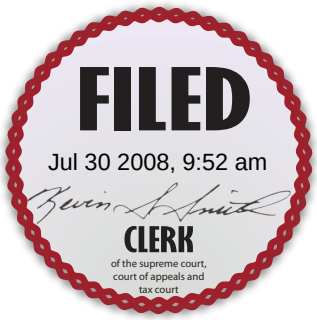

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IN THE
COURT OF APPEALS OF INDIANA

ROBERT E. PAYTON, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0803-CR-100
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0104-CF-47

July 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Robert E. Payton, Jr. appeals his sentence following his guilty plea to two counts of criminal deviate conduct,[1] each as a Class A felony. Payton raises two issues on appeal, which we restate as:

I. Whether the trial court improperly weighed aggravators and mitigators in sentencing Payton.

II. Whether Payton's aggregate sixty-year sentence is inappropriate based on the nature of the offense and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

Payton pled guilty and admitted the following factual allegations that supported his convictions: Payton admitted that he and a companion went to a high crime area to solicit sex in exchange for drugs. After arriving, Payton and his companion forced S.K. to perform fellatio by physically overpowering her. Later, Payton and his companion forced C.W. to submit to anal intercourse by physically overpowering her. Both woman suffered extreme pain as a result of Payton's assaults.

Pursuant to a plea agreement, Payton agreed to a sentencing cap of seventy-five years executed. Payton was sentenced to forty years for each offense with ten years suspended from each to run consecutively for an aggregate sentence of sixty years. Payton now appeals his sentence.

DISCUSSION AND DECISION

[1] *See* IC 35-42-4-2.

I. Aggravators and Mitigators

Sentencing decisions rest within the sound discretion of the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g* 875 N.E.2d 218. An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before it. *Id.*

Payton claims that several aggravators found by the trial court were entitled to minimal weight, including: 1) that he intended to exchange drugs for sex; 2) that the offense was committed as part of a gang initiation; 3) that the offense was committed under the influence of alcohol; and 4) his criminal history. Payton does not argue that these aggravators were improper. Courts of appeal may not review the weight applied to aggravating and mitigating factors. *Id*. at 491.

Payton also argues that the trial court improperly found the following aggravator: that he needed rehabilitative treatment best provided by a penal facility. Payton cites *Cotto v. State*, 829 N.E.2d 520, 525 (Ind. 2005), to argue that the trial court may not use the aggravator that Payton needed rehabilitative treatment best provided by a penal facility since it did not explain how the penal facility will provide rehabilitative treatment. Payton also claims that the need for rehabilitation is only an appropriate aggravator if the trial court imposes a sentence in excess of the presumptive term. *See Mayberry v. State*, 670 N.E.2d 1262, 1271 (Ind. 1996) (Supreme Court held that if aggravator is to support in part enhanced sentence, it must be understood to be period of incarceration in penal facility greater than presumptive term).

The trial court stated during Payton's sentencing hearing: "It appears long-term incarceration is needed to rehabilitate you, Mr. Payton, since probation, fines, costs, and short-term incarceration have proved to be wholly unsuccessful." *Tr.* at 77. Further, in its sentencing order, the trial court explained that Payton's previous encounters with the justice system and with the Department of Correction had failed to rehabilitate his indifference for Indiana law, and that a commitment to the Department of Correction for a substantial period of time will hopefully encourage his rehabilitation. *Appellant's App.* at 80-81. The trial court found his rehabilitation necessary to treat his violent behavior. *Id.* at 83. The trial court's explanation was adequate, and it did not abuse its sentencing discretion. *See Roney v. State*, 872 N.E.2d 192, 199-200 (Ind. Ct. App. 2007), *trans. denied* (maximum sentence for crime was justified based on rehabilitation aggravator due to violent nature of crime).

Payton also contends that the trial court improperly failed to find two mitigating factors: 1) his family's support; and 2) incarceration would cause an undue hardship on his two-year old son. Payton claims that his parents testified at his sentencing hearing that, although drugs had steered Payton in the wrong direction, he is generally a good person. *Tr.* at 38-45; 46-57.

A trial court is required to identify all significant mitigating factors. *Anglemyer*, 868 N.E.2d at 493. On appeal, the defendant has the burden of establishing that a mitigating factor is significant and clearly supported by the record and that the trial court's failure to acknowledge the mitigating factor was an abuse of discretion. *Id.*; *Corbett v. State*, 764 N.E.2d 622, 630 (Ind. 2002).

Here, the trial court was under no obligation to acknowledge either proffered mitigator because neither is clearly supported by the record. *See Anglemyer*, 868 N.E.2d at 491; *Comer v. State*, 839 N.E.2d 721, 730 (Ind. Ct. App. 2005) (citing *Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999)). Although Payton's parents testified in his support, they only asked the trial court for leniency. Otherwise, their testimony did not reflect positively on Payton. Payton's father testified that Payton could not handle alcohol, he constantly abused drugs, would "get rowdy" with his friends, and was likely intoxicated when he committed the crime. *Tr.* at 43-44. Payton's father also testified that he felt Payton had already paid for what he had done. *Id.* at 44. Payton's mother testified that Payton was a good kid until he went to live with his father and dropped out of school. *Id.* at 48. She also testified that she believed he could improve if he received rehabilitation away from the presence of drugs, but also admitted that he had squandered every second and third chance he had previously received. *Id.* at 50-56. Only Payton's father briefly mentioned that Payton participated in his son's life. *Id.* at 40-41. The record did not support either proffered mitigator. The trial court did not abuse its sentencing discretion.

II. Appropriate Sentence

Appellate courts may revise a sentence after careful review of the trial court's decision if they conclude that the sentence is inappropriate based on the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). Even if the trial court followed the appropriate procedure in arriving at its sentence, the appellate court still maintains a constitutional power to revise a sentence it finds inappropriate. *Hope v. State*, 834 N.E.2d 713, 718 (Ind. Ct. App. 2005).

Payton claims that his sentence is inappropriate in light of the nature of the offense and his character. However, nothing shows his enhanced, consecutive sentences are inappropriate. As for the nature of the offenses, Payton committed separate offenses against different victims justifying consecutive sentences. Payton sexually victimized two females against their will as part of a gang initiation. Payton was under the influence of alcohol and originally intended to trade drugs for sex. As for his character, Payton has a prior criminal history, which included convictions for possession of cocaine as a Class B felony, two convictions for possession of marijuana, driving while intoxicated, and driving while license suspended. We find Payton's sentence was not inappropriate.

Affirmed.

FRIEDLANDER, J., and BAILEY, J., concur.