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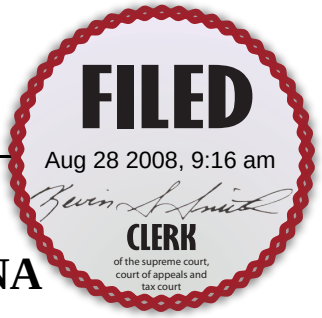

IN THE COURT OF APPEALS OF INDIANA

JOHN DEAN JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A04-0802-CR-101
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Wayne S. Trockman, Judge
Cause No. 82D02-0408-MR-629

August 28, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

John Dean Jr., appeals his forty-year sentence imposed for his class A felony burglary[1] conviction. We affirm.

Issues

Did the trial court abuse its discretion in sentencing Dean?

Is Dean's sentence inappropriate in light of the nature of the offense and his character?

Facts and Procedural History

This is the second time this case has come before us. In our earlier memorandum decision we set forth the relevant facts:

> [O]n August 20, 2004, Dean broke into the home of seventy-four-year-old Lloyd Goad, beat him, took his wallet and car keys, and fled the scene in Goad's car. Goad died less than three weeks later. Dean was apprehended a short time later when he was involved in a drunk-driving accident in Illinois while driving Goad's car. On November 1, 2004, Dean broke into the home of Bambi Boyle and exerted unauthorized control over several of Boyle's possessions.
>
> Dean was charged under cause number 82D02-0403-MR-629 (Cause 629) with burglary and robbery, both as class A felonies, and murder. In connection with the second incident, he was charged under Cause No. 82D02-0403-FC-261 (Cause 261) with burglary as a class C felony and theft as a class D felony. On July 3, 2006, Dean entered a guilty plea agreement calling for him to plead guilty to the offenses charged in Cause 261, and to plead guilty to burglary causing serious bodily injury and the lesser included offense of voluntary manslaughter in Cause 629. In exchange, the State agreed to dismiss the robbery and murder charges under Cause 629, and to dismiss other charges under an unrelated third cause number. With respect to sentencing, the parties agreed the two sentences under Cause 629 would run concurrent with each other, and the aggregate sentence under Cause 261 would run consecutive to the aggregate sentence under Cause 629. The sentences for each of the individual convictions were left to the court's discretion. Following a hearing, the court imposed an aggregate five-year sentence (two years and five years,

[1] Ind. Code § 35-43-2-1(2)(B).

> concurrent) under Cause 261, and an aggregate forty-five-year sentence under Cause 629 (fifteen years and forty-five years, concurrent), and ran the two aggregate sentences consecutively, for a total sentence of fifty years.
>
> In enhancing Dean's sentence, the court cited three aggravating circumstances: (1) Dean's criminal history, (2) Dean was on probation or out on bond at the time these offenses were committed, and (3) the physical infirmity of the victim.

John Dean Jr. v. State of Indiana, No. 82A01-0610-CR-439, slip op. at *2-3 (Ind. Ct. App. Aug. 31, 2007).

Dean appealed the forty-five year sentence for his conviction of class A felony burglary in Cause 629, arguing that (1) the trial court abused its discretion in relying on his criminal history, consisting of alcohol-related misdemeanor convictions, in enhancing his sentence, and (2) the trial court violated *Blakely v. Washington*, 542 U.S. 296 (2004), in sentencing him. As to the first issue, we held that the number and nature of his prior alcohol-related misdemeanors constituted a proper aggravating factor where "Dean admitted that he committed the instant offense as a direct result of his substance abuse." *Dean*, slip op. at *5. Regarding the second issue, we held that under *Blakely*, the trial court erred in determining that the infirmity of the victim was an aggravating factor. *Id*. at *6-7. We further found that the trial court's sentencing statement was insufficiently detailed for us to say with confidence that, based on the remaining two proper aggravating factors, it would have imposed the same sentence. We therefore reversed Dean's sentence and remanded for re-sentencing.[2] *Id*. at *8.

[2] Due to the resolution of the second issue, we did not address Dean's claim that his sentence was inappropriate.

On January 22, 2008, the trial court held a hearing to re-sentence Dean. The State did not argue that the victim's infirmity was an aggravating factor. The trial court found the following aggravating factors: (1) Dean was released on bond in cause number 82D02-04-FD-40 and was on probation in Cause 261 at the time he committed this offense, and (2) Dean's criminal history. Tr. at 8-9. The trial court found one mitigating factor: Dean's guilty plea. *Id*. at 9. The trial court then weighed the aggravating and mitigating factors and imposed a forty-year sentence for Dean's class A felony burglary conviction. *Id.*

Dean appeals.

Discussion and Decision

I. Abuse of Discretion

Dean asks us to consider whether the trial court committed various errors in re-sentencing him. Effective April 25, 2005, our legislature amended our sentencing statutes to replace presumptive sentences with advisory sentences. Because Dean committed his crime on August 20, 2004, before the amendment's effective date, the presumptive sentencing scheme applies.[3] *See Gutermuth v. State*, 868 N.E.2d 427, 431 n.4 (Ind. 2007) (sentencing statute in effect at time crime is committed governs sentence for that crime). Under the presumptive statutory scheme, sentencing decisions rest within the trial court's discretion. *Williams v. State*, 861 N.E.2d 714, 716 (Ind. Ct. App. 2007). Those decisions are given great deference on appeal and will be reversed only for an abuse of discretion. *Golden v. State*, 862 N.E.2d 1212, 1215 (Ind. Ct. App. 2007), *trans denied*. The trial court's broad discretion

includes the authority to increase the presumptive sentence. *Jones v. State*, 807 N.E.2d 58, 68-9 (Ind. Ct. App. 2004), *trans. denied*. However, when the trial court imposes an enhanced sentence, it must: (1) identify significant aggravating and mitigating circumstances, (2) state the specific reasons why each circumstance is aggravating or mitigating, and (3) evaluate and balance the mitigating circumstances against the aggravating circumstances to determine if the mitigating circumstances offset the aggravating circumstances. *Trowbridge v. State*, 717 N.E.2d 138, 149 (Ind. 1999). One valid aggravator alone is enough to enhance a sentence. *Dixon v. State*, 825 N.E.2d 1269, 1272 (Ind. Ct. App. 2005), *trans. denied*.

Dean first claims that the trial court erred in finding as an aggravating factor that he was on probation in Cause 261 at the time he committed this offense. The State acknowledges that while Dean was not on probation in Cause 261, he was released on bond in that cause. The State asserts, "It is unlikely that the error of confusing a release to bond or on his own recognizance instead of a release to probation contributed overmuch to the trial court's calculations when determining [Dean's] sentence." Appellee's Br. at 6. We agree.

Second, Dean asserts that the trial court failed to articulate the evaluation and balancing of the aggravating and mitigating circumstances. While it is true that the trial court merely stated that it "weigh[ed] [Dean's] aggravating and mitigating circumstances[,]"implicit in the court's decision to impose a forty-year sentence is its determination that the aggravating circumstances outweigh the mitigating circumstances. Tr.

[3] At the time Dean committed the instant offense, the presumptive sentence for a class A felony was thirty years, with up to twenty years added for aggravating circumstances and not more than ten years subtracted for mitigating circumstances. Ind. Code § 35-50-2-4 (2004).

at 9. Although it would be preferable for the trial court to set forth a more articulate evaluation, the trial court's statement here does not warrant reversal.

Finally, Dean contends that the trial court improperly balanced the aggravating and mitigating factors. He claims that his guilty plea is entitled to mitigating weight in the high range such that it would cancel out the weight of the aggravating factors, thereby justifying a presumptive sentence. We find Dean's bald assertion that his guilty plea was entitled to significant mitigating weight unpersuasive. In contrast, the State points out that Dean received a significant benefit as a result of his guilty plea. *See Sensback v. State*, 720 N.E.2d 1160, 1165 (Ind. 1999) (observing that a plea is not necessarily a significant mitigating factor). In exchange for pleading guilty to class B felony voluntary manslaughter, the State dismissed Dean's murder charge, which alone reduced his maximum possible sentence by forty-five years. In addition, we already found that "[t]he trial court did not err in enhancing Dean's sentence based upon his criminal history." *Dean*, slip op at *5. Although Dean challenges the trial court's reliance on his criminal history to enhance his sentence, the doctrine of *res judicata* prevents our review. *See Baird v. State*, 831 N.E.2d 109, 115 (Ind. 2005) ("To the extent [defendant's] present claim is the same as those we have previously decided, it is barred by the doctrine of *res judicata*."). We conclude that Dean's guilty plea was not of such mitigating weight as to cancel out the weight of the aggravating factors. Accordingly, the trial court did not abuse its discretion in imposing an enhanced sentence for Dean's class A felony burglary conviction.

II. Appropriateness of Sentence

Indiana Rule of Appellate Procedure 7(B) states: "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." "Although appellate review of sentences must give due consideration to the trial court's sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." *Purvis v. State*, 829 N.E.2d 572, 588 (Ind. Ct. App. 2005) (citations and quotation marks omitted), *trans. denied*. The defendant has the burden of persuading us that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

As to the nature of the offense, Dean has failed to present any argument. We observe that Dean beat a fragile seventy-four-year-old man and took his wallet and car. The victim died three weeks later, and it is reasonable to infer that he suffered a great deal.

Turning to Dean's character, he claims he expressed remorse at the initial sentencing hearing. While that hearing was incorporated into his re-sentencing hearing, that transcript is not in the record before us, and we therefore are without means to make an assessment of his expression of remorse. Instead, the statements we do have in the record indicate that he resisted accepting responsibility for his actions and blamed his alcohol and substance abuse problems. He said, "I'm not a criminal. I'm an addict and the only reason that everything happened was because I ran out of money and I couldn't get no more beer or anymore pills or anything." *Dean*, slip op. at *5 (quotation marks removed). While we recognize that

addiction can be extremely difficult to overcome, his multiple alcohol-related misdemeanor convictions show that he has been suffering from this condition for an extended period of time, but there is no evidence in the record that he has taken steps to address his dependence on drugs and alcohol. *See Bryant v. State*, 802 N.E.2d 486, 501 (Ind. Ct. App. 2004) (concluding that defendant was aware of his drug and alcohol problem but had not taken any positive steps to treat his addiction, and therefore trial court did not err in finding that his substance abuse was an aggravating factor). We therefore conclude that Dean's forty-year sentence is appropriate given the nature of the offense and his character.

Affirmed.

KIRSCH, J., and VAIDIK, J., concur.