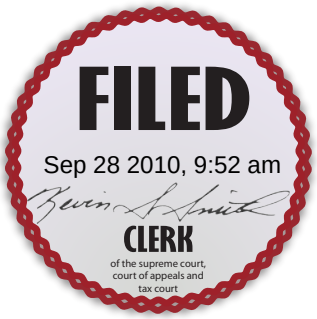

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IN THE
COURT OF APPEALS OF INDIANA

WANDA A. NEWBRY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-1002-CR-126
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT NO. 2
The Honorable Stephen E. Platt, Judge Pro Tempore
Cause No. 20D02-0005-CF-57

September 28, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Wanda A. Newbry (Newbry), appeals her sentence following a guilty plea to delivery of cocaine, a Class B felony, Ind. Code § 35-48-4-1.[1]

We affirm.

ISSUE

Newbry raises one issue on appeal, which we restate as: Whether the trial court's sentencing statement was sufficient to apprise the reviewing court of the reasons for imposing her sentence.

FACTS AND PROCEDURAL HISTORY

On January 24, 2002, the Elkhart County Drug Task Force, working with undercover officers and a confidential informant, purchased crack cocaine from Newbry. The transaction took place within one thousand feet of a school. On December 31, 2002, the State filed an Information charging Newbry with delivery of cocaine within one thousand feet of a school, a Class A felony. On September 8, 2003, Newbry entered into a plea agreement with the State, agreeing to plead guilty to delivery of cocaine, as a Class B felony. On October 13, 2003, during a sentencing hearing, the trial court accepted the plea agreement and considered the following:

> We've been, we've been in here on these things for the last thirteen (13), fourteen (14) years. I've reviewed the presentence. [C]ertainly there are no[] statutory mitigating circumstances. There are all kinds of statutory

[1] In a separate appeal before this court, Newbry is also appealing her fifteen year sentence that was imposed following a plea of guilty in Cause No. 20A03-1002-CR-125. We decide this companion case and hand it down simultaneously with the instant memorandum decision.

> aggravators. Uh, including but not limited to the past criminal record. Uh, the fact that there was a sentence modification before.
> [I]n trying to determine an appropriate sentence here, it would be easy to read this and say this is too much. You know, you get twenty (20) on each, take twenty (20) and just go away and get out what little hair I have. But that's not really appropriate.
> [The State's] comments are somewhat in line of what I was thinking of doing. I'm hope [sic] that you're serious about your spiritual enlightenment. That I've got a lot of stuff here and [Newbry's counsel] indicates he's got some letters. I hope it's providing you with some comfort and direction that you obviously need. I hope that you're serious about educational opportunities because sooner or later you're going to be back on the street.

(Transcript p. 12). At the close of the sentencing hearing, the trial court sentenced her to fifteen years at the Department of Correction. The trial court ordered this sentence to run consecutive to a fifteen year term Newbry received in a companion case on the same day.

On August 12, 2005, Newbry filed a petition for post-conviction relief. On December 15, 2006, the post-conviction court granted Newbry's petition and suspended an additional six years of Newbry's sentence.[2] On January 13, 2010, Newbry filed a verified petition for permission to file a belated notice of appeal, which was granted by the trial court on February 26, 2010.

Newbry now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Newbry contends that the trial court abused its discretion when imposing her sentence. Specifically, she claims that the trial court failed to provide a clear sentencing statement

[2] In the same proceeding, the post-conviction court also suspended six years of Newbry's sentence in her companion case.

apprising the reviewing court of the reasons for imposing a fifteen year sentence with six years suspended following her guilty plea.

Initially, we note that Newbry committed the instant charge on January 24, 2002 or prior to the amendments to Indiana's sentencing scheme which were instituted on April 25, 2005. As such, the pre-*Blakely* sentencing schedule applies to Newbry's sentence. *See Robertson v. State*, 871 N.E.2d 280, 286 (Ind. 2007).

Here, the trial court imposed a fifteen year sentence with six years suspended for delivery of cocaine, a Class B felony. At the time Newbry committed her offense, the presumptive penalty for a Class B felony was ten years, to which ten years could be added for aggravating circumstances or four years subtracted for mitigating circumstances. *See* I.C. § 35-50-2-5.

Sentencing decisions are within the discretion of the trial court and are reviewed only for an abuse of discretion. *Cox v. State*, 780 N.E.2d 1150, 1155 (Ind. Ct. App. 2002). When a trial court enhances a sentence, the trial court is required to state its specific reasons for doing so. *Id*. The sentencing statement must: (1) identify significant aggravating and mitigating circumstances; (2) state the specific reason why each circumstance is aggravating or mitigating; and (3) demonstrate that the aggravating and mitigating circumstances have been weighed to determine that the aggravators outweigh the mitigators. *Id*. at 1155-56. We examine both the written sentencing order and the trial court's comments at the sentencing hearing to determine whether the trial court adequately explained the reasons for the sentence. *Id*. at 1156. A sentence enhancement will be affirmed in spite of the trial court's

failure to specifically articulate its reasons if the record indicates that the court engaged in the evaluative processes and the sentence imposed was not manifestly unreasonable. *Id.* A single aggravating circumstance may be sufficient to enhance a sentence. *Id.*

In the instant case, the trial court found one specific aggravating circumstance—Newbry's criminal history—and no mitigating circumstances. A defendant's criminal history has always been a proper aggravating factor that can be used to justify an enhanced sentence. *Allen v. State*, 722 N.E.2d 1246, 1252 (Ind. Ct. App. 2000). Newbry's criminal history consists of three prior Class B felony convictions for dealing in cocaine in 1991. As such, Newbry's criminal history was properly used as an aggravator.

Newbry now contends that the trial court omitted to include "at least two statutory mitigators [which] were supported by the record." (Appellant's Br. p. 4). In particular, Newbry claims that she would likely respond affirmatively to probation and her imprisonment would result in an undue hardship to her adult daughter. A trial court is not required to find the presence of mitigating factors or to give the same weight or credit to mitigating evidence as does the defendant, nor is it obligated to accept the defendant's assertions as to what constitutes mitigating circumstances. *Id.*

With respect to her purported affirmative response to probation, we note that Newbry did not raise this argument at the sentencing hearing. We agree with the State that the trial court's observation during the sentencing hearing that she had "changed a lot in the nine months" since she had been in the county jail does not indicate that this statement was made

in relation to an omitted mitigator. (Tr. p. 12). As such, we cannot say that this proposed mitigating circumstance is significant and supported by the record.

During the sentencing hearing, Newbry informed the trial court that she had an adult daughter with a drug addiction who needed help. We have stated previously that a trial court is not required to find that a defendant's incarceration would result in undue hardship upon her dependents. *Gray v. State*, 790 N.E.2d 174, 178 (Ind. Ct. App. 2003). This mitigator cannot be assigned any weight when a defendant fails to show why incarceration for a particular term will cause more hardship than incarceration for a shorter term. *Abel v. State*, 773 N.E.2d 276, 280 (Ind. 2002). Newbry's statements at sentencing indicated that she is concerned for her daughter but failed to establish how a shorter sentence would reduce the hardship. Thus, the trial court did not abuse its discretion by not considering hardship as a mitigator.

In sum, the trial court's statement at sentencing identified the significant aggravators and lack of mitigators and provided this court with sufficient guidance as to its evaluative processes. *See Cox*, 780 N.E.2d at 1156. Therefore, we conclude that the sentence imposed was not manifestly unreasonable.

CONCLUSION

Based on the foregoing, we conclude that the trial court properly sentenced Newbry.

Affirmed.

KIRSCH, J., and BAILEY, J., concur.