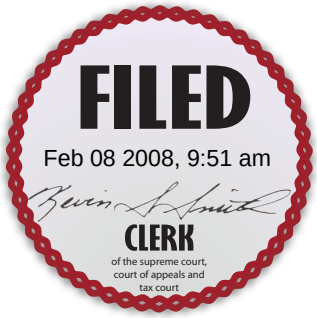

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IN THE
COURT OF APPEALS OF INDIANA

RICHARD W. DAILEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A04-0706-CR-355
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-0607-FB-215

February 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Richard W. Dailey appeals the sixteen-year, executed sentence he received following his convictions, entered upon his guilty plea, of Criminal Recklessness[1] and Mistreatment or Interfering With a Law Enforcement Animal,[2] both class A misdemeanors, Resisting Law Enforcement[3] and Battery Resulting in Bodily Injury,[4] both class D felonies, and Dealing in Cocaine,[5] a class B felony. Dailey presents the following restated issues for review:

1. Did the trial court err in failing to find remorse as a mitigating factor?

2. Was Dailey's sentence inappropriate?

We affirm.

The facts favorable to the judgment are that on July 11, 2006, the Madison County Drug Task Force received information that Dailey was going to deliver cocaine to Larry Denton. Officers conducting surveillance of Denton's house saw Dailey's vehicle pull into Denton's driveway. Police officers pulled their vehicle behind Dailey's, approached his vehicle, and saw him move a brown box in the passenger seat. Officers identified

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[1] Ind. Code Ann. § 35-42-2-2(B)(1) (West, PREMISE through 2007 1st Regular Sess.).

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

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

[4] I.C. § 35-42-2-1(A)(2)(A) (West, PREMISE through 2007 1st Regular Sess.).

[5] Ind. Code Ann. § 35-48-4-1(A)(1) (West, PREMISE through 2007 1st Regular Sess.).

themselves and instructed Dailey to exit his vehicle. Dailey responded by starting his vehicle, shifting into reverse, and backing up quickly. Chief Jack Miller of the Elwood

Police Department was unable to get out of the way and was struck by Dailey's side mirror. Officers pulled out their guns and shot Dailey's tires. He continued in reverse until he struck a police car, then drove forward and away from Denton's house. Police pursued with lights and sirens activated, but Dailey refused to stop. He was observed throwing objects, later determined to be cocaine, out the window of his vehicle as he drove. When his vehicle was eventually stopped, Dailey refused to get out. Police used a K-9 to extract Dailey. During that process, Dailey struck the K-9 in the head several times.

Dailey was charged with the crimes of which he was ultimately convicted, as set out above. Eventually, he agreed to plead guilty as charged in exchange for the State's agreement to not charge the dealing offense as a class A felony. Sentencing was left to the trial court's discretion. Following a hearing, the trial court sentenced Dailey to enhanced, thirty-month terms for each of the class D felony convictions and advisory, one-year terms for each of the two class A misdemeanors, all to run concurrent to an enhanced, sixteen-year term of imprisonment for the dealing conviction.

1.

Dailey contends the trial court abused its discretion in failing to find his remorse as a mitigating circumstance.

Sentencing decisions rest within the sound discretion of the trial court and are reviewed only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id*. If a trial court's sentencing statement includes a finding of aggravating or mitigating circumstances, the statement must identify all significant mitigating or aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id*. Our Supreme Court has clarified that a trial court may abuse its discretion in the following ways: (1) Failing to enter a sentencing statement; (2) entering a sentencing statement that includes reasons not supported by the record; (3) entering a sentencing statement that omits reasons clearly supported by the record and advanced for consideration; or (4) entering a sentencing statement that includes reasons that are improper as a matter of law. *Id*.

Although a sentencing court must consider all evidence of mitigating factors presented by a defendant, the finding of mitigating circumstances is committed to the court's sound discretion. *Creekmore v. State*, 853 N.E.2d 523 (Ind. Ct. App. 2006), *clarified on denial of reh'g*, 858 N.E.2d 230. The sentencing court is not required to consider alleged mitigating circumstances that are highly disputable in nature, weight, or significance. *Id*. Moreover, a sentencing court need not agree with the defendant's assessment of the weight or value to be given to proffered mitigating facts. *Id*. The court

is not obligated to explain why it did not find a factor to be significantly mitigating. *Id*. To support an allegation that the trial court failed to identify or find a mitigating factor, the defendant must establish that the mitigating evidence was both significant and clearly supported by the record. *Matshazi v. State,* 804 N.E.2d 1232 (Ind. Ct. App. 2004), *trans. denied*.

Dailey contends the trial court erred in failing to cite his remorse as a mitigating factor. Indeed, although Dailey stated at the sentencing hearing, "I'm very sorry for what happened", *Transcript* at 58, the trial court did not mention remorse as a mitigator. 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 this 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"). The trial court did not abuse its discretion in this regard.

2.

Dailey contends his enhanced, sixteen-year sentence is inappropriate in light of his character and the nature of the offenses of which he was convicted. We have the constitutional authority to revise a sentence if, after considering 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*.

Dailey's argument upon appeal that his sentence is inappropriate focuses almost entirely upon his character, as opposed to the nature of the offenses of which he was convicted. He notes for instance that he has a college degree, held a job while on bond for the instant offenses, pled guilty, and expressed remorse. Moreover, citing a court of appeals case, *i.e.*, *Bluck v. State*, 716 N.E.2d 516 (Ind. Ct. App. 1999), he notes that our Supreme Court "has stated that the maximum sentence enhancement permitted by law should be reserved for the very worst offenses and offenders."[6] *Appellant's Brief* at 10.

Addressing first the latter argument, we note that Dailey did not receive the maximum sentence for a class B felony. Dailey concedes as much, but seemingly seeks to extend this argument against maximum sentences to apply as well to *any* enhanced sentence. We have on previous occasions explained that the "maximum punishment for the worst offenders and offenses" principle does not justify sentencing by comparison,

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[6] In fact, our Supreme Court has articulated this principle. *See, e.g.*, *Buchanan v. State*, 699 N.E.2d 655, 657 (Ind. 1998) (quoting *Bacher v. State*, 686 N.E.2d 791, 802 (Ind. 1997)) ("the maximum sentence enhancement permitted by law ... should ... be reserved for the very worst offenses and offenders").

i.e., comparing the facts of the case before us "with either those of other cases that have been previously decided, or – more problematically – with hypothetical facts calculated to provide a 'worst-case scenario' template against which the instant facts [and offender] can be measured.'" *Brown v. State*, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), *trans. denied*. Even if the "worst punishment for the worst offense and offender" principle applied here, which it does not, our focus would remain on the nature of the offenses of which Dailey was convicted and his character. *See id*.

Dailey has a lengthy criminal history that includes six prior felonies and twenty-one prior misdemeanor convictions. He has violated probation on several occasions and has had the benefit of in-patient treatment for his substance abuse problems. Yet, as the trial court observed, despite attempts at addiction treatment, repeated contacts with the criminal justice system, a caring family, a good education, and lenient, probationary sentences, Dailey continues to re-offend on a consistent basis. In light of those facts, the enhanced, sixteen-year sentenced imposed by the trial court is not inappropriate.

Judgment affirmed.

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