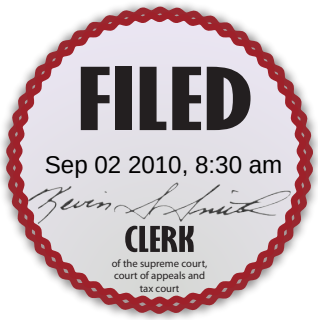

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IN THE
COURT OF APPEALS OF INDIANA

JOHNNY MACK WATTS, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-1002-CR-167
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Randy J. Williams, Judge
Cause No. 79D01-0807-FC-50

SEPTEMBER 2, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Senior Judge

Appellant Johnny Mack Watts, Jr., appeals his sentence after a conviction for criminal confinement as a class C felony.[1] We affirm.

On July 12, 2008, Watts went to the residence of the victim. Watts and the victim argued, and Watts grabbed her by the neck, holding her down. The victim suffered physical injury in the form of an abrasion, i.e., a red mark, on her neck and sought medical treatment.

The State charged Watts with criminal confinement as a class C felony, sexual battery as a class D felony,[2] and with being a habitual offender.[3] Watts pleaded guilty to criminal confinement, and the State dismissed the other charges. The trial court sentenced Watts to six years, which was the maximum possible sentence under the parties' plea agreement.

Watts raises two issues, which we expand and restate as: (1) whether the trial court abused its discretion during sentencing; and (2) whether Watts' sentence is inappropriate in light of the nature of the offense and the character of the offender.

Sentencing decisions rest within the sound discretion of the trial court and, if the sentence is within the statutory range, are reviewed on appeal for an abuse of discretion. See 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 before the court, or the reasonable, probable,

[1] Ind. Code § 35-42-3-3.
[2] Ind. Code § 35-42-4-8.
[3] Ind. Code § 35-50-2-8.

and actual deductions to be drawn therefrom. Id. (quotation omitted). Our Supreme Court has explained:

> One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that 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 490-491.

In this case, Watts contends that the trial court abused its discretion by omitting mitigating factors that are clearly supported by the record and by citing aggravating factors that are unsupported by the record. We will address each claim in turn.

The trial court determined that Watts' guilty plea, history of mental illness, and acceptance of responsibility for the crime were mitigating factors. A trial court is not required to find mitigating factors or to accept as mitigating the circumstances proffered by the defendant. Mead v. State, 875 N.E.2d 304, 309 (Ind. Ct. App. 2007).

Watts argues that the trial court should have cited his remorse as a mitigating factor. Substantial deference must be given to a trial court's evaluation of remorse. Corralez v. State, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004). The trial court, which has the ability to directly observe the defendant and listen to the tenor of his or her voice, is in the best position to determine whether the remorse is genuine. Id.

In this case, Watts submitted a written statement to the trial court. In the statement, Watts explained the circumstances that led him to commit the crime and stated that he was disappointed in himself, but he did not apologize for the offense or refer to

the harm he inflicted upon the victim. Thus, Watts took responsibility for his acts, for which the trial court gave him credit. However, he did not express remorse for the acts. He merely attempted to explain them. In light of the deference given to the trial court on this issue, the trial court did not abuse its discretion by failing to find remorse as a mitigating factor.

Watts also asserts that the trial court should have found as a mitigating factor that the circumstances that led to his crime are unlikely to recur. We disagree. Watts asserts that he committed the crime because he had quit taking medication for his mental illness and that he will take his medication in the future. Watts' assurance that he will continue taking his medication, thereby allegedly helping him to refrain from committing violent crimes, is unsupported by any evidence other than his own bare promise. The trial court was in the best position to evaluate Watts' credibility in making his promise. Thus, the trial court did not abuse its discretion by refusing to find that the circumstances that led to the crime are unlikely to recur.

The trial court identified the following aggravating factors: (1) "the victim recommends an aggravated sentence" (Appellant's App. 170); (2) the sentence for the conviction at issue is non-suspendable; (3) Watts is in need of correctional or rehabilitative treatment that can best be provided by commitment to a penal facility; and (4) Watts' criminal history. Appellant's App. pp. 169-170, 216, 218-219.

Watts contends that the trial court should not have identified the victim's recommendation as an aggravator. We agree. Recommendations from victims or their representatives are not mitigating or aggravating factors such as those terms are used in

the sentencing statute. See Haddock v. State, 800 N.E.2d 242, 247 (Ind. Ct. App. 2003). Thus, the trial court abused its discretion by noting that the victim recommended an aggravated sentence and that such was an aggravating factor.

We note that the victim's letter alluded to by the trial court was not inappropriate to consider during sentencing. The victim's letter in pertinent part stated that Watts

> "took my independence away from me you made me not be able to go outside after dark by myself everywhere I went I was with someone and looking over my shoulder to see if you were following me . . . To this day I look over my shoulder to see if you or someone you know is there . . ." Appellant's App. 244.

In her letter, the victim did not request a maximum sentence or even an aggravated sentence even though the trial court may have deduced that the letter was consistent with a request for a stringent sentence. Rather, it appears that instead of making a sentence request or recommendation, the victim was merely reciting the particularized and unique psychological and physical impact upon her. That impact was not the impact which usually occurs in a criminal confinement. Cf. Mitchem v. State, 685 N.E.2d 671, 680 (Ind. 1997), in which the court observed that it is presumed that the legislature in fixing a presumptive (now advisory) sentence considers the usual or normal victim impact for the crime involved.

In this regard, the case law permits unique or unusual physical or psychological impact to be considered in sentencing as opposed to a recommendation of a sentence over and above the advisory sentence for the felony involved. *See* Id. at 679-680; Hill v. State, 751 N.E.2d 273 at 279 (Ind. Ct. App. 2001) (Sullivan, J., concurring).

The case before us differs from other case scenarios in which the victim or the victim's family made a particular sentence request. See Edgecomb v. State, 673 N.E.2d 1185, 1199 (Ind. 1996), in which the court reduced an aggravated sentence of sixty years to the presumptive sentence of forty years. But see Brown v. State, 698 N.E.2d 779, 782 (Ind. 1998), in which despite recommendations by family members for the maximum sentence, the Court affirmed the maximum sentences, seeming to follow Mitchem and distinguishing sentence recommendations from impact evidence.

We hold that the trial court here erred in considering the victim's letter as a recommendation for an aggravated sentence and that the contents of the letter were an aggravating factor.

Next, Watts contends that two of the remaining aggravating factors, specifically that Watts' sentence is non-suspendable and that he is in need of correctional or rehabilitative treatment that can best be provided by commitment to a penal facility, cannot serve as separate aggravating factors because they spring from Watts' criminal history. We agree. The fact of prior convictions, standing alone, cannot be used to support three separate aggravators. See Williams v. State, 838 N.E.2d 1019, 1021 (Ind. 2005) (determining that the trial court should not have cited a defendant's criminal history, likelihood to re-offend, and need for rehabilitation as aggravating factors because all three involved the defendant's criminal history). In this case, Watts' non-suspendable sentence resulted from his criminal record, and, while discussing Watts' need for correctional or rehabilitative treatment that can best be provided by commitment to a penal facility, the trial court referred to Watts' lengthy history of probation revocations

and failure to appear for court proceedings. Thus, the trial court abused its discretion by citing those factors as separate aggravating circumstances.

Based on the foregoing, we are left with one valid aggravating factor, specifically Watts' criminal history, and three mitigating factors, specifically Watts' guilty plea, his history of mental illness, and his acceptance of responsibility for the crime. Watts contends that we should remand the case for resentencing. When the trial court abuses its discretion during sentencing, remand for resentencing is the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record. Anglemyer, 868 N.E.2d at 491.

In this case, Watts has accrued seven misdemeanor convictions, three felony convictions, and a habitual offender determination, all since 1994. He has also had his probation revoked five times and has failed to appear for court proceedings on numerous occasions. At the sentencing hearing, the trial court reviewed Watts' criminal history at length, spending far more time discussing that aggravating factor than any other. The trial court took special note of Watts' probation revocations and past failures to appear in court. The trial court here did so to explain why Watts was not a good candidate for probation on his current conviction. Under these circumstances, we can say with confidence that the trial court would have imposed the same sentence if it had considered Watts' criminal record to be the sole aggravating factor. Consequently, we decline to remand for resentencing.

Watts' final 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." 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. 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. Our Supreme Court in Anglemyer v. State, supra, noted that the advisory sentence is the "starting point" the Legislature has selected as an appropriate sentence for the crime committed. 868 N.E.2d at 494. However, this court has held that although the advisory sentence may be the appropriate sentence, it is not a "mandatory starting point". Richardson v. State, 906 N.E.2d 241, 243 (Ind. Ct. App. 2009). For our purposes of review under Appellate Rule 7(B) we will first look to the advisory sentence to guide us in determining whether the sentence imposed is appropriate given the nature of the offense and the character of the offender. At the time Watts committed his crime, the sentence for a class C felony was a fixed term of between two years and eight years, with the advisory sentence being four (4) years. See Ind. Code § 35-50-2-6.

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 Watts to six years, which was two years more than the advisory sentence and was the maximum allowed by the parties' plea agreement.

The nature of the crime is troubling. Watts asserts that the crime was not premeditated or prolonged. Nevertheless, Watts attacked the victim in her own home. Furthermore, prior to the sentencing hearing, the victim provided a letter to the trial court in which she indicated that she had experienced substantial emotional trauma in addition to the bodily injury contemplated by Ind. Code section 35-42-3-3. In the letter, the victim stated that her mother was driving her to and from work because she was too frightened to wait for the bus after Watts' attack. In addition, due to Watts' attack the victim quit going outside after dark without accompaniment.

Regarding the character of the offender, Watts contends that his criminal history does not justify an aggravated sentence because none of his prior convictions were for crimes of violence. While this is true, Watts' criminal history is nonetheless lengthy, consisting of seven misdemeanor convictions, three felony convictions, and a habitual offender determination. Furthermore, Watts admitted to a lengthy history of using illegal drugs and illegally obtained prescription drugs. Thus, his criminal history demonstrates a lengthy pattern of disregard for the law. Additionally, Watts has had his probation revoked five times and has failed to appear for court proceedings on multiple occasions. Watts' repeated failures to successfully complete probation are especially pertinent here

because Watts asked the trial court to allow him to serve a portion of his current sentence on probation.

Watts correctly points out that prior to the instant case, he had not accrued a criminal conviction since 2001 and contends that this reflects well on his character. We disagree. In 2006, Watts was charged with public intoxication and disorderly conduct. Those charges were addressed through a pre-trial diversion program, but they demonstrate that Watts was not fully complying with the law even though he had not been found guilty of a crime during this period. Furthermore, according to the presentence report, during this same time period Watts used marijuana and consistently took illegally obtained prescription drugs. His drug abuse also indicates failure to conform to the law.

Next, Watts notes that he had an abusive childhood. However, he fails to explain how his abusive childhood is related to his current crime, which he committed shortly before his thirty-sixth birthday.

Watts also argues that he has a lengthy history of mental illness. He asserts that the current crime was caused by his failure to take medication for his mental illness, and that the crime will not recur because he is resolved to take his medicine as directed from now on. We note once again that during the seven years prior to the instant crime, when Watts asserted that he was taking his medication and doing well, he was regularly taking illegally-obtained prescription drugs and using marijuana. This drug use undercuts Watts' claim that he is law-abiding when he takes his medication. Furthermore, Watts

provides no assurances, beyond his own promise, that he will continue to take all medications as directed and otherwise comply with the law.

Finally, Watts argues that we should consider his expression of remorse for this crime. As we noted above, in his letter to the Court Watts explained how the crime occurred and stated that he is disappointed in himself. However, Watts did not apologize to the victim or to the court for his conduct or acknowledge the harm that he has caused to the victim. Watts' letter is more of an acceptance of responsibility than an expression of remorse, and we cannot say that the letter reflects so positively upon Watts in that regard as to require a reduction of his sentence.

Watts has not carried his burden of persuasion, and we conclude that the trial court's sentence of six years is appropriate in light of the nature of the offense and the character of the offender.

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

Affirmed.

BAILEY, J., and BROWN, J., concur.