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IN THE COURT OF APPEALS OF INDIANA

BERNARD M. JONES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0904-CR-176
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0901-FD-25

November 10, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Bernard M. Jones (Jones), appeals his conviction for Count I, strangulation, a Class D felony, Ind. Code § 35-42-2-9; and Count II, battery, a Class A misdemeanor, I.C. § 35-42-2-1.

We affirm.

ISSUES

Jones raises two issues on appeal, which we restate as follows:

(1) Whether the trial court abused its discretion by failing to afford weight to mitigators; and

(2) Whether his sentence is inappropriate in light of his character and the nature of his offense.

FACTS AND PROCEDURAL HISTORY

On January 2, 2009, Jones and his girlfriend, Jacqulyn Ellis (Ellis), were drinking alcohol at Ellis' house. At some point, Jones and Ellis got into a fight and Jones began hitting Ellis on the head. Ellis fought back and hit Jones on his shoulder and then left the room. Jones followed her, grabbed her and threw her to the living room floor, where he began choking her until she could "hardly breathe." (Transcript p. 116). As soon as Ellis was able to free herself from Jones, she ran out of the house screaming for someone to call 911. Jones followed her and told her to come back in the house, but when Ellis refused, Jones jumped on Ellis and began hitting and choking her. Two of Ellis' neighbors saw Jones

attack Ellis and called 911. The police arrived and observed that Ellis had bruises and lacerations on her face and neck.

On January 6, 2009, the State filed an Information charging Jones with Count I, strangulation, a Class D felony; and Count II, battery, a Class A misdemeanor. On March 18, 2009, after a one-day jury trial, the jury found Jones guilty as charged of both Counts. On April 20, 2009, during the sentencing hearing, the trial court found no mitigating factors, but found as aggravating factors Jones' extensive criminal history, consisting of seventeen misdemeanor convictions and five felony convictions. The trial court also found as aggravating factors Jones' multiple failed efforts at rehabilitation and three previous parole revocations, including the fact that he was on parole at the time of the offense. The trial court sentenced Jones to three years on Count I and one year on Count II, all Counts to run consecutive, for a total sentence of four years in the Department of Correction.

Jones now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Abuse of discretion*

Jones contends that the trial court abused its discretion in imposing the maximum sentence and failing to find mitigating circumstances that were supported by the record. Jones argues that the trial court failed to identify the following mitigating circumstances: (1) his remorse; and (2) his history of alcohol abuse.

Jones was convicted of a Class D felony and a Class A misdemeanor. A person who commits a Class D shall be imprisoned for a fixed term of between six months and three

years, with the advisory sentence being one and one-half years, and for a Class A misdemeanor, not more than one year. *See* I.C. §§ 35-50-2-7; 35-50-3-2.

As long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Anglemeyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id*. Because the trial court no longer has any obligation to "weigh" aggravating and mitigating factors against each other when imposing a sentence, a trial court cannot now be said to have abused its discretion by failing to properly weigh such factors. *Id*. at 491. When an allegation is made that the trial court failed to find a mitigating factor, the defendant is required to establish that the mitigating evidence is both significant and clearly supported by the record. *Id*. at 493. However, a trial court is not obligated to accept a defendant's claim as to what constitutes a mitigating circumstance. *Rascoe v. State*, 736 N.E.2d 246, 249 (Ind. 2000).

A. *Remorse*

Jones asserts that the trial court abused its discretion by failing to recognize his remorse as a mitigating factor. In support of this issue, Jones directs us to the following statement in the sentencing transcript: "I'd like to first and foremost say I can't emphasize enough to say I never meant to hurt anyone . . . I'm a really good person but I understand that . . . for the wrong choices . . . I understand the [] penalty . . . ." (Sentencing Transcript pp.

11-12). Jones went on to say that he "learned from this more than [he] can really say," ultimately concluding that he "really truly need[s] help for real." (Sent. Tr. p. 17).

Our supreme court has recognized remorse as a valid mitigating circumstance. *Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005). However, this court gives substantial deference to a trial court's evaluation of a defendant's remorse. *See Allen v. State*, 875 N.E.2d 783, 788 (Ind. Ct. App. 2007). The trial court has the ability to directly observe the defendant and listen to the tenor of his voice and is, therefore, in the best position to determine whether the remorse is genuine. *See id*. Despite Jones' claims of remorse, he never actually expressed remorse towards Ellis, whom he choked and punched several times in her face. Instead, his comments at the sentencing hearing were self-serving. Even though he claims to have learned from this situation, he clearly did not learn from his previous mistakes, demonstrated by his extensive criminal history and three failed attempts at rehabilitation. Thus, the trial court did not abuse its discretion in failing to find remorse as a mitigating circumstance.

B. *Alcohol Abuse*

Jones contends that in addition to being intoxicated at the time of the fight, his alcohol and substance abuse should have been considered a mitigating circumstance. His presentence investigation report reflects that he started drinking at the age of 15 and has used marijuana, cocaine, and psilocybin mushrooms at different points in his life.

A trial court is not required to consider as a mitigating circumstances allegations of an appellant's substance abuse. *James v. State*, 643 N.E.2d 321, 323 (Ind. 1994). In fact, a history of substance abuse is sometimes found by trial courts to be an aggravator, not a

mitigator. *Roney v. State*, 872 N.E.2d 192, 199 (Ind. Ct. App. 2007). Furthermore, we are reluctant to hold that a mitigating consideration is necessarily required for sentencing when, at the time of an offense, the defendant was intoxicated. *Legue v. State*, 688 N.E.2d 408, 411 (Ind. 1997); *see also Wilson v. State*, 533 N.E.2d 114, 117 (Ind. 1989) (holding that the trial court did not err in finding no mitigating circumstances despite the fact that the defendant was intoxicated at the time of the offense).

Here, Jones has been convicted of drug or alcohol related offenses, including multiple convictions of public intoxication and possession of and dealing in cocaine, ranging from 1993 up until January 2009. Jones has only participated in one substance abuse program in 2007. Despite claiming that this experience revealed to him that he needs help, he has been aware of his drug and alcohol abuse addiction and has failed to make any efforts to find help and change his behavior. We are not persuaded that the trial court abused its discretion in failing to determine that Jones' intoxication at the time of the fight or that his alcohol and substance abuse should be a mitigating circumstance.

II. *Nature and Character*

Finally, Jones argues that his sentence is inappropriate in light of the nature of the offense and his character. Although a trial court may have acted within its lawful discretion, Appellate Rule 7(B) provides that the appellate court may revise a sentence authorized by statute if the appellate court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Anglemeyer*, 868 N.E.2d at 491. It is on this basis alone that a criminal defendant may now challenge his sentence where the trial court

has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing the particular sentence that is supported by the record, and the reasons are not improper as a matter of law. *Id*. 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).

With regard to the character of the offender, Jones argues that despite his extensive criminal history, his most recent convictions have been for nonviolent offenses. However, the significance of a criminal history in assessing a defendant's character and an appropriate sentence varies based on the gravity, nature and number of prior offenses in relation to the current offense. *Bryant v. State*, 841 N.E.2d 1154, 1156-57 (Ind. 2006). Jones has an extensive criminal history including 17 misdemeanor convictions and 5 prior felony convictions. While only two of the convictions are for physical violence, the mere fact that he has been in the criminal justice system so many times demonstrates that he has not learned from his mistakes. Additionally, Jones committed the instant offense while on parole which reveals his disregard for the law.

With regard to the nature of the offense, Jones did not just hit Ellis once. Instead, he continued the attack by chasing her outside and continued punching her in the face, head, and then choking her, leaving cuts, abrasions and bruises on her face and neck. Ultimately Jones

has not persuaded us that his sentence is inappropriate based on the character of the offender or the nature of the offense.

CONCLUSION

Based on the foregoing, we conclude that the trial court: (1) did not abuse its discretion in considering the aggravators and mitigators; and (2) the sentence was appropriate considering the nature of the offender and offense.

Affirmed.

BAKER, C.J., and FRIEDLANDER, J., concur.