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IN THE
COURT OF APPEALS OF INDIANA

THOMAS J. TARRANCE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 60A04-1106-CR-358
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE OWEN CIRCUIT COURT
The Honorable Frank M. Nardi, Judge
Cause No. 60C01-0912-FB-27

December 29, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Thomas J. Tarrance belatedly appeals his sentence, following a guilty plea, for armed robbery as a class B felony.[1]

We reverse and remand with instructions to enter a revised sentence.

ISSUE

Whether the trial court erred in sentencing Tarrance.

FACTS

On November 25, 2009, then twenty-year-old Tarrance and his friend, Phillip Pate, made a plan to rob Casey's General Store in Owen County; they agreed that Tarrance would go inside to rob the store and that Pate would drive the getaway car. Tarrance and Pate first drove to a parking lot near the store where they used various drugs, including Klonopin, Xanax, Valium, Lortab, Percocet and marijuana. Next, Tarrance—dressed all in black, wearing a ski mask, and armed with a handgun, although unloaded—went into Casey's General Store and demanded money from the store's clerks. After the clerk gave Tarrance approximately $400, he left the store, got into the getaway car, and sped away with Pate.

Two days later, he and Pate went to a gas station in Monroe County, where Pate acted as the masked gunman and robbed the gas station, while Tarrance acted as the getaway driver. The following day, Tarrance and Pate robbed another gas station in Monroe County. For this robbery, Tarrance, while masked and dressed in black, entered

[1] Ind. Code § 35-42-5-1.

the store, brandished a gun, and robbed the store. Monroe County police arrested Tarrance and Pate, and they eventually admitted their involvement in both robberies.

On December 1, 2009, the State charged Tarrance with class B felony armed robbery in Owen County. The State also charged Tarrance with two counts of class B felony armed robbery in Monroe County. For the Owen County robbery, Tarrance entered into a written plea agreement in which he agreed to plead guilty as charged, and the State agreed that sentencing would be open for argument and that any executed time would be capped at fifteen years. On August 31, 2010, Tarrance pled guilty, and the trial court accepted his guilty plea and entered judgment of conviction.

The trial court held Tarrance's sentencing hearing on September 17, 2010. At that time, Tarrance's Monroe County charges were still pending. During the sentencing hearing, Tarrance admitted that, in 2008, he stole alcohol from a grocery store and that, in 2009, he stole a coat from a store; both were misdemeanors. Tarrance was charged with conversion for each of these crimes, but the charges were dismissed after he completed pretrial diversion programs. During the hearing, Tarrance stated that he had contracted Crohn's disease[2] at the age of fifteen, and he asked the trial court to consider it as a mitigating circumstance. The trial court declined his request but found that his young age and the fact that he pled guilty were mitigators. The trial court also found that Tarrance's

[2] "Crohn's disease is a form of inflammatory bowel disease (IBD). It usually affects the intestines, but may occur anywhere from the mouth to the end of the rectum (anus)." http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001295/ (last visited Nov. 15, 2011). It is characterized by diarrhea, cramping, and loss of appetite and weight with local abscesses and scarring[.]" http://www.merriam-webster.com/medlineplus/crohn's%20disease (last visited Nov. 15, 2011).

history of criminal activity was an aggravating factor. Based on the evidence before it, the trial court sentenced Tarrance to maximum term of twenty years with six years suspended to probation and ordered that this sentence be served consecutively to any sentence he might receive out of Monroe County. Additional facts will be provided as necessary.

DECISION

Tarrance argues that the trial court erred in sentencing him. Specifically, Tarrance contends that: (a) the trial court failed to consider his health as a mitigator; (b) the trial court erred in its finding of his criminal arrest history as an aggravator; and (c) his sentence is inappropriate.

a. *Mitigator*

Tarrance argues that the trial court erred by failing to find his Crohn's disease to be a mitigating circumstance.

Sentencing decisions rest within the sound discretion of the trial court and are reviewed 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 (Ind. 2007). One way in which a court may abuse its discretion is by entering a sentencing statement that omits mitigating circumstances that are clearly supported by the record and advanced for consideration. *Id.* at 490–91. However, a trial court is not obligated to accept a defendant's claim as to what constitutes a mitigating circumstance. *Rascoe v. State*, 736 N.E.2d 246, 249 (Ind. 2000). A claim that the trial court failed to find a mitigating circumstance requires the

defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Anglemyer*, 868 N.E.2d at 493.

During the sentencing hearing, then twenty-one-year-old Tarrance presented evidence that he had been diagnosed with Crohn's disease when he was fifteen years old; that he had had two major disease-related surgeries, one in which he had eight to ten inches of his intestines removed; and that a doctor had prescribed medication for his condition. However, he also stated that he did not take the medication as prescribed and that he had not gone to get the necessary regular treatment for his disease despite the resources available. He admitted to self-medicating with the following drugs: marijuana, methamphetamine, cocaine, crack, Oxycontin, Valium, Hydrocodone, Vicodin, Klonopin, Seroquel, Percocet, Lortab, ecstasy, and black tar opium.

It is clear from the record that the trial court considered Tarrance's proffered mitigating evidence but declined to find it to be significant. Also, Tarrance did not show that his health condition would be impacted by incarceration nor did he present any evidence that his condition would be untreatable during incarceration. Accordingly, we conclude the trial court did not abuse its discretion by not finding Tarrance's health condition to be a mitigating circumstance. *See, e.g.*, *Henderson v. State*, 848 N.E.2d 341, 344-45 (Ind. Ct. App. 2006) (finding no error in trial court's refusal to consider defendant's poor health as mitigator because she failed to present evidence that her multiple health conditions would be untreatable during incarceration).

b. *Aggravator*

Tarrance also argues that the trial court abused its discretion by finding his history of criminal activity to be an aggravating circumstance. Tarrance asserts that the record does not support the trial court's finding of this aggravating circumstance and that his prior contacts with the criminal justice system do not constitute a "significant" aggravating circumstance. Tarrance's Br. at 11.

First, we may not review the relative weight the trial court assigns to aggravating circumstances. *See Anglemyer*, 868 N.E.2d at 490. Furthermore, the record supports the trial court's determination that Tarrance's history of criminal activity was an aggravator. While "[a] record of arrest, without more, does not establish the historical fact that a defendant committed a criminal offense and may not be properly considered as evidence of criminal history[,]" an arrest record "may reveal that a defendant has not been deterred even after having been subject to the police authority of the State." *Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005). Indeed, "[s]uch information may be relevant to the trial court's assessment of the defendant's character in terms of the risk that he will commit another crime." *Id.*

Here, the record reveals that Tarrance was charged with two counts of misdemeanor conversion in 2008 and 2009 and that each charge was dismissed after he completed pretrial diversion programs. In 2010, he committed the current armed robbery crime charged herein and was charged with two other robberies in another county. The trial court found that Tarrance's history of arrests, although not resulting in conviction, revealed an escalating pattern of criminal activity. Accordingly, we conclude the trial

court did not abuse its discretion by considering his prior criminal history as an aggravating factor.

c. *Inappropriate sentence*

Tarrance argues that his twenty-year sentence was inappropriate and asks this court to revise his sentence to "no more than eight years." Tarrance's Br. at 16.

We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). The defendant has the burden of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). The principal role of a 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). "In assessing whether a sentence is inappropriate, appellate courts may take into account whether a portion of the sentence is ordered suspended or is otherwise crafted using any of the variety of sentencing tools available to the trial judge[,]" including the imposition of probation. *Sharp v. State*, 951 N.E.2d 282, 289 (Ind. Ct. App. 2011) (citing *Davidson v. State*, 926 N.E.2d 1023, 1025 (Ind. 2010)). Whether a sentence is inappropriate ultimately turns on the culpability of the defendant, the severity of the crime, the damage done to others, and a myriad of other factors that come to light in a given case. *Cardwell*, 895 N.E.2d at 1224.

In determining whether a sentence is inappropriate, the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime

committed." *Childress*, 848 N.E.2d at 1081. The sentencing range for a class B felony is between six and twenty years, with the advisory sentence being ten years. I.C. § 35-50-2-5. The trial court sentenced Tarrance to the maximum term of twenty years, suspended six years to probation, and ordered that Tarrance's sentence be served consecutively to any sentence out of Monroe County.

Regarding Tarrance's offense, the record reveals that Tarrance and his accomplice went on an armed robbery crime spree in a span of three days that started with their plan to rob Casey's General Store. After using multiple drugs, Tarrance donned a ski mask, walked into the store wielding a handgun, demanded money from the store's clerks, and then fled the scene in his getaway car. Tarrance and his accomplice then repeated the same criminal activity at two gas stations in the following days.

Tarrance claims that "nothing about this offense rendered it extraordinary and deserving of a sentence above the advisory level" because he did not injure the clerks and there was no evidence that he threatened them. Tarrance's Br. at 13. While we cannot agree that there is no evidence that he threatened the clerks, we do agree that his crime was not exceptionally egregious. In and of itself, we cannot say that the nature of Tarrance's offense warrants the imposition of a maximum sentence.

In support of his character, Tarrance points to his young age, health condition, responsibility by pleading guilty, and "minor contacts with the criminal justice system[.]" Tarrance's Br. at 14.

The record reveals that Tarrance was twenty years old at the time of the offense, and it undisputed that Tarrance suffered from Crohn's disease since the age of fifteen.

This court has recognized that a defendant's youthful age and poor health can weigh in his favor in an assessment of character. *See James v. State*, 868 N.E.2d 543, 549 (Ind. Ct. App. 2007) (concluding maximum sentence was inappropriate based, in part, on defendant's youth); *Rhoton v. State*, 938 N.E.2d 1240, 1248 (Ind. Ct. App. 2010) (acknowledging that a defendant's poor health is a consideration when looking at defendant's character), *trans. denied*.

The record also reveals that Tarrance had not completed high school but reported that he had been taking classes in jail to earn his GED. During the sentencing hearing, Tarrance stated that he was last employed in 2008, and the record reflects that Tarrance relied on his mother for financial support and that he "bumm[ed]" from family and friends. (Tr. 40; App. 112). Tarrance's mother testified during sentencing that Tarrance had no job because of his Crohn's disease. Tarrance testified that he was not employed because he "was on a lot of drugs" and because his Crohn's disease "prevented [him] from like [he] was so bad from it [he] couldn't" work because he "was always rushing to the bathroom and sick and [that] the Crone's [sic] Disease was the main thing." (Tr. 40).

We acknowledge that Tarrance had minimal contacts with the justice system. Tarrance did not have a juvenile criminal history, and this robbery conviction was Tarrance's first felony conviction and, indeed, his first conviction of any type. Tarrance was charged with misdemeanor conversion in 2008 and 2009 for stealing alcohol and a coat—both nonviolent acts—but these charges were dismissed after he completed pretrial diversion programs. Thus, Tarrance did not have an extensive history of criminal activity.

At the same time, however, the record reveals that Tarrance had not been living a completely law-abiding life. Tarrance admitted that he had been using multiple drugs since he was fifteen or sixteen years old, which was around the same time that he was diagnosed with Crohn's disease. He started using alcohol and marijuana and then progressed to other drugs, including methamphetamine, cocaine, crack, Oxycontin, Valium, Hydrocodone, Vicodin, Klonopin, Seroquel, Percocet, Lortab, ecstasy, and black tar opium. These facts do not reflect positively on Tarrance's character. During the sentencing hearing, however, he admitted that he was in need of drug and alcohol treatment, and he expressed regret about his substance abuse and acknowledged the negative impact drugs and alcohol had on his life as follows:

> I've been doing drugs for so long that it just—now that I've actually done sobered up and [am] clear minded I realized how bad I was. I just don't want to go back to that like look to where all that led to people I was around and things I was doing.

(Tr. 41).

Additionally, Tarrance took responsibility and pled guilty to class B felony robbery. "A guilty plea demonstrates a defendant's acceptance of responsibility for the crime and at least partially confirms the mitigating evidence regarding his character." *Cotto*, 829 N.E.2d at 525; *see also Sanquenetti v. State*, 917 N.E.2d 1287, 1291 (Ind. Ct. App. 2009) (recognizing that a defendant's willingness to entry a guilty plea "reflects favorably" on his character). Tarrance's plea agreement called for him to plead guilty as charged, left sentencing opening to the trial court's discretion, and capped the executed sentence at fifteen years. Tarrance ended up with a maximum sentence of twenty years

with six years suspended that was ordered to be served consecutively to any Monroe County conviction. Thus, the benefit Tarrance received from his plea was minimal at best.

In light of the nature of the offense and Tarrance's character, Tarrance's twenty-year maximum sentence with six years suspended that was ordered to be served consecutively to any Monroe County conviction is inappropriate. Our Supreme Court has explained that trial courts should reserve maximum sentences for the worst offenders and offenses. *Johnson v. State*, 830 N.E.2d 895, 898 (Ind. 2005). Neither this offense nor this offender falls into the worst of the worst category. We do, however, believe that Tarrance's failure to live a law-abiding life, which includes his illegal drug use and limited history of criminal activity, does warrant an enhanced sentence above the advisory sentence. We, therefore, revise Tarrance's sentence to fourteen years with four years suspended to probation, and we will leave in place the trial court's order that this be served consecutively to his Monroe County sentence.[3] Therefore, we remand to the trial court with directions to enter a revised sentence.

Reversed and remanded with instructions to enter a revised sentence.

[3] Tarrance also argues that his sentence is inappropriate when compared to the sentence he received in Monroe County for the two additional counts of armed robbery that he committed on the days following this crime. Tarrance asserts that he pleaded guilty in Monroe County and received a ten-year sentence with two years suspended to probation. While Tarrance's counsel indicated during sentencing that Tarrance was going to plead guilty in Monroe County and that "it is open[,]" (tr. 52), there is no evidence in the record before us regarding the specific terms of any plea agreement in that case or regarding the mitigators presented during sentencing in that case. Furthermore, "the question under Appellate Rule 7(B) is not whether another sentence is *more* appropriate; rather the question is whether the sentence imposed is inappropriate." *Fonner v. State*, 876 N.E.2d 340, 344 (Ind. Ct. App. 2007). Because we have already concluded that Tarrance's sentence is inappropriate, we decline his invitation to compare his sentence to his Monroe County sentence.

FRIEDLANDER, J., and VAIDIK, J., concur.