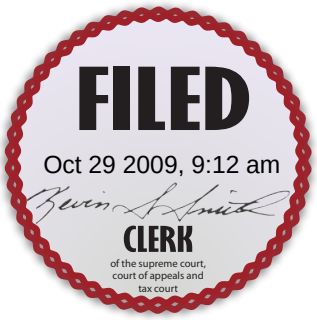

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IN THE
COURT OF APPEALS OF INDIANA

WILEY BELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 09A05-0902-CR-66
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CASS CIRCUIT COURT
The Honorable Leo T. Burns, Judge
Cause No. 09C01-0704-FB-18

October 29, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Wiley Bell[1] appeals the twelve-year sentence imposed by the trial court following his conviction for dealing in cocaine[2] as a Class B felony. On appeal, Bell raises the following restated issues:

I. Whether the trial court abused its discretion in failing to consider certain mitigating circumstances during sentencing; and

II. Whether Bell's twelve-year sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

FACTS AND PROCEDURAL HISTORY

On April 20, 2007, the State charged Bell with two counts of dealing in cocaine, each as a Class B felony. During an August 4, 2008 hearing, Bell pleaded guilty to Count 1, and the trial court accepted his plea. Thereafter, the State dismissed Count 2. Following a sentencing hearing, at which five witnesses testified on Bell's behalf, the trial court sentenced Bell to twelve years of incarceration. Bell now appeals.

DISCUSSION AND DECISION

I. Failure to Find Mitigating Factors

Bell first argues that the trial court abused its discretion in failing to consider certain mitigating factors during sentencing. Sentencing decisions are within the discretion of the trial court and are reviewed on appeal 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. "An abuse of discretion occurs if the decision is 'clearly against the logic and effect of

[1] While the caption refers to "Wiley," we note that official documents in the record before us also refer to the defendant as "Willey." *Appellant's App.* at 24, 33.

[2] *See* Ind. Code § 35-48-4-1(a)(1).

the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.'" *Id.* (quoting *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006)). A trial court may abuse its discretion (1) by failing to issue a sentencing statement or (2) by issuing a sentencing statement that bases a sentence on reasons that are not clearly supported by the record; omits reasons both advanced for consideration and clearly supported by the record; or includes reasons that are improper as a matter of law. *Id.* at 490-91.

The trial court is not required to find mitigating factors, nor is it obligated to accept as mitigating each of the circumstances proffered by the defendant. *Ashby v. State*, 904 N.E.2d 361, 363 (Ind. Ct. App. 2009). 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. However, under the current 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. *Benefield v. State*, 904 N.E.2d 239, 247 (Ind. Ct. App. 2009), *trans. denied.*

During Bell's January 22, 2009 sentencing hearing, five individuals testified on Bell's behalf. Karen Waldron, an employee of the Mental Health Association of Cass County, testified that she spent nearly sixty hours with Bell while he participated in her anger management courses. *Tr*. at 28. Waldron testified that Bell successfully completed two such courses, and opined that Bell would be successful on either in-home detention

or probation. *Id*. Gordon Grieder, a counselor who likewise taught anger management, agreed that Bell could be successful on in-home detention or probation. *Id*. at 32.

Bell's sister, Lily, maintained regular communication with her brother while he was incarcerated and testified that she believed Bell's past criminal history was caused by a drug problem. *Id*. at 38. Lily stated that they have a "close-knit family," and that Bell has assisted both his mother, who is on dialysis, and his handicapped brother. Reverend Edward Locke, who counseled Bell at the Cass County Jail, testified that he no longer thinks of Bell as a threat to the community. *Id*. at 42. Finally, Bell gave a statement expressing to his family his regret for what he has put them through and how grateful he is for their support. *Id*. at 45.

At the start of the sentencing hearing, the trial court corrected the pre-sentence investigation report ("PSI"), at the State's request, to reflect that Bell's guilty plea was a mitigating factor. *Id*. at 19. The State presented no witnesses but commented that Bell had taken responsibility for what he had done and that he had made "positive" and "excellent" changes. *Id*. at 47. As to Bell's completion of anger management classes, the State noted that Bell "would not have taken those courses had he not been incarcerated." *Id*. Bell's substance abuse problems were long-standing, and although Bell had significant time to address these issues, he had failed to do so. *Id*. at 48. While the State did not deny that Bell could be of help to his mother and brother, "the flip side of that coin, unfortunately, is that he had those responsibilities, those family responsibilities [including child support] when he chose to deal cocaine." *Id*. at 49. As to Reverend

Locke's suggestion that Bell be released on probation, Bell's criminal history precluded such a suggestion.[3]

The State also set forth Bell's extensive criminal history, which covered a time period of more than twenty years, extended over the states of Florida, Ohio, and Indiana, and included arrests and convictions for crimes including theft, check deception, false informing, criminal conversion, disorderly conduct, public intoxication, operating a vehicle after being adjudged an habitual offender, and possession of a controlled substance. *Id*. at 49-51. Finally, citing to Bell's PSI, the State raised a previously unmentioned factor; that Bell "owes nearly $18,000 in child support." *Id*. at 48. The State requested that Bell be sentenced to twenty years incarceration.

At the time of sentencing, the trial court made the following comments.

> Having heard evidence, having had the advantage of the [PSI] and the various information drawn from that, the Court now sentences you, Mr. Bell, to twelve years in the Indiana Department of Correction. The advisory sentence in this case is ten years, and the State makes an excellent argument, that your, in their words, horrible record speaks for itself and should result in the maximum sentence. The Court finds that your record is a significant aggravator. The Court finds that as suggested by the State that the child support arrearage in this case is an aggravator. The mitigator here is not only what, your plea of guilty, but also the steps that you have taken so far. This is a sentence that will result in continued incarceration for you. I'm going to make part of my order that you are eligible to participate in the CLIFF program through the Department of Correction, Clean Living is Freedom Forever. I hope you continue to take advantage of whatever resources are available to you.

Id. at 58.

[3] The State commented, "I'd also like the Court to know that this sentence is non-suspendible. He has a prior felony conviction so this, this sentence is not suspendible for the minimum portion of it." *Tr*. at 48. Neither Bell nor the trial court addressed this contention.

Bell argues that in sentencing him, the trial court failed to consider the following mitigating factors:

> (i) the crime was the result of circumstances unlikely to recur; (ii) the character and attitude of Bell indicates that he would be unlikely to commit another criminal offense; (iii) Bell is likely to respond affirmatively to in-home detention or short-term imprisonment; and (iv) long-term imprisonment of Bell would result in undue hardship to his brother and ailing mother.

Appellant's Br. at 4-5.

We first note that the trial court was free to disregard mitigating factors it did not find to be "'both significant and clearly supported by the record.'" *Lavoie v. State*, 903 N.E.2d 135, 141 (Ind. Ct. App. 2009) (quoting *Anglemyer*, 868 N.E.2d at 493). On appeal, Bell carries the burden of showing that a disregarded mitigator is both significant and supported by the record; therefore, we address each proffered mitigator in turn. *Id*.

First, Bell contends that the trial court failed to consider that the crime was the result of circumstances unlikely to recur. "'If the defendant does not advance a factor to be mitigating at sentencing, this Court will presume that the factor is not significant and the defendant is precluded from advancing it as a mitigating circumstance for the first time on appeal.'" *Henley v. State*, 881 N.E.2d 639, 651 (Ind. 2008) (quoting *Spears v. State*, 735 N.E.2d 1161, 1167 (Ind. 2000)). Bell did not address this mitigator at sentencing; as such, he cannot raise it for the first time on appeal. *See id*.

Second, Bell asserts that the trial court should have found as a significant mitigator that he was unlikely to commit another crime. While witnesses testified as to Bell's character and changed nature, his criminal history, both in duration and in number of

crimes committed, reveals Bell's blatant disregard for the law and his propensity to re-offend. Bell's statement that he was unlikely to commit another offense was not clearly supported by the record.

Third, Bell offers that he is likely to respond affirmatively to in-home detention or short-term imprisonment. Consideration and imposition of alternatives to incarceration is a "matter of grace" left to the discretion of the trial court. *Million v. State*, 646 N.E.2d 998, 1001-02 (Ind. Ct. App. 1995). According to Bell's PSI, in 1988, he was convicted in Florida for possessing and dealing cocaine. His conviction resulted in a sentence of almost two years in prison. Since that time, Bell has been arrested more than twenty times. Those cases resulted in sentences imposing pre-trial diversion, in-home detention, or probation—both supervised and unsupervised. Based on Bell's extensive history, and his failure to change following the court's previous leniencies, we cannot say that the trial court abused its discretion in finding that Bell should be incarcerated.

Finally, Bell argues that the trial court should have found that his long-term imprisonment will result in undue hardship to his handicapped brother and ailing mother. While imprisonment resulting in undue hardship can be a valid mitigating factor, *see* Indiana Code section 35-38-1-7.1(b)(10), here, there is no evidence of such undue hardship. Bell's sister testified that Bell could be helpful with his mother because the family would "like to maybe try" a dialysis machine that could cycle overnight and it would be important to have someone in the home. *Tr*. at 37. Bell's sister merely hopes to make a change in the future; there is no evidence in the record before us that Bell has assisted with his mother's care in the past. Bell's argument concerning the hardship to

his mother can therefore only be speculative. Bell's sister also testified that Bell's imprisonment would cause undue hardship because Bell helps his brother do work around the house that his brother otherwise cannot do. At the time of the sentencing hearing, Bell had been incarcerated for 541 days. *Id*. at 59. Apparently, any assistance Bell's mother and brother needed during that time was provided by someone other than Bell. The hardship, while real, appears to have been felt more by the rest of the family than by Bell's mother and brother. Put another way, Bell has failed to demonstrate that any hardship suffered by his mother and brother is "undue" in the sense that it is any worse than that suffered when, in any family, a family member is incarcerated. *Nicholson v. State*, 768 N.E.2d 443, 448 n.13 (Ind. 2002).

Bell has failed to carry the burden of showing that the above disregarded mitigators were both significant and clearly supported by the record. *Lavoie*, 903 N.E.2d at 141. In sum, we cannot say that the trial court abused its discretion in failing to consider the above-discussed circumstances during sentencing.

II. Inappropriateness of the Sentence

Bell contends that his sentence is inappropriate in light of the nature of the offense and the character of the offender. "Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution 'authorize[] independent appellate review and revision of a sentence imposed by the trial court.'" *Anglemyer*, 868 N.E.2d at 491 (changes in original). This appellate authority is implemented through Indiana Appellate Rule 7(B), which permits revision of 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." *Id*.

"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.'" *Ross v. State*, 908 N.E.2d 626, 632 (Ind. Ct. App. 2009) (quoting *Anglemyer*, 868 N.E.2d at 494). Bell was charged with two counts of dealing in cocaine, each as a Class B felony. After Bell entered a plea of guilty to one count, the State dismissed the second count. The advisory sentence for a Class B felony is ten years. *See* Ind. Code § 35-50-2-5. Although the State urged the trial court to sentence Bell to twenty years for his Class B conviction, the trial court only sentenced Bell to twelve years.

As to the nature of the offense, Bell offers that the offense involved selling a "small amount of crack cocaine to a confidential police informant," and "[n]o person was injured during the incident." *Appellant's Br*. at 8. The sale of drugs did not happen upon a chance meeting. Bell arranged to meet the confidential informant at a certain location. Upon meeting, Bell asked the informant whether he was wearing a wire, and proceeded to pat down the informant. Bell then sold the drugs to the informant. We are not persuaded that the nature of the offense justified a lesser sentence.

As to the character of the offender, Bell contends that he "had a lengthy substance abuse problem. Specifically, [he] began using illegal drugs following a relationship break-up in 2000." *Id.* at 8. He further asserts that he is a devoted son and brother, that he took anger management classes, which benefitted him, and that he has reflected on his actions and is determined to change his life. *Id*. at 9. While Bell admittedly had a

substance abuse problem, his eleven arrests between 2000 and 2007 provided Bell with more than enough notice that substance abuse was a problem that caused him to participate in criminal activity. Bell's sister testified to the closeness of Bell's family and the role she could see Bell playing in assisting his mother and brother. These factors, however, must be considered in light of Bell's extensive criminal history, which spans more than twenty years and includes arrests and convictions in three different states. Additionally, Bell is at least $18,000 behind in his child support payments. Again, we are not persuaded that the character of the offender makes Bell's twelve-year sentence inappropriate. Bell's sentence is not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

NAJAM, J., and BARNES, J., concur.