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IN THE
COURT OF APPEALS OF INDIANA

ARNETIA SEALS,	)	
	)	
Appellant-Defendant/Cross-Appellee,	)	
	)	
vs.	)	No. 09A02-0505-CR-374
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff/Cross-Appellant.	)	

APPEAL FROM THE CASS SUPERIOR COURT
The Honorable Richard Maughmer, Judge
Cause No. 09D02-0307-FB-35

December 27, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

CRONE, Judge

Case Summary

After remand for rebriefing, Arnetia Seals appeals her eight-year executed sentence for class B felony dealing in cocaine. The State cross-appeals the trial court's modification of Seals's sentence on remand. We vacate the modification and remand for a more detailed sentencing statement. We retain jurisdiction of this case; on remand, the trial court is authorized to entertain a petition to modify Seals's sentence.

Issues

We must first address an issue raised by the State on cross-appeal:

I. Whether the trial court's modification of Seals's sentence on remand is void.

We then address the following issue raised by Seals:

II. Whether the trial court abused its discretion in failing to state its reasons for imposing a reduced sentence.

Facts and Procedural History

In *Seals v. State*, 846 N.E.2d 1070 (Ind. Ct. App. 2006), we outlined the facts and procedural history as follows:

> On October 23, 2003, in cause number 09D02-0307-FB-35, the State charged Seals with one count of class B felony dealing in cocaine. At the initial hearing on December 11, 2003, the trial court appointed a public defender to represent Seals. Seals subsequently retained counsel, who entered his appearance on March 1, 2004. At a hearing on February 3, 2005, Seals pled guilty as charged pursuant to an agreement that capped the executed portion of her sentence at eight years, with any probationary period to be left to the trial court's discretion. Appellant's App. at 80. In return, the State agreed to dismiss "all counts" of the information filed in cause number 09D01-0307-FB-17.[1] *Id*. Seals admitted to selling cocaine to either Kristy Edmondson or

[1] The exact nature of the counts is unknown, although the record suggests that Seals was charged with four additional counts of dealing in cocaine.

Cheryl Wooten on January 15, 2003. Tr. vol. 2 at 9.[2] The trial court took the plea under advisement and set the matter for sentencing.

At the sentencing hearing on March 8, 2005,[3] Seals's counsel called as a witness Sharon Johnston, the probation officer who prepared the presentence investigation report. Johnston recommended that Seals serve the executed portion of her sentence on home detention because she had no prior felony or misdemeanor convictions and because she has a medical condition that caused her to become legally blind.[4] Tr. vol. 1 at 6. Johnston testified that Seals was receiving social security disability benefits and needed treatment that she would be unlikely to receive in prison. *Id*. at 7.

The State called Cass County Sheriff's Detective Jeffrey D. Schnepp, who had investigated Seals for over two years. Over objection, Detective Schnepp opined that Seals was likely to reoffend because her "entire family was involved in cocaine trafficking" and therefore home detention would be inappropriate. *Id*. at 9-10. Detective Schnepp acknowledged that he had arrested Seals for "five different incidences [sic] of cocaine dealing." *Id*. at 10. The trial court clarified that Seals was being prosecuted only for one class B felony charge and stated, "[T]hat's the only thing the Court is going to consider." *Id*. When asked about the appropriateness of home detention for Seals, Detective Schnepp testified over objection, "I believe with all these trafficking [sic] we had on her, I don't believe in home is appropriate, personally." *Id*. Seals's counsel moved to strike and stated, "Once again, your Honor has already made a ruling that you're not going to consider things she's charged with and were dismissed." *Id*. The court responded, "I am considering things that she's been charged with but my record shows that she has been charged with one count of dealing in cocaine, is that correct?" *Id*. When Seals's counsel responded in the affirmative, the court stated, "Okay, I understand what [your] objection is. I don't know that it relates to the opinion that he's given or I do understand what your objection is." *Id*. at 11.

In closing, Seals's counsel pointed out that Seals had been convicted "of being involved in a transaction for fifty dollars for .45 grams" of cocaine. *Id*. at 14. He noted that Seals had no prior criminal history, had pled guilty,

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[2] In establishing the factual basis, the State failed to elicit testimony regarding the weight of the cocaine sold. The record indicates that the cocaine weighed 0.45 grams. *See* Tr. vol. 1 at 14 (Seals's counsel: "This is a case where [Seals] stands before you convicted by her plea of being involved in a transaction for fifty dollars for .45 grams."). Dealing in cocaine is a class A felony if "the amount of the drug involved weighs three (3) grams or more[.]" Ind. Code § 35-48-4-1(b).

[3] The sentencing hearing transcript mistakenly shows the date as May 8, 2005.

[4] Seals suffers from bilateral optical atrophy and has only peripheral vision. Appellant's App. at 66 (presentence investigation report); Tr. vol. 1 at 8 (Seals's testimony).

and was "legally blind and needs treatment for the blindness which she cannot receive at the Indiana Women's Prison." *Id*. Seals's counsel referred to Johnston's recommendation for home detention and stated that "that would be the appropriate sentence[,]" without suggesting a specific term. *Id*.

The State argued that Seals had already received "a mitigated plea for pleading guilty" and noted that she had been "charged with five different sales of cocaine." *Id*. The State observed that blindness "is not a statutory mitigator" and that no evidence had been presented that the Indiana Women's Prison could not take "care of [Seals's] physical infirmities." *Id*. at 15. The State mentioned Detective Schnepp's "opinion on giving home detention to convicted drug dealers[,]" noted that the presumptive sentence for a class B felony is ten years, and asserted that Seals "deserves eight years in the Department of Corrections and two years probation. That will get her to the ten years." *Id*.[5]

The trial court pronounced sentence as follows:

> Well, the Court as I said is going to consider one case and that's the one that I have before me and the plea agreement that was presented before me and I do accept the plea agreement as tendered by the parties in this cause of action. And, Arnetia, based upon the plea agreement. The range that I have available to me, I am sentencing you to eight years in the Department of Corrections. Eight years is a mitigated sentence for what you've been pled—what you pled guilty for. And that will be the sentence of the Court.

Id. at 16. The court informed Seals of her right to appeal her sentence and told her to notify the court if she desired "to have appointed counsel to appeal the sentencing in this cause of action." *Id*. at 17.

Id. at 1071-73 (footnotes in original).

The trial court appointed a public defender, who filed a brief that failed to comply with the requirements of *Packer v. State*, 777 N.E.2d 733 (Ind. Ct. App. 2002), and "demonstrate[d] a lack of commitment and dedication to his client." *Id*. at 1076. In our previous opinion, handed down May 10, 2006, we acknowledged the State's observation that

[5] At this point, the trial court asked the State, "Why did you offer the plea of eight as opposed to something different? Up to twenty? If you had all these cases allegedly pending against her? Are they bad cases or they—did you [give] consideration for …[.]" Tr. vol. 1 at 15. The State responded, "I gave her consideration for her record and I gave her consideration for pleading guilty." *Id*. Seals's counsel stated, "I would further add, Judge, they are bad cases. There are problems with these cases." *Id*.

"the public defender failed to raise the 'facially obvious issue' of the appropriateness of Seals's eight-year executed sentence pursuant to Indiana Appellate Rule 7(B)." *Id*. (footnote omitted). We retained jurisdiction and remanded for appointment of replacement counsel and rebriefing. *Id*. at 1077.

On May 12, 2006, the trial court appointed Robert L. Murray as Seals's replacement counsel. According to Murray's brief, he "had Seals transported from the Indiana Women's Prison to consult with him regarding her appeal." Appellant's Br. at 3. With Seals's permission, Murray filed a petition to modify her sentence on July 14, 2006. The parties subsequently filed their respective briefs.

Discussion and Decision

I. Modification of Sentence

On cross-appeal, the State contends that the trial court had no jurisdiction to modify Seals's sentence on remand and that the modification is therefore void. We agree. This Court acquired jurisdiction over Seals's case on May 23, 2005, when the trial court clerk issued a notice of completion of clerk's record. Ind. Appellate Rule 8. "[A]s a general rule, once an appeal is perfected the trial court loses subject matter jurisdiction over the case." *Clark v. State*, 727 N.E.2d 18, 20 (Ind. Ct. App. 2000), *trans. denied*. We retained jurisdiction over Seals's case and remanded for the limited purpose of appointing replacement counsel and rebriefing. "The limitation upon a trial court's jurisdiction after a remand is based upon the expectation that the trial court will do what it was requested to do by the appellate court." *Stepp v. Duffy*, 686 N.E.2d 148, 152 (Ind. Ct. App. 1997), *trans. denied* (1998). Here, the trial court overstepped its jurisdictional bounds in ruling on Seals's

petition to modify her sentence. "Where a trial court, having once had jurisdiction, has been divested of that jurisdiction and still attempts to exercise its power, its actions are void." *Carter v. Allen*, 631 N.E.2d 503, 507 (Ind. Ct. App. 1994). We therefore vacate as void the trial court's modification of Seals's sentence.[6]

II. Failure to Find Mitigating Circumstances

Seals notes that her eight-year sentence is less than the ten-year presumptive sentence for a class B felony and contends that the trial court abused its discretion in failing to "perform the balancing of aggravators and mitigators" in imposing a reduced sentence. Appellant's Br. at 12; *see* Ind. Code § 35-50-2-5 (setting presumptive sentence for class B felony at ten years, with not more than four years subtracted for mitigating circumstances and not more than ten years added for aggravating circumstances).[7] We agree.

In *Kinkead v. State*, 791 N.E.2d 243 (Ind. Ct. App. 2003), *trans. denied*, we explained,

> A trial court is afforded broad discretion in determining a defendant's sentence, and we will reverse the trial court's determination only for an abuse of that discretion. When a trial court imposes a sentence other than the presumptive sentence, we examine the record to ensure that the trial court explained its reasoning for selecting the imposed sentence. When a trial court deviates from the statutorily prescribed presumptive sentence, it must identify all of the significant mitigating and aggravating circumstances, state the reason why it considers each circumstance to be either mitigating or aggravating, and articulate the evaluation and balancing of these circumstances to determine whether an enhanced or reduced sentence is appropriate.

Id. at 247 (citations and footnote omitted). In *Frey v. State*, 841 N.E.2d 231 (Ind. Ct. App. 2006), another panel of this Court stated that "the duty to explain sentences, including the

[6] On October 11, 2006, Seals filed a "belated motion to remand to the Cass Superior Court for the limited purpose of considering [her] Petition to Modify Sentence." We hereby deny that motion.

identification of aggravating and mitigating factors, is triggered in every instance *except* when the trial court imposes the presumptive sentence without explaining its decision." *Id*. at 234; *see also Battles v. State*, 688 N.E.2d 1230, 1236 (Ind. 1997) ("Inclusion of mitigators in the sentencing statement is mandatory only if they are used to reduce the presumptive sentence or to offset aggravators."). At sentencing in this case, the State acknowledged that it "gave [Seals] consideration" for her lack of criminal record and for pleading guilty in offering her an eight-year cap on the executed portion of her sentence, but the trial court did not specifically find these to be mitigators in its sentencing statement. Tr. vol. 1 at 15.[8]

Given the trial court's failure to explain its rationale for imposing a reduced sentence, what is the proper course of action on appeal? In *Frey*'s lead opinion, Judge Friedlander searched the record sua sponte for mitigators and aggravators, balanced them, and upheld the maximum eight-year sentence imposed for the defendant's class B felony conviction pursuant to the plea agreement.[9] Judge Vaidik disagreed with this procedure:

> The task of identifying aggravating and mitigating circumstances is a matter best entrusted to our trial courts and juries and not to us. *See* Ind. Code § 35-38-1-7.1;[10] *Blakely v. Washington*, 542 U.S. 296 (2004). This is so

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[7] In response to *Blakely v. Washington*, 542 U.S. 296 (2004), the legislature amended Indiana Code Section 35-50-2-5 effective April 25, 2005, to provide for an "advisory" sentence of ten years.

[8] Absent an explanation for the trial court's sentencing decision, we cannot agree with the State's assertion that "[b]y adopting a sentence within the plea agreement, the trial court necessarily found those mitigators." Appellee's Br. at 10. The State observes that "a sentence enhancement will be affirmed in spite of a trial court's failure to specifically articulate its reasons if the record indicates that the court engaged in the evaluative processes" and asks us to apply this precept to Seals's reduced sentence. *Plummer v. State*, 851 N.E.2d 387, 392 (Ind. Ct. App. 2006) (brackets and quotation marks omitted). We cannot do so here, since the record does not indicate that the trial court did anything other than impose the maximum executed sentence permitted by the plea agreement.

[9] In *Frey*, the defendant's total sentence was capped at eight years. In this case, the trial court could have imposed a total sentence greater than the presumptive ten-year term.

[10] Indiana Code Section 35-38-1-7.1 lists numerous aggravating and mitigating circumstances that a trial court may consider in imposing sentence.

> because the identification of aggravating and mitigating factors often depends on credibility determinations. And trial courts and juries are in a better position to judge the credibility of the evidence as they view the evidence first-hand. Our task, then, is to review the findings of aggravators and mitigators for an abuse of discretion only after the findings are made. Admittedly Indiana Appellate Rule 7(B)[11] authorizes appellate courts to revise sentences, but that function should not give us a green light to identify aggravators and mitigators in the first place. In other words, our authority to revise sentences does not mean that when a trial court fails to identify aggravators and mitigators, we should do that for them. I therefore disagree with the lead opinion's decision to identify and weigh the aggravators and mitigators in this case. Instead, I would remand the case for the trial court to do so.

Frey, 841 N.E.2d at 237 (Vaidik, J., dissenting in part) (parallel citations omitted).

We find Judge Vaidik's reasoning persuasive, especially in this case, where Seals argues that the trial court should have found her expression of remorse to be a mitigating circumstance. Our supreme court has stated that a trial court's determination of the sincerity of a defendant's remorse is "similar to a determination of credibility." *Pickens v. State*, 767 N.E.2d 530, 534-35 (Ind. 2002). The same may be said for the determination of whether a defendant's decision to plead guilty was a genuine acceptance of responsibility or a purely pragmatic decision perhaps less deserving of mitigation. We therefore conclude that the proper course of action is to remand for a more detailed sentencing statement.[12] As before, we retain jurisdiction of this case. On remand, the trial court may entertain a petition by

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[11] Indiana Appellate Rule 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."

[12] Consequently, we do not address Seals's argument that her sentence is inappropriate in light of the nature of the offense and her character pursuant to Indiana Appellate Rule 7(B).

Seals to modify her sentence. Regardless of whether the trial court modifies Seals's sentence, it must state its reasons for imposing a sentence less than the presumptive term.

Vacated and remanded.

KIRSCH, C.J., and BAILEY, J., concur.