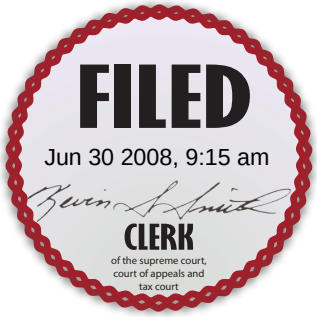

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IN THE
COURT OF APPEALS OF INDIANA

RODNEY B. ARMOUR, SR.	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0801-CR-32
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0703-FD-195

June 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Rodney B. Armour, Sr., appeals his convictions and sentence. We find no error in the admission of evidence seized pursuant to Armour's lawful arrest for public intoxication. Neither is his three-year sentence for a Class D felony inappropriate in light of his twenty-one prior convictions. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

At 8:30 p.m. on March 1, 2007, Fort Wayne Police Officer George Nicklow was on patrol in his marked squad car. As Officer Nicklow drove northbound on Oliver Street, he encountered Armour walking northbound in the middle of the street. Oliver Street has a sidewalk on both sides. Armour's "balance appeared to be off and he swayed a bit when he walked." (Tr. at 9.) Officer Nicklow approached Armour and immediately noticed he smelled of alcohol. Armour reported he had been drinking beer. Officer Nicklow offered a portable breath test, which revealed the presence of alcohol, and he arrested Armour for public intoxication. A search incident to the arrest uncovered cocaine, marijuana, and two metal pipes, which the officer believed were crack pipes.

The State charged Armour with Class D felony possession of cocaine,[1] Class D felony possession of marijuana,[2] Class A misdemeanor possession of paraphernalia,[3] and Class B misdemeanor public intoxication.[4] Armour objected to the admission of the cocaine, marijuana and pipes on the ground his arrest was unlawful. The court found the search occurred incident to Armour's lawful arrest for public intoxication, overruled

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[1] Ind. Code § 35-48-4-6.
[2] Ind. Code § 35-48-4-11.
[3] Ind. Code § 35-48-4-8.3.
[4] Ind. Code § 7.1-5-1-3.

Armour's objection, admitted the evidence, and found Armour guilty of public intoxication, possession of marijuana, and possession of cocaine.

At sentencing the court found Armour's criminal history, including sixteen misdemeanor convictions and five felony convictions, an aggravator. The court rejected Armour's age and non-violence as proposed mitigators. The court imposed concurrent sentences of three years for each possession conviction and ninety days for public intoxication.

DISCUSSION AND DECISION

1. Admission of Evidence

Trial courts enjoy broad discretion in ruling on the admission of evidence. *Vasquez v. State*, 868 N.E.2d 473, 476 (Ind. 2007). We will reverse the court's decision only for an abuse of discretion. *Id.* An abuse of discretion occurs if the court's decision was "clearly against the logic and effect of the facts and circumstances" before the court. *Datzek v. State*, 838 N.E.2d 1149, 1154 (Ind. Ct. App. 2005), *reh'g denied*, *trans. denied* 855 N.E.2d 1006 (Ind. 2006).

Armour alleges his detention and search violated our federal and state constitutions because there was no warrant for his arrest or search and no probable cause to believe he had committed a crime. We cannot agree.

"A search incident to arrest is a well-recognized exception to the Fourth Amendment's warrant requirement." *Black v. State*, 810 N.E.2d 713, 715 (Ind. 2004). "It is a Class B misdemeanor for a person to be in a public place or a place of public resort in a state of intoxication caused by the person's use of alcohol or a controlled

substance." Ind. Code § 7.1-5-1-3. Accordingly, public intoxication justifies arrest without a warrant. *Doench v. State*, 168 N.E. 494, 90 Ind. App. 609 (1929).

> Probable cause to arrest exists where the officer has knowledge of facts and circumstances that would warrant a man of reasonable caution to believe that a suspect has committed the criminal act in question. Under the search-incident-to-arrest exception to the warrant requirement, a police officer may conduct a search of the defendant's person and the area within his control.

Sebastian v. State, 726 N.E.2d 827, 830 (Ind. Ct. App. 2000), *trans. denied* 735 N.E.2d 235 (Ind. 2000).

Armour was walking northbound in the middle of a north-south street that had sidewalks on each side.[5] Officer Nicklow testified he would have struck Armour with his car had he not stopped. Armour's "balance appeared to be off and he swayed a bit when he walked." (Tr. at 9.) Armour smelled of alcohol and admitted drinking beer. This evidence is sufficient to "warrant a man of reasonable caution to believe" Armour was intoxicated in public. *See*, *e.g.*, *Gamble v. State*, 591 N.E.2d 142, 143 (Ind. Ct. App. 1992) (evidence sufficient for conviction of public intoxication where defendant smelled of alcohol, had slurred speech, and became boisterous and fought with police); *Atkins v. State*, 451 N.E.2d 55, 57 (Ind. Ct. App. 1983) (evidence was sufficient for conviction where defendant "was unsteady on her feet, had an alcoholic odor . . . , and was arrested

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[5] Although Officer Nicklow did not testify regarding the lighting conditions on Oliver Street, we note he encountered Armour at 8:30 p.m., nearly two hours after sunset, which further suggests Armour's reasoning abilities were impaired. *See* The Old Farmer's Almanac, *available* at http://www.almanac.com/rise/results.php?month=3&day=1&year=2007&zipcode=46801&searchtype=zip&place=Fort+Wayne&state=IN&usamap_x=&usamap_y=&timezone=0&what%5B%5D=Sun&what%5B%5D=Moon (last visited on June 3, 2008) (reporting 6:32 p.m. sunset in Fort Wayne, Indiana, on March 1, 2007).

due to her condition and actions at the scene").

Armour nevertheless argues the officer could not have had probable cause to arrest him for public intoxication under Ind. Code § 9-13-2-131, which provides "prima facie evidence of intoxication includes evidence that at the time of an alleged violation the person had an alcohol concentration equivalent to at least .08 of a gram of alcohol per 210 liters of a person's breath," and Ind. Code § 9-13-2-151, which provides "relevant evidence of intoxication includes evidence that at the time of the alleged violation a person had an alcohol concentration equivalent to at least .05 of a gram, but less than .08 of a gram of alcohol per 210 liters of the person's breath." We do not find those statutes controlling for two reasons.

First, those definitions apply to Title 9 of the Indiana Code. *See* Ind. Code § 9-13-1-1 ("Except as otherwise provided, the definitions in this article apply throughout this title."). The public intoxication statute under which Armour was arrested is found in Title 7.1.

Second, the legislature defined public intoxication to include intoxication caused by "the person's use of alcohol *or* a controlled substance." Ind. Code § 7.1-5-1-3 (emphasis added). The statute explicitly permits conviction based on consumption of controlled substances only, and we decline Armour's invitation to graft onto the statute a requirement of a minimum level of alcohol in a person's blood or breath. *See*, *e.g.*, *Miller v. State*, 641 N.E.2d 64, 69 (Ind. Ct. App. 1994) (Title 9 definition[6] of intoxication

[6] At that time, Ind. Code § 9-13-2-86 (1992) provided:

"does not require proof of a blood alcohol content," only that "defendant was impaired, regardless of his blood alcohol content."), *trans. denied* (Ind. 1995).

Because there was probable cause to arrest Armour for public intoxication, the evidence seized during the search pursuant to his arrest was admissible at trial. Accordingly, we affirm Armour's convictions.

2. Sentencing

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 on other grounds* 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.* (*quoting K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2005)).

Armour argues the court did not find mitigators supported by the record. We review a trial court's finding of aggravators and mitigators for an abuse of discretion. *Id.* An abuse of discretion occurs if "the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration." *Id.* at 491.

Intoxicated means under the influence of: (1) alcohol; (2) a controlled substance (as defined in IC 35-48-1); (3) a drug other than alcohol or a controlled substance; or (4) a combination of alcohol, controlled substances, or drugs; so that there is an impaired condition of thought and action and the loss of normal control of a person's faculties.

The trial court explicitly rejected two of Armour's alleged mitigators:

> You've indicated that your . . . record is non-violent. I beg to differ. I consider Assault and Battery and Resisting Law Enforcement of which you have several, to be crimes of violence. Your attorney has asked that I consider as a mitigating circumstance, your age being fifty-six (56), I'm not sure why that would be a mitigating circumstance, you're clearly old enough to know better Mr. Armour. You've been in the system most of your life. The Court would find that the aggravating circumstance of your extensive and long standing criminal record outweighs the fact that you're fifty-six (56) years of age.

(Sentencing Tr. at 9-10.) We find no abuse of discretion in the rejection thereof.

Armour offered only one other mitigator, his drug addiction, and the court did not abuse its discretion in declining to find that a significant mitigator. *See James v. State*, 643 N.E.2d 321, 323 (Ind. 1994) (trial court not required to consider substance abuse a mitigating circumstance); *see also Iddings v. State*, 772 N.E.2d 1006, 1018 (Ind. Ct. App. 2002) (substance abuse can be aggravator), *trans. denied* 783 N.E.2d 700 (Ind. 2002). Armour's criminal history includes ten prior convictions of drug crimes. Armour reported twice completing drug treatment, but he has not maintained sobriety.

Armour also asserts his three-year sentence for a Class D felony is inappropriate.

> Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review of a sentence imposed by the trial court." This appellate authority is implemented through Appellate Rule 7(B), which provides that the "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."

Anglemyer, 868 N.E.2d at 491 (citations omitted). We give deference to the trial court's decision, recognizing its special expertise in making sentencing decisions. *Barber v.*

State, 863 N.E.2d 1199, 1208 (Ind. Ct. App. 2007), *trans. denied* 878 N.E.2d 208 (Ind. 2007). The defendant bears the burden of persuading us the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

Armour was walking intoxicated in the street with marijuana and cocaine in his pocket. In the thirty-six years prior to these crimes, Armour had been convicted of five felonies and sixteen misdemeanors. Ten convictions were drug crimes, three were resisting law enforcement, and three were battery convictions. Twice his probation was revoked. A mere month before he committed these crimes, Armour was found guilty of Class C misdemeanor possession of paraphernalia and ordered to serve thirty days in jail.

While maximum sentences "should be reserved for the worst offenders and offenses," *Newsome v. State*, 797 N.E.2d 293, 302 (Ind. Ct. App. 2003), *trans. denied* 812 N.E.2d 792 (Ind. 2004), we see no error in the court's assignment of concurrent three-year maximum sentences for two Class D felony convictions for possession of illegal drugs by a man whose criminal history suggests he has not learned, or does not care to learn, from the court's prior sentences.

Affirmed.

VAIDIK, J., and MATHIAS, J., concur.