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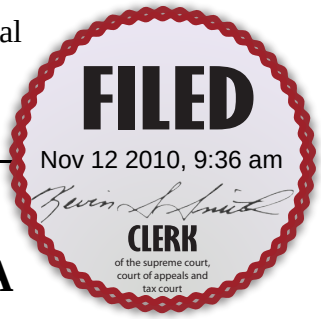

IN THE COURT OF APPEALS OF INDIANA

RANDY J. LABRESH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A05-1004-CR-229
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-0811-FC-153

November 12, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Randy Labresh appeals his sentence imposed for Class C felony operating a vehicle while intoxicated causing death. We affirm.

Issues

The issues before us are:

I. whether the trial court abused its discretion by failing to find that Labresh's medical condition was a mitigating factor; and

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

Facts

On November 14, 2007, Labresh was driving his vehicle eastbound on a two-lane road in Hammond, Indiana. Kevin Smith and Evetta Williams were in a vehicle traveling westbound on the same road. Labresh's vehicle crossed the center line and struck Smith and Williams's vehicle. Smith was killed and Williams was injured. At the time of the accident Labresh had a blood alcohol level of .234. Labresh sustained injuries in the accident, which resulted in paraplegia.

On November 14, 2008, the State charged Labresh with operating a vehicle while intoxicated causing death, a Class C felony; operating a vehicle while intoxicated causing serious bodily injury, a Class D felony; and two counts of operating a motor vehicle while intoxicated as Class A misdemeanors.

Labresh pled guilty to operating a vehicle while intoxicated causing a death and the State dismissed the other charges. On March 16, 2010, the court held a sentencing hearing and sentenced Labresh to seven years in the Indiana Department of Correction. Labresh now appeals.

Analysis

We engage in a four-step process when evaluating a sentence under the current "advisory" sentencing scheme. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). First, the trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e. to particular aggravators or mitigators, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id. Even if a trial court abuses its discretion by not issuing a reasonably detailed sentencing statement or in its findings or non-findings of aggravators and mitigators, we may choose to review the appropriateness of a sentence under Rule 7(B) instead of remanding to the trial court. See Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007).

I. Abuse of Discretion

Labresh asserts that the trial court abused its discretion by failing to identify Labresh's paraplegia as a mitigating circumstance. An abuse of discretion in identifying or not identifying aggravators and mitigators occurs if it 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)). Additionally, an abuse of discretion occurs if the record does not support the reasons given for imposing sentence, 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 490-91.

Here, the trial court did consider Labresh's paraplegia but found it was not a mitigating factor. At sentencing, the trial court stated:

> Now, I want to be very clear with respect to [Labresh's] injuries. The Court does not consider the injuries of the defendant to be a mitigating factor, because he caused his own injuries. That's the plain truth. He did this to himself. . . . You don't get to drive drunk and kill someone and then claim your own injuries as somehow a mitigation against the sentence, that's not justice, that's not fair.

Tr. p. 58. Labresh argues the trial court should have considered his physical impairment as a mitigating factor and cites Moyer v. State, 796 N.E.2d 309 (Ind. Ct. App. 2003). In Moyer, the defendant testified about the medical hardship he would endure if incarcerated, but the trial court gave no consideration to this testimony. 796 N.E.2d at 314. On appeal, this court found that the defendant's illness was significant and deserved consideration because the defendant required constant care. Id. This court found that the aggravating factors still outweighed the mitigating factors, but we remanded the case to the trial court in order to consider the defendant's mental illness. Id.

On the other hand, where the defendant is at fault for his or her own illness, this court has found it proper to not identify the illness as a mitigating factor. Storey v. State, 875 N.E.2d 243, 252 (Ind. Ct. App. 2007), trans. denied. The defendant in Storey was

convicted of possession and manufacturing controlled substances. Id. at 247. The defendant was in very poor health, but the trial court refused to consider his illness as a mitigating factor because his health was caused by his life-long substance abuse. Id. at 252. On appeal, this court affirmed and noted that the trial court did not ignore the defendant's poor health, but simply refused to recognize it as a mitigating factor. Id.

Here, Labresh's paraplegia was considered by the trial court. The trial court did not simply ignore the facts concerning Labresh's injuries, as did the trial court in Moyer. Instead, Labresh's injuries were considered and dismissed as a mitigating factor, similar to the Storey case, because Labresh caused the injuries himself. Therefore, the trial court did not abuse its discretion by failing to identify Labresh's paraplegia as a mitigating circumstance.

II. Appropriateness

We now assess whether Labresh's sentence is inappropriate under Appellate Rule 7(B) in light of his character and the nature of the offense. See Angelemyer, 868 N.E.2d at 491. Although Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. "Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id.

The principal role of Rule 7(B) review "should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement

of the sentencing statutes, but not to achieve a perceived 'correct' result in each case." Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008). We "should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count." Id. When reviewing the appropriateness of a sentence under Rule 7(B), we may consider all aspects of the penal consequences imposed by the trial court in sentencing the defendant, including whether a portion of the sentence was suspended. Davidson v. State, 926 N.E.2d 1023, 1025 (Ind. 2010).

Labresh argues that his seven-year sentence is inappropriate for several reasons, including his limited criminal history, that he was a contributing member of society and paid child support before the incident, that he showed remorse, and that he showed responsibility by pleading guilty. Labresh points out that the advisory sentence for a Class C felony is four years and the maximum sentence is eight years.

Labresh does have a criminal history. In 1988, he was convicted of operating while intoxicated as a misdemeanor. Labresh has never been convicted of a felony; however, his prior conviction for operating while intoxicated is highly significant considering that "[a] single aggravator is sufficient to support an enhanced sentence." Williams v. State, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008) (citing Trusley v. State, 829 N.E.2d 923, 927 (Ind. 2005)). Given the fact that Labresh's 1988 conviction was of the same nature as the crime he pled guilty to in this case, it is noteworthy. It is true that this prior offense occurred twenty-two years ago; however "we will not say that remoteness in time, to whatever degree, renders a prior conviction irrelevant." Storey, 875 N.E.2d at

251 (quoting Wooley v. State, 716 N.E.2d 919, 929 (Ind. 1999)). Labresh's record also shows eleven other minor traffic violations

The fact that Labresh pled guilty and has shown remorse do reflect well on his character. His prior conviction for operating while intoxicated and his multiple other traffic violations, however, do not. Further, we must consider both the defendant's character and the nature of the offense. We cannot ignore the fact that Labresh killed Smith and injured Williams. Labresh's blood alcohol level was three times the legal limit. In light of these circumstances, we cannot say his seven-year sentence is inappropriate. We affirm the trial court's sentence.

Conclusion

The trial court did not abuse its discretion by failing to identify Labresh's paraplegia as a mitigating circumstance and the trial court's sentence was appropriate in light of the nature of the offense and the character of the offender. We affirm.

Affirmed.

FRIEDLANDER, J., and CRONE, J., concur.