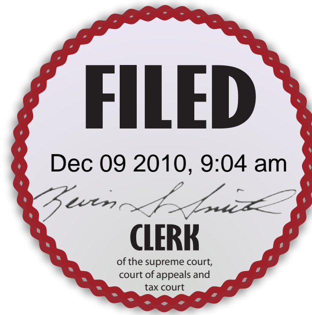
Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

JOHN H. BROOKE
Delaware County Public Defender
Muncie, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

WADE JAMES HORNBACHER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

LEWIS JEROME McNEARY,)
)
Appellant-Defendant,)
)
vs.) No. 18A02-1005-CR-580
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Thomas A. Cannon, Jr., Judge
Cause No. 18C05-0904-FC-10

December 9, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

An armed drug dealer shot and killed his girlfriend during an argument. Admitting that his behavior was reckless but maintaining that the gun discharged accidentally during the argument, the drug dealer pled guilty to class C felony reckless homicide. The trial court sentenced him to a seven-year term of imprisonment, with six years executed and one year suspended to probation. The drug dealer appeals, arguing that the sentence imposed is too harsh under the circumstances. Finding no abuse of discretion by the trial court, we affirm the sentence.

Facts and Procedural History

Lewis Jerome McNeary, a twenty-one-year-old admitted marijuana and cocaine dealer, regularly carried a loaded handgun for protection due to his line of business. On March 28, 2009, McNeary was engaged in an ongoing argument with his on-again, off-again girlfriend Tameka Huff. McNeary and Huff had an abusive relationship that Huff was attempting to terminate. On March 28, as well as on the previous day, McNeary sent Huff various text messages which included threats such as "I hope you f***ing die," "I am gonna make to where you ain't gonna talk no f***ing more, you want to test me to see how far I will go," and "I swear to god I hope you f***ing die." Appellant's App. at 227-44. On the night of March 28, McNeary drove to Huff's home with a loaded handgun under the seat of his car. Then, by way of text message, McNeary ordered Huff to "Bring yo ass out here." *Id.* Before Huff got into McNeary's car, McNeary retrieved his loaded handgun and placed it on the front seat of the car. Once Huff was in the car, the pair argued and a struggle for the gun

ensued. During the struggle, McNeary shot Huff. McNeary drove Huff to the hospital, but fled on foot when he was approached by a police officer, leaving Huff in the car. Huff was pronounced dead shortly thereafter.

The State charged McNeary with class C felony reckless homicide. On March 30, 2010, pursuant to a written plea agreement, McNeary pled guilty as charged with sentencing left open to the trial court's discretion. On April 28, 2010, the trial court sentenced McNeary to seven years, with six years executed and one year suspended to probation. This appeal followed.

Discussion and Decision

Sentencing decisions rest within the sound discretion of the trial court and we review those decisions on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. The trial court is required to enter a sentencing statement explaining its reasons for imposing the sentence which provides a recitation of facts, in some detail, which are peculiar to the particular defendant and the crime, and such facts must have support in the record. *Id*. An abuse of discretion occurs if the trial court's 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. *Id*.

During sentencing, the trial court may consider certain aggravating and mitigating circumstances. Ind. Code § 35-38-1-7.1. Still, the trial court may impose "any sentence" authorized by statute and permitted by the Constitution "regardless of the presence or

absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d). If the trial court includes a finding of aggravating and mitigating circumstances in its recitation of reasons for imposing a particular sentence, then a sentencing statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be aggravating or mitigating. *Robinson v. State*, 894 N.E.2d 1038, 1042 (Ind. Ct. App. 2008). However, the trial court has no obligation to weigh aggravating and mitigating circumstances against each other when imposing sentence, and thus the trial court cannot be said to have abused its discretion in failing to properly weigh such factors. *Powell v. State*, 895 N.E.2d 1259, 1262 (Ind. Ct. App. 2008), *trans. denied*.

Aggravating Factors

Among the factors the trial court here found to be aggravating were: that McNeary is an admitted cocaine and marijuana dealer who regularly carries a loaded firearm; that McNeary recklessly fired his handgun on an earlier occasion; that McNeary has a substance abuse problem he is unwilling to address; that the facts and circumstances surrounding this crime are particularly disturbing because McNeary was in a position of trust with his victim; and that the loss suffered by the victim's family is significant. McNeary concedes that many of these circumstances are proper aggravators, but maintains that a few are invalid. We will address the challenged aggravators.

McNeary first argues that the trial court improperly considered as an aggravating factor that he was in a position of trust with Huff. Indiana Code Section 35-38-1-7.1(8) provides that it is a valid aggravating circumstance if the defendant "was in a position having

care, custody, or control of the victim of the offense." We agree with McNeary that the boyfriend/girlfriend relationship he shared with his victim was not a position of trust as contemplated by the statute. *See e.g. Rodriguez v. State*, 868 N.E.2d 551, 555 (Ind. Ct. App. 2007) (position of trust aggravator frequently used where adult has committed offense against minor). However, McNeary not only failed to object to the State's argument and the trial court's finding that he was in a position of trust with Huff, but his counsel invited any error by explicitly agreeing that McNeary's violation of a position of trust could be considered an aggravating factor. Tr. at 67-68. McNeary's failure to object and/or invited error waives any claim of error on appeal. *Gamble v. State*, 831 N.E.2d 178, 184 (Ind. Ct. App. 2005) (invited errors not subject to appellate review), *trans. denied*; *Kirby v. State*, 746 N.E.2d 440, 442 (Ind. Ct. App. 2001) (failure to object results in waiver on appeal), *trans. denied*.

Waiver notwithstanding, a closer look at the trial court's sentencing statement reveals that although the court described McNeary and Huff's boyfriend/girlfriend relationship as one involving a position of trust, the trial court was essentially considering the particularized circumstances of the crime. It is proper for a sentencing court to consider the particularized individual circumstances of the crime as an aggravating factor. *Robinson*, 894 N.E.2d at 1043. The trial court considered the parties' ongoing abusive relationship and threatening text messages sent by McNeary the day before and on the day of the crime, finding the circumstances of the crime "particularly disturbing." Appellant's App. at 266. We conclude

that the trial court did not abuse its discretion when it considered the particularized circumstances of the crime as an aggravating factor.

McNeary also maintains that the trial court improperly considered as aggravating circumstances his admitted reckless firing of a handgun on a previous occasion and his decision to regularly carry a handgun despite his lack of firearm training. However, even if we were to agree that those aggravating circumstances were improper, McNeary does not challenge the other valid aggravating circumstances cited by the court. A single aggravator is sufficient to support an enhanced sentence. *Williams v. State*, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008). Moreover, upon review of the record, we can say with confidence that the trial court would have imposed the same sentence without regard to the challenged aggravators. *See McDonald v. State*, 868 N.E.2d 1111, 1114 (Ind. 2007).

Mitigating Factors

Regarding mitigating factors, McNeary first argues that the trial court failed to consider his guilty plea as a mitigating factor. Although a guilty plea is not automatically a significant mitigating factor, a defendant who pleads guilty deserves some mitigating weight to be given to the plea in return. *Anglemyer*, 875 N.E.2d at 220-21. Here, the trial court specifically found McNeary's guilty plea to be a mitigating factor in both the oral and the written sentencing statements. In the written sentencing statement, the trial court found five mitigating factors, including that McNeary pled "guilty as charged without a negotiated plea agreement, and this shows acceptance of responsibility on his part for his crime and allows the Court to forego the expense and resources necessary to take this cause to trial."

Appellant's App. at 264-65. Contrary to McNeary's assertion, the trial court did not ignore his guilty plea when entering his sentence.

McNeary next contends that the trial court failed to consider as a mitigating factor that his crime of reckless homicide was accidental. The finding of mitigating circumstances is within the trial court's discretion, and the court is not required to find mitigating factors or explain why it has chosen not to do so. *Antrim v. State*, 745 N.E.2d 246, 248 (Ind. Ct. App. 2001). This is especially the case where the record reveals that a proffered mitigator is disputed. *Id*. The trial judge 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 consider them properly. *Chambliss v. State*, 746 N.E.2d 73, 78 (Ind. 2001). 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. *Gray v. State*, 790 N.E.2d 174, 177 (Ind. Ct. App. 2003). Moreover, the trial court is not required to include within the record a statement that it considered all proffered mitigating circumstances, only those that it considered significant. *Id*.

McNeary pled guilty to reckless homicide, thereby admitting that he killed Huff while engaged in conduct "in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct." Ind. Code §§ 35-42-1-5, 35-41-2-2. McNeary admitted that he drove to Huff's house with a loaded handgun and invited her into his car in order to continue a heated and emotional

argument that had ensued between the pair. With conscious disregard for the harm that might result, McNeary positioned the handgun on the seat of his car so that it was visible and accessible during the argument. McNeary grabbed the firearm during the heated exchange, and while his finger was on the trigger, McNeary shot Huff. Although McNeary maintained during sentencing that the discharge of the weapon was accidental, the trial court found ample evidence to the contrary. Accordingly, the trial court properly declined to find McNeary's claim of accident to be a mitigating factor.

It appears that McNeary's overriding concern is that the trial court "over emphasized the aggravating circumstances" as compared to the mitigating circumstances. Appellant's Br. at 9. This essentially boils down to an argument that the trial court failed to properly weigh the factors. This argument must fail. As we stated above, because the trial court has no obligation to weigh aggravating and mitigating circumstances against each other when imposing sentence, the trial court cannot be said to have abused its discretion in failing to properly weigh such factors. *See Powell*, 895 N.E.2d at 1262. Indiana Code Section 35-50-2-6 provides that a person who commits a class C felony shall be imprisoned for a fixed term between two and eight years, with the advisory sentence being four years. In its sentencing statement, the trial court set forth a thorough explanation to support its imposition of a sentence in excess of the four-year class C felony advisory sentence. The trial court did not abuse its discretion when it sentenced McNeary.

Suspended Sentence

McNeary finally contends that the trial court abused its discretion when it declined to fully suspend his sentence. Specifically, McNeary contends that the trial court considered his need for correctional rehabilitative treatment as an additional aggravating factor but failed to explain why he was in need of such treatment or to explain why a suspended sentence would be insufficient. Here, after considering aggravating and mitigating circumstances, the trial court imposed a seven-year sentence, with six years executed and one year suspended to probation. Contrary to McNeary's contention, the trial court did not treat McNeary's need of correctional rehabilitative treatment as an independent aggravating circumstance. Instead, the trial court merely declined McNeary's invitation to suspend his sentence, determining that imposition of a suspended sentence would depreciate the seriousness of his offense. This was the trial court's prerogative. We remind McNeary that a defendant is not entitled to serve his sentence on probation; rather, such placement is a "matter of grace" and a "conditional liberty that is a favor, not a right." *Abernathy v. State*, 852 N.E.2d 1016, 1020 (Ind. Ct. App. 2006). McNeary has established no abuse of discretion. The trial court's sentencing decision is not clearly against the logic and effect of the facts and circumstances before the court.[1]

Affirmed.

---

[1] Without setting forth cogent argument, McNeary requests that we reduce his sentence in light of the nature of his offense and his character. Pursuant to Indiana Appellate Rule 7(B), we may revise a sentence otherwise 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." The burden is on the defendant to persuade the appellate court that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). McNeary's failure to put forth a cogent argument on this issue waives his opportunity for appellate review. *Allen v. State*, 875 N.E.2d 783, 788 n.8 (Ind. Ct. App. 2007).

KIRSCH, J., and BRADFORD, J., concur.