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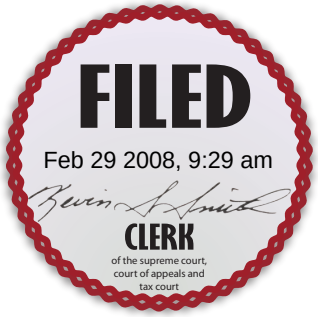

IN THE
COURT OF APPEALS OF INDIANA

JOHN D. RANDALL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0711-CR-538
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable David C. Bonfiglio, Judge
Cause No. 20D06-0704-FD-106

February 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

John Randall appeals the sentence he received after pleading guilty to failing to register as a sex offender,[1] a class D felony. We affirm.

Issues

We restate the issues as follows:

I. Whether the trial court abused its discretion when it did not find Randall's guilty plea to be a mitigating factor; and

II. Whether the court committed reversible error in not advising Randall of the right of allocution.

Facts and Procedural History

On January 29, 1997, Randall was convicted of child molesting as a class C felony. App. at 29. He received an eight-year sentence and was on probation until 2006. *Id*.; Guilty Plea Tr. at 4. On April 4, 2007, the State charged Randall with failure to register as a sex offender. App. at 14. On the advice of appointed counsel but with no plea agreement, Randall pled guilty as charged on August 8, 2007. *Id*. at 20. At a September 12, 2007 sentencing hearing, the following exchange occurred:

> THE COURT: I have read the pre-sentence report and certainly the prior criminal history is of concern but I think of more concern are the counseling reports that are attached – are part of the PSI. I believe that the counseling reports consistently indicate that Mr. Randall never took his treatment – I guess what they talk about as "thinking errors" and that he continues to be at very high risk to re-offend, that he – I guess I would describe it as "he has a sense of entitlement" and that this is one of the issues that is of great concern because if there is, in fact, that entitlement and then the behaviors that are documented here about being near children, it certainly does give one concern based upon the mental health reports, the treatment reports, the evaluations. I

[1] Ind. Code § 11-8-8-17.

> think they're all pretty clear and replete that there's always been a concern about his behavior to re-offend. I think, certainly …
>
> DEFENDANT: Can I say something, Your Honor?
>
> THE COURT: … I think …
>
> PUBLIC DEFENDER: Let the Judge finish.
>
> THE COURT: … I think that based on the prior criminal history, based upon the reports of the assessments, I think a three year sentence is justified when one looks at the risk he presents to the community based upon the mental health reports from the PSI. Give him credit for 135 days in custody with time for good time credit. I don't believe an additional fine or any Public Defender fee is appropriate.

Sent. Tr. at 6.

Discussion and Decision

I. Abuse of Discretion and Guilty Plea

So long as a defendant's sentence is within the statutory range, the trial court's sentencing decision is subject to review only for abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007) ("*Anglemyer I*"), *clarified on reh'g*, 875 N.E.2d 218 ("*Anglemyer II*"). The advisory sentence for a class D felony is eighteen months, with the range being from six months to three years. Ind. Code § 35-50-2-7. Randall received a three-year sentence for his class D felony; therefore, we apply the abuse of discretion standard.

> An abuse of discretion occurs 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.
>
> One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not

> support the reasons, 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. Under those circumstances, remand for resentencing may be the appropriate remedy 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.

Anglemyer I, 868 N.E.2d at 490-91 (citations and quotation marks omitted).

Randall contends for the first time on appeal that the trial court abused its discretion by failing to find his guilty plea a mitigating circumstance. A guilty plea is "one exception to the rule that a potential mitigator must be advanced at the trial court level in order to be preserved for appeal," and a defendant who pleads guilty deserves some mitigating weight be given to the plea in return. *Anglemyer II*, 875 N.E.2d at 220. As our supreme court further observed in *Anglemyer II*, however,

> an allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is not only supported by the record but also that the mitigating evidence is *significant*. And the significance of a guilty plea as a mitigating factor varies from case to case. For example, a guilty plea may not be significantly mitigating when it does not demonstrate the defendant's acceptance of responsibility, or when the defendant receives a substantial benefit in return for the plea.

875 N.E.2d at 220-21 (citations omitted) (emphasis added).

Here, the same judge presided over both the guilty plea hearing and the sentencing hearing. Thus, the court was well aware that Randall had pled guilty. *See* Sent. Tr. at 3 (public defender responded affirmatively when the court asked, "This is a chips plea?"). The court was also informed that the State did not offer a plea agreement because Randall had been "extremely deceptive in his whereabouts with the Elkhart County Sheriff's Department." *Id*. at 5. Moreover, Randall's plea was reluctant. *See* G.Pl. Tr. at 4 (when

asked if he received notice that he was required to register but did not do so, Randall replied, "I thought I had mailed the form back to them but I was going through a mental depression at the time and I may not have sent it back in but I thought I had.").

To the extent that Randall's guilty plea was entitled to any consideration as a mitigating circumstance, we believe that its significance pales in comparison to the aggravating circumstances. Those include his very high risk to re-offend, as detailed in his counseling records[2] and recounted by the court, and his criminal history.[3] We can confidently say that the trial court would have imposed the same sentence had it specifically found the guilty plea to be a mitigating factor. Given these particular facts, we see no reason to remand for resentencing.

II. Right of Allocution

Randall next asserts that the court deprived him of due process at his sentencing hearing by failing to advise him that he had the right to speak on his own behalf.

The "right of allocution," which is defined as the opportunity at sentencing for criminal defendants to offer statements in their own behalf before the trial judge pronounces sentence, is rooted in the common law. *Biddinger v. State*, 868 N.E.2d 407, 410 (Ind. 2007).

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[2] The counseling records dating back to 1996 document repeated problems and ongoing issues related to evasiveness, maintaining dangerous relationships, placing himself in inappropriate situations, struggling to identify thinking errors to justify and rationalize poor choices, ambivalent attitude, inconsistent progress, and continued avoidance of concrete social and lifestyle changes.

[3] In addition to the 1997 class C felony conviction for molesting his three-year-old daughter, Randall was charged with five misdemeanors and convicted of two (check deception in 2001 and criminal mischief in 2004), not to mention the current offense. App. at 29-32. It was also reported that Randall violated probation while on probation for child molesting by failing to comply with the sex offender treatment program and that he received an unsatisfactory discharge from probation. *Id*. at 29.

This common law right of allocution was first codified in this state in 1905, and has since been recodified or amended several times. *Id*. at 410-11. In its present incarnation the statute provides:

> When the defendant appears for sentencing, the court shall inform the defendant of the verdict of the jury or the finding of the court. The court shall afford counsel for the defendant an opportunity to speak on behalf of the defendant. The defendant may also make a statement personally in the defendant's own behalf and, before pronouncing sentence, the court shall ask the defendant whether the defendant wishes to make such a statement. Sentence shall then be pronounced, unless a sufficient cause is alleged or appears to the court for delay in sentencing.

Ind. Code § 35-38-1-5(a).

Although there had been confusion regarding the right of allocution in guilty plea situations,[4] our supreme court recently clarified the matter as follows:

> Because a guilty plea is not based on "the verdict of the jury or the finding of the court" the trial judge is *not* required to ask the defendant whether the defendant wants to make a statement as provided by Indiana Code section 35-38-1-5. It is in that sense that there is no *statutory* right of allocution upon a plea of guilty. But when a defendant specifically makes a request of the court for the opportunity to give a statement, as the defendant did in [*Biddinger*], then the request should be granted.

Biddinger, 868 N.E.2d at 412 (citing *Vicory v. State*, 802 N.E.2d 426, 429 (Ind. 2004), in which our supreme court cited Article 1, Section 13 of the Indiana Constitution; observed that the Indiana Constitution places a unique value upon the desire of an individual accused of a crime to speak out personally in the courtroom and state what in his mind constitutes a predicate for his innocence of the charges; and decided as a matter of first impression that

such right should apply to probation revocation hearings) (emphases added) (footnote omitted) . In *Biddinger*, our supreme court found that the trial court erred by failing to allow the defendant to make a statement. *Id*. However, the court found the error harmless because Biddinger failed to "establish how the excluded portion of his statement would have made a difference in the sentence the trial court imposed." *Id*. at 413.

Applying *Biddinger* here, we conclude that the court was not statutorily required to ask Randall, who had pled guilty, whether he wished to make a statement. Moreover, when Randall asked the court if he could say something, the court did not say "no." Rather, Randall's counsel advised him to "let the Judge finish." Sent. Tr. at 6. Thereafter, neither Randall nor his counsel specifically requested the opportunity to give a statement. Further, on appeal, Randall makes no effort to suggest, let alone establish, what he would have stated that would have made a difference in the sentence the court imposed. Indeed, during his guilty plea hearing, Randall had the opportunity to explain his view of the facts and circumstances. *See* G.Pl. Tr. at 4-5 (Randall testified: "I thought I had mailed the form back to them but I was going through a mental depression at the time and I may not have sent it back in but I thought I had. … I was still living at the same address and everything where I had registered and I told them."). At the sentencing hearing, defense counsel reiterated Randall's confusion about registering. The fact that Randall was given the opportunity to testify at his guilty plea hearing demonstrates that the goal of allocution was largely

[4] *See Minton v. State*, 400 N.E.2d 1177, 1179 (Ind. Ct. App. 1980) (refusing to vacate or remand the defendant's plea of guilty because the defendant was not given an opportunity at sentencing to offer a statement in his own behalf); *Fuller v. State*, 485 N.E.2d 117, 122 (Ind. 1985) ("there is no right of allocution upon a plea of guilty"). In shedding light on this area, our supreme court overruled certain language in *Fuller* and disapproved of similar language in *Minton*. *See Biddinger*, 868 N.E.2d at 412 n.8.

accomplished. That is, he was able to tell his side of the story and speak on his own behalf. What he has not done is show how his sentence would have changed if he had been presented with another chance to speak on the matter. *See Vicory*, 802 N.E.2d at 430; *see also Biddinger*, 868 N.E.2d at 410-13 (Biddinger failed to establish how the excluded portion of his statement would have made a difference in the sentence the trial court imposed); *cf. Hull v. State*, 868 N.E.2d 901, 903 (Ind. Ct. App. 2007) (holding that because defendant neither asked to speak nor objected to lack of opportunity to speak, he waived non-statutory right of allocution in revocation of suspension case), *trans. denied*. Accordingly, we find no error, harmless or otherwise.

Affirmed.

BAILEY, J., and NAJAM, J., concur.