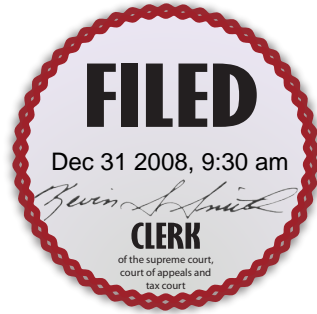


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

VICTOR SALAZAR,)
)
Appellant-Defendant,)
)
vs.) No. 79A02-0805-CR-464
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0112-CF-32; 79C01-0206-FC-12

December 31, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Victor Salazar appeals the thirty-year aggregate sentence that was imposed following his guilty plea to Dealing in Cocaine,¹ a class B felony and Dealing in a Schedule IV Controlled Substance,² a class B felony. Specifically, Salazar claims that the sentence must be set aside because the trial court identified several improper aggravating circumstances and that the trial court should have afforded more mitigating weight to Salazar's decision to plead guilty. Salazar also argues that his sentence is inappropriate in light of the nature of the offenses and his character. Concluding that Salazar was properly sentenced, we affirm the judgment of the trial court.

FACTS

On December 6, 2001, the State charged Salazar with two counts of armed robbery, a class B felony, intimidation while armed with a deadly weapon, a class C felony, and pointing a firearm, a class D felony, under cause number 79D01-0112-CF-122, which was subsequently transferred to cause number 79C01-0206-FC-0012 (Cause 0012). The State alleged that Salazar had robbed a Village Pantry convenience store and a White Castle Restaurant in Tippecanoe County.

On December 12, 2001, Salazar was charged with thirteen drug-related offenses under Cause Number 79C01-0112-CF-0032 (Cause 0032) that related to various drug transactions with confidential informants who were working with the local police department. Thereafter,

¹ Ind. Code § 35-48-4-1.

² I.C. § 35-48-4-3.

on February 4, 2003, the parties entered into a plea agreement, which called for Salazar to plead guilty to dealing in cocaine, a class B felony, and to dealing in a controlled substance, a class B felony, as charged in Cause 0032. In exchange, the State agreed to dismiss all remaining counts under that cause number and all charges under Cause 0012. The plea agreement provided that although the length of the sentence would rest within the trial court's discretion, the sentences would run consecutively.

At the sentencing hearing, which was conducted on February 10, 2003, Salazar proffered evidence that his criminal history did not include any serious offenses as a mitigating factor. Salazar also argued that his age, acceptance of responsibility for his actions by pleading guilty, and mental health were mitigating circumstances. The State presented evidence suggesting that Salazar's mental health issues were the result of his disruptive behavior while in jail, which included using his own feces to contaminate the jail cell.

Prior to imposing the sentence, the trial court considered a number of factors including: (1) Salazar will likely commit another crime; (2) the nature and circumstances of the crime; (3) his criminal history; (4) his character; and (5) his "general condition." Appellant's App. p. 85-86. Thereafter, the trial court specifically found the following as aggravating circumstances: (1) Salazar's criminal history; (2) Salazar's need for correctional or rehabilitative behavior best provided by commitment to a penal institution; and (3) Salazar's misconduct during incarceration. The trial court also determined that Salazar's decision to plead guilty was a mitigating circumstance. After concluding that the

“aggravating factors significantly outweigh the mitigating factors,” appellant’s app. p. 85-86, the trial court sentenced Salazar to fifteen years of incarceration on each count. And, pursuant to the plea agreement, those sentences were ordered to run consecutively, resulting in an aggregate sentence of thirty years. Salazar now appeals.³

DISCUSSION AND DECISION

I. Aggravating and Mitigating Circumstances

Salazar claims that his sentence must be set aside because the trial court erred in identifying certain aggravating circumstances when sentencing him. Specifically, Salazar maintains that his prior criminal history should not have been considered an aggravating factor because his prior offenses consisted of only alcohol-related offenses “that are neither violent nor relate to the present offense.” Appellant’s Br. p. 14. Moreover, Salazar contends that the “need for rehabilitation” aggravator was improper because the trial court failed to state why that factor should be considered aggravating, and that his conduct during incarceration should not have been identified as an aggravating factor because he received “inhumane treatment” at the jail. *Id.* at 15-16. Finally, Salazar suggests that the trial court should have assigned greater weight to his decision to plead guilty as a mitigating factor.

A. Aggravating Factors

³ Salazar initially appealed the trial court’s denial of his petition for permission to file a belated appeal. In *Salazar v. State*, 854 N.E.2d 1180 (Ind. Ct. App. 2006), a panel of this court reversed and ordered the trial court to grant Salazar’s petition. *Id.* at 1187. We subsequently dismissed Salazar’s appeal for lack of jurisdiction on October 18, 2007, when it was alleged that his former counsel had not complied with an order to produce client files. *Salazar v. State*, No. 79A02-0611-CR-1045 (Ind. Ct. App. Oct. 18, 2007). The trial court then issued an order on February 8, 2008, authorizing Salazar to file a belated appeal. Salazar’s counsel filed an amended motion for a belated appeal, which was granted on May 15, 2008.

In addressing Salazar's claims, we note that when a trial court identifies aggravating circumstances to enhance a presumptive sentence,⁴ it must set forth all significant factors, state the specific reasons why the circumstance is considered aggravating or mitigating, and articulate the court's evaluation and balancing of the circumstances. Hollen v. State, 761 N.E.2d 398, 401 (Ind. 2002). A "perfunctory" recitation of an aggravating circumstance is improper; however, even if a particular aggravator is deemed improper, remaining factors that are proper will support the sentence. Hollins v. State, 679 N.E.2d 1305, 1308 (Ind. 1997). Moreover, only one aggravator is necessary to support an enhanced or consecutive sentence. Reaves v. State, 586 N.E.2d 847, 852 (Ind. 1992).

Contrary to Salazar's contentions regard his prior convictions, we note that even a limited criminal history can be considered an aggravating factor. See Pagan v. State, 809 N.E.2d 915, 928 (Ind. Ct. App. 2004) (observing that a single juvenile adjudication and a single adult conviction warranted "some aggravation"). Even more compelling, the trial court is under no obligation to afford mitigating weight to a defendant's prior criminal actions. Robinson v. State, 775 N.E.2d 316, 321 (Ind. 2002).

As discussed above, Salazar's criminal history consists of three prior misdemeanor convictions involving the consumption of alcohol as a minor. Appellant's App. p. 3-4. Although those offenses are seemingly minor when compared to other types of criminal

⁴ The State alleged that Salazar had committed the crimes between December 2000 and January 2001. Although Salazar refers to cases in his appellate brief that have interpreted the "advisory" sentencing scheme, the statutes in effect when Salazar committed the offenses were concerned with "presumptive" sentences.

activity, Salazar admitted in the presentence investigation report that he had been actively involved in alcohol and drug use since he was fourteen years old. Id. at 6. Moreover, Salazar admitted committing two robberies at gunpoint to satisfy his drug addiction. Id. at 48-49. In light of these circumstances, we cannot say that the trial court abused its discretion in identifying his criminal history as an aggravating factor.

Salazar next argues that the trial court erred in identifying his conduct at the jail as an aggravating factor. Notwithstanding this claim, this court has held that a defendant's record of criminal activity while incarcerated may be considered an aggravating factor. Anderson v. State, 798 N.E.2d 875, 880-81 (Ind. Ct. App. 2003). In this case, the prosecutor presented evidence that Salazar had used his own feces to contaminate his cell and accost jail staff. Appellant's App. p. 71-82. Salazar's conduct resulted in over \$1,200 in damage to the jail facilities. Id. at 71-72. In light of these circumstances, we conclude that the trial court properly identified Salazar's conduct during incarceration as an aggravating circumstance when fashioning the sentence.

Finally, Salazar argues that the trial court failed to provide an adequate reason to support its conclusion that Salazar was in need of rehabilitative treatment in a correctional facility. However, we note that the trial court commented at the sentencing hearing about Salazar's "condition," which related directly to his drug use and behavioral issues. Appellant's App. p. 85-86. Moreover, the State presented evidence establishing that Salazar

Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007). Thus, we will address Salazar's arguments under the prior scheme. Id.

was paranoid and behaving irrationally, and Salazar’s counsel agreed that an appropriate sentence should include mental health counseling to the extent that Salazar should be monitored by a psychiatrist until he was “stabilized.” Id. at 70-71. In our view, the trial court was making it clear that Salazar could receive the necessary treatment, which would best be provided by commitment to a penal facility. However, even assuming that the trial court’s reasons for finding that Salazar’s need for rehabilitative treatment were inadequate and should not have been considered an aggravating circumstance, the remaining aggravating factors were proper. Hence, these remaining factors alone justified the enhanced sentence. Reaves, 586 N.E.2d at 852.

B. Guilty Plea—Mitigating Factor

Salazar also claims that the thirty-year sentence was not warranted because the trial court did not give enough weight to his decision to plead guilty as a mitigating factor. Therefore, Salazar contends that he was entitled to a reduced sentence.⁵

In general, a guilty plea demonstrates acceptance of responsibility for a crime and must be considered a mitigating factor. Scheckel v. State, 655 N.E.2d 506, 511 (Ind. 1995). However, a plea bargain does not constitute a substantial mitigating factor when the defendant has already received a significant benefit from the plea agreement. Sensback v.

⁵ Had Salazar been sentenced under the advisory scheme, his claim would not be available for review because our Supreme Court in Anglemyer determined that a trial court cannot be said to have abused its discretion in failing to “properly weigh” aggravators and mitigators. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007), clarified on rehearing, 875 N.E.2d 218 (Ind. 2007). However, because Salazar was sentenced under the presumptive sentencing scheme, we will review his claim.

State, 720 N.E.2d 1160, 1165 (Ind. 1999). Moreover, a guilty plea may not rise to the level of significant mitigation where the evidence against the defendant is such that the decision to plead guilty is merely a pragmatic one. Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005).

In this case, the record demonstrates that the State originally filed nearly twenty counts against Salazar under two cause numbers, including two class A felonies, six class B felonies, and five class C felonies. Appellant's App. p. 15, 25-39, 44-47. As discussed above, Salazar agreed to plead guilty to two class B felony drug dealing offenses in exchange for the dismissal of all remaining counts. Obviously, Salazar could have received a substantially longer sentence had he been tried and convicted on all charged offenses. As a result, it is readily apparent that Salazar received a substantial benefit from pleading guilty. Moreover, Salazar has not claimed that it would have been difficult for the State to convict him of the charged offenses. Therefore, Salazar's decision to plead guilty was merely a pragmatic one and, although his guilty plea was a mitigating circumstance, it was not entitled to substantial weight.

II. Inappropriate Sentence

Salazar next claims that that the thirty-year aggregate sentence is inappropriate in light of the nature of the offenses and his character. In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Our Supreme Court has recently

further articulated the role of appellate courts in reviewing a 7(B) challenge:

Ultimately the length of the aggregate sentence and how it is to be served are the issues that matter. . . . And whether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case. . . . There is thus no right answer as to the proper sentence in any given case. As a result, the role of an appellate court in reviewing a sentence is unlike its role in reviewing an appeal for legal error or sufficiency of evidence. . . .

The principal role of appellate 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. In the case of some crimes, the number of counts that can be charged and proved is virtually entirely at the discretion of the prosecution. For that reason, appellate review 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.

Cardwell v. State, 895 N.E.2d 1219, 1224-25 (Ind. 2008) (footnotes omitted).

In this case, the trial court enhanced the ten-year presumptive sentence⁶ on each class B felony count by five years when imposing the sentence. The trial court then ordered those sentences to run consecutively as set forth in the plea agreement, yielding an aggregate sentence of thirty years.

⁶ When Salazar committed these offenses in 2000 and 2001, respectively, Indiana Code section 35-50-2-5 provided that “A person who commits a Class B felony shall be imprisoned for a fixed term of ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances; in addition, he may be fined not more than ten thousand dollars (\$10,000).”

When considering the nature of the offenses, the record shows that Salazar made at least three drug sales to a confidential informant who was working with the police. The amount of drugs that Salazar sold were quantities that a dealer would purchase and package for resale. Appellant's App. p. 61. Salazar was also able to obtain drugs in larger quantities. Id. at 41-42.

As for Salazar's character, the record shows that he has amassed three misdemeanor convictions that involved the consumption of alcohol as a minor. Appellant's App. p. 3-4. Salazar also admitted that he had been active in alcohol and drug use since he was fourteen years old and has never sought assistance for his addictions. Id. at 6. Instead, Salazar has continued to commit serious criminal offenses. Salazar admitted that he had committed two robberies at gunpoint to satisfy his drug habit. Id. at 48-49. Finally, as discussed above, Salazar continued to commit criminal offenses even while he was incarcerated.

Based upon our review of the offenses and Salazar's character, we conclude that the thirty-year aggregate sentence is not inappropriate.

The judgment of the trial court is affirmed.

NAJAM, J., and KIRSCH, J., concur.