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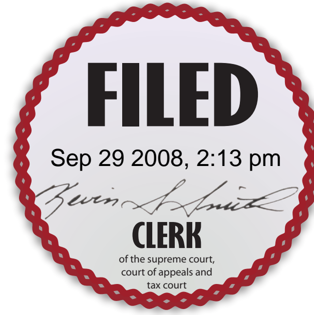

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IN THE
COURT OF APPEALS OF INDIANA

JENNIFER HARDING,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A02-0806-CR-585
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable William C. Menges, Jr., Judge
Cause No. 34D01-0705-FB-00294

September 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Jennifer Harding appeals the sentence that was imposed following her guilty plea to Dealing in Cocaine,[1] a class B felony. Specifically, Harding argues that the trial court abused its discretion in imposing the advisory sentence of ten years[2] and ordering her to serve one year of that sentence in the Indiana Department of Correction (DOC) because it overlooked certain mitigating factors that warranted a reduced sentence. Harding also argues that the sentence was inappropriate when considering the nature of the offense and her character. Finding no error, we affirm the judgment of the trial court.

FACTS

On May 3, 2007, Harding was charged with dealing in cocaine as a class B felony. Thereafter, Harding and the State entered into a plea agreement, which provided that "ten . . . years will be the maximum sentence as agreed by the parties, with four . . . years to be the maximum executed time as agreed by the parties." Appellant's App. p. 30-32.

The trial court accepted the plea, and at a sentencing hearing that commenced on May 14, 2008, Harding was sentenced to ten years of incarceration, all of which were suspended to probation except for one year that she was to serve in the DOC. In imposing the sentence, the trial court commented as follows:

[1] Ind. Code § 35-48-4-1.

[2] The sentencing range for a class B felony is six to twenty years imprisonment, with an advisory sentence of ten years. Ind. Code § 35-50-2-5.

> I agree that there are no particular aggravating factors here, nor are there any mitigating factors. The presumptive term of 10 years would be appropriate. . . . That concerns me, the fact that you just started, well, you're in the assessment process now for an IOP is troubling since this has been postponed since February when you were attempting to get treatment at that point in time. Your plan to go to Indianapolis is also troubling for a couple reasons. First and foremost is that the probation department in Marion County is extremely overworked and it almost falls into the category of your chances of violating and getting caught down there are significantly less than what they are here. Your chance of violating or continuing to use drugs and getting caught if you're on probation through Howard County Probation Department is virtually 100 percent. I'm also concerned about the fact that back in February you were scheduled for surgery and prescribed Suboxone but you were going to be switching to Hydrocodone, particularly when you have a self-reporting problem with Oxycontin, that's not necessarily a good idea.

Tr. p. 13-15. Harding now appeals.

DISCUSSION AND DECISION

I. Mitigating Circumstances

Harding first contends that her sentence must be set aside because the trial court overlooked certain mitigating factors. Specifically, Harding maintains that the trial court should have identified her substance abuse problems and the hardship that incarceration would have on her young child as mitigating circumstances.

We initially observe that sentencing decisions rest within the trial court's sound discretion and are reviewed on appeal only for an abuse of that discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (2007). Trial courts are required to enter sentencing statements whenever imposing a sentence for a felony offense. The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. 868 N.E.2d at 490. If the recitation

includes the finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating factors and explain why each circumstance has been determined to be mitigating or aggravating. Id. A trial court may abuse its discretion by entering a sentencing statement that includes reasons for imposing a sentence not supported by the record, omits reasons clearly supported by the record, or includes reasons that are improper as a matter of law. Id. at 490-91.

We also note that if the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it found that the factor does not exist. Fugate v. State, 608 N.E.2d 1370, 1374 (Ind. 1993). Indeed, we will conclude that a trial court overlooked a mitigating circumstance only when the record contains substantial evidence of a significant mitigating circumstance. Creager v. State, 737 N.E.2d 771, 782 (Ind. Ct. App. 2000).

In addressing Harding's contention that the trial court should have identified her substance abuse problem as a mitigating factor, this court has held that untreated substance abuse is more often found to be an aggravating, rather than mitigating, circumstance. See Burgess v. State, 854 N.E.2d 35, 40 n.5 (Ind. Ct. App. 2006) (upholding trial court's determination that the defendant's risk of re-offending was a valid aggravator because of his methamphetamine addiction). As set forth above, the trial court considered and evaluated Harding's history of substance abuse at the sentencing hearing. In particular, the trial court noted Harding's lack of timely treatment, the fact that she obtained a prescription for oxycontin, and the Marion County Probation Department's inability to adequately monitor her. Tr. p. 13-15. As a result, we cannot

say that the trial court abused its discretion when it did not identify Harding's substance abuse as a mitigating factor. See Bryant v. State, 802 N.E.2d 486, 501 (Ind. Ct. App. 2004) (observing that when a defendant is aware of a substance abuse problem but has not taken appropriate steps to treat it, the trial court does not abuse its discretion in not identifying the addictive behavior as a mitigating circumstance).

Next, we note that a trial court is not required to find that a defendant's incarceration would result in an undue hardship upon his or her dependents. Davis v. State, 835 N.E.2d 1102, 1116 (Ind. Ct. App. 2005). Many defendants convicted of crimes have children and, absent special circumstances, a trial court need not find this mitigator. Roney v. State, 872 N.E.2d 192, 204-05 (Ind. Ct. App. 2007), trans. denied.

In this case, Harding did not argue to the trial court that a hardship of her incarceration would have been "undue," i.e., that the hardship would be worse than that suffered by any child whose parent is incarcerated. In fact, the record indicates that Harding lives with her child and two other adults who would be able to care for the child. Tr. p. 9. Thus, Harding's claim fails. See Dowdell v. State, 720 N.E.2d 1146, 1154 (Ind. 1999) (concluding that the trial court did not abuse its discretion when it did not find that a defendant's incarceration would result in undue hardship on his dependents as a mitigating factor at sentencing in the absence of special circumstances).

II. Inappropriate Sentence

Harding also contends that her sentence is inappropriate in light of the nature of the offense and her character pursuant to Indiana Appellate Rule 7(B). In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866

N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). 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).

As for the nature of the offense, Harding agreed with the contents of the probable cause affidavit regarding the circumstances of the charged offense. Tr. p. 9-10. Harding admitted that on August 11, 2006, she knowingly "delivered cocaine to another person" in Kokomo. Id. at 10. In essence, Harding's nature of the offense argument does not aid her inappropriateness claim.

In examining Harding's character, the record reflects that she was twenty years old at the time of sentencing. Harding had been placed in a state facility while a juvenile for a status offense, and she was convicted of illegal possession of alcohol by a minor in 2005. Id.

The evidence established that Harding has used marijuana since she was thirteen years old and started drinking alcohol at the age of fifteen. Id. at 5. Harding has also abused cocaine, valium, heroin, oxycontin, and several other drugs during her lifetime. Id. She delayed seeking treatment for her addictions, and she began treatment just prior to sentencing in this case. In essence, although Harding was afforded the opportunity for rehabilitation, she waited for a long period of time to seek meaningful treatment.

In sum, the record demonstrates that Harding has accumulated a criminal history and significant drug addiction problems. Thus, Harding's character does not indicate that the imposition of the ten-year advisory sentence with only one year of incarceration was

inappropriate, especially given that Harding agreed to a cap of the advisory sentence in the plea agreement.

The judgment of the trial court is affirmed.

MATHIAS, J., and BROWN, J., concur.