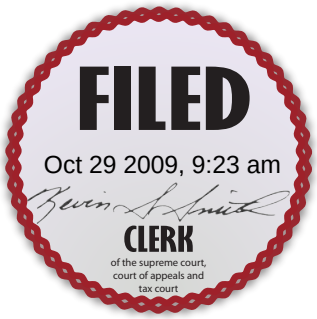

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IN THE
COURT OF APPEALS OF INDIANA

TROMAINE LANGHAM,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0810-CR-926
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0712-FA-48

October 29, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Tromaine Langham ("Langham") appeals his sentence after pleading guilty to two counts of dealing in cocaine,[1] each as a Class B felony. Langham presents the following restated issues for our review:

I. Whether the trial court abused its discretion in its consideration of aggravating and mitigating circumstances; and

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

We affirm.

FACTS AND PROCEDURAL HISTORY

On December 11, 2007, the State charged Langham with six felony offenses: one count of dealing in cocaine as a Class A felony; one count of possession of cocaine as a Class B felony; two counts of dealing in cocaine each as a Class B felony; and two counts of possession of cocaine each as a Class D felony.

On July 3, 2008, Langham entered into a plea agreement with the State, whereby the State would amend the Class A felony count of dealing in cocaine to allege the commission of a Class B felony count of dealing in cocaine. Langham would then plead guilty to two counts of dealing in cocaine each as a Class B felony in exchange for the dismissal of the four remaining counts. Sentencing was left to the discretion of the trial court. Langham pleaded guilty pursuant to the terms of the plea agreement and admitted to delivering cocaine on one occasion to an undercover officer and on another occasion to a confidential informant. After the sentencing hearing, the trial court found the aggravating and mitigating circumstances to be in equipoise and sentenced Langham to

[1] *See* Ind. Code § 35-48-4-1.

concurrent sentences of ten years each, with seven years executed and three years on probation with placement in community corrections. Langham now appeals.

DISCUSSION AND DECISION

I. Failure to Find Mitigating Circumstances

Sentencing decisions are within the sound discretion of the trial court and are reviewed on appeal only for an abuse of that discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (2007). Likewise, the finding of mitigating circumstances is well within the discretion of the trial court. *Edmonds v. State*, 840 N.E.2d 456, 461-62 (Ind. Ct. App. 2006). A sentencing court need not agree with the defendant as to the weight or value to be given to a proffered mitigating factor. *Id*. An allegation that the trial court failed to identify or find a mitigating circumstance requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Hackett v. State*, 716 N.E.2d 1273, 1278 (Ind. 1999). The trial court is not obligated to accept the defendant's contentions as to what constitutes a mitigating circumstance. *Id.*

The trial court found the following aggravating circumstances when sentencing Langham: (1) Langham's prior negative contacts with the criminal justice system, including a prior misdemeanor marijuana possession conviction; and (2) Langham's long-term substance abuse. *Tr.* at 39. The trial court found the following mitigating circumstances at sentencing: (1) Langham has strong family support; (2) he supports his family, including his children and his mother, and incarceration would impose an undue

hardship on his family; (3) he has obtained his GED; and (4) he has some work history. *Id*.

Langham argues that the trial court exaggerated his criminal history as an aggravating circumstance. Initially, we observe that Langham's argument about the weight attributed to his criminal history is no longer available for review on appeal. "The relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse." *Anglemyer*, 868 N.E.2d at 491.

Additionally, because Langham has failed to supply a copy of his pre-sentence investigation report in the Appellant's Appendix, appellate review of his sentencing arguments is impeded. As a consequence, we are left to rely on the transcript of the guilty plea and sentencing hearings. *See Perry v. State*, 904 N.E.2d 302, 312 (Ind. Ct. App. 2009) (sentencing issues reviewed by use of sentencing hearing transcript); *Perry v. State*, 845 N.E.2d 1093, 1094 n. 2 (Ind. Ct. App. 2006) (failure to include pre-sentence investigation report in appendix does not waive sentencing issues); Ind. Appellate Rule 49(B) (failure to include items in appendix does not waive issues from review).

Langham claims that the trial court erred by failing to find the following as mitigating circumstances: (1) Langham is unlikely to commit another crime; (2) Langham pleaded guilty; (3) there were no victims of his crimes; (4) Langham is likely to respond favorably to probation or short-term imprisonment; and (5) incarceration would cause undue hardship on Langham's fiancé, mother, and sister.

As noted above, the trial court did find as a mitigating circumstance that Langham's incarceration would result in an undue hardship on his children. Langham

appears to argue that the trial court abused its discretion by failing to find that Langham's incarceration would result in an undue hardship on his mother, sister, and fiancé. Yet, the trial court's oral sentencing statement includes the trial court's discussion of Langham's strong family support, that Langham lives with his mother and looks after his family, and that Langham's incarceration would result in an undue hardship. *See Tr.* at 39. Considering the findings and oral sentencing statement as a whole, which includes the impact of Langham's incarceration on all of his immediate family members, we find that Langham has failed to show that the trial court abused its discretion.

As for the remainder of the proffered mitigating circumstances, the record reveals that they are not clearly supported by the record. Langham argues that he is unlikely to commit another crime. However, Langham is and has been a substance abuser, and the instant offenses involve dealing in cocaine. Langham has a prior history of negative contacts with the criminal justice system which have not resulted in any attempts to address his addiction, nor have they resulted in the cessation of his criminal activity. Thus, the trial court did not abuse its discretion in declining to find as a mitigating circumstance that Langham was unlikely to commit another crime.

Langham's guilty plea, while deserving of some mitigation in sentencing, is not significant in this specific case. *See Anglemyer*, 875 N.E.2d 218, 220-21 (Ind. 2007), *on reh'g* (significance of guilty plea as a mitigator varies from case to case). Langham was originally charged with six counts and received a substantial benefit from his plea agreement; a Class A felony count was reduced to a Class B felony, while four of the charges filed against him were dismissed outright. Langham's plea agreement

significantly reduced his potential sentencing exposure; therefore, this claimed mitigating circumstance is not significant. "[A] guilty plea does not rise to the level of a significant mitigation where the defendant has received a substantial benefit from the plea." *Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005).

Langham argues that because he dealt cocaine to an undercover officer and a confidential informant, he committed victimless crimes, which is deserving of some consideration as a mitigating circumstance. However, the significance of this proffered mitigating circumstance is debatable. Langham was unaware that he was dealing cocaine to persons who would not use it. Further, the State expended resources in curtailing Langham's commission of drug-related offenses. The trial court did not err by failing to find this mitigating circumstance, and Langham has failed to demonstrate that it is both clearly supported by the record and significant.

Lastly, Langham's argument that he is likely to respond affirmatively to probation or short-term imprisonment is disputable. Langham previously was extended lenient treatment which did not lead to his reformation. Langham has failed in his burden of establishing that this claimed mitigating circumstance is significant and clearly supported by the record. Further, the executed portion of Langham's sentence may only last three and one-half years with good behavior and educational opportunities, while the remainder will be served in community corrections. As a consequence, Langham's incarceration may be relatively short-term, especially for Class B felony convictions.

We conclude that the trial court did not abuse its discretion by its treatment of the aggravating and mitigating circumstances, both proffered and found, in this case.

II. Inappropriate Sentence

This Court has the constitutional authority to revise a sentence 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. Ind. Appellate Rule 7(B); *Childress v. State*, 848 N.E.2d 1073, 1076 (Ind. 2006). The burden is on the defendant to persuade the appellate court that his sentence is inappropriate. *Childress*, 848 N.E.2d at 1080.

We begin by considering the nature of Langham's offense. Langham was charged with six felony offenses, of which the most serious was a Class A felony. The Class A felony charge of dealing in cocaine was amended to allege the commission of dealing in cocaine as a Class B felony. Langham pleaded guilty to two counts of dealing in cocaine each as a Class B felony, and the remaining charges were dismissed.

Indiana Code section 35-50-2-5 provides that a person who commits a Class B felony "shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years." The trial court sentenced Langham to the advisory sentence of ten years for each conviction and provided that the sentences should be served concurrently, with seven years executed and three years on probation with placement in community corrections. Considering the maximum possible sentence Langham might have received had he been convicted of six felonies, one of which was a Class A felony, Langham substantially benefitted from entering into the agreement allowing him to plead guilty to two Class B felonies, and dismissing the remaining felony charges filed against him. As to Langham's character, Langham has a substance abuse

problem which has resulted in many of his negative encounters with the criminal justice system. While Langham has some positive qualities, considering both the positive and negative aspects of his character, we cannot say that Langham has met his burden of establishing that the imposition of the advisory sentence, with seven years executed and three years on probation with placement in community corrections, was inappropriate. *See Lewis v. State*, 898 N.E.2d 1286, 1291 (Ind. Ct. App. 2009) (when advisory sentence is imposed, defendant bears heavy burden in arguing inappropriateness of sentence).

Affirmed.

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