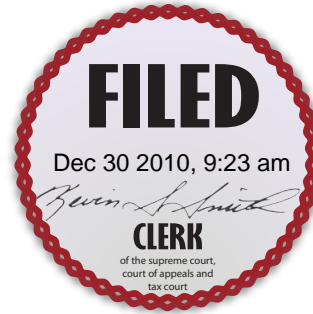


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

KENNETH HOPPER,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 82A01-1006-CR-299

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable Carl A. Heldt, Judge
Cause No. 82C01-0702-FB-243

December 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Kenneth Hopper went on a spree of bizarre criminal behavior resulting in eight criminal charges filed against him. Pursuant to a plea agreement, Hopper pled guilty to five of the counts. Hopper asserted mental illness and, thereafter, the trial court entered judgment of conviction of guilty but mentally ill. The court sentenced Hopper to the advisory sentence on each criminal count to be served concurrently with one another. On appeal, Hopper contends that the trial court abused its discretion when it imposed concurrent advisory sentences. Finding no abuse of discretion, we affirm.

Facts and Procedural History

The relevant facts indicate that on February 27, 2007, Hopper approached Wendy James, who was walking her dog outside of the Charter Oaks Apartments in Evansville. Hopper spoke to James and then began hitting her repeatedly in the face and head. Hopper forced her to the ground and began strangling her. James's dog eventually bit Hopper, which caused him to halt the attack. At the time of the attack, Hopper's arms and legs were covered in blood. Police officers responded to the scene and went to Hopper's apartment looking for him. In addition to the assault on James, officers were alerted that, earlier that evening, a witness had seen Hopper break into one of the apartments by breaking the side window of the apartment with a rock. Several items were discovered missing from that apartment. Officers eventually located Hopper hiding inside yet another apartment, the model apartment. Hopper had broken the sliding door of that apartment to gain entry. At the time officers found

Hopper, he had suffered several cuts on his feet. Officers arrested Hopper and transported him to the hospital to treat his injuries.

Once at the hospital, a nurse attempted to take Hopper's temperature rectally. Hopper began to fight. As police officers tried to restrain Hopper, he resisted violently, causing one of the officers to suffer a severely dislocated thumb. Hopper managed to punch another officer in the head and face several times, causing injuries. Hopper also stuck his bloody fingers inside an officer's mouth as they struggled.

The State charged Hopper with eight criminal counts including: class D felony residential entry; class D felony battery by body waste; class C felony battery; class D felony battery; class D felony attempted strangulation; class A misdemeanor battery; and two counts of class A misdemeanor criminal mischief. On May 9, 2008, pursuant to a written agreement with the State, Hopper pled guilty to class D felony battery by body waste, class C felony battery, class D felony battery, class A misdemeanor battery, and one count of class A misdemeanor criminal mischief. During the guilty plea hearing, Hopper asserted that he wished to plead guilty but mentally ill to the charges and agreed that sentencing would be left to the trial court's discretion. The trial court approved the guilty plea but took the issue of Hopper's mental state under advisement until sentencing. Hopper was subsequently arrested and charged in Warrick County on another offense and, thus, sentencing in the instant case was delayed until May 17, 2010. During sentencing, the trial court accepted the parties' plea agreement and entered judgment of conviction of guilty but mentally ill. The trial court then sentenced Hopper to the advisory sentence of eighteen months for class D felony battery by

body waste, the advisory sentence of four years for class C felony battery, the advisory sentence of eighteen months for class D felony battery, and the advisory sentence of one year for each class A misdemeanor count. The court ordered those sentences to be served concurrently.¹

Discussion and Decision

Hopper contends that the trial court abused its discretion when it sentenced him to the advisory sentence on each of the convictions. 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. 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

¹ The trial court ordered that Hopper's sentences be served consecutive to his sentence on the unrelated Warrick County conviction, which thirty-six day sentence the court recognized had already been served at the time of sentencing. Tr. at 60.

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*.

Hopper first argues that the trial court improperly considered as an aggravating circumstance the “seriousness of the damage” that he caused to the police officer’s thumb as well as the damage suffered by his other victims. Tr. at 59. Hopper argues that because serious bodily injury is an element of the offense of class C felony battery, the trial court abused its discretion when it considered the injury sustained to the officer as an aggravating factor. However, our review of the record reveals that the trial court was essentially considering the particularized circumstances of Hopper’s various crimes. 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 properly considered all of the damage caused by Hopper during his crime spree as an aggravating circumstance.

Hopper next argues that the trial court should have considered his criminal history, which consists of convictions for misdemeanor battery and felony theft, as a mitigating factor rather than an aggravating factor because he has led a law-abiding life for a “substantial period of time.” Appellant’s Br. at 9. We are not persuaded by Hopper’s argument that he should have been sentenced to less than the advisory terms because he has only a few prior convictions and only one prior felony conviction. Hopper has shown no abuse of discretion.

Hopper additionally contends that the trial court failed to give sufficient mitigating weight to his alleged mental illness. We agree with Hopper that mental illness is a mitigating factor to be considered and given significant weight under certain circumstances. *See Biehl v. State*, 738 N.E.2d 337, 340 (Ind. Ct. App. 2000) (mitigating weight attributed to mental illness depends upon the extent of defendant’s ability to control behavior due to illness, overall limitations on functioning, duration of mental illness, and extent of any nexus between illness and commission of crime), *trans. denied*. However, our concern upon appeal is to determine whether the trial court improperly overlooked a significant mitigating factor that is clearly supported by the record. *Ousley v. State*, 807 N.E.2d 758, 763 (Ind. Ct. App. 2004).

Here, the trial court did not overlook Hopper’s alleged mental illness and in fact gave this proffered factor mitigating weight. The court stated that “obviously there was something mental going on with the defendant although it’s pretty hard to say what it was, but the bizarre nature of what he did lends the belief that that may be the case.” Tr. at 59. We remind Hopper that 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 give proper weight to such factors. *Powell*, 895 N.E.2d at 1262. Hopper’s allegation that his alleged mental illness was entitled to more weight is simply not an available argument on appeal.

Finally, Hopper summarily requests that we revise his sentence. 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 defendant bears the burden to "persuade the appellate court that his or her sentence has met this inappropriateness standard of review." *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). We note that the advisory sentence is the starting point our legislature has selected as an appropriate sentence for the crime committed. *McKinney v. State*, 873 N.E.2d 630, 646-47 (Ind. Ct. App. 2007). Therefore, when the trial court imposes advisory sentences, and orders them served concurrently, the defendant bears a heavy burden of persuading us that his or her aggregate sentence is inappropriate. *See id.* at 647.

Although Hopper cites Indiana Appellate Rule 7(B) and asks that we revise his sentence, Hopper has failed to argue his inappropriateness claim separately from his abuse of discretion claim. Hopper gives us no guidance as to why the nature of his offenses or his character renders advisory concurrent sentences inappropriate. Failure to argue an inappropriateness claim independently from an abuse of discretion claim results in waiver of review of an inappropriateness claim if the result is lack of cogent argument. *Allen v. State*, 875 N.E.2d 783, 788 n.8 (Ind. Ct. App. 2007). Hopper does not present cogent argument on this issue and, thus, he has waived our review of the appropriateness of his sentence.

Affirmed.

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