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# IN THE COURT OF APPEALS OF INDIANA

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| KRYSTAL JOANNA RANEY, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 73A05-0803-CR-152 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE SHELBY CIRCUIT COURT
The Honorable Charles D. O'Connor, Judge
Cause No. 73C01-0608-FC-30

**September 30, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BROWN, Judge**

Krystal Joanna Raney appeals her sentence for theft as a class D felony.[1] Raney raises two issues, which we revise and restate as:

I. Whether the trial court abused its discretion in sentencing Raney;

II. Whether Raney's sentence is inappropriate in light of the nature of the offense and the character of the offender; and

III. Whether the trial court abused its discretion by ordering Raney to pay restitution.

We affirm in part, reverse in part, and remand.

The relevant facts follow. Between April and August of 2006, Raney, while working at a Wal-Mart store in Shelbyville, Indiana, stole a large amount of money in a scheme with her boyfriend, Brandon Thomas. When the theft was discovered, Raney gave a written statement to Wal-Mart indicating that she had stolen approximately $53,500.00 to $60,000.00. State's Exhibit 1. The State charged Raney with theft as a class D felony and corrupt business influence as a class C felony.

Raney pled guilty to theft as a class D felony. As part of the plea agreement, Raney agreed to pay restitution to Wal-Mart in an amount to be determined by the trial court. At the guilty plea hearing, the State argued that Raney had stolen $47,400.00. Raney disputed the amount of money that was stolen, but she admitted to stealing money from Wal-Mart and that Brandon Thomas was involved in the scheme.

At the sentencing hearing, Raney testified that she took $15,000.00 to $20,000.00. At that time, Raney was engaged to Thomas and was pregnant with his child. The State

[1] Ind. Code § 35-43-4-2 (2004).

argued that Raney had stolen $47,700.00, and admitted into evidence Raney's statement to Wal-Mart that she had stolen approximately $53,500.00 to $60,000.00.

The trial court found one aggravator, the nature and circumstances of the offense, specifically the large amount of money that was stolen. The trial court found one mitigator, Raney's lack of a criminal history, which it assigned minimal weight. The trial court then imposed a three-year sentence with ninety days executed in the Shelby County Criminal Justice Center and one year of direct commitment to house arrest with the balance suspended to probation. After noting the differing estimates of the money stolen, the trial court ordered restitution in the amount of $47,700.00. The trial court ordered Raney to pay the restitution as a condition of probation. Transcript at 57; Appellant's Appendix at 15-16.

I.

The first issue is whether the trial court abused its discretion in sentencing Raney. We note that Raney's offense was committed after the April 25, 2005 revisions of Indiana's sentencing scheme. In clarifying these revisions, the Indiana Supreme Court has held that the "trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007), clarified on reh'g by Anglemyer v. State ("Anglemyer Rehearing"), 875 N.E.2d 218 (Ind. 2007). We review the sentence for an abuse of discretion. Id. An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances before the court . . . ." Id. at 490.

A trial court abuses its discretion if it: (1) fails "to enter a sentencing statement at all;" (2) enters "a sentencing statement that explains reasons for imposing a sentence – including a finding of aggravating and mitigating factors if any – but the record does not support the reasons;" (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration;" or (4) considers reasons that "are improper as a matter of law." Id. at 490-491. If the trial court has abused its discretion, we will remand for resentencing "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." Id. at 491. However, under the new statutory scheme, the relative weight or value assignable to reasons properly found, or those which should have been found, is not subject to review for abuse of discretion. Id.

First, Raney argues that the trial court did not give enough weight to her lack of criminal history mitigator. As noted above, under Anglemyer, the relative weight assignable to a mitigator is not subject to review for abuse of discretion. Id. Consequently, this argument is not subject to review.

Next, Raney argues that the nature and circumstances aggravator was improper because the finding that she stole $47,700.00 is not supported by evidence in the record. At the sentencing hearing, the State presented evidence that Raney had previously admitted in a written statement to Wal-Mart that she stole approximately $53,500.00 to $60,000.00. State's Exhibit 1. However, Raney testified at the sentencing hearing that she took $15,000.00 to $20,000.00 from Wal-Mart. The State asserted that Raney took

more than $47,000.00. The trial court noted the differing versions and found that Raney took $47,700.00. The trial court found that the "nature and the circumstances of the crime committed [was] very serious." Transcript at 55. Regardless of whether Raney stole $15,000.00 to $20,000 or $53,500.00 to $60,000.00, she took a substantial amount of money from her employer. We conclude that the trial court properly considered the nature and circumstances of the offense as an aggravator. See, e.g., Kollar v. State, 556 N.E.2d 936, 943 (Ind. Ct. App. 1990) (noting that the trial court considered the significant amounts of money lost by three investors as an aggravating factor), trans. denied.

Raney also argues that the trial court overlooked her guilty plea, cooperation, young age, family support, the undue influence of her boyfriend, and an argument that the crime was unlikely to reoccur as mitigators. "The finding of mitigating factors is not mandatory and rests within the discretion of the trial court." O'Neill v. State, 719 N.E.2d 1243, 1244 (Ind. 1999). An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999).

We first address Raney's guilty plea and cooperation. The Indiana Supreme Court has held that "a defendant who pleads guilty deserves 'some' mitigating weight be given to the plea in return." Anglemyer Rehearing, 875 N.E.2d at 220 (quoting McElroy v. State, 865 N.E.2d 584, 591 (Ind. 2007)). However, the significance of a guilty plea as a

mitigating factor varies from case to case. Id. at 221. "For example, a guilty plea may not be significantly mitigating when it does not demonstrate the defendant's acceptance of responsibility, . . . or when the defendant receives a substantial benefit in return for the plea." Id. (citing Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999)). Here, the State dismissed a charge of corrupt business influence as a class C felony and allowed Raney to plead guilty to theft as a class D felony. Thus, rather than face a maximum sentence of eleven years in the Indiana Department of Correction, Raney faced a maximum sentence of three years. See Ind. Code §§ 35-50-2-6 (sentencing for class C felony), 35-50-2-7 (sentencing for class D felony). Given the significant benefit that Raney received as a result of the plea agreement, we conclude that the trial court did not abuse its discretion. See, e.g., Sensback, 720 N.E.2d at 1165.

As for Raney's young age, we note that she was twenty years old at the time of the offense. A defendant's youth may be a mitigating factor in some circumstances. Gross v. State, 769 N.E.2d 1136, 1141 n.4 (Ind. 2002). However, age is not a per se mitigating factor. Id. Raney has failed to show that this proposed mitigator was significant or that the trial court abused its discretion. See, e.g., Green v. State, 850 N.E.2d 977, 992 (Ind. Ct. App. 2006) (holding that the trial court did not abuse its discretion when it concluded that the defendant's age of twenty years was not a mitigating factor), summarily affirmed in relevant part by 856 N.E.2d 703 (Ind. 2006).

Finally, as for Raney's family support, the undue influence of her boyfriend, and her argument that the crime was unlikely to reoccur, the trial court considered and

rejected these proposed mitigators. Although Raney had her family's support and was living with her parents, she had rejected her family's advice concerning Brandon Thomas. She was now engaged to Thomas and was pregnant with his child. The trial court found that her continued relationship with Thomas put her at risk for reoffending. Under these circumstances, the trial court did not abuse its discretion by rejecting the proposed mitigators. We conclude that the trial court did not abuse its discretion in sentencing Raney.

II.

The next issue is whether Raney's three-year sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

According to Raney, she is not one of the worst offenders, and the maximum sentence should be reserved for the very worst offenses and offenders. The Indiana Supreme Court has observed that "the maximum possible sentences are generally most appropriate for the worst offenders." Buchanan v. State, 767 N.E.2d 967, 973 (Ind. 2002).

> This is not, however, a guideline to determine whether a worse offender could be imagined. Despite the nature of any particular offense and offender, it will always be possible to identify or hypothesize a significantly more despicable scenario. Although maximum sentences are ordinarily appropriate for the worst offenders, we refer generally to the class of offenses and offenders that warrant the maximum punishment. But such class encompasses a considerable variety of offenses and offenders.

Id.

Our review of the nature of the offense reveals that Raney repeatedly stole substantial amounts of money from her employer, Wal-Mart. The trial court found that, over a six-month time period, Raney stole $47,700.00. Raney testified that she gave much of the money to her boyfriend, Brandon Thomas. Although Raney pled guilty to one count of theft as a class D felony, we note that the State dismissed a charge of corrupt business influence as a class C felony and, conceivably, could have originally charged her with numerous counts of theft, possibly as many as seventy-five. See State's Exhibit 1, which is Raney's written statement in which she admitted to stealing money from Wal-Mart more than seventy-five times. Our review of the character of the offender reveals that twenty-year-old Raney does not have a criminal history. However, as of the sentencing hearing, Raney had continued her relationship with Thomas, was engaged to him, and was pregnant with his child.

Although the trial court sentenced Raney to three years, only ninety days of the sentence was to be executed in the Shelby County Criminal Justice Center. Raney was also sentenced to one year of direct commitment to house arrest with the balance of the sentence suspended to probation. Moreover, the trial court allowed her to start serving

the ninety-day executed sentence one month after her baby was born. After due consideration of the trial court's decision, given the substantial amount of money that was stolen, we cannot say that the three-year sentence imposed by the trial court is inappropriate in light of the nature of the offense and the character of the offender.

III.

The final issue is whether the trial court abused its discretion in ordering Raney to pay restitution to Wal-Mart. "The purpose of a restitution order is to impress upon the criminal defendant the magnitude of the loss he has caused and to defray costs to the victims caused by the offense." Henderson v. State, 848 N.E.2d 341, 346 (Ind. Ct. App. 2006). An order of restitution is a matter within the sound discretion of the trial court, and we will reverse only upon a showing of an abuse of that discretion. Id. An abuse of discretion occurs if the court's decision is clearly against the logic and effects of the facts and circumstances before it. Id.

Raney first argues that the restitution order was an abuse of discretion because the State failed to present sufficient evidence as to Wal-Mart's loss. The amount of actual loss is a factual matter that can be determined only upon the presentation of evidence. Bennett v. State, 862 N.E.2d 1281, 1286 (Ind. Ct. App. 2007). As noted above, at the sentencing hearing, the State presented evidence that Raney had previously admitted in a written statement to Wal-Mart that she stole approximately $53,500.00 to $60,000.00. State's Exhibit 1. However, Raney testified at the sentencing hearing that she took $15,000.00 to $20,000.00. The State asserted that Raney took more than $47,000.00.

The trial court noted the differing versions and found that Raney took $47,700.00. The State presented sufficient evidence of the amount stolen from Wal-Mart, and Raney merely asks that we reweigh the evidence and judge her credibility, which we cannot do. We conclude that the trial court did not abuse its discretion when it determined that Raney stole $47,700.00 from Wal-Mart. See, e.g., Wittl v. State, 876 N.E.2d 1136, 1138 (Ind. Ct. App. 2007) (holding that the restitution amount was not speculative where the car rental company presented evidence of its estimated damages), trans. denied.

Raney also argues that the restitution order is an abuse of discretion because the trial court did not inquire into Raney's ability to pay the restitution. "[W]hen the trial court enters an order of restitution as part of a condition of probation, the court is required to inquire into the defendant's ability to pay." Pearson v. State, 883 N.E.2d 770, 772 (Ind. 2008) (citing Ind. Code § 35-38-2-2.3(a)(5)), reh'g denied. "This is so in order to prevent indigent defendants from being imprisoned because of a probation violation based on a defendant's failure to pay restitution." Id.

The parties differ as to whether the restitution was ordered as a condition of probation, with Raney contending that the restitution was ordered as a condition of probation while the State argues that the restitution was ordered as a part of Raney's sentence. Our review of the record reveals that restitution was ordered as a condition of Raney's probation. See Appellant's Appendix at 16 (noting that, as a condition of probation, Raney was required to pay restitution of $47,700.00).

Ind. Code § 35-38-2-2.3 provides that "[w]hen restitution or reparation is a condition of probation, the court shall fix the amount, which may not exceed an amount the person can or will be able to pay, and shall fix the manner of performance." The trial court here did not determine how much Raney could pay and did not fix the manner of performance. Consequently, we reverse and remand for a determination of Raney's ability to pay and fixation of the manner of payment.[2] See, e.g., Garrett v. State, 680 N.E.2d 1, 3 (Ind. Ct. App. 1997) (holding that the trial court's restitution order was so unreasonably vague that it was unenforceable where the trial court did not consider the defendant's ability to pay or fix the manner of payment); cf. Pearson, 883 N.E.2d at 773-774 (holding that remand was not required where the trial court failed to inquire into the defendant's ability to pay but the trial court fixed the manner of payment and the defendant did not challenge the amount of restitution or contend that he did not have the ability to pay).

For the foregoing reasons, we affirm Raney's sentence but reverse the trial court's restitution order and remand for proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

BAKER, C. J. and MATHIAS, J. concur

[2] The Indiana Supreme Court noted in Pearson that the expiration of the probationary term did not terminate the defendant's obligation to pay restitution, which had been ordered as a condition of probation. 883 N.E.2d at 773-774.