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ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

JESSE R. POAG
Newburgh, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

BRIAN REITZ
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

JOHN BARRIENTES,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 82A04-1106-CR-302
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable David D. Kiely, Judge
Cause No. 82D02-1006-FB-579

November 30, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

John Barrientes appeals his fifteen-year executed sentence stemming from a plea agreement for seven charges related to a drunk driving motor vehicle accident that caused the death of one individual and seriously injured another. He contends that the trial court abused its discretion in sentencing by considering elements of the crime as aggravating factors. Because we determine that Barrientes has failed to persuade us that the trial court abused its discretion, we affirm.

Facts and Procedural History¹

On June 16, 2010, Barrientes was speeding in a stolen vehicle when Evansville Police Department Officer Mike Sloat observed him stop at a red light and signal an eastbound turn. Barrientes instead turned westbound into the eastbound lanes and “accelerated rapidly.” Appellant’s App. p. 16. Barrientes collided head-on with a Ford Taurus, causing it to roll over at least twice and slide into the median where it came to a stop upside-down. The driver of the Ford Taurus, Jesse Lynn, and the passenger, Kyle Weis, were trapped in the vehicle. Lynn suffered an orbital bone fracture, a broken vertebra, and other lacerations and was transported to the hospital. *Id.* at 16-17. Weis died at the scene from his injuries. *Id.* at 16.

Evansville Police Department Officer Jeff Breivogel was at the scene and indicated that Barrientes had bloodshot eyes, smelled “strongly” of alcohol, and had several beer bottles in the vehicle. *Id.* at 16. Barrientes was taken into custody and

¹ Barrientes did not provide a transcript of the guilty plea hearing; therefore, the facts of his crimes come from the probable cause affidavit included in his Appellant’s appendix rather than the factual basis as set forth in his guilty plea hearing. We note that both Barrientes and the State rely on the probable cause affidavit as well.

transported to the hospital where he consented to a blood and urine test. His alcohol concentration equivalent (“ACE”) was .355 grams per 100 milliliters of blood. *Id.*

The State charged Barrientes with Class B felony causing death when operating a motor vehicle with an ACE of .15 or more (Count 1, Weis), Class C felony causing death when operating a motor vehicle while intoxicated (Count 2, Weis), Class D felony causing serious bodily injury when operating a motor vehicle with an ACE of .08 or more (Count 3, Lynn), Class D felony causing serious bodily injury when operating a motor vehicle while intoxicated (Count 4, Lynn), Class D felony receiving stolen property (Count 5), Class C felony criminal recklessness (Count 6, Weis), and Class D felony criminal recklessness (Count 7, Lynn). Barrientes entered into a plea agreement in which he pled guilty to all charges in exchange for an executed sentence that was capped at fifteen years. *Id.* at 27-32. The agreement also limited the sentences for each individual count: Count 1 was capped at fifteen years, Counts 2 and 6 were both capped at eight years, and Counts 3, 4, 5, and 7 were each capped at three years. *Id.*

A sentencing hearing was held on May 23, 2011. The trial court found as the two mitigating factors Barrientes’ guilty plea and his remorse. The aggravating factors were his criminal history, his “extremely high” ACE, his driving of a stolen vehicle, and the death was of an innocent bystander and not someone in the stolen vehicle driven by Barrientes. *Tr.* p. 47-50. The trial court sentenced Barrientes to executed sentences of fifteen years for Count 1, eight years each for Counts 2 and 6, and three years each for Counts 3, 4, 5, and 7. *Appellant’s App.* p. 11. The court ordered the sentences to run concurrently, for a total executed sentence of fifteen years.

Barrientes now appeals.

Discussion and Decision

Barrientes contends that the trial court abused its discretion in sentencing him by considering material elements of the offenses as aggravating factors. Specifically, he argues that the trial court erroneously considered the death of the victim as well as his blood alcohol level when determining his sentence.²

Sentencing decisions rest within the sound discretion of the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). So long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Id.* An abuse of discretion will be found where the 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.* We review the presence or absence of reasons justifying a sentence for an abuse of discretion, but we cannot review the relative weight given to these reasons. *Id.* at 491.

While Indiana law prevents the trial court from considering elements of the crime as aggravating circumstances, *Ellis v. State*, 707 N.E.2d 797, 804 (Ind. 1999), “particular circumstances of a criminal act may constitute separate aggravating circumstances.” *Vasquez v. State*, 762 N.E.2d 92, 98 (Ind. 2001). If those circumstances of the criminal act are considered aggravators, “the trial court must then ‘detail why the defendant deserves an enhanced sentence under the particular circumstances.’” *McElroy v. State*, 865 N.E.2d 584, 590 (Ind. 2007) (quoting *Vasquez*, 762 N.E.2d at 98). When a

² Barrientes does not argue that his sentence is inappropriate under Indiana Appellate Rule 7(B).

circumstance of the criminal act is considered an aggravating factor, it is generally “thought to be associated with particularly heinous facts or situations.” *Smith v. State*, 675 N.E.2d 693, 698 (Ind. 1996).

In this case, the trial court considered two circumstances of the criminal act as aggravating factors: Barrientes’ ACE and that the person killed by his actions was an innocent bystander. Tr. p. 48-50.

As for Barrientes’ ACE, it was substantially higher than the level required under statute to commit the offenses with which he was charged. At a level of .355, it was .205 higher than needed to have committed Count 1, and .275 higher than needed to have committed Count 2. In detailing the reasons for this being an aggravating factor, the trial court said “[t]he other thing that’s aggravating is the facts of the case in that you tested .35, okay. Which is extremely high. . . . And the – and the actions as a result of that resulted in taking someone’s life and seriously injury [sic] another – another person.” *Id.* at 49. This “extremely high” ACE made the offense especially dangerous to Barrientes and those around him and also shows the particularly atrocious nature of this crime.

As for the death of an innocent bystander, we need not reach a decision on this aggravating factor. “A sentence enhancement may still be upheld when a trial court improperly applies an aggravator but other valid aggravators exist.” *Anglin v. State*, 787 N.E.2d 1012, 1018 (Ind. Ct. App. 2003). There are multiple valid aggravators that the trial court correctly considered: Barrientes’ criminal history, his high ACE, and his driving of a stolen vehicle. Tr. p. 48-49. We are confident that the trial court would have

reached the same conclusion regarding Barrientes' sentence even had it not considered the death of an innocent bystander as an aggravating factor in its decision.

The court therefore did not abuse its discretion in sentencing Barrientes to an aggregate sentence of fifteen years at the Indiana Department of Correction. We affirm Barrientes' sentence.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.