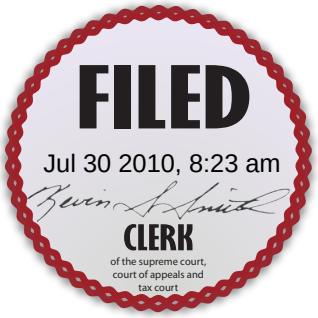

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IN THE
COURT OF APPEALS OF INDIANA

GERONIMO MONTALVO,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 12A05-0910-CR-597
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CLINTON CIRCUIT COURT
The Honorable Linley E. Pearson, Judge
Cause No. 12C01-0711-FA-309

July 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Geronimo Montalvo appeals his twenty-five-year sentence for Dealing in Cocaine, as a Class A felony.[1] We affirm.

Issues

Montalvo raises four issues,[2] which we consolidate and restate as:

I. Whether the sentencing court abused its discretion by considering information contained in the pre-sentence investigation report ("PSIR"), namely, statements of co-defendants regarding Montalvo's conduct after the instant offense; and

II. Whether the trial court abused its discretion in making its findings.

Facts and Procedural History

On November 9, 2007, Montalvo possessed, with the intent to deliver, substantially more than three grams of cocaine. The State charged him with Dealing in Cocaine, as a Class A felony, Corrupt Business Influence, a Class C felony, Dealing in Marijuana, as a

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[1] Ind. Code § 35-48-4-1.

[2] Montalvo offers two arguments that we decline to address. First, the probation officer in this case was married to one of the police officers involved in the surveillance and arrest of Montalvo and others in his home. Montalvo argues that his sentence was improper because the probation officer violated the Indiana Probation Standards and the Indiana Code of Judicial Conduct.

Although he cites authority for his contention that the probation officer had a conflict of interest, Montalvo fails to provide support for his bald assertion that such a conflict of interest would invalidate his sentence. Each argument must contain the appellant's contentions supported by cogent reasoning, citation to authority and to the record, the applicable standard of review, and a brief statement of the procedural and substantive facts necessary for consideration of the issue. Ind. Appellate Rule 46(A)(8)(a, b). Failure to comply with Indiana Appellate Rule 46(A)(8) waives the argument. Majors v. State, 773 N.E.2d 231, 235 n.2 (Ind. 2002).

Second, Montalvo argues that the sentencing court "did not afford the proper mitigating weight" to the fact that Montalvo pled guilty. Appellant's Brief at 7. However, a trial court's sentencing order may no longer be challenged as reflecting an improper weighing of sentencing factors. See Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007), clarified on reh'g on other grounds, 875 N.E.2d 218 (Ind. 2007).

Class D felony, and Maintaining a Common Nuisance, a Class D felony.

In a plea agreement, Montalvo pled guilty to Dealing in Cocaine, as a Class A felony; the State agreed to dismiss the other three counts. The agreement left the sentence to the sentencing court's discretion.

After an evidentiary hearing, the sentencing court found six "circumstances to consider in sentencing," without labeling them as aggravating or mitigating: (1) Montalvo's plea; (2) his age, sixty-two at the time of sentencing, and the hardship it could impose; (3) Montalvo's criminal history; (4) his need of correctional or rehabilitative treatment because "multiple periods of incarceration for brief periods of time, probation, fines and a drug and alcohol class have not caused the defendant to cease criminal activity"; (5) the fact that Montalvo and his wife continued to use and sell cocaine after his arrest for the instant offense; and (6) that he was eligible to be alleged as a Habitual Controlled Substance Offender.[3] Appendix at 74. Montalvo received a twenty-five-year sentence – eighteen years executed with the Department of Correction, two years executed with Clinton County Community Corrections, and five years suspended.

Montalvo now appeals his sentence.

Discussion and Decision

I. Consideration of Statements in PSIR

Montalvo argues that the trial court abused its discretion by considering information in the PSIR. Specifically, he asserts that the statements of his codefendants – that he continued

[3] The State did not include this allegation in its charges.

to violate the law after his arrest for the instant offense – were inadmissible hearsay.

First, the sentencing court must consider the PSIR when sentencing one convicted of a felony. Ind. Code § 35-38-1-8. Second, Indiana Rule of Evidence 101(c)(2) provides that the evidentiary rules, other than those pertaining to privileges, are not applicable in sentencing hearings. Thus, hearsay, including statements in a PSIR, is admissible at sentencing hearings. Stokes v. State, 828 N.E.2d 937, 941 (Ind. Ct. App. 2005), trans. denied. The trial court did not abuse its discretion by considering the statements of Montalvo's codefendants referenced in the PSIR.

II. Aggravating Circumstances

Montalvo also argues that the trial court abused its discretion by treating two sentencing considerations as aggravators. "So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g on other grounds, 875 N.E.2d 218 (Ind. 2007). This includes the finding of an aggravating circumstance and the omission to find a proffered mitigating circumstance. Id. at 490-91; and Hollin v. State, 877 N.E.2d 462, 464 (Ind. 2007). "An abuse of discretion occurs if the decision is 'clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.'" Anglemyer, 868 N.E.2d at 490 (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)).

When imposing sentence for a felony, the trial court must enter "a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing a

particular sentence." Id. at 491. Its reasons must be supported by the record and must not be improper as a matter of law. Id. A trial court is neither obligated to find a circumstance to be mitigating simply because it was proffered by the defendant, nor to explain why it found that the factor did not exist. Highbaugh v. State, 773 N.E.2d 247, 252 (Ind. 2002); and Anglemyer, 868 N.E.2d at 493 (quoting Fugate v. State, 608 N.E.2d 1370, 1374 (Ind. 1993)). "[T]he seriousness of the offense . . . which implicitly includes the nature and circumstances of the crime as well as the manner in which the crime is committed, has long been held a valid aggravating factor." Anglemyer, 868 N.E.2d at 492.

Montalvo contends that the sentencing court abused its discretion by treating two sentencing considerations as aggravators. Notably, the sentencing court found six circumstances to consider, but did not label them as aggravators or mitigators. It then issued its decision to sentence Montalvo to twenty-five years – five years less than the advisory sentence for a Class A felony. See Ind. Code § 35-50-2-4. Of the six sentencing considerations, Montalvo asserts that the sentencing court improperly treated two of them as aggravators: his criminal history and his need of correctional or rehabilitative treatment. The sentencing court found as follows:

> 3. The defendant has a criminal history, which consists of convictions for Theft, Illegal Consumption, Forgery, OWI (twice), Battery[4] and the present offense of Dealing in Cocaine. The defendant was also using illegal drugs and profiting from the sale of cocaine by his wife, Linda Montalvo, for a period of time dating back to 2004.

[4] The Battery charge against Montalvo was dismissed.

> 4. The defendant is in need of correctional or rehabilitative treatment that can best be provided by his commitment to the Department of Correction for the reason that multiple periods of incarceration for brief periods of time, probation, fines and a drug and alcohol class have not caused the defendant to cease criminal activity and to become rehabilitated.

App. at 74.

As to his criminal history, Montalvo suggests that it should have been treated as a mitigator because his prior convictions were misdemeanors committed long ago: 1966, 1971, 1986, and 1993. However, as noted above, the sentencing court did not indicate how it considered Montalvo's criminal history. Regardless, while he pled guilty to conduct committed on November 9, 2007, the trial court cited evidence that the Montalvo home was the location of drug use and drug dealing "dating back to 2004." Id. The sentencing court therefore would have been within its discretion to find Montalvo's criminal history as an aggravating circumstance.

Finally, Montalvo challenges the sentencing court's finding that he was in need of correctional or rehabilitative treatment that could best be provided by the Department of Correction. However, the trial court may make such a finding (and consider it as an aggravating circumstance) if it explains why the defendant has such a need or if the sentence is less than the advisory sentence. Cotto v. State, 829 N.E.2d 520, 524 (Ind. 2005) and Roney v. State, 872 N.E.2d 192, 199 (Ind. Ct. App. 2007), trans. denied. Here, Montalvo received five years less than the advisory sentence. Furthermore, the sentencing court explained that "multiple periods of incarceration for brief periods of time, probation, fines and a drug and alcohol class have not caused the defendant to cease criminal activity and

become rehabilitated." App. at 74. The sentencing court did not abuse its discretion in making its findings of considerations for Montalvo's sentence.

Conclusion

The trial court did not abuse its discretion by considering the statements of Montalvo's codefendants in the PSIR or in making its findings.

Affirmed.

MAY, J., and BARNES, J., concur.