2 of the Indiana Rules for the Appellate Review of Sentences applied and stated, in relevant part, "[t]he reviewing court will not revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender." Nevertheless, when this Court applies its independent authority to review a sentence, we review the sentence as of the date the decision or opinion is handed down. *See Kien v. State*, 782 N.E.2d 398, 417 (Ind. Ct. App. 2003), *reh'g denied, transfer denied*. For this reason, we review Drake's new sentence pursuant to the standard set forth in Indiana Appellate Rule 7(B).

³ Drake has failed to include the pre-sentence investigation report in his Appellant's Appendix, which has hindered our review.

at 1130-1131. At the time Drake committed his crimes, the presumptive sentence for attempted murder was thirty years, with a minimum of twenty years and a maximum of fifty years. See Ind. Code § 35-50-2-4 (West 1986).

The character of the offender portion of the standard set forth in Appellate Rule 7(B) refers to the general sentencing considerations and the relevant aggravating and mitigating circumstances. Major, 873 N.E.2d at 1131.

In this case, the trial court sentenced Drake to twenty-seven years for each conviction, which was three years less than the presumptive sentence, to be served consecutively for a total of fifty-four years.

The nature of the crimes reflects poorly on Drake. He had disguised his rifle as a wrapped present and had attached a silencer to the rifle, both of which indicate a degree of planning. Drake broke into Kathleen, David, and Suzanne's house when they were not home and ambushed them when they returned. Drake shot David multiple times and shot Kathleen as she crouched over Suzanne, trying to shield her daughter with her body.

Regarding the character of the offender, Drake had a history of mental illness when he committed the crimes, and he did not have a prior criminal record. Furthermore, he has behaved well during his incarceration. Drake asserts that he paid partial restitution, but the record indicates that Drake assigned his interest in a life insurance policy to Kathleen and David because it was necessary to partially satisfy a civil judgment they had obtained against him. Thus, Drake's partial payment of restitution does not necessarily reflect positively on his character. Nevertheless, in the aggregate Drake's character provides some mitigating considerations.

Balancing the heinous nature of the offense against the mitigating considerations present in Drake's character, we conclude that the trial court's sentence of twenty-seven years for each conviction, to be served consecutively, is appropriate.

CONCLUSION

For the reasons stated above, we affirm the judgment of the trial court.

Affirmed.

MAY, J., and ROBB, J., concur.