ATTORNEY FOR APPELLANT:

CHRIS P. FRAZIER
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

THOMAS D. PERKINS
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

GREG TRIBBY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0712-CR-1080
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge
Cause No. 49G03-0609-FA-179413

July 15, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Greg Tribby appeals his sentence for two counts of class B felony attempted carjacking.[1]

We affirm.

ISSUE

Whether the trial court erred in sentencing Tribby.

FACTS

On the evening of September 19, 2006, Yolanda Lee was driving her vehicle near an Indianapolis shopping center. As Lee approached a stop sign, Tribby stepped in front of Lee's vehicle and pointed a loaded semi-automatic handgun at her. Lee put her vehicle in reverse gear and backed up the vehicle, escaping Tribby. Tribby then pointed his gun at Joseph Allen as Allen approached the same stop sign in his vehicle. Allen escaped Tribby by running the stop sign.

Shortly thereafter, Deputy John Miller, Jr. of the Marion County Sheriff's Department received a report of a man walking toward a shopping center with a gun. Once at the shopping center, Deputy Miller spoke with Lee and Allen, who informed Deputy Miller about their encounters with Tribby and gave Deputy Miller a description of Tribby. Deputy Miller radioed a description of Tribby and waited for additional officers to arrive on the scene.

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[1] Ind. Code §§ 35-41-5-1; 35-42-5-2.

Upon his arrival at the scene, Deputy Jason Holland conducted a search of the area and observed Tribby leaving a construction area. As Deputy Holland approached him, Tribby entered a nearby business. Once inside the business, an armed Tribby confronted an employee, who ran toward the back of the building. Deputies Miller and Holland followed Tribby into the business, identified themselves as officers, and twice ordered Tribby to drop his gun. Tribby then turned toward the officers with his arm fully extended. As Tribby pointed his gun at the officers, Deputy Miller fired his service weapon, disarming and wounding Tribby.

On September 25, 2006, the State charged Tribby with Counts 1 and 2, class A felony attempted murder; Counts 3 and 4, class D felony pointing a firearm; Counts 5 and 6, class D felony criminal recklessness; Count 7, resisting law enforcement, as a class D felony; Count 8, resisting law enforcement, as a class A misdemeanor; and Count 9, carrying a handgun without a license, as a class A misdemeanor.

In December of 2006 and January of 2007, respectively, Drs. George Parker and Ned Masbaum examined Tribby to determine his competency to stand trial. Dr. Parker found "with reasonable medical certainty that [Tribby] did not have a mental disease or defect at the time of the alleged offenses." (App. 67). Dr. Masbaum also found that Tribby "was of sound mind at the time of the alleged offenses" and had "comprehension sufficient to understand the nature of these proceedings." (App. 71).

On or about September 19, 2007, the State and Tribby entered into a plea agreement, whereby Tribby agreed to plead guilty to two counts of class B felony

attempted carjacking and two counts of class C felony attempted battery. In return, the State agreed to dismiss all remaining counts.

As to Tribby's sentence, the plea agreement provided that the State would recommend an executed sentence of no more than fifteen years for each attempted carjacking charge and an executed sentence of no more than six years for each attempted battery charge. The plea agreement further provided that "[a]ll counts shall run concurrent to each other and the total executed sentence shall not exceed fifteen (15) years." (App. 117) (emphasis omitted). The plea agreement also provided that "[i]t is further agreed that the sentence recommended and/or imposed is the appropriate sentence to be served pursuant to this agreement . . . ." (App. 117).

On October 3, 2007, the State filed an amended information, adding the following counts: Counts 10 and 11, class B felony attempted carjacking; and Counts 12 and 13, class C felony attempted battery. Also on October 3, 2007, the State filed a motion to dismiss Counts 1 through 9, which the trial court granted.

The trial court accepted the plea agreement and ordered a pre-sentence investigation report ("PSI"). According to the PSI, Tribby had a conviction in Arizona for misdemeanor assault in 2000, for which he received and completed one year of probation; Tribby also had a conviction in Florida for loitering in 1970.

The trial court held a sentencing hearing on November 7, 2007. During the hearing, Tribby admitted that the gun he was carrying on September 19, 2006, was loaded. Tribby also admitted that prior to going to the shopping center, he had fired

numerous rounds of bullets through his apartment's patio door and had to reload his gun before leaving his apartment to go to the shopping center.

Lieutenant Kevin Kelly of the Marion County Sheriff's Department testified that when he arrived at the scene after Deputy Miller shot Tribby, he discovered that "there was one round actually in the firing chamber" of Tribby's gun and that "the hammer was cocked back." (Tr. 63). Tribby's gun also had in it a cartridge with "a fourteen or fifteen round magazine capacity." *Id.* Thus, Tribby's gun "was fully loaded, fully operational." *Id.* Lieutenant Kelly also observed approximately twenty-five "military style ammo pouches," with "approximately two fully loaded magazine pouches in each one of those . . . ." *Id.* Each magazine had approximately fourteen or fifteen rounds. Lieutenant Kelly testified that Deputies Miller and Holland had "indicated that [Tribby] had on these ammo pouches strapped on his belt and strapped onto his clothing." (Tr. 64).

Regarding his prior misdemeanor battery conviction, Tribby acknowledged that the conviction was for "domestic violence . . . ." (Tr. 53). Tribby also admitted that when officers arrested him in 2000, they discovered loaded guns in his room.

Tribby testified that he had been suffering from numerous illnesses, including fibromyalgia, and throat cancer—now in remission. Tribby had been taking "[m]ethadone for the pain" for the past fifteen years. (Tr. 46). Tribby testified that he committed his current offenses after his doctor discontinued his methadone, which allegedly "threw [him] into withdrawal . . . ." (Tr. 47). According to Tribby, he had been admitted to a local hospital's drug-detoxification program but "decided to leave" after three days. (Tr. 56).

Tribby admitted that he was disappointed when officers were not called to his apartment after he fired his gun. Tribby conceded that by his actions that day, he was attempting "suicide by cop[.]" (Tr. 58).

The trial court found Tribby's guilty plea to be a mitigating circumstance, though not a significant mitigating circumstance as Tribby received a significant benefit in return for his plea. The trial court also found Tribby's expression of remorse to be a mitigator, though not a significant one. As to Tribby's criminal history, the trial court did not give it significant weight as an aggravating circumstance; also, the trial court did not find Tribby's lack of serious prior convictions to be a significant mitigator as his battery conviction was for an offense against a person and Tribby possessed guns at the time. The trial court continued its statement as follows:

> What the Court has considered and given significant weight as an aggravating circumstance is the nature and circumstances of this particular offense. It was clear that you were on your own little path of destruction that day and you were very well prepared to take out anyone who came into your path if they got in your way. . . . [Y]ou had a great deal of time to plan it and think about it and implement it that day. You put four different people at great risk and in great fear on that day and it is the multiple victims of your case that I find to be the most significant aggravating circumstance. As far as your risk to commit this offense again and your danger to the community, it is the Court's opinion that you are extremely dangerous and extremely at risk to do just this type of thing again because instead of taking control of your life and getting it in order, you let things get to the point where this is how you respond and then you try to excuse it away by saying, "well, I was sick, I've got all these illnesses going on or I have this mental issue of depression." Well, if you read the reports about you, and I've read them all more than once, the [PSI], Dr. Parker's report, Dr. Masbaum's report, many of the problems that you declare to be issues that cause you to do things are problems you brought on yourself. The drinking, which lead [sic] to the drug use, which led to the need to go to detox, which led to you leaving detox before you should have which then follows our offense, all of those things you created yourself. And it's not

> just the situation you got in over your head in a year or two of time and you got so involved in these drugs and you didn't know how to handle things, we are talking about multiple years, up to twenty years, of this consistent drug use, in and out of different types of drugs and getting more serious and so bad that you can't even get enough to fulfill your habit. That's all your doing and you shouldn't be rewarded for it by having that considered as a circumstance that should reduce your sentence when you committed the type of crime you committed on these people on that day. Because of that, I find the aggravating circumstances due [sic] outweigh the mitigating circumstances in your case . . . .

(Tr. 81-83). The trial court sentenced Tribby to fifteen years for each count of class B felony attempted carjacking and six years for each count of class C felony attempted battery, to be served concurrently. Thus, Tribby received a total executed sentence of fifteen years.

DECISION

Tribby asserts that the trial court erred in sentencing him. Specifically, Tribby argues that the trial court either overlooked several mitigators or failed to assign them proper weight. Tribby also argues that his executed sentence of fifteen years is inappropriate.

1. Mitigating Circumstances

Tribby asserts that the trial court ignored several mitigating circumstances in sentencing him. Namely, Tribby contends that the following factors

> require a lesser sentence than the fifteen-year sentence pronounced by the trial court: his plea of guilty, his statement of remorse at sentencing, the fact that no one was injured but himself in this incident, the fact that the circumstances of this offense were unlikely to recur, his lack of prior criminal history (with the exception of two older misdemeanor offenses), and most importantly his mental and physical problems at the time of the offense.

Tribby's Br. at 9.

In *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007), the Indiana Supreme Court determined that trial courts are required to enter a sentencing statement whenever imposing sentence for a felony offense. 868 N.E.2d at 490. "[T]he statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence." *Id.* If the trial court finds 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.*

A sentence that is within the statutory range is subject to review only for an abuse of discretion. *Id.* One way in which a trial court may abuse its discretion is if the sentencing statement "omits reasons for imposing a sentence that are clearly supported by the record and advanced for consideration . . . ." *Id.* at 490-91. A trial court, however, "no longer has any obligation to 'weigh' aggravating and mitigating factors against each other when imposing a sentence," and therefore, "can not now be said to have abused its discretion in failing to 'properly weigh' such factors." *Id.* at 491.

In this case, the trial court's sentencing statement identified Tribby's proffered mitigating circumstances. Specifically, it found Tribby's guilty plea and remorse to be mitigating circumstances, though not a significant factor. The trial court rejected as a mitigator that the offense is one unlikely to recur. The trial court also considered, but rejected as mitigating circumstances, Tribby's mental health and physical ailments. The trial court did not find Tribby's criminal history to be a mitigating circumstance; rather, it

found his prior conviction for battery to be an aggravating circumstance, though not a significant one.

Thus, the record clearly shows that the trial court considered Tribby's proffered mitigating circumstances and explained why it considered each circumstance to be either an aggravating or mitigating circumstance. As to the weight assigned to the mitigating circumstances, it is not subject to review for abuse of discretion. *See Anglemyer*, 868 N.E.2d at 490. Thus, we find no error.

2. Inappropriate Sentence

Tribby also asserts that his executed sentence of fifteen years is inappropriate.[2] We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). It is the defendant's burden to "'persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.'" *Anglemyer*, 868 N.E.2d at 494 (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

In determining whether a sentence is inappropriate, the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Childress*, 848 N.E.2d at 1081. The advisory sentence for a class B felony is ten years. I.C. § 35-50-2-5.[3] The potential maximum sentence is twenty years. *Id.*

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[2] We note that Tribby's plea agreement provided that "[i]t is further agreed that the sentence recommended and/or imposed is the appropriate sentence to be served pursuant to this agreement . . . ." (App. 117). Nonetheless, we choose to address this issue on its merits.

[3] Indiana's new advisory sentencing scheme, which went into effect on April 25, 2005, applies in this case. Pursuant to Indiana Code section 35-50-2-5, "[a] person who commits a Class B felony shall be

Here, the trial court sentenced Tribby to fifteen years on each class B felony count, to be served concurrently. Accordingly, Tribby did not receive the maximum sentence.

Regarding the nature of his offense, Tribby contends that "[u]nlike many other carjacking offenders, Tribby did not actually seek to gain property from his offense; he only wanted the police to appear and end the misery and pain he was experiencing at the time." Tribby's Br. at 10. We find this argument unpersuasive.

In this case, Tribby fired multiple rounds through his patio door in the hopes that law enforcement officers would arrive and kill him. These actions placed any bystanders at substantial risk of injury or death. When this did not create the desired effect, Tribby reloaded his gun and walked to a nearby shopping center. Tribby then pointed a loaded gun at two bystanders before walking into a business and confronting an employee with his loaded gun. Then, ignoring officers' commands, Tribby turned his loaded gun on the officers, forcing one of the officers to shoot him.

Regarding his character, Tribby maintains that "because of the withdrawal symptoms and his suicidal mental state at the time of the offense, he was not fully aware of what he was doing" and had "suffered depression most of his life." Tribby's Br. at 10. Tribby also argues that "his genuine expression of remorse for what happened during his suicidal period, show[s] that Tribby merited a lesser sentence than he received. *Id.*

We recognize that Tribby suffers from physical ailments and drug addiction. Rather than seeking professional help for his problems, however, Tribby chose to put the

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imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years."

lives of others in danger.[4] We also recognize that Tribby expressed remorse for his offenses. Nevertheless, the nature of his offense weighs heavily against Tribby. Our review of the record does not convince us that Tribby's sentence is inappropriate. Accordingly, we find no abuse of discretion in sentencing Tribby to two fifteen-year concurrent terms.

Affirmed.

NAJAM, J., and BROWN, J., concur.

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[4] We note that Tribby had professional help available to him when he entered a detoxification program; Tribby, however, voluntarily left the program after only three days.