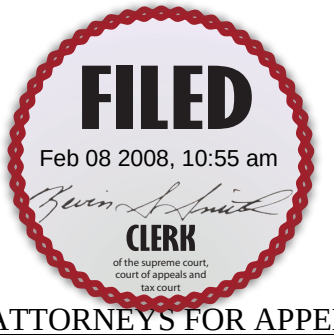


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# IN THE
# COURT OF APPEALS OF INDIANA

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|---|---|---|
| KEITH POWELL, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 34A05-0708-CR-461 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable Stephen M. Jessup, Judge
Cause No. 34D02-0603-FB-59

**February 8, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

Keith Powell appeals his conviction, entered upon his guilty plea, for Robbery,[1] a class C felony, and the sentence imposed thereon. Powell presents the following restated issues for review:

1. Did the trial court err in not advising Powell at sentencing of his right to a jury trial?

2. Did the trial court err in failing to find mitigating circumstances, and was the sentence appropriate?

We affirm.

The facts favorable to the conviction are that on February 20, 2006, Powell entered a Village Pantry store in Kokomo, sprayed the cashier with pepper spray, and took approximately $150.00 from the cash drawer. Powell later admitted he had taken the money from the Village Pantry in question, but did not remember whether he used pepper spray on the cashier because he was at the time under the influence of alcohol, cocaine, or both. Powell was charged with robbery as a class B felony, but that charge was later dismissed when a second robbery count was added, the second one charging the robbery offense as a class C felony. The only difference between the two robbery charges is that the dismissed B felony charge alleged that the cashier/victim suffered bodily injury.

Powell eventually pled guilty to the class C felony charge and received the maximum sentence allowed by statute for an offense of that classification – i.e., eight years.

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[1] Ind. Code Ann. § 35-42-5-1 (West, PREMISE through 2007 1st Regular Sess.).

1.

Powell contends the conviction must be reversed because the trial court did not advise him at the plea hearing of his right to a jury trial.

"[I]t is basic to and idiosyncratic in Indiana law that an error premised upon a guilty plea must be brought by a petition for post-conviction relief." *Huffman v. State*, 822 N.E.2d 656, 660 (Ind. Ct. App. 2005). This principle applies in cases in which the defendant challenges the validity of his or her plea on grounds that the plea was not knowing or voluntary. *See Hall v. State*, 849 N.E.2d 466, 472 (Ind. 2006) (in which the defendant challenged his guilty plea on grounds of an inadequate advisement of rights; our Supreme Court noted, "[p]recisely because a conviction imposed as a result of a guilty plea is not an issue that is available to a defendant on direct appeal, any challenge to a conviction thus imposed must be made through the procedure afforded by the Indiana Rules of Procedure for Post-Conviction Remedies"). Accordingly, Powell may not challenge the validity of his guilty plea in this direct appeal.

2.

Powell contends the trial court erred in failing to find mitigating circumstances, and that the eight-year sentence is inappropriate.

Powell first contends the trial court erred in failing to find as mitigating circumstances his drug addiction and the fact that he pled guilty. Sentencing determinations, including the finding of mitigating factors, are generally committed to the

trial court's discretion. *Scott v. State*, 840 N.E.2d 376 (Ind. Ct. App. 2006), *trans. denied*. A sentencing court must consider all evidence of mitigating factors presented by a defendant, but is not obligated to weigh or credit them in the manner a defendant suggests. *Id*. Also, a sentencing court "need not consider, and we will not remand for reconsideration of, alleged mitigating circumstances that are highly disputable in nature, weight, or significance." *Creekmore v. State*, 853 N.E.2d 523, 530 (Ind. Ct. App. 2006), *clarified on reh'g*, 858 N.E.2d 238. "Indeed, a sentencing court is under no obligation to find mitigating factors at all." *Id*. Nevertheless, if a trial court fails to find a mitigator clearly supported by the record, a reasonable belief arises that the mitigator was improperly overlooked. *Creekmore v. State*, 853 N.E.2d 523. We review challenges to the identification of aggravating and mitigating circumstances for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. A trial court abuses its discretion in identifying or failing to identify aggravators and mitigators 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.'" *Id.* at 490 (quoting *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006)). Also, an abuse of discretion occurs if the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration. *Anglemyer v. State*, 868 N.E.2d 482.

We begin with the trial court's failure to find Powell's guilty plea as a mitigating factor. 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, the evidence of Powell's guilt, including eyewitness identification, a surveillance tape, and Powell's admission of guilt to investigating police officers, was overwhelming. Under these circumstances, the trial court was entitled to view the decision to plead guilty as a pragmatic one. Therefore, the trial court did not abuse its discretion in failing to cite the guilty plea as a significant mitigating factor.

With respect to Powell's claim that the trial court erred in failing to cite his history of drug addiction as a mitigator, we note that a history of substance abuse is sometimes found by the trial court to be an aggravator, not a mitigator. *See Iddings v. State*, 772 N.E.2d 1006 (Ind. Ct. App. 2002), *trans. denied*. Moreover, in its comments, the court indicated that Powell has had opportunities while incarcerated for previous convictions to address his drug addiction, but has failed to do so successfully. The trial court did not abuse its discretion in failing to cite his history of drug use as a mitigator.

Powell contends the eight-year sentence imposed by the trial court was inappropriate. 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*.

In challenging his sentence as inappropriate, Powell argues that the trial court improperly used the first plea agreement, which the trial court rejected. By way of explanation, the first plea agreement tendered to the trial court called for Powell to plead guilty to robbery as a class B felony. Under the terms of that agreement, Powell would receive a twelve-year sentence with four years suspended, for an eight-year executed sentence. The trial court rejected that sentence, and thus the plea agreement, as too lenient. The court referred to the rejected agreement in sentencing Powell for the instant offense, stating:

> I note that what the State is asking for is exactly what you agreed to back in 2006, that would have been a guilty plea to a B felony, and you agreed to be-sentenced [sic] to a period of 12 years, serve 8, 4 suspended. I rejected that as being too lenient. Since then the State has dismissed the B. We're here on the C and the maximum sentence you could get is what you agreed to last Fall. That is of major importance to me.

*Appellant's Appendix* at 54. We note, however, that the court went on to discuss in some detail its reasons for imposing the sentence it did. Those reasons included Powell's criminal history and the likelihood that he would commit crimes in the future. We have reviewed the trial court's comments and reasoning and are satisfied that it did not, as Powell phases it, improperly "springboard off of an earlier, rejected negotiation of penalty into a fresh, clean determination of a penalty for a lesser offense[.]" *Appellant's Brief* at 10. The court did not abuse its discretion in referencing the rejected plea agreement at sentencing.

In imposing a sentence above the advisory, the trial court cited Powell's rather extensive criminal history, which consisted of seven prior felony convictions and three misdemeanor convictions. Those offenses included, among others, criminal trespass, theft, unauthorized use of a vehicle, battery, and robbery. Powell admitted he has a significant substance abuse problem – one that he has tried several times to overcome, but without success. It appears that his substance addiction is a significant cause of his criminal behavior. By his own admission, it was certainly a significant cause in the instant offense. The trial court considered that troubling pattern and determined the maximum sentence was appropriate, explaining,

> I think of over-riding concern at this hearing, [the prosecutor]'s correct, in my opinion incarceration is not gonna help your problem except it will keep you hopefully away from the stuff, at least make it harder to get when you're in prison. I think the over-riding concern is public safety. I don't know if you're high when you do these things or if you're so desperately needing money whatever that you endanger other people when you make your mistake, so I'm granting the State's wish and sentence you to 8 years.

*Appellant's Appendix* at 54-55. Given Powell's extensive criminal history, his long-term substance addiction, and his propensity to commit crimes in conjunction with that addiction, we cannot say that the eight-year sentence imposed by the trial court is inappropriate.

Judgment affirmed.

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