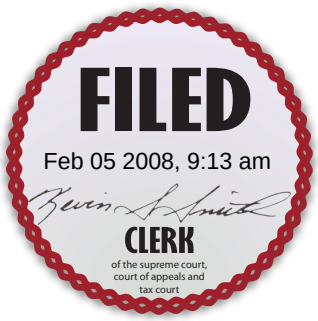

ATTORNEY FOR APPELLANT:

ANNA E. ONAITIS
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MICAHEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CHARLES B. DILLON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 57A03-0707-CR-334
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE NOBLE SUPERIOR COURT
The Honorable Robert E. Kirsch, Judge
Cause No. 57D01-0704-FD-79

February 5, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Charles B. Dillon appeals the sentence he received following his conviction of Battery to a Law Enforcement Officer,[1] a class D felony, Resisting Law Enforcement,[2] a class A misdemeanor, and Interfering With A Law Enforcement Animal,[3] a class A misdemeanor. Those convictions were entered upon Dillon's plea of guilty. Dillon presents the following restated issues for review:

1. Did the trial court err in identifying aggravating and mitigating circumstances?

2. Was the sentence inappropriate in light of Dillon's character and the nature of his offenses?

We affirm.

The facts favorable to the convictions are that on April 5, 2007, an intoxicated and angry Dillon went to the home of family members. The family members exited through the back door of the house and got in their van. Dillon followed and jumped on the van before it pulled away. They drove to the police station in Avilla in Noble County, Indiana, where Officer Mike Duncan of the Avilla Police Department saw Dillon riding on the hood of the van. Officer Duncan asked Dillon what he was doing and Dillon jumped off of the van and advanced toward the officer with clenched fists. A scuffle

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[1] Ind. Code Ann. § 35-42-1 (West, PREMISE through 2007 1st Regular Sess.).

[2] Ind. Code Ann. § 35-44-3-3 (West, PREMISE through 2007 1st Regular Sess.).

[3] Ind. Code Ann. § 35-46-3-11 (West, PREMISE through 2007 1st Regular Sess.).

ensued as Dillon threatened Officer Duncan and refused to obey verbal commands. Officer Duncan deployed his tazer, but to little effect. As the situation escalated, Officer Duncan released his K-9 unit from his police car. Dillon struck the K-9 as he continued to resist the officer's commands to cease. Eventually, other officers arrived on the scene and, after being hit a second time with a tazer, Dillon was subdued. Officer Duncan sustained injuries to his neck, right knee, right elbow, and shoulder.

As a result of the incident, Dillon was charged with battery of an officer as a class D felony, resisting law enforcement as a class A misdemeanor, striking a law enforcement animal as a class A misdemeanor, and disorderly conduct as a class B misdemeanor. On May 25, Dillon pled guilty to the first three counts, in exchange for which the State agreed to dismiss the disorderly conduct charge. Sentencing was left to the court's discretion. After considering the evidence presented at the sentencing hearing, including a presentence investigation report, the trial court imposed the advisory one-year sentence for each of the class A misdemeanor convictions, which were to run concurrent to the maximum three-year sentence imposed for the felony conviction, with eighteen months of that sentence suspended to probation. Dillon challenges his sentence.

When evaluating certain sentencing challenges under the advisory sentencing scheme under *Anglemeyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218, we first confirm that the trial court issued the required sentencing statement that included "reasonably detailed reasons or circumstances for imposing a particular sentence." *Id*. at 491. Second, the reasons or omission of reasons given for choosing a

sentence are subject to review on appeal for an abuse of discretion. *Anglemeyer v. State*, 868 N.E.2d 482. We note that the weight given to those reasons, *i.e.*, to particular aggravators or mitigators, is not subject to appellate review. *Id*. Finally, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). *Id*. Even if a trial court abuses its discretion by not issuing a reasonably detailed sentencing statement or in its statement concerning aggravators and mitigators, we may choose to review the appropriateness of a sentence under Rule 7(B) instead of remanding to the trial court. *Id*.

1.

Dillon contends the trial court abused its discretion in identifying aggravating and mitigating circumstances. An abuse of discretion in identifying or failing to identify aggravators and mitigators occurs if it 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.'" *Anglemeyer v. State*, 868 N.E.2d at 490 (quoting *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006)). Also, an abuse of discretion occurs if the record does not support the reasons given for imposing sentence, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. *Anglemeyer v. State*, 868 N.E.2d 482.

Following is the trial court's sentencing statement:

> Unfortunately your record tells me you are a criminal. That is the problem, starting September 1996 through today. Now, [defense attorney] indicates that you have behaved yourself since October of 2005, which is certainly

> good, but if you look at the rest of this, uh, record you know, it is a little far fetched to say you are not a criminal. You are a criminal. And, I also can't lose sight of the fact that you did strike or batter a police officer who was trying to perform his duties and there has to be consequences for that.

Transcript at 43-44. Dillon asserts that the foregoing comments omit several significant mitigating circumstances, include his guilty plea, his remorse, and the fact that he suffers from mental illness.

We begin with the trial court's failure to cite Dillon's guilty plea. It is well established that a defendant who pleads guilty deserves to have some mitigating weight extended to the guilty plea in return. *See Cotto v. State*, 829 N.E.2d 520 (Ind. 2005). Although a trial court should make some acknowledgment of a guilty plea when sentencing a defendant, the extent to which a guilty plea is mitigating will vary from case to case. *See Hope v. State*, 834 N.E.2d 713 (Ind. Ct. App. 2005). As has been frequently observed, "a plea is not necessarily a significant mitigating factor." *Cotto v. State*, 829 N.E.2d at 525; *see also Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005) ("a guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one"), *trans. denied*. Here, Dillon clearly received substantial benefits in return for his guilty plea. It is apparent from several places in the appellate materials, including a letter from Dillon to the trial court, that although a habitual offender charge was never filed, the State could have and perhaps would have added the charge had Dillon not chosen to plead guilty. Had he been found

to be a habitual offender, the resulting enhancement would have substantially increased his sentence. Moreover, we note that Dillon sent the aforementioned letter to the trial court for the purpose of asking permission to withdraw his guilty plea. Under these circumstances, even had it been cited as a mitigator, the guilty plea was not entitled to great weight and thus is not a significant mitigating factor.

Dillon contends the trial court erred in failing to cite his remorse as a mitigating factor. Dillon is correct that the trial court did not mention remorse as a mitigator, although Dillon clearly apologized at the sentencing hearing for what happened to Officer Duncan. We presume this means the trial court was not convinced the expression of remorse was credible. From our distant vantage point, we are reluctant to substitute our judgment for the trial court's on that issue. *See Gibson v. State*, 856 N.E.2d 142, 148 (Ind. Ct. App. 2006) ("[r]emorse, or lack thereof, by a defendant often is something that is better gauged by a trial judge who views and hears a defendant's apology and demeanor first hand and determines the defendant's credibility"); *see also Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002) ("[w]ithout evidence of some impermissible consideration by the court, we accept its determination of credibility"). Moreover, we note that Dillon continued to maintain at the hearing that he did not injure Officer Duncan, and that his (Dillon's) actions were caused by his wife's refusal to allow him to see his children, and by the fact that he was drunk at the time. Such assertions significantly diminish the authenticity of his claim of remorse.

Dillon contends the trial court erred in failing to find his mental illness as a mitigator. Even assuming the trial court erred in failing to find mental illness as a mitigator, that does not necessarily mean such a finding would have impacted the sentence. When a trial court makes a finding of mental illness, it must consider several factors in determining what, if any, mitigating weight to give to any evidence of a defendant's mental illness. *Krempetz v. State*, 872 N.E.2d 605 (Ind. 2007). Those factors include: (1) the extent of the defendant's inability to control his or her behavior as a result of the disorder or impairment, (2) the defendant's overall limitations on functioning, (3) the duration of the mental illness, and (4) the extent of the nexus, if any, between the disorder or impairment and the commission of the crime. *Id*.

Dillon did not present evidence at the sentencing hearing relevant to any of the above factors. Most notably, he did not argue, much less establish, that there was a nexus between his actions and his alleged mental illness. In fact, Dillon blamed his actions at the police station not on mental illness, but on his intoxication at the time. Under these circumstances, the trial court was not required to find that his mental illness constituted a significant mitigating circumstance.

2.

Dillon contends that his enhanced sentence is inappropriate for three reasons. First, he notes that the trial court imposed the maximum three-year sentence for the D-felony conviction and, citing *Payton v. State*, 818 N.E.2d 493 (Ind. Ct. App. 2004), *trans. denied*., contends such should be reserved only for the worst offenders and

offenses. He further claims he is not the worst offender and his was not the worst offense. His second and third arguments center upon the mitigating effects of his mental illness and, to a lesser extent, his criminal history. As to the latter, he notes that although he was convicted regularly between 2000 and 2005, his criminal history "has been clean for one year and eleven months." *Appellant's Brief* at 7.

We have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B); *Corbin v. State*, 840 N.E.2d 424 (Ind. Ct. App. 2006). "We recognize, however, the special expertise of the trial courts in making sentencing decisions; thus, we exercise with great restraint our responsibility to review and revise sentences." *Scott v. State*, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006), *trans. denied*.

We begin by examining Dillon's character. Dillon argued only three mitigators: (1) the guilty plea, (2) his recent record of no convictions (*i.e.*, "[s]o, although he had violated probation in the past, at least in this instance it did indicate that he was capable of completing the deferred prosecution agreement successfully"), *Transcript* at 35, and (3) his history of mental health problems (*i.e.*, "[a]nd whether or not (his mental health) is part of the problem I don't know, but he obviously has some problems that require a good deal of medication"). *Id*. We have already observed that the guilty plea and his history of mental health problems are entitled to minimal weight. The guilty plea was more a

pragmatic decision than a reflection of his contrition and remorse, and even he acknowledged that his actions were the result alcohol intoxication, not mental illness.

As for his criminal record, we agree with the trial court that it is a significant factor. In *Ruiz v. State*, 818 N.E.2d 927, 929 (Ind. 2004), our Supreme Court observed that the significance of prior alcohol-related misdemeanor offenses at sentencing "'varies based on the gravity, nature and number of prior offenses as they relate to the current offense.'" (Quoting *Wooley v. State*, 716 N.E.2d 919, 929 (Ind. 1999)). According to the presentence investigation report, Dillon's criminal history consisted of fifteen convictions, fourteen of which occurred since 2000. Of those, there were six alcohol-related convictions and one conviction for marijuana possession. Although the individual alcohol-related convictions are relatively minor, in the aggregate, they are both significant and relevant. This is especially true considering the nature of those offenses as juxtaposed against the admitted reason for the attack upon the police officers and their canine partner.

Turning now to the nature of the crime, Dillon instigated the encounter when, by his own admission, he became angry with his wife because she would not let him speak to their children. After becoming intoxicated, he went to a family member's house. The occupants of the house were afraid of him so they went out the back door and got into their vehicle. Dillon grabbed onto the vehicle and hung on as it was driven to the police station. Once there, Dillon attacked police officers, ignoring their commands to stop. In

the altercation that ensued, he injured not only a police officer, but a police dog as well. He did not cease his struggle until he was hit with multiple tazer jolts

Considering Dillon's many criminal convictions, and especially the number of convictions related to alcohol and substance abuse, and considering the unprovoked and sustained attacked upon law enforcement officers and their dog, we agree that a three-year sentence is not inappropriate. This is especially so in view of the fact that the trial court suspended half of the sentence.

Judgment affirmed.

ROBB, J., and MATHIAS, J., concur.