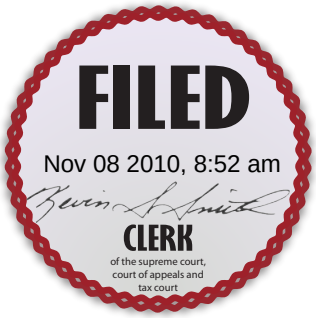

ATTORNEY FOR APPELLANT:

ROBERT D. WICKENS
Wickens & Wickens, LLC
Greensburg, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MARJORIE LAWYER-SMITH
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JONATHAN GRIDER, SR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 16A01-1005-CR-246
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DECATUR SUPERIOR COURT
The Honorable Matthew D. Bailey, Judge
Cause No. 16D01-0902-FC-91

November 8, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Jonathan Grider, Sr. appeals his sentence for manufacturing methamphetamine as a class B felony.[1] Grider raises two issues, which we revise and restate as:

I. Whether the trial court abused its discretion in sentencing Grider; and

II. Whether Grider's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

The relevant facts follow.[2] On February 25, 2009, Indiana State Police Officers Howell, Prather, and Ponsler came upon the home of Bill Grider, who was Grider's father, "to look in his outbuilding for possible methamphetamine that may have been left behind" by Grider's son, who had been arrested earlier that day. Appellant's Appendix at 32. Officer Ponsler approached Grider, who was seated in a pickup truck, and when he began to speak with Grider he noticed that Grider had syringes in his jacket pocket. After Officer Ponsler asked Grider about the syringes, Grider "moved his hand rapidly towards the front of his pants." Id. Officer Ponsler became concerned for his safety and grabbed Grider's forearm, and Officer Howell grabbed his other forearm. Grider then began to fight with both officers. At one point, Officer Prather noticed that there was a gun under Grider's legs, and he secured the firearm. A search of Grider's person revealed "a silver tin containing off-white, rock-like substance, a pocket knife, flashlight keychain with keys and a pipe plug." Id. at 33.

[1] Ind. Code § 35-48-4-1.1(a)(1) (Supp. 2006).

[2] At the guilty plea hearing, the trial court took judicial notice, without objection, of the probable cause affidavit filed on February 26, 2009 "in support of the factual basis." Transcript at 9. Thus, the recitation of the facts in this opinion relies in part upon the probable cause affidavit.

A search of Bill's "pig barn" revealed plastic bags which "contained items used in the production of methamphetamine," including ephedrine, lithium metal, anhydrous ammonia, and organic solvents. Id. The officers also searched a shed in which Grider had been residing, and the shed contained evidence that Grider had been producing methamphetamine. The officers placed Grider under arrest.

On February 26, 2009, the State charged Grider with manufacturing methamphetamine. On March 19, 2009, the State filed an amended charging information and charged Grider with Count I, possession of methamphetamine as a class C felony; Count II, carrying a handgun without a license as a class A misdemeanor; Count III, resisting law enforcement as a class A misdemeanor; Count IV, dealing in methamphetamine as a class A felony; and Count V, manufacturing methamphetamine as a class B felony. On April 5, 2010, Grider and the State entered into a conditional guilty plea agreement whereby Grider agreed to plead guilty to Count V, manufacturing methamphetamine as a class B felony, and the State agreed to dismiss Counts I-IV. Sentencing was left to the discretion of the court, but the State agreed to recommend ten years executed.

On that same date, the trial court held a guilty plea hearing and accepted Grider's guilty plea. A sentencing hearing was set for April 26, 2010. On that date, however, Grider failed to appear at the hearing because he was "comin' [sic] down off meth. . . . [Grider] passed out, and [he] overslept for like three hours . . . ." Transcript at 34. A warrant was issued for Grider's arrest which was executed on May 3, 2010. Incident to this arrest, Grider was charged with the additional crimes of manufacturing of

methamphetamine as a class A felony and possession of methamphetamine as a class C felony.[3] On May 20, 2010, the court held a sentencing hearing. At the sentencing hearing, the court stated in weighing the aggravators and mitigators:

> Mr. Grider has advanced . . . two factors in mitigation, the first being his plea of guilty. Mr. Grider's plea of guilty was made the day before the jury trial. In return, the State of Indiana dismissed Counts 1 through 4 of the Charging Information, which one of those was a Class A Felony charge. This was a pragmatic decision made by Mr. Grider, and . . . should not be given any – any weight in mitigation. The other mitigator advanced by Mr. Grider is his substance abuse history. If you read through the presentence investigation report, Mr. Grider reported that he first used alcohol and marijuana at age 13. He's used methamphetamine, LSD, and cocaine, and at the time of the presentence investigation report, he reported he had last used methamphetamine on April 12, 2010. I've heard from his wife that he – I don't know if she characterized it as sought treatment, but turned to God sometime in 2008 for a period of time in order to try to – I don't know if that was an attempt to change his life or if that was a concern for his eternal salvation. I'm not sure how that helps his . . . substance abuse issue. Then I heard testimony from Mr. Grider that sometime around April 28, 2010, he called a facility in Louisville, Kentucky. I would note that that date would be the – also the date he failed to appear for a sentencing hearing, and his explanation for failing to appear was that he was coming down from meth high and overslept. I find it hard to believe that he's using meth and calling a facility and seeking treatment, and even if he did, he didn't seek treatment until the day that he thought that he was going to be sentenced in this matter, so I don't consider his substance abuse to be a mitigating factor in . . . this case. I actually [consider] it to be an aggravator, his failure to seek treatment. He was charged with these matters, in this case, in February of 2009, and went that period of time without seeking treatment, until allegedly doing it, or until he says he did it, the day he was supposed to be sentenced.

Id. at 40-41. The court went on to recite Grider's criminal history and found it as an aggravator. The court also noted that Grider had been arrested after his failure to appear, which the court found to "be a general disrespect for the criminal justice system," and

[3] The additional charges of manufacturing of methamphetamine as a class A felony and possession of methamphetamine as a class C felony were pending in the Decatur Superior Court as of the May 20, 2010 sentencing hearing.

was charged with additional crimes, and that although "[t]hey are not convictions . . . they do reflect on Mr. Grider's character and indicate that he is a risk of committing future crimes." Id. at 42. The court also noted that "[t]he number of convictions shows to me that Mr. Grider has not been deterred by his involvement in the criminal justice system," and that "[p]rior attempts at deterrence and rehabilitation of his unlawful conduct have not been successful." Id. The court concluded that Grider was deserving of an enhanced sentence and sentenced him to fifteen years executed in the Department of Correction.

I.

The first issue is whether the trial court abused its discretion in sentencing Grider. We note that Grider's offense was committed after the April 25, 2005 revisions of the sentencing scheme. In clarifying these revisions, the Indiana Supreme Court has held that "the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). We review the sentence for an abuse of discretion. Id.

An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances before the court." Id. A trial court abuses its discretion if it: (1) fails "to enter a sentencing statement at all;" (2) enters "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;" (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and

advanced for consideration;" or (4) considers reasons that "are improper as a matter of law." Id. at 490-491. If the trial court has abused its discretion, we will remand for resentencing "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." Id. at 491. However, the relative weight or value assignable to reasons properly found, or those which should have been found, is not subject to review for abuse of discretion. Id.

The trial court found Grider's criminal history, his failure to seek treatment for his addiction, and the fact that Grider's previous involvement in the criminal justice system has "not been successful" in rehabilitating him as aggravators. Transcript at 42. The trial court also addressed the two mitigators identified by Grider, the fact that Grider pled guilty and his history of substance abuse, but it did not find that those factors carried any mitigating weight. Grider argues that "the trial court wrongly refused to credit the defendant's guilty plea as a mitigating factor, omitted the mitigating factor that the offense did no harm to persons or property, and wrongly considered [his] criminal history [as] an aggravating factor." Appellant's Brief at 7-8.

Regarding mitigators, "[t]he finding of mitigating factors is not mandatory and rests within the discretion of the trial court." O'Neill v. State, 719 N.E.2d 1243, 1244 (Ind. 1999). The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. Gross v. State, 769 N.E.2d 1136, 1140 (Ind. 2002). "Nor is the court required to give the same weight to proffered mitigating factors as the defendant does." Id. Further, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. Sherwood v. State, 749 N.E.2d 36, 38 (Ind. 2001),

reh'g denied. However, the trial court may "not ignore facts in the record that would mitigate an offense, and a failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them." Id. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999).

Initially, regarding Grider's argument that the court overlooked in mitigation that "the offense did no harm to persons or property," we note that, as argued by the State, Grider did not raise this as a proposed mitigator. Appellant's Brief at 7-8. Again, "it is within a trial court's discretion to determine both the existence and the weight of a significant mitigating circumstance." Pennington v. State, 821 N.E.2d 899, 905 (Ind. Ct. App. 2005). "Given this discretion, only when there is substantial evidence in the record of significant mitigating circumstances will we conclude that the sentencing court has abused its discretion by overlooking a mitigating circumstance." Id. "An allegation that the trial court failed to identify or find a mitigating circumstance requires the defendant on appeal to establish that the mitigating evidence is both significant and clearly supported by the record." Id.

Here, even if we were to find that the record clearly supports the proposed mitigator that no persons or property were harmed in the actual manufacturing of methamphetamine, we do not believe that the court abused its discretion in not identifying it and according it any mitigating weight. Indeed, Grider's wife testified at the sentencing hearing that methamphetamine has "destroy[ed]" Grider, and also that as a

result of Grider's addiction she and Grider have lost their home. Transcript at 19. Also, Grider testified that, as a result of his methamphetamine addiction, he has lost "everything [he] own[s] . . . and relationships with people, you know, with family members . . . it's cost [him] everything." Id. at 32. We therefore cannot say that this mitigator, proposed for the first time at the appellate level, is significant.

Next, regarding Grider's argument that the court wrongly refused to consider his guilty plea to be a mitigator, we note that "[a] guilty plea does not automatically amount to a significant mitigating factor." Edrington v. State, 909 N.E.2d 1093, 1100-1101 (Ind. Ct. App. 2009), trans. denied; see also Powell v. State, 895 N.E.2d 1259, 1262-1263 (Ind. Ct. App. 2008) (noting that where the State "dropped two Class A felony counts in exchange for [defendant's] guilty plea . . . . [T]he trial court would not have erred had it failed to find [defendant's] guilty plea to be a mitigating factor") (citing Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999)), trans. denied. "It does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one." Id. Here, in refusing to find Grider's guilty plea as a mitigator, the trial court noted that it "was made the day before the jury trial," and that "[i]n return, the State of Indiana dismissed Counts 1 through 4 of the Charging Information, [including] a Class A Felony charge." Transcript at 40. The trial court therefore deemed Grider's guilty plea "a pragmatic decision." Id. We cannot say that the trial court abused its discretion in not according Grider's guilty plea any mitigating weight.

Finally, Grider argues, without citation to authority, that the court "wrongly considered [his] criminal history [as] an aggravating factor" because "he had not had a serious offense since 1992." Appellant's Brief at 8-9. "The chronological remoteness of a defendant's prior criminal history should be taken into account." Buchanan v. State, 767 N.E.2d 967, 972 (Ind. 2002) (citing Harris v. State, 272 Ind. 210, 215, 396 N.E.2d 674, 677 (1979)). "However, 'we will not say that remoteness in time, to whatever degree, renders a prior conviction irrelevant.'" Id. (quoting Harris, 272 Ind. at 215, 396 N.E.2d at 677). Indeed, "[t]he remoteness of prior criminal history does not preclude the trial court from considering it as an aggravating circumstance." Id. (quoting Bowling v. State, 493 N.E.2d 783, 787 (Ind. 1986) (citing Perry v. State, 447 N.E.2d 599, 600 (Ind. 1983))). Such decisions are "within the ambit" of the trial court's discretion. Id.

Here, Grider's criminal history includes being found delinquent for battery and theft as a juvenile. As an adult, in June 1991 Grider was convicted of disorderly conduct, criminal mischief, resisting law enforcement, and battery. Also, in November 1992 Grider was convicted of theft as a class D felony and driving while suspended. Moreover, Grider admits to having used drugs since he was thirteen years old including methamphetamine, marijuana, LSD, cocaine, and alcohol. Also, regarding his methamphetamine use, Grider admits that his addiction is at "the point where that drug controls [his] life." Transcript at 36. Despite the relative remoteness of Grider's criminal history, he was not living a law-abiding life. See Edrington, 909 N.E.2d at 1100; see also Bostick v. State, 804 N.E.2d 218, 225 (Ind. Ct. App. 2004) (finding no abuse of discretion where the court declined to give substantial weight to the defendant's lack of a

criminal history and noting that, although defendant lacked criminal history, evidence existed indicating she had a substance abuse problem and "was leading a less than law-abiding life"). We therefore conclude that the trial court did not abuse its discretion when it found Grider's criminal history as an aggravating circumstance. See Buchanan, 767 N.E.2d at 972 (holding that, despite its remoteness in time, the trial court did not abuse its discretion by including defendant's criminal history as an aggravator).

Moreover, we note that even if the trial court erred in finding Grider's criminal history as an aggravator, a single valid aggravator is enough to sustain an enhanced sentence. Buchanan v. State, 699 N.E.2d 655, 657 (Ind. 1998). Here, in addition to Grider's criminal history, the trial court found his failure to seek treatment for his addiction and that his previous involvement in the criminal justice system had not been successful in rehabilitating him as aggravators, and Grider does not challenge these aggravators on appeal.

II.

The second issue is whether Grider's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Grider argues that "[t]he Indiana Supreme Court recently ruled that appellate courts can consider not only the length of the sentence,

but also whether a 'portion of the sentence is ordered suspended or otherwise crafted using any variety of sentencing tools available,'" and thus that his "sentence should be reduced and some of it should be permitted to be served on probation." Appellant's Brief at 9-10 (quoting Davidson v. State, 926 N.E.2d 1023, 1024 (Ind. 2010)).

A review of the nature of the offense reveals that three officers came upon Grider's father's property to search for methamphetamine after arresting Grider's son earlier in the day. Grider was found to be manufacturing methamphetamine in a shed on the property. In the process of being arrested, Grider resisted and fought with two officers. At one point, one of the officers had to secure a firearm from Grider.

A review of the character of the offender reveals that Grider has a criminal history including juvenile adjudications for battery and theft and adult convictions for disorderly conduct, criminal mischief, resisting law enforcement, battery, theft, and driving while suspended. Grider failed to appear at his original sentencing hearing because he was "comin' [sic] down off meth" and overslept, which the trial court found to "be a general disrespect for the criminal justice system." Transcript at 34, 42. A warrant was issued for Grider's arrest, and when Grider was arrested he was contemporaneously charged with the additional crimes of manufacturing of methamphetamine as a class A felony and possession of methamphetamine as a class C felony. Grider has been using drugs since he was thirteen years old.

After due consideration of the trial court's decision, we cannot say that the fifteen year sentence imposed by the trial court is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Storey v. State, 875 N.E.2d 243, 253

(Ind. Ct. App. 2007) (holding that defendant's enhanced sentence for manufacturing methamphetamine was not inappropriate), trans. denied.

For the foregoing reasons, we affirm Grider's sentence for manufacturing methamphetamine as a class B felony.

Affirmed.

DARDEN, J., and BRADFORD, J., concur.