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IN THE
COURT OF APPEALS OF INDIANA

JOSHUA FOSTER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 09A05-0709-CR-512
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CASS SUPERIOR COURT
The Honorable Frances C. Rick Maughmer, Judge
Cause No. 09D02-0704-FB-6

March 18, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Joshua Foster appeals the sentence he received following his conviction of Burglary,[1] a class B felony, which was entered upon his plea of guilty. Foster presents the following restated issues for review:

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

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

We affirm.

Foster admitted at the guilty plea hearing that on March 30, 2007, he and two friends drove to the home of Ben Dehaven and threw a rock through a window to determine if anyone was home. When no one reacted, confirming their belief that the family was away on vacation, they broke into the home. Once inside, they "trashed" the house. *Appellant's Appendix* at 9. Among other things, the group (1) dumped trash on the floor, threw mayonnaise, eggs, and other food stuffs on the walls, floors, and ceilings; (2) damaged woodwork, toppled furniture, destroyed a computer, and broke many items, including a television set; (3) ransacked the bedrooms; (4) stole various items from the home, including alcohol, guns, DVDs, and cameras; and (4) stole and then "trashed" two of the Dehavens' vehicles. *Id*. at 12. All told, the damage caused to the Dehavens' home and vehicles was in the tens of thousands of dollars.

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[1] Ind. Code Ann. § 35-43-2-1 (West, PREMISE through 2007 1st Regular Sess.).

Foster was arrested and charged with burglary as a class B felony, auto theft as a class D felony, and criminal mischief as a class A misdemeanor. Foster and the State entered into a plea agreement calling for the State to drop all charges but the burglary charge, in exchange for Foster's guilty plea. Sentencing was left to the trial court's discretion, with the following limitation: "[A] cap of 10 years on the total sentence, with a cap of 6 years on executed time." *Id*. at 82. The trial court accepted the plea and, following a hearing, imposed the advisory ten-year sentence for a class B felony, with four years suspended to probation, for an executed sentence of six years. Foster challenges his sentence on two bases. First, he contends the trial court failed to identify significant mitigating circumstances and failed to properly weigh those circumstances. Second, he contends the trial court imposed a sentence that was inappropriate in view of his character and the nature of the offense.

Both of Foster's arguments on appeal challenge his sentence. In the wake of recent changes in Indiana's sentencing laws, a defendant who receives a felony sentence may now challenge that sentence on two bases – one procedural and the other concerning the appropriateness of the sentence imposed. We review the first category, concerning the sentencing process, for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218, ("[s]o long as the sentence is within the statutory range, it is subject to review only for abuse of discretion"). Our Supreme Court clarified that a process-oriented abuse of discretion may occur 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. *Anglemyer v. State*, 868 N.E.2d 482. On the other hand, a defendant who challenges the appropriateness of the sentence itself must do so via Indiana Appellate Rule 7(B), which provides that the "[c]ourt may review 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." The defendant bears the burden to persuade us that his or her sentence is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482.

1.

Foster's first challenge amounts to claims that the trial court (1) failed to enter a sentencing statement, (2) entered a sentencing statement that omitted mitigating factors clearly supported by the record, and (3) improperly weighed the mitigating factors.

Beginning with the latter contention, our Supreme Court has determined that a claim of improper weighing is no longer available:

> Because the trial court no longer has any obligation to "weigh" aggravating and mitigating factors against each other when imposing a sentence, unlike the pre-*Blakely* statutory regime, a trial court can not now be said to have abused its discretion in failing to "properly weigh" such factors. *See, e.g.*, *Jackson v. State*, 728 N.E.2d 147, 155 (Ind. 2000) (finding that the Court could not determine from the sentencing statement whether the trial court "properly weighed" the aggravating and mitigating factors).

Id. at 491. This claim is no longer viable as an abuse of the trial court's discretion.

We turn now to the contention that the trial court abused its discretion in failing to enter a sentencing statement. Our Supreme Court has determined that the court must enter a sentencing statement when imposing a felony sentence and "the [sentencing] statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence." *Id*. at 490. Moreover, if it includes a finding of aggravating or mitigating circumstances, the statement "must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." *Id*.

In sentencing Foster, the trial court stated, in relevant part:

> Alright, Joshua, I've heard the evidence and I've heard the argument of Counsel and I've considered the pre-sentence investigation report, and based up [sic] the plea that was tendered to the Court, I consider that the mitigating factors uh I'm going to take into consideration as a basis for accepting this plea agreement. You know it's not any secret, this is of my twenty-five, twenty-six years in criminal justice system [sic] in some capacity, actually more as a public defender, this is about as, this is as bad as it gets as far as burglary of a house is concerned. I'm going to sentence you to ten years to the Department of Corrections, I'm going to order that, I'm uh going to suspend four of those, uh I'm going to have you returned after you do your DOC time back here to Court, uh both for community transition and we'll set out the terms of probation at that time. Hopefully we'll have some hard number as to the amount of restitution at that time, uh, I have no idea what your [sic] going to accomplish when your [sic] in prison, whether you'll do some drug and alcohol abuse [sic] and I may factor that into any term of probation that I might enter in the future. And it depends on what property has been recovered, I don't have any idea what property has been recovered at this point in time or what hasn't, but obviously that's going to factor into the restitution order that I make after you return from the Department of Corrections. Your [sic] going to get a hundred and thirty days of jail time credit, I'm assuming there's been no credit deprivation proceedings against you. You understand that, yes you do because you worked in the jail. So that will equate to two hundred and

> sixty days once they start adding up the time. And uh, I think that's all for today.

Transcript at 72-73.

A colloquy ensued between the court and Foster's counsel regarding the sentence, which counsel obviously believed was overly harsh. When counsel advised the court that he would appeal the sentence "immediately", *id*. at 74, the court responded: "Okay. We gave him the presumptive sentence, I found your mitigating circumstances, I've given him the minimum incarcerated period that I could possibly give him, six years." *Id*. As the discussion continued, counsel stated, "your [sic] saying there's no mitigating factors that came off the presumptive." *Id*. The court responded, "Oh, no I found mitigating circumstances. But there are other circumstances here that your, that are being dismissed Counsel, as a result of the plea agreement." *Id*. at 75. Counsel continued to argue that the mitigating circumstances merited a lighter sentence. The court explained "stealing the cars and creating damage to those cars, are a separate criminal offense if it were charged. I think that's an aggravating factor." *Id.* The court continued, "Destroying property while your [sic] in it and creating additional damage and stealing things that mean nothing is an aggravating circumstance. Okay, but I agree with you, that the mitigators wipe all that out." *Id*. at 76.

If we were to focus exclusively upon the court's opening comments, i.e., those before the colloquy with counsel following pronouncement of sentence, then we would be inclined to agree that the court abused its discretion in failing to make an adequate

sentencing statement. We are not, however, limited to those remarks in assessing the adequacy of a trial court's sentencing statement. Instead, we consider all of the trial court's comments contained in the transcript of the sentencing proceedings. *See Corbett v. State*, 764 N.E.2d 622, 631 (Ind. 2002) ("we are not limited to the written sentencing statement but may consider the trial court's comments in the transcript of the sentencing proceedings"); *see also Strong v. State*, 538 N.E.2d 924, 929 (Ind. 1989) ("[i]n addition to the discussion set forth in the separate sentencing order, this Court has reviewed the trial court's thoughtful comments at the conclusion of the sentencing hearing"). In short, we may discern the trial court's intentions from either the written sentencing statement, the court's comments during the sentencing hearing, or both.

In the instant case, the court's initial comments shed little light upon its reasoning. Contrary to later comments made by the trial court, it did not initially identify any mitigating factors. Nor, for that matter, did it initially identify aggravating circumstances – at least not as such. Instead, the trial court stated that it had considered the presentence investigation report, the plea agreement, and the (as-yet unidentified) mitigating factors. Noting that this was the worst case of burglary it had encountered, the court then imposed the maximum sentence permitted by the plea agreement. Had the hearing ended at that point, we would be left to wonder whether the trial court had found any mitigators, and, if so, what they were. The ensuing colloquy, however, permitted the trial court to clarify those matters.

On three separate occasions during that discussion, the trial court stated that it had, in fact, found that certain mitigating factors existed. When defense counsel asked the court to verify counsel's understanding that the court had found no mitigators, the court corrected him, i.e., "Oh, no I found mitigating circumstances." *Transcript* at 72. Later, when explaining its balancing process, the court identified the aggravating circumstance to which it obviously gave great weight, i.e., the particular circumstances of Foster's crime, but concluded that the mitigators "wipe all that out," *id*. at 76, meaning the aggravator and mitigators were in equipoise. What were those mitigators? The court did not specifically list them, but its comments were nevertheless sufficient to identify them. At the outset of aforementioned colloquy, in response to defense counsel's questioning of the sentence, the trial court responded, "Okay. We gave him the presumptive sentence, *I found your mitigating circumstances* …." *Id*. 74 (emphasis supplied). In context, we think it evident that the trial court was informing counsel that it found as mitigators all of the factors argued by counsel. A review of the argument presented by counsel on that subject reveals that he argued in favor of the following mitigating factors: (1) Remorse; (2) Foster's guilty plea; (3) Foster's age, (4) Foster's lack of a criminal history, and (5) Foster was drunk when he committed the instant offenses. Thus, the trial court accepted all of the mitigators proffered by Foster.

Although the trial court's sentencing statement was not a model of clarity, the entire body of its comments at the hearing constitute a sentencing statement sufficient to illuminate its reasoning, and certainly sufficient to constitute a sentencing statement in

the first place. Accordingly, the trial court did not abuse its discretion by failing to enter a sentencing statement. Moreover, the best interpretation of the trial court's comments at the sentencing hearing leads to the conclusion that it found in favor of Foster on all of the mitigators argued by counsel at the hearing. Therefore, the trial court did not abuse its discretion in failing to find mitigators clearly supported by the record.

2.

Foster challenges the appropriateness of his sentence. 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 Foster's character. As explained above, the trial court found five mitigating circumstances: (1) Foster's expression of remorse; (2) the fact that he pled guilty; (3) his age and (4) lack of a criminal history, and (5) the fact that he was drunk when he committed these acts. Of these, the trial court clearly discounted the mitigating weight of the guilty plea, noting that Foster benefited by agreeing to plead guilty. 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*. In the instant case, Foster received a substantial benefit from pleading guilty. Therefore, it is entitled to minimal mitigating weight.

Foster expressed remorse for his actions, and this is entitled to some mitigating weight. The same can be said for Foster's relative youth and the fact that he had no criminal history. As to the remaining mitigator, we are not inclined to assign significant mitigating weight to the fact that Foster was drunk when he committed these acts because his intoxication was voluntary. Balanced against those several mitigators was the single aggravator that can best be summarized as the particularly egregious facts of this offense. As the trial court noted, this incident involved much more than merely breaking into someone's home and stealing objects. Once inside the home, Foster and his confederates committed many acts of wanton and gratuitous vandalism – destroying and defacing the Dehavens' property for no reason that we can discern. Obviously, the sheer amount and senselessness of the destructive acts committed by Foster and his compatriots reflect

poorly on his character, notwithstanding his relative youth and the fact that he had not run afoul of the law before that episode. In the end, we agree with the trial court's assessment that, considering Foster's character and the nature of the acts to which he pled guilty, the advisory sentence with a portion of that sentence suspended to probation is appropriate.

Judgment affirmed.

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