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IN THE COURT OF APPEALS OF INDIANA

ROBIN L. SCHLUSSER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A04-0705-CR-275
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Marianne Vorhees, Judge
Cause No.18C01-0605-MR-2

January 28, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a guilty plea, Robin Schlusser appeals his fifteen-year sentence for voluntary manslaughter, a Class B felony. Schlusser raises two issues, which we restate as whether the trial court abused its discretion in declining to suspend two years of this sentence and whether his sentence is inappropriate given the nature of the offense and his character. Concluding the trial court acted within its discretion and the sentence is not inappropriate, we affirm.

Facts and Procedural History

On May 2, 2006, Schlusser got into an argument with Michael Riley during a party at Schlusser's apartment. Later that evening, Schlusser confronted Riley down the street from Schlusser's apartment. Riley had a baseball bat and Schlusser had a knife, with which he stabbed Riley twice in the chest. Riley died as a result of these wounds. On May 5, 2006, the State charged Schlusser with murder. On February 21, 2007, Schlusser pled guilty to voluntary manslaughter pursuant to a plea agreement, which provided that the State agreed to drop the murder charge and the executed portion of Schlusser's sentence could not exceed fifteen years. On April 27, 2007, the trial court held a sentencing hearing. At this hearing, Schlusser's counsel argued for a sentence of fifteen years with two years suspended to probation. Schlusser's counsel argued that Schlusser had behaved while incarcerated awaiting sentencing and that Schlusser's criminal record contained only one violent offense, a misdemeanor conviction for battery. Following testimony and argument, the trial court made the following statement:

> There are circumstances that do support the enhanced sentence. Defendant does have an extensive history of criminal activity as an adult with conviction. . . . There are circumstances that would support a reduced sentence: Defendant does state and appear to be remorseful, and Defendant assumed responsibility for his actions and pleaded guilty. However, I do give this factor very minimal to no weight . . . as Defendant received a significant benefit from the plea . . . . So I do find that the circumstances supporting an enhanced sentence so completely and totally outweigh the circumstances warranting a reduced sentence, so as to justify imposing an enhanced sentence in this case. In support, the Court finds the Defendant has had previous opportunities to rehabilitate himself through correctional treatment, of which he has not taken advantage. . . . Defendant admitted in his testimony that he has been on probation before and was not successful on probation in Florida and in Indiana. . . . In addition, the Defendant's criminal history demonstrates a pattern of constant involvement in the criminal justice system since at least 1981, through at least 2002. [The trial court then lists all Schlusser's offenses.] The Court finds suspending part of the sentence is not appropriate in this case. . . . The nature and circumstances of this crime call for a completely executed sentence, especially in light of the fact that Defendant has had prior opportunities for probation and has not succeeded.

Transcript at 41-44. The trial court then sentenced Schlusser to fifteen years executed. Schlusser now appeals his sentence.

Discussion and Decision

I. Abuse of Discretion

A trial court may impose any legal sentence "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d). However, a trial court is still required to issue a sentencing statement when sentencing a defendant for a felony. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218. "If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or

aggravating." Id. The trial court may abuse its discretion if it omits "reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law." Id. at 490-91. We will conclude the trial court has abused its discretion if 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." Hollin v. State, 877 N.E.2d 462, 464 (Ind. 2007) (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)).

Schlusser argues that the trial court abused its discretion by failing to consider Schlusser's behavior during the year he spent in jail awaiting sentencing. At the sentencing hearing, Schlusser testified that he had not been written up for any violations, had maintained sobriety, and had been attending parenting classes. We acknowledge that the trial court's sentencing statement makes no note of these circumstances. However, it is within the trial court's sound discretion whether to find mitigating circumstances. Newsome v. State, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003), trans. denied. We will not remand for reconsideration of alleged mitigating factors that have debatable nature, weight, and significance. Id. In order to find an abuse of discretion, we must conclude "the mitigating evidence is both significant and clearly supported by the record." Anglemyer, 868 N.E.2d at 493. Our supreme court has held a trial court is not required to find a defendant's conduct while in jail awaiting trial to be a mitigating circumstance. Page v. State, 689 N.E.2d 707, 712 (Ind. 1997). Although Schlusser is to be commended for his behavior and efforts to better himself through parenting classes, we do not find this behavior to be a significant mitigating

circumstance, and we conclude the trial court did not abuse its discretion by failing to find it as such. See Carter v. State, 711 N.E.2d 835, 839 (Ind. 1999) ("Although [the defendant's] academic achievement [while in jail awaiting trial] in the face of a pending murder charge is laudable, the trial court did not abuse its discretion by failing to find it as a mitigating circumstance.").

Schlusser also argues that the trial court improperly referenced the "nature and circumstances of the crime," without explaining what about the crime was aggravating. We agree that "[a] trial court's sentencing statement must 'explain why each circumstance has been determined to be mitigating or aggravating.'" Smith v. State, 872 N.E.2d 169, 179 (Ind. Ct. App. 2007) (quoting Anglemyer, 868 N.E.2d at 490), trans. denied. We also agree that the trial court's generalized reference to the nature and circumstances of the crime does not explain what about the crime renders inappropriate a partially suspended sentence. See id; McCoy v. State, 856 N.E.2d 1259, 1263 (Ind. Ct. App. 2006) (indicating that when finding the nature and circumstances of a crime to be an aggravating circumstance, the trial court must point to facts not necessary to establish the elements of the offense).

If we find an error related to the trial court's sentencing statement, "we have the option to remand to the trial court for a clarification or new sentencing determination, to affirm the sentence if the error is harmless, or to reweigh the proper aggravating and mitigating circumstances independently at the appellate level." Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005). Additionally, we may exercise our authority under Indiana Appellate Rule 7(B) to review the sentence to determine if it is inappropriate given the nature of the

offense and the character of the offender. See Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007); Ruiz v. State, 818 N.E.2d 927, 929 (Ind. 2004).

First, we conclude any error in the sentencing statement is harmless, as we can say with confidence that the trial court would have entered the same sentence without making this comment regarding the nature and circumstances of the crime. Cf. Anglemyer, 868 N.E.2d at 491 (recognizing that remand will be appropriate "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record"). Indeed, the trial court's sentencing statement contains a lengthy recitation of Schlusser's criminal history, which includes nine felonies and six misdemeanors, and failed attempts at rehabilitation, and a mere sentence mentioning the nature and circumstances of the crime. Moreover, in the same sentence noting the nature and circumstances of the crime, the trial court indicates that it is particularly concerned with Schlusser's previous failed attempts at completing probation.

In addition to concluding any error is harmless, were we to reweigh the aggravating factor of Schlusser's criminal history and failed attempts at rehabilitation against the mitigating factors, we would conclude an executed sentence of fifteen years is proper.

II. Appropriateness of Schlusser's Sentence

When reviewing a sentence imposed by the trial court, we "may revise a sentence 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." Ind. Appellate Rule 7(B). We have authority to "revise sentences when certain

broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). When determining whether a sentence is inappropriate, we recognize that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). We must examine both the nature of the offense and the defendant's character. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When conducting this inquiry, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. The burden is on the defendant to demonstrate that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

A Class B felony carries an advisory sentence of ten years, with a minimum sentence of six years and a maximum sentence of twenty years. Ind. Code § 35-50-2-5. Here, the trial court sentenced Schlusser to fifteen years – a sentence halfway between the advisory sentence and the maximum sentence.

The information we have regarding the nature of the offense is somewhat limited, as this case was disposed of via a guilty plea. However, it appears from the record that after arguing with Riley earlier in the day, Schlusser approached Riley armed with a knife. During the fight, Schlusser stabbed Riley in the chest two times and continued to attack even after Riley yelled, "Stop man, I had enough! I had enough!"[1] Sentencing Hearing Exhibit 1 at 2. Although it appears that Riley was armed with a baseball bat during at least part of the confrontation, we do not find that the information in the record regarding the nature of the

offense renders a fifteen-year sentence inappropriate.

In regard to Schlusser's character, the record indicates that Schlusser has an extensive criminal history, consisting of nine felonies and six misdemeanors. We recognize that only one of these convictions is for a violent offense, battery causing bodily injury. However, the sheer number and seriousness of the offenses, which include two convictions for burglary, a crime that inherently involves the risk of violence, render this criminal history a significant negative comment on Schlusser's character. Cf. Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006) (recognizing that the weight of a defendant's criminal history "is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability"). We also note that on three occasions, Schlusser was charged with battery resulting in bodily injury, but the charges were dismissed due to the failure of witnesses to appear, and that Schlusser has also been arrested for multiple other offenses. See Cox v. State, 780 N.E.2d 1150, 1157 (Ind. Ct. App. 2002) ("[A] trial court may consider an arrest record as reflective of the defendant's character and as indicative of the risk that the defendant will commit other crimes in the future."). Further, Schlusser has previously failed to successfully complete probation. See Field v. State, 843 N.E.2d 1008, 1011 (Ind. Ct. App. 2006) (holding probation violations are proper aggravating circumstances), trans. denied.

Mindful that it was Schlusser's burden to persuade this court that his sentence is inappropriate, we conclude a fifteen-year executed sentence is not inappropriate given the

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[1] It is unclear whether the fatal stab wounds occurred before or after Riley begged Schlusser to cease

nature of the offense and Schlusser's character, as evidenced by his lengthy criminal history.

Conclusion

We conclude that any abuse of discretion committed by the trial court was harmless and that Schlusser's sentence is not inappropriate given his character and the nature of the offense.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.

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his assault.