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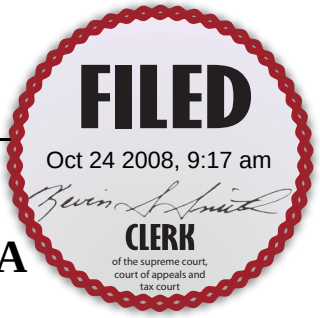

IN THE COURT OF APPEALS OF INDIANA

ERIC D. JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0804-CR-175
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-0710-FB-148

October 24, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Following a guilty plea, Eric D. Johnson appeals his eight-year sentence for class C felony carrying a handgun without a license. We affirm.

Issues

I. Did the trial court overlook a significant mitigating circumstance clearly supported by the record?

II. Is Johnson's sentence inappropriate in light of the nature of the offense and his character?

Facts and Procedural History

On October 2, 2007, the State charged Johnson with class B felony unlawful possession of a firearm by a serious violent felon. On February 27, 2008, one day before the scheduled trial date, the State charged Johnson with class C felony carrying a handgun without a license. *See* Ind. Code § 35-47-2-23(c) (elevating offense from class A misdemeanor to class C felony if defendant has been convicted of felony within fifteen years before date of offense). Also on that date, Johnson signed a plea agreement in which he agreed to plead guilty to the class C felony charge in exchange for the dismissal of the class B felony charge. Sentencing was left to the trial court's discretion.

At the ensuing guilty plea hearing, Johnson admitted to being on parole and to the facts alleged in the charging information. *See* Appellant's App. at 30 (alleging that on or about September 20, 2007, Johnson unlawfully carried "on or about his person or in a vehicle a handgun, without a license therefor, in a place not his place of abode or his fixed place of business"); *id*. at 31 (alleging that Johnson had been convicted of class C felony robbery on

March 14, 2005). The trial court took Johnson's plea under advisement and set the matter for sentencing.

At the sentencing hearing on March 24, 2008, Johnson's counsel argued that the circumstances of the crime were "somewhat mitigating" and stated,

> Judge, surely you read the probable cause affidavit in this case and it's the circumstances of this that are somewhat mitigating and I think the prosecutor would agree with me. While Mr. Johnson's cause for having the gun on that date is not a valid one or any justification whatsoever, he and this other fellow, Eric Meeks, went over to this residence and whatever they had in mind obviously was not of any good, but when they got there Mr. Meeks was the one that pulled out his gun and was pointing at these women. They were looking for another male individual who apparently was not there or wasn't at least coming out. But Mr. Meeks was the one pointing this gun and threatening and Mr. Johnson, I think all the witnesses will agree Mr. Johnson was trying to be a calming influence. He was telling Meeks to put the gun away, to stop pointing it, to chill out, to do whatever he can to calm himself. Mr. Johnson never took out a gun. He never did anything threatening. When one of the women told the two guys that they called the police they both took off running and the[y] found Mr. Johnson in an area where they also found a gun laying. So, that's the possession. But Mr. Johnson never took out a gun. He was trying to calm the situation down. Although he went over there obviously for whatever purpose looking for this other fellow. So Judge, obviously it's not an excuse. It's not any kind of justification, but the situation could have been a heck of a lot worse and I just want you to weigh that possibly against his criminal history. Obviously that's not good. We're looking at asking the Court just to give the advisory four year sentence executed[.]

Sentencing Tr. at 5-7.

The prosecutor acknowledged that he had "no dispute with" counsel's statements and replied,

> On the one hand, as far as he telling Mr. Meeks to, you know, chill, don't be pointing a gun at these people. But never the less, he was packing a firearm and as I recall there was a fingerprint that was found on the magazine that was inside the firearm. So I mean, he obviously [w]as carrying a handgun.

Id. at 7.

During his allocution, Johnson admitted that he had "no excuse for carrying a firearm[,]" which he knew to be illegal, and that he was "unaware that the penalty was so severe." *Id*. at 8. The trial court accepted Johnson's guilty plea and stated,

> I'm going to find that the defendant's plea of guilty and acceptance of responsibility to the extent that it is an acceptance of responsibility, is a mitigator, but not a substantial one and in as much as that's been compensated for by the dismissal of a class B felony in the plea agreement. So he has received substantial benefit by way of the plea agreement. On the other hand the aggravators of the defendant's extensive criminal history as listed almost two full pages [in the presentence investigation report ("PSI")].

Id. at 8-9. The court sentenced Johnson to eight years executed. This appeal ensued.

Discussion and Decision

I. Mitigating Circumstance

Johnson claims that the trial court erred in failing to consider his calming effect on his accomplice Meeks as a mitigating circumstance. So long as a defendant's sentence is within the statutory range, it is subject to review only for abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. A trial court may abuse its discretion if its sentencing statement omits reasons for imposing a sentence "that are clearly supported by the record and advanced for consideration[.]" *Id*. at 491. "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." *Id*. at 493.[1]

In *Fugate v. State*, our supreme court explained,

> The finding of mitigating factors is discretionary with the trial court. The trial court is not required to find the presence of mitigating factors. 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 has found that the factor does not exist. Further, the trial court is not required to weigh or credit the mitigating evidence the way appellant suggests it should be credited or weighed.

608 N.E.2d 1370, 1374 (Ind. 1993) (citations omitted). "A court does not err in failing to find mitigation when the presence of a mitigating circumstance is highly disputable in nature, weight, or significance." *Moon v. State*, 823 N.E.2d 710, 717 (Ind. Ct. App. 2005), *trans. denied*.

The State points out that no testimony regarding the specific facts of the crime was ever elicited under oath and that the arguments of counsel are not evidence. *Blunt-Keene v. State*, 708 N.E.2d 17, 19 (Ind. Ct. App. 1999). Even so, Johnson's counsel admitted that his client's designs in visiting the residence at issue were "not of any good," and Johnson admitted that he knew it was illegal to possess the handgun. Finally, it is reasonable to infer that Johnson was prepared to use his weapon if the need arose and that the incident did not escalate only because Johnson and his accomplice fled from the police. In light of the foregoing, we conclude that the trial court was well within its discretion in disregarding Johnson's proffered mitigator.

[1] To the extent Johnson argues that the trial court abused its discretion in weighing the proffered mitigator, we note that the trial court's weighing of aggravators and mitigators is not subject to review for

II. Appropriateness of Sentence

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." Johnson bears the burden of persuading us that his sentence has met this standard. *Anglemyer*, 868 N.E.2d at 494.[2]

"[R]egarding the nature of the offense, the advisory sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Id*. The sentencing range for a class C felony is two to eight years, with the advisory sentence being four years. Ind. Code § 35-50-2-6. Here, by his counsel's own admission, Johnson did not merely possess a handgun without a license; he brought it to another person's home, accompanied by an armed accomplice, with the intent to perpetrate mischief, if not violence. When he fled from the home, he dropped the handgun, thereby rendering it accessible to passersby. Certainly, the nature of Johnson's offense supports a sentence above the advisory.

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abuse of discretion. *Anglemyer*, 868 N.E.2d at 491.

[2] The State cites *Golden v. State*, 862 N.E.2d 1212 (Ind. Ct. App. 2007), *trans. denied*, for the proposition that "appellate review of sentencing is 'very deferential' to the trial court's decision' and that appellate courts should 'refrain from merely substituting our judgment for that of the trial court[.]'" Appellee's Br. at 8 (citing *Golden*, 862 N.E.2d at 1218). We direct the State's attention to *Stewart v. State*, 866 N.E.2d 858 (Ind. Ct. App. 2007), in which we urged the State "to discontinue citing earlier cases from this court stating that our review of sentences under Rule 7(B) is 'very deferential to the trial court and that we exercise our authority to revise sentences 'with great restraint.'" *Id*. at 865 (citations omitted). In *Stewart*, we espoused the view that "the Indiana Supreme Court has set a different course for us to follow when reviewing sentences, one that does not involve '*great* restraint' or being '*very* deferential' to the trial court." *Id*. In *Neale v. State*, our supreme court noted that the rewording of Appellate Rule 7(B) to allow revision of "inappropriate" as opposed to "manifestly unreasonable" sentences "changed its thrust from a prohibition on revising sentences unless certain narrow conditions were met to an authorization to revise sentences when certain broad conditions are satisfied." 826 N.E.2d 635, 639 (Ind. 2005).

As for Johnson's character, he admitted that he was on parole when he committed the instant crime. His criminal history fills two pages of his PSI and details eight true juvenile findings (including for assault, burglary of a dwelling with a deadly weapon, and marijuana possession); numerous driving- and alcohol-related convictions; convictions for domestic battery, attempted robbery, and robbery; and the revocation of three suspended sentences. Johnson's only apparent regret in committing the crime was that he had been unaware of the potential severity of the punishment.[3] Given Johnson's demonstrably antisocial character, we are unpersuaded that his eight-year sentence is inappropriate.

Affirmed.

KIRSCH, J., and VAIDIK, J., concur.

[3] If Johnson had been convicted of the class B felony with which he was originally charged, he could have received up to twenty years in prison. *See* Ind. Code § 35-50-2-5 (sentencing range for class B felony).