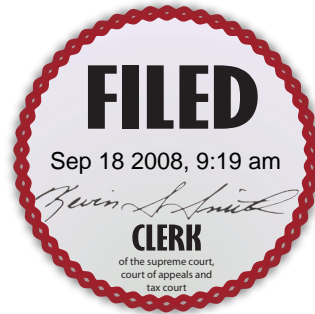


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JUSTIN M. PHILLIPS,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 47A01-0803-PC-135

APPEAL FROM THE LAWRENCE SUPERIOR COURT
The Honorable William G. Sleva, Judge
Cause No.47D02-0702-FC-156

September 18, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a guilty plea, Justin Phillips appeals his sentence for burglary, a Class C felony. On appeal, Phillips raises one issue, which we restate as whether Phillip's advisory sentence of four years, with two years suspended, is inappropriate in light of the nature of the offense and his character. Concluding Phillips's sentence is not inappropriate, we affirm.

Facts and Procedural History

On January 19, 2007, an intoxicated Phillips, along with his brother and his friend, broke into a Lawrence County service station owned by Rob Arthur. Arthur is the maternal grandfather of Phillips's daughter, V.P., and he had previously employed Phillips at the service station. According to the probable cause affidavit, on January 24, 2007, Phillips admitted to Detective Gerald McGee of the Lawrence County Sheriff's Department that he broke into the service station with his brother and his friend and "removed gloves, tobacco and some other stuff." Appellant's Appendix at 8. Phillips subsequently explained during a presentence investigation interview that he broke into the service station "out of spite" because Arthur and his daughter (V.P.'s mother) "neglected to let [him] see [V.P.] whatsoever." Presentence Investigation Report at 4-5.¹

On February 22, 2007, the State charged Phillips with burglary, a Class C felony, and theft, a Class D felony. On November 19, 2007, the parties entered into a plea agreement under which Phillips agreed to plead guilty to burglary, and the State agreed to

¹ The presentence investigation report is inserted into Phillips's appendix, but is not numbered consecutively with the other appendix documents. We remind counsel of Indiana Appellate Rule 51(C): "All pages of the Appendix shall be numbered at the bottom consecutively, without obscuring the Transcript page numbers, regardless of the number of volumes the Appendix requires." In the case of documents (such as presentence investigation reports) that are excluded from public access, see Ind. Administrative Rule 9(G) and (J), such documents should be compiled in an appendix in a manner consistent with Indiana Trial Rule 5(G).

dismiss the theft charge. The plea agreement also stated that the executed portion of Phillips's sentence could not exceed four years. On the same day, the trial court conducted a guilty plea hearing, at which it took Phillips's plea under advisement pending review of a presentence investigation report and scheduled a sentencing hearing for February 4, 2008.

At the February 4, 2008, sentencing hearing, the State argued that Phillips's abuse of a position of trust, Phillips's juvenile true finding for illegal consumption,² and the "gratuitous" damage to the service station were aggravating circumstances, transcript at 24, while Phillips argued that his guilty plea, his employment, and the undue hardship to his family that would result from his imprisonment were mitigating circumstances. The trial court rejected the State's aggravating circumstances, and apparently found that Phillips's guilty plea and undue hardship to his family were mitigating circumstances.³ Based on these findings, the trial court sentenced Phillips to four years, with two years suspended. Phillips now appeals.

Discussion and Decision

I. Standard of Review

Indiana appellate courts have authority to revise a sentence "if, after due consideration of the trial court's decision, the Court finds that the sentence is

² The State also noted that Phillips had recently been charged in Washington Circuit Court with criminal recklessness as a Class D felony and illegal consumption as a Class A misdemeanor (presumably this charge is contributing to a minor's illegal consumption, but the record is unclear), but did not argue that these charges were aggravating circumstances.

³ The record is not entirely clear on whether the trial court found these circumstances to be mitigating, as it merely reiterated them during the sentencing hearing without saying it found them as such, see tr. at 28 (trial court describing two of Phillips's proffered mitigating circumstances as "[i]mprisonment would result in undue hardship and he did plead guilty"), and the trial court's written sentencing order does not reference any mitigating circumstances. Nevertheless, because the State claims the trial court found these circumstances to be mitigating, see appellee's brief at 3, we will assume for purposes of this appeal that it did.

inappropriate in light of the nature of the offense and the character of the offender.” Ind. Appellate Rule 7(B). In determining whether a sentence is inappropriate, we examine both the nature of the offense and the character of the offender, see Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied, and begin our examination with the understanding that the advisory sentence “is the starting point the Legislature has selected as an appropriate sentence for the crime committed,” Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). When examining the nature of the offense and character of the offender, we may look to any factors appearing in the record, Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied, starting with “the trial court’s recognition or nonrecognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed here was inappropriate,” Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). We recognize, however, that “inappropriateness review should not be limited . . . to a simple rundown of the aggravating and mitigating circumstances found by the trial court.” McMahon v. State, 856 N.E.2d 743, 750 (Ind. Ct. App. 2006). We also recognize that it is the defendant’s burden to “persuade the appellate court that his or her sentence has met this inappropriateness standard of review.” Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

II. Appropriateness of Sentence

The trial court sentenced Phillips to four years, with two years suspended, for his Class C felony burglary conviction. Thus, Phillips received the advisory sentence. See Ind. Code § 35-50-2-6(a) (“A person who commits a Class C felony shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being

four (4) years.”); Weaver v. State, 845 N.E.2d 1066, 1072 n.4 (Ind. Ct. App. 2006) (explaining that a defendant’s total sentence includes both the executed and suspended portion of the sentence).

A. Nature of the Offense

As is the case with most sentences imposed after a guilty plea has been entered, there are fewer facts in the record commenting on the nature of the offense than if a trial had occurred. Perhaps due to this lack of detail, Phillips does not point to any evidence that the nature of his offense was less egregious than a typical burglary. The State argues, as it did at the sentencing hearing, that Phillips’s offense is more egregious than a typical burglary because he “add[ed] insult to injury” by knocking over display cases and pouring oil on the floor. Appellee’s Br. at 5. Although the prosecutor noted the police report referenced such “gratuitous” damage to the service station, Phillips stated he was “not aware of nothing [sic] being done to oil cans or cases or what have you.” Tr. at 21. We recognize the trial could have determined, as a matter of credibility, that Phillips simply lied about his involvement in causing such damage; however, it declined to do so, and the record is too tenuous on this point for us to attribute such conduct to Phillips. Nevertheless, at least on the record before us, there is nothing to indicate that Phillips’s offense is anything other than a garden-variety burglary, which is reflected in the fact that he received the advisory sentence. Thus, we conclude the nature of the offense does not render Phillips’s sentence inappropriate.

B. Character of the Offender

Regarding Phillips's character, we note, as the trial court did, that Phillips pled guilty and that his family would experience undue hardship as a result of his imprisonment. Both are valid mitigating circumstances. See Scheckel v. State, 655 N.E.2d 506, 511 (Ind. 1995) (recognizing that "a defendant who willingly enters a plea of guilty has extended a substantial benefit to the state and deserves to have a substantial benefit extended to him in return" (quoting Williams v. State, 430 N.E.2d 759, 764 (Ind. 1982))); Ind. Code § 35-38-1-7.1(b)(10) (stating that it may be a valid mitigating circumstance if "[i]mprisonment of the person will result in undue hardship to the person or the dependents of the person"). However, the mitigating weight of Phillips's guilty plea is diminished somewhat because the State agreed to dismiss the charge of theft as a Class D felony and cap the executed portion of his sentence at four years. See Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999) (explaining that a guilty plea does not warrant significant mitigating weight if the defendant received a substantial benefit from the plea). Against these mitigating circumstances is evidence that Phillips admittedly lied to police officers about his intoxication on the night of the burglary and that Phillips committed the burglary "out of spite," based on Phillips's view that Arthur and his daughter were not allowing him to see V.P. Presentence Inv. Rpt. at 4. This evidence comments negatively on Phillips's character, and sufficiently offsets the mitigating circumstances such that we are not convinced Phillips's character renders his advisory sentence inappropriate.

The burden was on Phillips to demonstrate that his sentence is inappropriate in light of the nature of the offense and his character. After due consideration of the trial court's sentencing decision and of the record, we are not convinced Phillips has carried this burden. Thus, we conclude Phillips's sentence is not inappropriate.

Conclusion

Phillips's sentence is not inappropriate in light of the nature of the offense and his character.

Affirmed.

NAJAM, J., and MAY, J., concur.