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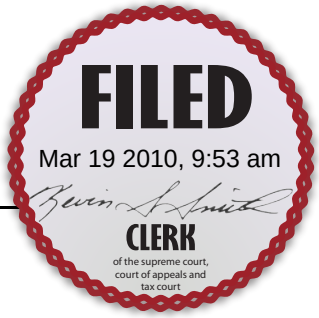

IN THE
COURT OF APPEALS OF INDIANA

LEE MARTIN GLEAVES, II,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A04-0907-CR-382
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable William J. Hughes, Judge
Cause No. 29D03-0806-FD-243

March 19, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Lee Martin Gleaves II appeals the sentence imposed for his conviction of Invasion of Privacy[1] as a class D felony, which was entered upon his guilty plea. Gleaves presents the following restated issues for review:

1. Did the trial court cite an improper aggravating circumstance?

2. Did the trial court err in failing to find a proffered mitigating circumstance?

3. Did the sentence imposed by the trial court violate the terms of the plea agreement?

We affirm.

The facts favorable to the judgment are that on June 5, 2008, the Howard Superior Court issued an order for protection prohibiting Gleaves from contacting Jessi Arreola, who alleged she had been the victim of domestic abuse at Gleaves's hands. Gleaves violated that order on June 29, 2008 when he visited Arreola at her home. Arreola contacted the police, who arrested Gleaves for violating the order of protection. Gleaves was charged with invasion of privacy as a class A misdemeanor.

On May 21, 2009, Gleaves accepted a plea agreement providing that he would plead guilty to invasion of privacy as a class D felony and his sentence would be as follows: "A cap of 180 days in the Department of Corrections,[2] open to argument as to amount of time and placement. Defendant given 32 total days credit for 16 actual days already served and attributable to this case as of the date of sentencing, specifically June 29, 2008 to 7/14/2008."

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[1] Ind. Code Ann. § 35-46-1-15.1 (West, Westlaw through 2009 1st Special Sess.).

[2] It is "Department of Correction", not "Department of Corrections". We will note this error only in this first instance.

Appellant's Appendix at 51 (footnote supplied). The trial court took the plea under advisement and set the matter for sentencing. On June 26, 2009, the parties tendered the written plea agreement and the trial court conducted a sentencing hearing. At the conclusion of the hearing, the court entered the following sentencing statement and pronounced sentence:

> Plea agreement is accepted. The Court finds the aggravating factors in this case exist as follows. Defendant has a significant history of criminal or delinquent activity including violations of, against the same victim in this case who is not an alleged victim, there was an admission in this case. Court finds that the Defendant has violated in recent terms, conditions of probation, parole, or pardon, and that he violated a protective order issued against the person protecting the victim of the offense, not the least of which the Court has learned that he has violated the protective order, apparently, for his own release in this case. Because there's been a recent contact between the Defendant and the victim in this case [sic]. That order has not been released. Has never been requested to be released and is not going to be released. An order, is an order, is an order, regardless of when she calls you, how she calls you, what she calls you, if she asks you to come over and spend a week, doesn't matter. As long as this Court has an order that you are not to be in contact, and you violate that order, it is a criminal offense for which you will pay a penalty. I'm offended by what I saw happen in this courtroom today, I'll tell you that, and you allowed it to occur. Had very little to do with what happened before, it's got to do with what happened on this offense and you already admitted that you violated this offense and now you want to justify it and it is not justifiable to violate a protective order, so aggravators substantially outweigh mitigators. The only mitigator is, undue hardship to your family and it will be an undue hardship for a child, sorry. Three years, Indiana Department of Corrections, all of which is suspended except the maximum, which I can impose under the plea of 180 days. Against that you'll receive credit and good time credit for 16 actual days served, June 29 to July 14, 2008. You will begin probation immediately. You will continue on probation until such time as the Hamilton County Community Corrections Work Release facility has a bed for you at which time you will enter the Hamilton County Work Release facility and you will complete the remaining portion of your executed time which is to be served, which I believe sir is, 162 days, which you will accomplish in 81 days. You're on probation for the balance of your sentence has been suspended. You're placed on probation for a

period of two years....

Transcript at 29-30.

1.

Gleaves contends the trial court erred by citing an improper aggravating circumstance.

When imposing a sentence for a felony offense, trial courts are required to enter a sentencing statement. This statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Anglemyer v. State,* 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 If the court finds aggravating or mitigating circumstances, it "must identify all *significant* mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." *Anglemyer v. State*, 868 N.E.2d at 490 (emphasis supplied). 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.'" *Id.* (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. *Anglemyer v. State*, 868 N.E.2d 482.

In this case, Gleaves contends the trial court erroneously cited as an aggravator that he had recently (i.e., shortly before the sentencing hearing) violated a protective order that was still in effect with respect to Arreola. It appears that Gleaves is correct. The trial court found

that Gleaves had violated the conditions of his release "in recent terms" in that "there's been recent contact between [Gleaves] and the victim in this case." *Transcript* at 29. The court went on to state that the protective order had not been released, "has never been requested to be released and is not going to be released." *Id.* The materials before us reveal that the protective order Gleaves violated in this case expired on June 30, 2008. On July 1, 2008, another protective order was issued. The order contained the following notation: "This Order remains in effect until this case has been tried and the Defendant has been sentenced if found guilty." *Id.* at 26. On October 6, 2008, the Stated filed a motion to terminate the July 1 protective order, citing as the reason that Arreola had requested that it be terminated. The motion was granted and the protective order was terminated by an order issued on October 8, 2008. We can find no record of any other protective order that remained active after October 8, 2008. Therefore, it appears that any contact Gleaves had with Arreola after that date would not have violated a protective order. The trial court erred in finding otherwise.

2.

Gleaves contends the trial court erred in failing to find a mitigating circumstance. Specifically, he contends the trial court erred in failing to find as a mitigator that Arreola induced or facilitated the offense. *See* Ind. Code Ann. § 35-38-1-7.1(b)(3) (West, Westlaw through 2009 1st Special Sess.).

Determining mitigating circumstances is within the discretion of the trial court. *Corbett v. State*, 764 N.E.2d 622 (Ind. 2002). A trial court does not err in failing to find mitigation when a mitigation claim is "highly disputable in nature, weight, or significance."

Smith v. State, 670 N.E.2d 7, 8 (Ind. 1996). We further observe that the trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. *Corbett v. State*, 764 N.E.2d 622. Nor is the trial court required to give the same weight to proffered mitigating factors as the defendant does. *Id*. Additionally, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. *Id*. The failure to find mitigating circumstances that are clearly supported by the record, however, may imply that they were overlooked and not properly considered. *Id*. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Id*.

The trial court here failed to find as a significant mitigator that Arreola induced or facilitated the offense. The evidence revealed that Gleaves had on numerous occasions violated this and previous protective orders concerning Arreola. Gleaves's testimony at the hearing reflected that he downplayed the significance of his serial offenses and even sought to blame Arreola for his transgressions. We believe it is this, i.e., Gleaves's failure to take responsibility for his actions and instead to blame the victim, that caused the court to remark, "I'm offended by what I saw happen in this courtroom today[.]" *Transcript* at 30. Moreover, the court appears to have explained its rationale for rejecting this proposed mitigator, as reflected in the following: "It's no justification whatsoever that she invites you over. None whatsoever. If you accept those invitations, if you do that, you can go to prison for two and a half years." *Id*. at 31. We believe the trial court was placing the onus for violating the orders squarely where it belonged – upon Gleaves. Thus, we cannot say that the failure to find as a

significant mitigator that Arreola induced or facilitated the offense was an abuse of discretion.

Finally, we note that Gleaves appends at the end of his argument on this issue the claim that his sentence is inappropriate. His entire argument on this point consists of the following sentence: "Gleaves [sic] sentence is inappropriate in light of the nature of the offense and Arreola's complicity and inducement of Gleaves to violate the protective order." *Appellant's Brief* at 6. This claim seems to be premised primarily on the anticipated impact upon the sentence of a mitigator he claims was improperly rejected[3] – a trial court decision that we have affirmed. Of course, any argument that builds upon the failed mitigator argument must also fail.

We have decided the trial court improperly cited as an aggravator that Gleaves violated what was, in fact, a nonexistent protective order. In our view, this aggravator was not significant. The court cited Gleaves's "significant history of criminal or delinquent activity", *Transcript* at 29, which included among other things a history of repeated violations of protective orders pertaining to this particular victim. The court's most pointed comments, however, were directed at Gleaves's apparent lack of remorse and attempt to place the blame for his behavior upon the victim. Indeed, Gleaves's statement to the court just prior to sentencing was replete with accusations that Arreola had lied to the court (e.g., "[a] lot of the things that she just sat up there and said was lies", *id.* at 28), that he had not

[3] *See Appellant's Brief* at 6 ("Arreola's act of inviting Gleaves to … move into her home, is clear evidence of her facilitation of Gleaves [sic] violation of the protective order. … [These events] occurred one … day short of the expiration of the protective order. These factors are unquestionably significant to [Gleaves's] sentence").

threatened nor touched her on several occasions when she accused him of battery, that she had lured him to her house before calling the police on him. Gleaves does not challenge the finding regarding his criminal and juvenile delinquent history. Gleaves's diatribe against Arreola and his protestations of innocence, both of which were found as aggravating by the trial court also still stand as aggravators. Finally on this point, even dismissing the erroneously found violations, there remain numerous other violations of protective orders with respect to this victim. In short, even without the improper aggravator, the sentence imposed by the trial court is not inappropriate.

3.

Gleaves contends the sentence imposed by the trial court violates the terms of the plea agreement. The language of the plea agreement reflects otherwise. Gleaves claims his sentence violated the sentencing terms to which the parties agreed in the plea agreement, as follows:

> The State's recommendation provided for less than the advisory sentence. The plea agreement does not limit the 180 days to executed time. Nor does it specifically provide for probation. Given that a cap of 180 days was recommended, as defined by statute, the Court was limited to sentencing Gleaves to one (1) year and order [sic] that 180 days of that sentence be executed and the balance suspended and served on probation or in some other fashion. At the very least the guilty plea is ambiguous and, as such, should strictly [sic] construed against its drafter, the state [sic].

Appellant's Brief at 9. Essentially, Gleaves contends that the sentence imposed must be limited to no more than one year, with only 180 days executed because the plea agreement called for "A cap of 180 days in the Department of Corrections, open to argument as to amount of time and placement." *Appellant's Appendix* at 51.

In support of this claim, Gleaves cites *Valenzuela v. State,* 898 N.E.2d 480 (Ind. Ct. App. 2008), *trans. denied*. In *Valenzuela*, the defendant had entered into a plea agreement whose sentencing term was as follows: "Cap of Thirty Five Years (35)." *Id*. at 483. The trial court sentenced the defendant to 45 years with 32 years executed. Valenzuela claimed that this sentence violated the terms of the plea agreement because it exceeded the term to which the parties had agreed. The State responded that the plea agreement was ambiguous and should be construed to mean that the thirty-five-year cap recommended by the State applied only to the executed portion of the sentence. We rejected the State's argument that the sentencing term could be construed as the State urged, and even rejected the claim that this term of the plea agreement was ambiguous in the first place. We explained: "'Cap' means just that – it is a cap on the sentence the trial court could impose on Valenzuela. And the cap here was thirty-five years. Having exceeded that cap by imposing a forty-five-year sentence, the trial court improperly exceeded the plain terms of Valenzuela's plea agreement." *Id*.

In the instant case, however, the sentencing term of the agreement went beyond setting merely a general cap, as was the case in *Valenzuela*. Instead, Gleaves's plea agreement set a "cap of 180 days *in the Department of Corrections*[.]" *Appellant's Appendix* at 51 (emphasis supplied). Citing *Valenzuela*, Gleaves contends this language plainly refers to the total sentence, not just the executed portion thereof. In the alternative, Gleaves contends that even if it is deemed ambiguous, the ambiguity must be construed against the drafter, in this case the State. We agree with Gleaves that the language in question is not ambiguous, but we reject his interpretation. By adding the phrase, "in the Department of Corrections", we

conclude that the plea agreement was referring to executed time, which of course would be served "in" a Department of Correction facility. The same result would ensue even if we deemed this provision to be ambiguous.

When construing contract language we avoid if possible an interpretation that would render any words, phrases, or terms ineffective or meaningless. *Ten Cate Enbi, Inc. v. Metz,* 802 N.E.2d 977 (Ind. Ct. App. 2004). "'Courts should presume that all provisions included in a contract are there for a purpose[.]'" *Id.* at 981 (quoting *Indiana Gaming Co., L.P. v. Blevins*, 724 N.E.2d 274, 278 (Ind. Ct. App. 2000), *trans. denied*). To construe the language in question so as to bring this plea agreement within the ambit of the *Valenzuela* holding would effectively render meaningless the phrase, "in the Department of Corrections". Moreover, we note that the presentence investigation report recommended a sentence of 2 years, with 180 days executed. We can find no place in the record where Gleaves argued that the probation department's recommendation ran afoul of the plea agreement. Similarly, the State argued at the sentencing hearing that Gleaves should receive the maximum 180-day cap set out in the plea agreement, and in addition "that [Gleaves] then be put on probation for the suspended time with whatever treatment recommendation programs the Court feels appropriate." *Transcript* at 27. The "suspended time" mentioned here can only have referred to a sentence imposed in the instant case in excess of the 180-day executed sentence. Again, Gleaves's counsel offered no objection on the basis that the plea agreement did not permit it. It thus appears that the parties understood "in the Department of Corrections" as a reference to executed time served in a Department of Correction facility. The imposition of a

suspended sentence in addition to the 180-day executed sentence did not violate the terms of the plea agreement.

Judgment affirmed.

NAJAM, J., and BRADFORD, J., concur.