Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

JASON W. BENNETT
Bennett Boehning & Clary, LLP
Lafayette, 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

JERRELL WATKINS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0712-CR-1048
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0611-FA-22

July 25, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Jerrell Watkins appeals his thirty-year sentence for dealing cocaine within 1000 feet of a school, a Class A felony.[1] We affirm, but remand with instruction.

FACTS AND PROCEDURAL HISTORY

In November 2006, police were using Carl Rohland, a drug user, to make connections with drug dealers. On November 20th, an undercover detective called Rohland looking for $100 worth of crack cocaine. When Rohland could not contact the supplier used for the prior two purchases, he called Watkins. The detective and Rohland met Watkins at a Marsh grocery store that is within 1000 feet of two schools. Rohland took the detective's $100 to Watkins' van and came back with crack cocaine. When police stopped Watkins, he was in possession of the marked $100 and a small amount of marijuana.

The State charged Watkins with Class A felony dealing cocaine within 1,000 feet of a school, Class B felony possession of cocaine,[2] Class A felony conspiracy to deal cocaine within 1000 feet of a school,[3] and Class D felony maintaining a common nuisance.[4] A jury found him guilty of all four charges. The court entered convictions and sentences for all four counts, but found concurrent sentences were appropriate because the counts "merge." (App. at 80.) The longest sentence, for dealing in cocaine, was thirty years, with three suspended to probation.

[1] Ind. Code § 35-48-4-1(a), (b)(3)(B)(i).
[2] Ind. Code § 35-48-4-6(a), (b)(2)(B)(i).
[3] Ind. Code §§ 35-41-5-2, 35-48-4-1.
[4] Ind. Code § 35-48-4-13(b)(2)(E).

DISCUSSION AND DECISION

We first address an ambiguity regarding Watkins' sentence. The written order of judgment states:

> The Court finds the aggravating factors outweigh the mitigating factors and sentences the defendant to the Indiana Department of Correction for a period twenty[-]seven (27) years on Count I, ten (10) years on Count II, twenty[-]five (25) years on Count III and one and one half (1 1/2) years on Count IV. The Court finds that Counts II, III, and IV merge with Count I. The Court now finds that twenty[-]seven (27) years of said sentence should be and hereby are ORDERED executed at the Department of Correction followed by three (3) at Tippecanoe County Community Corrections at a level to be determined by them, a [sic] as condition of probation.

(Appellant's Br. at 20.) Similarly, the abstract of judgment provides the sentence for Count I is "Twenty-Seven (27) Years," (*id.* at 22), and:

> The defendant was sentenced to the Indiana Department of Correction for a period twenty seven (27) years on Count I . . . . The Court now finds that twenty[-]seven (27) years of said sentence should be and hereby are ORDERED executed at the Department of Correction followed by three (3) at Tippecanoe County Community Corrections at a level to be determined by them, a[sic] as condition of probation.

(*Id.*)

As Watkins notes, if his sentence is twenty-seven years and he is to serve twenty-seven years executed at the Department of Correction, then there are no additional years of his sentence that could be suspended to probation. Accordingly, the court either meant for his sentence to be thirty years, with twenty-seven executed, or twenty-seven years, with twenty-four executed.

At the sentencing hearing, the court said:

> [W]hen I put everything together *I'm at the presumption of thirty years.* I think *I am at the presumption and I'm inclined to give him that. . . .* On

> count one, uh, I am going to give him twenty[-]five years---I'm sorry, twenty[-]seven years at the Department of Corrections [sic] followed by three years at Tippecanoe County Corrections at a level to be determined for---and the three years at Tippecanoe County Community Corrections would be a condition of probation. . . . And so, that's what I'm inclined to give him. . . . *it's hard for me to sentence him above the presumption at his level of involvement and circumstances, it's hard for me to give him less than the presumption.* . . . I am going to go ahead and enter judgment I was inclined to enter. . . . So you've got twenty[-]seven years at the DOC on count one with three years at Tippecanoe County Community Corrections at a level to be determined. . . . I'm sorry, make it twenty[-]seven years. I'm making it twenty[-]seven years and the three years is a condition of probation. Okay.

(Tr. at 159-60, 163-65) (emphases added).

Our Indiana Supreme Court explained:

> The approach employed by Indiana appellate courts in reviewing sentences in non-capital cases is to examine both the written and oral sentencing statements to discern the findings of the trial court. Rather than presuming the superior accuracy of the oral statement, we examine it alongside the written sentencing statement to assess the conclusions of the trial court. This Court has the option of crediting the statement that accurately pronounces the sentence or remanding for resentencing.

McElroy v. State, 865 N.E.2d 584, 589 (Ind. 2007).

In its oral statement, the court repeatedly indicated its intent was to sentence Watkins to the "presumption." The court was presumably referring to the statutory "presumptive" sentence, which was thirty years until 2005 when our legislature replaced "presumptive" sentences with "advisory" sentences to comport with *Blakely v. Washington*, 542 U.S. 296 (2004), *reh'g denied* 542 U.S. 961 (2004). *See* Ind. Code Ann. § 35-50-2-4 (2004) ("person who commits a Class A felony shall be imprisoned for a fixed term of thirty (30) years"). The advisory sentence for a Class A felony is also thirty years. Ind. Code § 35-50-2-4 (2005). Accordingly, we direct the court to correct

its written sentencing order and abstract of judgment to indicate a thirty-year sentence, with three years suspended to probation. *See Willey v. State*, 712 N.E.2d 434, 446 n.8 (Ind. 1999) ("Based on the unambiguous nature of the trial court's oral sentencing pronouncement, we conclude that the Abstract of Judgment and Sentencing Order contain clerical errors and remand this case for correction of those errors.").

Having clarified Watkins' sentence, we review his arguments regarding its length. Watkins first claims "even though neither aggravator found at sentencing was legally defective, neither deserved more than minimal weight." (Appellant's Br. at 10.) Next, he asserts his "mitigators were compelling, and showed that he is not in need of lengthy incarceration." (*Id*.) We may no longer find an abuse of discretion in the trial court's weighing and balancing of aggravators and mitigators. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007) ("Because the trial court no longer has any obligation to 'weigh' aggravating and mitigating factors against each other when imposing a sentence, . . . a trial court can not now be said to have abused its discretion in failing to "properly weigh" such factors."), *clarified on other grounds* 875 N.E.2d 218 (Ind. 2007). Because Watkins acknowledges the court properly found all the aggravators and mitigators, these claims present nothing for us to review. *See id.* at 490-91 (A trial court abuses its discretion in sentencing a defendant if: (1) the court failed to provide any sentencing statement; (2) the sentencing statement is not supported by the record; (3) the statement omits aggravators or mitigators clearly supported by the record and advanced by a party; or (4) the court's reasons for the sentence are improper as a matter of law.).

Next, Watkins asserts his sentence 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."

Id. 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).

Watkins sold cocaine within 1000 feet of two schools, which is a Class A felony carrying an advisory sentence of 30 years. Nothing about the manner in which Watkins committed this crime makes the advisory sentence inappropriate.

As for Watkins' character, we believe his positive and negative qualities are in equipoise. Watkins has a high school diploma and was offered a scholarship to college, but he did not take advantage of that opportunity. While Watkins' criminal history consists of only one conviction, it was also drug related. He was charged in 2002 and 2006 for possession of marijuana, which charges were "Stricken with Leave to Reinstate." (App. at 97.) This suggests his prior interactions with the justice system have not discouraged his involvement with drugs.

Finding nothing about Watkins' character or the nature of his offense make the advisory sentence inappropriate, we affirm. Nevertheless, we remand for the court to correct the written sentencing order and the abstract of judgment.

Affirmed and remanded.

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