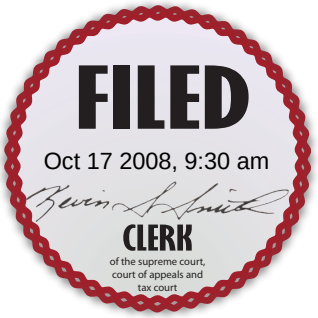

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IN THE
COURT OF APPEALS OF INDIANA

ANTIOWAN D. LOFTIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 92A05-0806-CR-313
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WHITLEY SUPERIOR COURT
The Honorable Michael D. Rush, Judge
Cause No. 92D01-0711-FD-799

October 17, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Antiowan Loftin appeals his sentence for resisting law enforcement as a class D felony,[1] operating a motor vehicle while suspended as a class A misdemeanor,[2] and possession of marijuana as a class A misdemeanor.[3] Loftin raises two issues, which we restate as:

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

II. Whether his sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

The relevant facts follow. On November 17, 2007, Loftin, though a habitual traffic offender with a suspended license, was operating a motor vehicle when a police officer tried to stop him. Although the police officer pursued him with flashing lights and the siren turned on, Loftin did not stop. Loftin also had marijuana in his possession during the chase.

The State charged Loftin with resisting law enforcement as a class D felony, operating a motor vehicle while privileges are suspended as a class D felony, criminal

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[1] Ind. Code § 35-44-3-3 (Supp. 2006).

[2] Ind. Code § 9-30-10-16 (2004).

[3] Ind. Code § 35-48-4-11 (2004).

recklessness as a class A misdemeanor, possession of marijuana as a class A misdemeanor, and failure to stop after an accident as a class B misdemeanor. On January 28, 2008, Loftin pled guilty to resisting law enforcement as a class D felony, operating a motor vehicle while suspended as a class A misdemeanor, and possession of marijuana as a class A misdemeanor, and the State dismissed the remaining charges. The plea agreement provided that Loftin would be sentenced to two and one-half years but left how much of the sentence would be executed and how much suspended to probation to the trial court's discretion.

At the sentencing hearing, Loftin argued that he should be given credit for time served and then be placed on probation for the remainder of his sentence because he "does have some strong support people in Court that have come. . . . They care a lot about what happens to him. They've been to every one of his court appearances." Transcript at 22. The trial court addressed Loftin as follows:

> You've got seven previous misdemeanors and a felony. A history of substance abuse. An abysmal, terrible driving record. It's almost like you think that maybe the laws don't apply to you. That you just do what you want to do anyway. You've got a Failure to Appear in your background. And you haven't finished your education. These are reasons why I would look at these things as aggravating circumstances. I don't see, maybe your relative youth could be considered a mitigating circumstance. But you've had opportunities in previous occasions to say what you wanted to judges, to write letters, to have lawyers speak for you and you are still coming back Antiowan. I don't understand that. You are still coming back to criminal court. And so I have to make a decision here as to how we can somehow punish you and also maybe do some good stuff for you too. So I'm going to order that you stand committed for the full two and a-half years. I can't

> see any reason to do otherwise. You will be given credit for one hundred and twenty-nine days against that. I'm going to have you serve this at the Indiana Department of Correction. And here's why. A couple of reasons. Number One: I think you can get your GED there at the time you will be there. So I'm expecting you to get your GED. Get an education. Number Two: There's job training available there. Number Three: There's substance abuse assistance available at the Department of Corrections. We can't give you all of that over here at the Whitley County Jail. . . . I'm also going to require Antiowan that while you are in the Department of Corrections, if I haven't already said it, get some substance abuse assistance, that will help. All that's available under one roof. And if you are going to be the man you can be someday, you need those services.

Id. at 25-27. Thus, the trial court sentenced Loftin to two and one-half years in the Indiana Department of Correction.[4]

I.

The first issue is whether the trial court abused its discretion in sentencing Loftin. We note that Loftin's offenses were committed after the April 25, 2005 revisions of the sentencing scheme.[5] 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, 490 (Ind. 2007), clarified on reh'g, 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

[4] Loftin was also ordered to pay restitution for property damage resulting from his actions but does not raise the issue on appeal.

against the logic and effect of the facts and circumstances before the court." Id.

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 that should have been found, is not subject to review for abuse of discretion. Id.

Loftin argues that the trial court improperly rejected a mitigating factor and erroneously found an aggravating factor.

A. Mitigating Factor

Loftin argues that he has "strong support from friends and family" and that the trial court abused its discretion "in rejecting [his] family support as a mitigating

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[5] Indiana's sentencing scheme was amended effective April 25, 2005 to incorporate advisory sentences rather than presumptive sentences. See Ind. Code § 35-50-2-7 (Supp. 2005).

circumstance." Appellant's Brief at 9. 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).

Here, although Loftin's attorney mentioned in closing arguments that he has "some strong support people" who "care a lot about what happens to him," no evidence was presented in support of this assertion. Transcript at 22. Although at sentencing the trial court noted that Loftin's friends and family agree that Loftin "still ha[s] the capacity to do good stuff," id. at 25, we agree with the State that the record does not support that Loftin has a support structure. We cannot say that the trial court abused its discretion in failing to find the support of Loftin's friends and family as a significant mitigating factor.

B. Aggravating Factor

Loftin argues that the trial court "erroneously found [his] failure to pursue his education to be an aggravating circumstance." Appellant's Brief at 8. He correctly notes that a lack of education is often considered a mitigating circumstance. See, e.g., Long v. State, 743 N.E.2d 253, 262 (Ind. 2001) ("Long's limited education, his limited intellectual functioning, and his lack of significant family support throughout his life, are mitigating circumstances that appeal to our compassion."). He also notes that he "had no legal obligation prior to his sentencing to complete his high school degree or obtain a GED."

Id. We agree that the trial court abused its discretion to the extent that it considered his lack of education to be an aggravating factor.

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." Anglemyer, 868 N.E.2d at 491. The trial court also found, and Loftin does not challenge these findings, that Loftin has a criminal history including convictions for seven misdemeanors and one felony, has failed to appear for hearings before the court, and has an abysmal driving record suggesting that he does not believe that laws apply to him. Given these remaining aggravating factors, we can say with confidence that the trial court would have imposed the same sentence without consideration of the one improper aggravator.

II.

The next issue is whether Loftin's 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). Loftin argues that we should reduce the executed portion of his sentence.

Our review of the nature of the offense reveals that Loftin was driving illegally because his privileges had been suspended for being an habitual traffic offender. He refused to stop his vehicle when pursued by a police officer with flashing emergency lights and an activated siren. Moreover, he had marijuana in his possession during the chase.

Our review of the character of the offender reveals that Loftin was twenty-four years old when he committed the present offenses. Loftin has previous convictions for four counts of operating never having a valid license as class C misdemeanors, three counts of operating while suspended as class A misdemeanors, and one felony conviction for criminal confinement as a class D felony. Loftin has also failed to appear for a hearing on a petition alleging a violation of probation and regarding pending criminal charges under another proceeding. We agree with the trial court that Loftin's actions suggest that he thinks that "maybe the laws don't apply to [him]." Transcript at 25.

After due consideration of the trial court's decision, we cannot say that the sentence imposed by the trial court is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Shouse v. State, 849 N.E.2d 650, 660 (Ind. Ct. App. 2006) (holding that defendant's eight and one-half year sentence for auto theft and two counts of resisting law enforcement was not inappropriate), trans. denied.

For the foregoing reasons, we affirm Loftin's sentence for resisting law enforcement as a class D felony, operating a motor vehicle while privileges are suspended

as a class A misdemeanor, and possession of marijuana as a class A misdemeanor.

Affirmed.

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