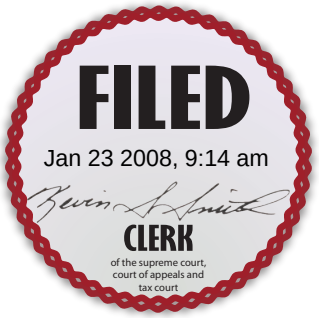

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IN THE COURT OF APPEALS OF INDIANA

DEMOND J. DIXON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A05-0706-CR-341
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane Ross Boswell, Judge
Cause No. 45G03-0503-FA-00009

January 23, 2008

MEMORANDUM DECISION– NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Demond J. Dixon appeals the twelve-year sentence that was imposed following his conviction for Dealing in Cocaine,[1] a class B felony. Specifically, Dixon argues that the trial court failed to identify certain mitigating circumstances and that the sentence was inappropriate in light of the nature of the offense and his character. Thus, Dixon claims that his sentence "should be reduced to a term at or below the advisory sentence of ten years." Appellant's Br. p. 5. Finding no error, we affirm the judgment of the trial court.

FACTS

At a guilty plea hearing that was conducted on March 8, 2007, Dixon admitted that on or about February 10, 2005, he knowingly or intentionally delivered cocaine to a confidential informant in Gary. The stipulated factual basis provided that:

> 2. On February 10, 2005, a Confidential Informant, employed by the Gary Police Department, went to the front door of a residence [on] Carolina Street, Gary, Lake County, Indiana and met with Demond J. Dixon, Sr.
> 3. On February 10, 2005, Demond J. Dixon, Sr. gave the Confidential Informant two (2) clear plastic bags of crack cocaine in exchange for forty dollars ($40.00) in U.S. Currency.
> 4. On February 10, 2005, . . . Dixon did knowingly or intentionally deliver Cocaine, pure or adulterated, contrary to I.C. 35-48-4-1 and against the peace and dignity of the State of Indiana.
> 5. That all of these events occurred in Lake County Indiana.

Appellant's App. p. 36.

The trial court took the plea agreement under advisement and scheduled a sentencing hearing for April 19, 2007. Thereafter, the trial court accepted Dixon's guilty plea and found

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[1] Ind. Code § 35-48-4-1(a)(2).

him guilty of Dealing in Cocaine as a class B felony. The trial court identified Dixon's admission to the offense and his remorse as mitigating circumstances and found the following aggravating factors: (1) Dixon's prior criminal history, which included one felony and three misdemeanor convictions; (2) Dixon had violated probation in the past; and (3) Dixon was on bond from LaPorte County on another drug-related crime when he committed the instant offense. The trial court then sentenced Dixon to fourteen years of incarceration.

On May 21, 2007, Dixon filed a motion to reconsider the sentence, which the trial court granted. Specifically, Dixon was resentenced to twelve years, to be served as follows: nine years with the Indiana Department of Correction and three years with the Lake County Community Correction. The sentence was ordered to run consecutively to the sentence that was imposed in the LaPorte County case. Dixon now appeals.

DISCUSSION AND DECISION

I. Mitigating Factors

Dixon first claims that his sentence must be set aside because the trial court failed to identify two significant mitigating circumstances that were supported by the record. Specifically, Dixon argues that the trial court should have acknowledged that he was supporting three children. As a result, Dixon makes the related claim that an executed sentence in excess of the minimum sentence would "cause an undue hardship to him and his dependents." Appellant's Br. p. 6.

Sentencing decisions are within the sound discretion of the trial court. Jones v. State, 790 N.E.2d 536, 539 (Ind. Ct. App. 2003).[2] It is within the trial court's discretion to determine both the existence and weight of a significant mitigating circumstance. Creager v. State, 737 N.E.2d 771, 782 (Ind. Ct. App. 2000). An allegation that the trial court failed to identify a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Anglemyer v. State, 868 N.E.2d 482, 493 (Ind. 2007). In other words, a trial court is not obligated to find a circumstance to be mitigating merely because it is advanced as such by the defendant. Spears v. State, 735 N.E.2d 1161, 1167 (Ind. 2000). However, when a trial court fails to find a mitigator that is clearly supported by the record, a reasonable belief arises that the trial court improperly overlooked this factor. Banks v. State, 841 N.E.2d 654, 658 (Ind. Ct. App. 2006), trans. denied.

In addressing Dixon's claims, we note that a trial court "is not required to find [that] a defendant's incarceration would result in undue hardship on his dependents." Davis v. State,

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[2] On April 25, 2005, the legislature amended Indiana's felony sentencing statutes, which now provide that the person convicted is to be sentenced to a term within a range of years, with an "advisory sentence" somewhere between the minimum and maximum terms. See Ind. Code §§ 35-50-2-3 to -7. The statutes were amended to incorporate advisory sentences rather than presumptive sentences and comply with the holdings in Blakely v. Washington, 542 U.S. 296 (2004), and Smylie v. State, 823 N.E.2d 679 (Ind. 2005).

In Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007), our Supreme Court determined that "the sentencing statute in effect at the time a crime is committed governs the sentence for that crime." Because Dixon committed the charged offense on February 10, 2005, which was prior to the effective date of the sentencing amendments, we apply the former version of the statute. When Dixon committed the offense, 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."

835 N.E.2d 1102, 1116 (Ind. Ct. App. 2005), trans. denied. As our Supreme Court has observed, "[m]any persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship." Dowdell v. State, 720 N.E.2d 1146, 1154 (Ind.1999).

In this case, although Dixon informed a probation officer that he has fathered three children and has "provided assistance" to them, appellant's br. p. 6, Dixon has failed to demonstrate the degree to which his children rely on him for support. Therefore, Dixon's claim that the trial court abused its discretion when it did not identify his alleged financial support of the children and the alleged undue hardship that would result from his incarceration as mitigating circumstances fails. See Anglin v. State, 787 N.E.2d 1012, 1018 (Ind. Ct. App. 2003) (holding that the trial court did not abuse its discretion when it did not find a mitigating circumstance where the record did not reveal the degree of a child's financial dependence upon the defendant). Put another way, Dixon has failed to demonstrate that any hardship suffered by his children is "undue" in the sense that it is any worse than that suffered by any child whose father is incarcerated. Nicholson v. State, 768 N.E.2d 443, 448 n.13 (Ind. 2002).

II. Inappropriate Sentence

Dixon maintains that the sentence cannot stand because a twelve-year term of incarceration is inappropriate when considering the nature of the offense and his character. Specifically, Dixon argues that he was entitled to a reduced sentence because the evidence established that he was only a "small time dealer," and Dixon's relatives testified at the

sentencing hearing that he was a "very good person." Appellant's Br. p. 6-7.

Pursuant to Indiana Appellate Rule 7(B), our court has the constitutional authority to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is "inappropriate in light of the nature of the offense and the character of the offender." We defer to the trial court during appropriateness review, Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007), and 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).

Regarding the nature of the offense, the record shows that Dixon delivered two bags of crack cocaine to a confidential informant in exchange for forty dollars. Appellant's App. p. 36. While there appears to be nothing out of the ordinary about this offense, the evidence shows that Dixon was on bond in LaPorte County on another drug-related offense when he committed this crime. Tr. p. 27. In our view, this factor warranted an enhanced sentence for a class B felony. See Field v. State, 843 N.E.2d 1008, 1013 (Ind. Ct. App. 2006) (observing that the defendant's commission of an offense while on bond in another matter warranted an enhanced sentence), trans. denied.

As for Dixon's character, the evidence shows that he has a prior felony conviction for dealing in cocaine and misdemeanor convictions for possession of cocaine, disorderly conduct, and conversion. Pre-Sentence Investigation Report at 3-6. Also, as noted above, Dixon was on bond for another drug-related offense when he committed this crime. Thus, the evidence established that Dixon was more than a "small-time" drug dealer. And, despite Dixon's repeated contact with the criminal justice system, it is readily apparent that he has

not been deterred from criminal conduct. Therefore, we cannot say that the twelve-year sentence was inappropriate when considering the nature of the offense and Dixon's character.

The judgment of the trial court is affirmed.

DARDEN, J., and BRADFORD, J., concur.