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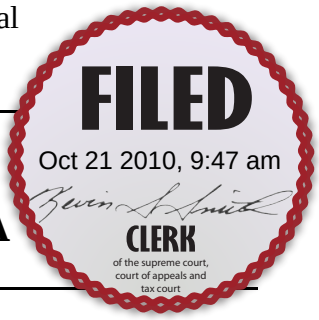

IN THE COURT OF APPEALS OF INDIANA

JOSEPH C. BANNON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A05-1001-CR-120
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Daniel J. Pfleging, Judge
Cause No. 29D02-0807-MR-82

October 21, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Joseph C. Bannon appeals his sentence following a plea of guilty to attempted obstruction of justice, a class D felony;[1] and reckless homicide, a class C felony.[2]

We affirm.

ISSUE

Whether the trial court erred in sentencing Bannon.

FACTS

Bannon and Nicholas Reners had been friends since childhood. Bannon occasionally allowed Reners, who was living in his van, to shower at his apartment and borrow clothes.

After a night of drinking on July 29, 2008, Bannon, Reners, Steven Eliot, Jessica Jerome, Amanda Bonney, and DeShawn Jones went to Bannon's Westfield apartment. At some point, Bannon butted Reners' head with his own head. When Reners tried to leave, Bannon struck him three more times.

Although Reners sustained obvious injuries and showed signs of distress during the night and into the next morning, no one sought medical assistance. At some point during the morning, Reners died.

At approximately 11:00 a.m. on July 30, 2008, Jerome, Bonney, and Bannon discovered that Reners was dead. Bannon told Jerome and Bonney to leave the

[1] Ind. Code §§ 35-44-3-4; 35-41-5-1.

[2] I.C. § 35-42-1-5.

apartment. Jerome and Bonney telephoned 911 from the parking lot but returned to Bannon's apartment at the dispatcher's request. Bannon instructed Jerome not to tell the police that he had struck Reners. An autopsy performed the next day revealed that Reners had died from blunt force trauma to the head.

On July 31, 2008, the State charged Bannon with class C felony criminal confinement and three counts of class D felony obstruction of justice. On August 6, 2008, the State filed an amended information, charging Bannon with murder and class B felony aggravated battery.

On December 14, 2009, the day of the scheduled jury trial, Bannon entered into a plea agreement with the State. Pursuant to the plea agreement, Bannon agreed to plead guilty to one count of attempted obstruction of justice, a class D felony, and reckless homicide, a class C felony, as a lesser-included offense of murder. In exchange for Bannon's guilty plea, the State agreed to dismiss all remaining counts. The plea agreement provided that sentencing would be within the trial court's discretion.

The trial court ordered a pre-sentence investigation report ("PSI") and held a sentencing hearing on January 5, 2010. According to the PSI, Bannon was twenty-four years old when he committed the present offense. The PSI showed that Bannon had been adjudicated a juvenile delinquent for committing acts which, if committed by an adult, would have constituted the following: two counts of theft; illegal consumption of alcohol; cruelty to animals; disorderly conduct; possession of marijuana; and aiding, inducing or causing burglary.

The PSI further showed that, as an adult, Bannon had been convicted of the following: class B misdemeanor battery; class A misdemeanor resisting law enforcement; two counts of class C misdemeanor illegal consumption of alcohol; class A misdemeanor operating a vehicle while intoxicated; class C misdemeanor operating a vehicle while intoxicated; class B misdemeanor false informing; class A misdemeanor dealing in marijuana; class A misdemeanor battery; and class A misdemeanor possession of marijuana. Four of Bannon's convictions resulted in probation. Bannon violated his probation several times, resulting in three revocations.

Additionally, Bannon had been charged with class A misdemeanor conversion and class C misdemeanor illegal consumption of alcohol. The State, however, dismissed these charges per plea agreements. Furthermore, in 2001, the State charged Bannon with sexual battery, but the arrest did not result in a conviction. The PSI further reported that while Bannon was in jail awaiting trial for the present offense, he committed numerous violations, resulting in eight incident reports.

During the sentencing hearing, Bannon expressed remorse for his crime. He also argued that the autopsy performed on Reners indicated that Reners had "participated in [the] head butt . . . ." (Tr. 118).

The trial court found as follows:

> [T]here has been a history of criminal or delinquent behavior, and I do find that that is an aggravating circumstance in this particular matter but I do take particular note of the nature of several of the offenses. . . . [M]any of these were resolved in such a way that they would be misdemeanor convictions rather than felony convictions but the overall trend is we have a

> person that's before the Court at this point in time that has a total disregard for his fellow man. He has a tendency to be violent or to place people in a condition where their safety could be in danger. Even though they are misdemeanors because of the nature of the offense and the nature of this case, I find that those are justifiable aggravating factors that must be taken into consideration prior to me doing sentencing. We have heard argument and we have had statements that the defendant has violated the conditions of his probation . . . . We also had allegations and it's been eluded [sic] that he has disciplinary complaints at the jail while this case has been pending. And, for that reason . . . and the violations of probation . . . he is not a suitable candidate for Community Corrections commitment. . . . [The probation officer] set out imprisonment will result [in] undue hardship to the person or the dependents of the person. The Court is not going to find that. I have not seen one thing in the [PSI] nor have I heard one shred of evidence that [Bannon] has given any monetary support to [his two children]. . . . [Bannon's counsel] asks that the Court accept an argument that the victim, the decedent, participated in the event. Well, I believe the State has taken that into consideration when they offered to reduce the murder to reckless homicide as a lesser included offense. . . . [T]here was this argument made during sentence [sic] that Bannon was taking care of [Reners]. . . . I believe . . . he was doing nothing to care for his friend. In fact, the lack of care by [Bannon] . . . is one of the things that lead [sic] to [Reners'] death.

(Tr. 132-35). The trial court then sentenced Bannon to consecutive sentences of three years for attempted obstruction of justice and eight years for reckless homicide for a total sentence of eleven years.

DECISION

Bannon asserts that the trial court erred in sentencing him. Specifically, he argues that the trial court failed to consider, or give adequate consideration to, mitigating circumstances and failed to enter an adequate sentencing statement in support of imposing consecutive sentences. Bannon also argues that his sentence is inappropriate.

A sentence that is within the statutory range is subject to review only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). A trial court may abuse its discretion if the sentencing statement

> explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law.

Id. at 490-91. However, the relative weight or value assignable to reasons properly found, or to those which should have been found, is not subject to review for abuse of discretion. *Id.*

1. Mitigating Circumstances

Bannon argues that the trial court abused its discretion in failing to find the following mitigating circumstances: his remorse, his plea of guilty, Reners' role in the crime, and the hardship Bannon's incarceration will impose on his dependents. We disagree.

As to the undue hardship his incarceration may impose on Bannon's dependents and the purported "role the victim played in the act that lead [sic] to his death," it is clear from the sentencing statement that the trial court considered these factors but did not find them to be significant. Bannon's Br. at 7. As to the weight assigned to those mitigating circumstances, it is not subject to review for abuse of discretion. *See Anglemyer*, 868 N.E.2d at 490. Thus, we find no abuse of discretion.

As to the remaining proffered mitigating circumstances, we note that

> [t]he failure to find a mitigating circumstance clearly supported by the record may imply that the trial court overlooked the circumstance. The trial court, however, is not obligated to consider "alleged mitigating factors that are highly disputable in nature, weight, or significance." The trial court need enumerate only those mitigating circumstances it finds to be significant. On appeal, a defendant must show that the proffered mitigating circumstance is both significant and clearly supported by the record.

Rawson v. State, 865 N.E.2d 1049, 1056 (Ind. Ct. App. 2007) (internal citations omitted), *trans. denied*.

Here, Bannon maintains that the trial court abused its discretion in failing to find his guilty plea to be a mitigating circumstance. "Our courts have long held that a defendant who pleads guilty deserves to have some mitigating weight extended to the guilty plea in return." *Cotto v. State*, 829 N.E.2d 520, 525 (Ind. 2005). A guilty plea, however, is not necessarily a significant mitigating factor. *Id.*

The evidence against Bannon indicates that his decision to enter a guilty plea was pragmatic. Furthermore, Bannon received a substantial benefit from his plea, where the State dismissed several felony charges. Thus, we do not find that the trial court abused its discretion in failing to identify Bannon's guilty plea as a mitigating circumstance as we cannot say that it was significant. *See Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005) ("[A] guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one."), *trans. denied*. In addition, we cannot say that Bannon's guilty plea is a significant mitigating

circumstance as he pleaded guilty the day of his trial. *See Primmer v. State*, 857 N.E.2d 11, 16 (Ind. Ct. App. 2006) ("The significance of a guilty plea is lessened if it is made on the eve of trial and after the State has already expended significant resources."), *trans. denied*.

Bannon also maintains that the trial court abused its discretion in failing to find his remorse to be a mitigating circumstance. Remorse is a valid mitigating circumstance. *Hape v. State*, 903 N.E.2d 977, 1002 (Ind. Ct. App. 2009), *trans. denied*. "On appeal, however, our review of a trial court's determination of a defendant's remorse is similar to our review of credibility judgments: without evidence of some impermissible consideration by the trial court, we accept its determination." *Id.* at 1002-03.

Here, Bannon does not allege any impermissible considerations, and we find none. Finding no abuse of discretion in failing to find Bannon's remorse to be a significant mitigator, we accept the trial court's determination.

2. Sentencing Statement

Bannon also asserts that the trial court failed to "sufficiently articulate the reasons for the imposition of consecutive sentences." Bannon's Br. at 9.

> The decision to impose consecutive sentences lies within the discretion of the trial court. A trial court is required to state its reasons for imposing consecutive sentences or enhanced terms. However, a trial court may rely on the same reasons to impose a maximum sentence and also impose consecutive sentences.

Gilliam v. State, 901 N.E.2d 72, 74 (Ind. Ct. App. 2009) (internal citations omitted). A single aggravating circumstance may be sufficient to support the imposition of consecutive sentences. *Id.*

The trial court's sentencing statement in this case clearly indicates that the trial court found Bannon's extensive criminal history to be an aggravating circumstance. To the extent that Bannon claims that the trial court erred in its weighing of his criminal history, this argument is not available to him. *See Anglemyer*, 868 N.E.2d at 491. We therefore find no abuse of discretion in ordering Bannon's sentences to run consecutively.

Even if this court were to find the trial court's sentencing statement inadequate or that the trial court abused its discretion in failing to consider Bannon's remorse and guilty plea as mitigating circumstances, this court would have at least three courses of action:

> 1) "remand to the trial court for a clarification or new sentencing determination", 2) "affirm the sentence if the error is harmless", or 3) "reweigh the proper aggravating and mitigating circumstances independently at the appellate level."

Scott v. State, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006) (quoting *Cotto*, 829 N.E.2d at 525), *trans. denied*.

Here, the record clearly supports the finding of Bannon's criminal history, which includes numerous convictions and probation violations, as an aggravating circumstance. Even if we were to find Bannon's remorse and guilty plea to be significant mitigating circumstances, his criminal history far outweighs these mitigating circumstances. Thus, any error in sentencing was harmless.

3. Inappropriate Sentence

Bannon also asserts that his sentence is inappropriate. We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). It is the defendant's burden to "'persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.'" *Anglemyer*, 868 N.E.2d at 494 (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

In determining whether a sentence is inappropriate, the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Childress*, 848 N.E.2d at 1081. The advisory sentence for a class D felony is one and one-half years, with a potential maximum sentence of three years. I.C. § 35-50-2-7(a). The advisory sentence for a class C felony is four years, with a potential maximum sentence of eight years. I.C. § 35-50-2-6. Here, Bannon received the maximum sentence on both counts.

Regarding the nature of Bannon's offense, he violently struck his friend several times for no apparent reason. Despite Reners' obvious distress during the night and morning, Bannon failed to obtain medical assistance for him. After Reners was found dead, Bannon attempted to conceal his role in Reners' death.

Regarding Bannon's character, we acknowledge Bannon's expression of remorse during his sentencing statement. The trial court, however, is in the best position to observe a defendant's demeanor; determine whether his remorse is genuine; and sentence

accordingly. *See Golden v. State*, 862 N.E.2d 1212, 1216 (Ind. Ct. App. 2007), *trans. denied*.

As to Bannon's acceptance of responsibility for his crime by pleading guilty, we cannot say that this is a significant reflection of his character. The evidence against him indicates that his guilty plea was pragmatic; he received a substantial benefit for his plea in the dismissal of several felony charges; and the State did not reap a considerable benefit as Bannon pleaded guilty the day of his trial.

We further note that Bannon has several prior convictions. Several of the convictions, like the present offense, arose from alcohol or drug use. Moreover, his adjudication as a delinquent for having committed an act which, if committed by an adult, would have constituted animal cruelty followed by subsequent convictions for resisting law enforcement and battery indicate an escalating pattern of violence.

Bannon also violated probation several times and committed numerous violations while awaiting trial in jail. Bannon also has a record of several arrests and charges, including a charge of sexual battery. A defendant's record of arrests "may be relevant to the trial court's assessment of the defendant's character in terms of the risk that he will commit another crime." *Cotto*, 829 N.E.2d at 526. Given Bannon's obvious disregard for the law and failed prior attempts to rehabilitate him, we cannot say that his sentence is inappropriate.

Affirmed.

BRADFORD, J., and ROBB, J., concur.