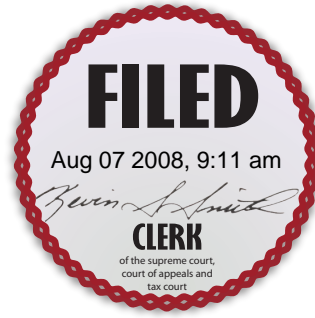


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

WILLIAM LE'SHAWN THOMAS,)

Appellant-Defendant,)

vs.)

No. 10A01-0802-PC-90)

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE CLARK SUPERIOR COURT
The Honorable Vicki L. Carmichael, Judge
Cause No. 10D01-0502-FA-015

AUGUST 7, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Senior Judge

William Thomas appeals the fifty-year sentence imposed after he pleaded guilty to attempted robbery as a class A felony.

We affirm.

The sole issue for our review is whether the trial court erred in sentencing Thomas.

On January 30, 2005, nineteen-year-old Thomas shot cab driver Paul Lauderdale in the neck while demanding money from him. The State charged Thomas with attempted robbery as a class A felony and possession of a firearm by a serious violent felon as a class B felony. Two and one-half years later, Thomas pleaded guilty to the class A felony in exchange for the State dismissing the class B felony.

At the sentencing hearing, the trial court found the following aggravating circumstances: 1) Thomas' criminal history, including the fact that Thomas was on probation for a class C felony robbery conviction at the time he shot Lauderdale; 2) the seriousness of the offense, including the fact that Lauderdale was still impaired; and 3) Thomas' need for incarceration. The court found no mitigating factors, and sentenced Thomas to fifty years with five years suspended to probation. Thomas appeals the sentence.

At the outset we note that because the crimes in this case occurred before the April 25, 2005, amendments to the sentencing statutes, we review Thomas' sentence under the presumptive sentencing scheme. *See Gutermonth v. State*, 868 N.E.2d 427, 432, n. 4 (Ind. 2007). Under the presumptive scheme, sentencing determinations are within the trial court's discretion. *Padgett v. State*, 875 N.E.2d 310, 315 (Ind. Ct. App. 2007), *trans.*

denied. For example, it is within the trial court’s discretion to determine whether a presumptive sentence will be enhanced due to aggravating factors. *Id.* When the trial court does enhance a sentence, it must: 1) identify significant mitigating and aggravating circumstances; 2) state the specific reasons why each circumstance is aggravating or mitigating; and 3) evaluate and balance the mitigating against the aggravating circumstances to determine if the mitigating offset the aggravating factors. *Id.* It is generally inappropriate for us to merely substitute our judgment or opinions for those of the trial judge. *Id.*

I. Improper Aggravating Circumstances

Thomas argues that trial court erred in finding the aggravating circumstances. Specifically, Thomas first contends that the trial court erroneously failed to expand on the nature of his criminal history in such a manner as would support its use as an aggravating factor. In order to enhance a criminal sentence based, in whole or in part, on the defendant’s history of criminal activity, a sentencing court must find instances of specific criminal conduct shown by probative evidence to be attributable to the defendant. *Tunstill v. State*, 568 N.E.2d 539, 544 (Ind. 1991). Our review of the record of the proceedings reveals that the trial court complied with this requirement when it found that Thomas had been convicted of and was on probation for a class C felony robbery that occurred just six month before the offense in this case.

Thomas also argues that the trial court erred when it found the seriousness of the offense, including the fact that the victim was still impaired, as an aggravating factor. According to Thomas, the “trial court [used] the serious bodily injury element of the

offense to likewise serve as an aggravating factor.” Appellant’s Br. at 12. Although a trial court may not use a material element of the crime as an aggravating factor, the court may consider the particularized nature and circumstances of the offense. *Lemos v. State*, 746 N.E.2d 972, 975 (Ind. 2001). Here, the serious bodily injury element of the offense was the shot to Lauderdale’s neck. The aggravating factor, on the other hand, was the fact that Lauderdale was still disabled from the shot at the time of trial. Lauderdale testified at the sentencing hearing that there is a bullet lodged in his neck, he has permanent limited mobility of his left arm, and he is unable to secure employment. These are the particularized circumstances of the offense. We find no error.

Lastly, Thomas argues that the trial court erred in finding that his need for incarceration was an aggravating factor because the court gave no individualized statement of why Thomas was in need of rehabilitative treatment that could best be provided by a period of incarceration in excess of the presumptive sentence. However, this court has previously explained that the trial court is not required to give such a statement where the court engages in a lengthy and detailed discussion of considerations for aggravators and sentencing. *Hornbostel v. State*, 757 N.E.2d 170, 184 (Ind. Ct. App. 1991), *trans. denied*. Here, the record of the proceedings reveals that the court engaged in such a discussion when it noted that it had 1) reviewed Thomas’ presentence investigation report filed by Thomas’ probation officer who recommended a fifty-year sentence; 2) considered Thomas’ criminal history, which included a prior conviction and probation for class C felony robbery; 3) considered Thomas’ juvenile record; and 4)

considered the permanent impairment to the victim of the offense. The trial court did not err in finding aggravating circumstances.

II. Overlooked Mitigating Circumstances

Thomas also argues that the trial court overlooked certain mitigating circumstances. A finding of mitigating circumstances, like sentencing decisions in general, lies within the trial court's discretion. *Wilkie v. State*, 813 N.E.2d 794, 798 (Ind. Ct. App. 2004), *trans. denied*. When a defendant alleges that the trial court failed to identify or find a mitigating circumstance, the defendant must establish that the mitigating evidence is both significant and clearly supported by the record. *Hillenburg v. State*, 777 N.E.2d 99, 109 (Ind. Ct. App. 2002), *trans. denied*. The trial court is not required to make an affirmative finding negating each potentially mitigating circumstance. *Id.*

Thomas first contends that the trial court improperly failed to consider his remorse as a mitigating factor. Substantial deference must be given to a trial court's evaluation of remorse. *Corrales v. State*, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004). The trial court, which has the ability to directly observe the defendant and listen to the tenor of his voice, is in the best position to determine whether the remorse is genuine. *Id.* Thomas' mere reference to his statement articulating his remorse is insufficient to establish an abuse of discretion. *See id.*

In addition, Thomas contends that the trial court erred in failing to consider the hardship to his dependent as an aggravating factor. Many people 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. *Ware v. State*, 816 N.E.2d 1167, 1178 (Ind. Ct. App. 2004). Indeed, these mitigators can properly be assigned no weight when the defendant fails to show why incarceration for a particular term will cause more hardship than incarceration for a shorter term. *Weaver v. State*, 845 N.E.2d 1066, 1074 (Ind. Ct. App. 2006), *trans. denied*. Here, Thomas does not explain and points to no evidence that the enhanced sentence would impose any more hardship on his five-year-old-son than a shorter sentence. We therefore find no error.

Thomas also argues that the trial court failed to consider his guilty plea as a mitigating factor. However, a guilty plea does not automatically amount to a significant mitigating factor. *Sensback v. State*, 720 N.E.2d 1160, 1165 (Ind. 1999). For example, a guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one. *Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), *trans. denied*. Here, the State dismissed a B felony in exchange for Thomas' guilty plea. In light of this substantial benefit to Thomas, we find no error in the trial court's failure to consider this factor to be mitigating.

Thomas also contends that the trial court erred in failing to consider his dysfunctional childhood and mental illness as mitigating circumstances. This court has previously identified the following four factors that bear on the weight that should be given to mental illness in sentencing: 1) the extent of the defendant's inability to control his behavior due to the disorder; 2) overall limitations on his functioning; 3) the duration of the mental illness; and 4) the extent of any nexus between the disorder and the

commission of the crime. *Scott v. State*, 840 N.E.2d 376, 384 (Ind. Ct. App. 2006), *trans. denied*. Here, Thomas has failed to show any nexus between his alleged mental illness and the robbery. He has also failed to offer any evidence regarding the disorder. Under these circumstances, the trial court did not abuse its discretion when it failed to find Thomas' dysfunctional childhood and mental illness as mitigating circumstances.

II. Inappropriate Sentence

Lastly, Thomas argues that his sentence is inappropriate. When reviewing a sentence imposed by the trial court, we “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.” Ind. Appellate Rule 7(b).

Here, with regard to the character of the offender, Thomas has a prior criminal history that includes a robbery conviction as well as a conviction for resisting law enforcement. Thomas’ prior contacts with the law have not caused him to reform himself.

With regard to the nature of the offense, Thomas shot a taxi cab driver in the neck while demanding money from money. Thomas’ prior convictions show a pattern of crime indicating a disregard for other persons and their property as well as an escalation in the threat of violence to those persons. *See Ruiz v. State*, 818 N.E.2d 927, 929 (Ind. 2004) (holding that the significance of prior criminal history varies based on the gravity, nature, and number of prior offenses as they relate to the current offense).

Based upon our review of the evidence, we see nothing in the character of this offender or in the nature of this offense that would suggest that Thomas's sentence is inappropriate.

Affirmed.

BARNES, J., and CRONE, J., concur.