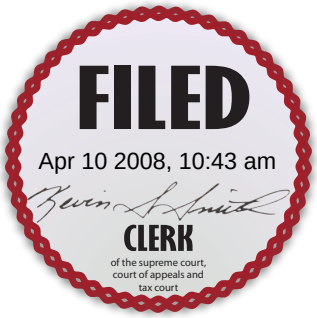

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IN THE COURT OF APPEALS OF INDIANA

JOSHUA B. SMITH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 05A02-0709-CR-783
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BLACKFORD CIRCUIT COURT
The Honorable Dean A. Young, Judge
Cause No. 05C01-0611-FB-49

April 10, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Following his plea of guilty to robbery as a Class B felony, Joshua B. Smith appeals his above-advisory sentence of twenty years. Specifically, he contends that the trial court erred in identifying as an aggravator a charge that was dismissed pursuant to the plea agreement in this case and in failing to identify as mitigators his drug addiction, the hardship to his dependents, and his guilty plea. In addition, Smith contends that his sentence is inappropriate. Although the trial court did not abuse its discretion in failing to identify the three mitigators, the court did abuse its discretion in finding the dismissed charge as an aggravator. Nevertheless, because we can say with confidence that the trial court would have imposed the same sentence had it not considered the improper aggravator, we affirm Smith's sentence. In addition, in light of the fact that Smith's extensive criminal history appears to be escalating in both frequency and severity and that he has not yet sought treatment for his lifelong drug abuse, we conclude that his sentence is not inappropriate.

Facts and Procedural History

In the early morning hours of October 31, 2006, Smith, while armed with a large knife and wearing a mask, entered the Village Pantry store in Hartford City, Indiana, confined the clerk behind the counter, and demanded money from the cash register.[1]

[1] We do not have the transcript from Smith's guilty plea hearing, where the State presented the factual basis for the robbery conviction. At the sentencing hearing, Smith testified that at the guilty plea hearing he agreed to the statements made in the charging information. In his appellant's brief, Smith cites to the police report for his facts. We rely on both documents for our facts.

In addition, we note that Smith included a copy of the presentence investigation report on white paper in his appendix. *See* Appellant's App. p. 11-20. We remind Smith that Indiana Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with HTrial Rule 5(G)H." Administrative Rule 9(G)(1)(b)(viii) states that "[a]ll pre-sentence reports pursuant to Ind. Code § 35-38-1-13" are "excluded from public access"

Smith took the money, which appears to be less than $100, and fled. Thereafter, the State charged Smith with robbery as a Class B felony, criminal confinement as a Class B felony, and theft as a Class D felony.

In July 2007, Smith pled guilty to robbery as a Class B felony. In exchange, the State dismissed the remaining charges in this case as well as all charges pending under two separate cause numbers in Blackford Superior Court (one of which was maintaining a common nuisance). In addition, the plea agreement provided that Smith's sentence in this case would run concurrently with any sentence imposed on Smith under yet another cause number in Delaware Circuit Court for Class B felony robbery. All other terms of Smith's sentence were "left to the discretion of the Court." Appellant's App. p. 125. A sentencing hearing was held in August 2007, following which the trial court identified the following aggravators: (1) Smith has a lengthy juvenile history, including wardship to the Department of Correction; (2) Smith has a lengthy criminal history, which consists primarily of misdemeanors; however, Smith did not successfully complete any term of probation imposed upon him for these misdemeanors; (3) Smith pled guilty to Class B felony robbery in Delaware Circuit Court; (4) Smith has a history of drug abuse and "there was pending in the Blackford Superior Court a class 'D' felony charge of Maintaining a Common Nuisance"; and (5) the nature of the offense, "including

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and "confidential." The inclusion of the presentence investigation report printed on white paper in his appellant's appendix is inconsistent with Trial Rule 5(G), which states, in pertinent part:

> Every document filed in a case shall separately identify information excluded from public access pursuant to Admin. R. 9(G)(1) as follows:
>
> > (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked "Not for Public Access" or "Confidential."

confinement of the victim, supports imposition of an executed sentence and the aggravation of the advisory sentence in this cause." *Id.* at 112. The trial court did not identify any mitigators and sentenced Smith to twenty years. Smith now appeals his sentence.

Discussion and Decision

Smith raises three issues on appeal. First, he contends that the trial court erred in identifying as an aggravator that he was charged with maintaining a common nuisance because that charge was dismissed pursuant to the plea agreement in this case. Second, he contends that the trial court erred in failing to identify as mitigators his drug addiction, the hardship to his dependents, and his guilty plea. Third, he contends that his sentence is inappropriate.

I. Aggravator and Mitigators

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only 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 (Ind. 2007). 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. *Id.* There are several ways a trial court may abuse its discretion. *Id.* Two of these ways are (1) the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration and (2) the reasons given are improper as a matter of law. *Id.* at 491. Under these 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. *Id.*

First, Smith contends that the trial court erred in identifying as an aggravator that he was charged with maintaining a common nuisance because that charge was dismissed pursuant to the plea agreement in this case. "If a trial court accepts a plea agreement under which the State agrees to drop or not file charges, and then uses facts that give rise to those charges to enhance a sentence, it in effect circumvents the plea agreement." *Roney v. State*, 872 N.E.2d 192, 201 (Ind. Ct. App. 2007), *trans. denied*. Here, the trial court found the following aggravator, "That the defendant has a history of drug abuse as reflected in his prior criminal charges, and there was pending in the Blackford Superior Court a class 'D' felony charge of Maintaining a Common Nuisance." Appellant's App. p. 112. However, maintaining a common nuisance was one of the charges that the State agreed to dismiss pursuant to the plea agreement in this case. Accordingly, we conclude that the trial court abused its discretion by finding this dismissed charge as an aggravating circumstance.

Nevertheless, we do not need to remand for resentencing because we can say with confidence that the trial court would have imposed the same sentence had it not considered the dismissed charge of maintaining a common nuisance. That is, the trial court relied on the charge as an example of Smith's drug abuse. However, there is plenty of other evidence in the record of Smith's lifelong drug abuse without referencing this charge. In addition, the trial court found four other aggravators, which Smith does not challenge.

Next, Smith contends that the trial court erred in failing to identify three mitigators. First, he argues that the trial court should have considered his drug abuse as a mitigator. Smith testified at the sentencing hearing that he was under the influence of several drugs at the time of the robbery, that he had a substance abuse problem, and that his drug problem was contributing to his legal problems. Smith told the court that he needed drug counseling and treatment so that he could "get out of the clouds." Tr. p. 10. According to the PSI, Smith, who was twenty-six years old at the time of the robbery, began consuming alcohol at age three, marijuana at age seven, pills at age twelve, cocaine at age fourteen, LSD at age fifteen, and methamphetamine as an adult. However, Smith had never sought any substance abuse treatment. Smith's drug abuse may not only not be considered as a mitigating factor but was properly considered here as an aggravating factor. *See Roney*, 872 N.E.2d at 199 ("A history of substance abuse may constitute a valid aggravating factor."). The trial court did not abuse its discretion in failing to find Smith's drug abuse as a mitigator.

Second, Smith argues that the trial court erred in failing to identify the undue hardship to his dependents as a mitigator. Smith testified at the sentencing hearing that he has two children and that the mother of one of his children was recently diagnosed with a terminal illness. However, we note that jail is always a hardship on dependents. *Vazquez v. State*, 839 N.E.2d 1229, 1234 (Ind. Ct. App. 2005), *trans. denied*. "Many persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship." *Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999). Although the

mother of one of Smith's children may indeed have a terminal illness, Smith has failed to demonstrate the degree to which his children rely upon him for support. *See Roney*, 872 N.E.2d at 205. Smith points to no evidence in the record that he even supported his children. The PSI reflects that Smith's last job was in 2003-2004, but he quit because he was "too high or drunk, or just couldn't be around people at the time." Appellant's App. p. 17. The trial court did not abuse its discretion in not finding undue hardship to be a mitigating factor.

Finally, Smith argues that the trial court erred in failing to identify his guilty plea as a mitigator. The Indiana Supreme Court has held that "a defendant who pleads guilty deserves 'some' mitigating weight to be given to the plea in return." *Anglemyer*, 875 N.E.2d at 220 (citing *McElroy v. State*, 865 N.E.2d 584, 591 (Ind. 2007)). The caveat, however, is that "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." *Id.* at 220-21. "[T]he significance of a guilty plea as a mitigating factor varies from case to case," and "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." *Id.* at 221 (citations omitted). Here, the record reveals that Smith received a substantial benefit from his guilty plea in that the State dismissed the two felony charges related to this incident and multiple charges under two other cause numbers. In addition, the plea agreement provided that the sentence in this case would run concurrently to Smith's robbery sentence in Delaware County. We do not find that

Smith's guilty plea is a substantial mitigating circumstance such that remand or revision is warranted.

II. Inappropriate Sentence

Smith contends that his twenty-year sentence is inappropriate. Although a trial court may have acted within its lawful discretion in imposing a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a court "may revise 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." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer*, 868 N.E.2d at 491). The burden is on the defendant to persuade us that his sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

The Indiana Supreme Court recently reiterated in *Reid* that "[t]he maximum possible sentences are generally most appropriate for the worst offenders." *Id.* Here, Smith's offense is for Class B felony robbery, for which the sentencing range is six to twenty years, with the advisory sentence being ten years. Ind. Code § 35-50-2-5. Smith received the maximum possible sentence. As for the nature of the offense, Smith—while under the influence of multiple illegal substances, armed with a large knife, and wearing a mask—robbed a Village Pantry store in the early morning hours. As for Smith's character, he has an extensive criminal history, which appears to be escalating in both frequency and severity. Between 1996 and 2007, Smith was adjudicated a delinquent

child on three separate occasions and was convicted of eight misdemeanors as an adult. In addition, the State filed numerous petitions to revoke Smith's probation. Finally, Smith's criminal history is rounded out by the Class B felony robbery in this case, which occurred in close proximity to the Class B felony robbery in Delaware County, for which he was sentenced to twelve years. In addition, Smith has a lifelong drug problem for which he has yet to seek any treatment, and he has not been employed since 2003-2004. When responding to Smith's claim that he did not clearly remember committing the robbery in this case because he was so intoxicated, the trial court succinctly stated, "[this] means, Mr. Smith, that you're remaining free is a very scary proposition for everybody." Tr. p. 15. Although Smith pled guilty in this case, the State dismissed numerous other charges pending against him. Given Smith's escalating criminal history and untreated drug abuse, Smith has failed to persuade us that his twenty-year sentence is inappropriate.

Affirmed.

SHARPNACK, J., and BARNES, J., concur.