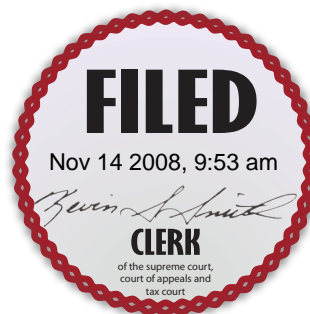


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JON D. BAUMGARTNER,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 90A04-0805-CR-313

APPEAL FROM THE WELLS CIRCUIT COURT
The Honorable David L. Hanselman, Sr., Judge
Cause No. 90C01-0608-FD-74

November 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Jon D. Baumgartner appeals his three-year sentence for Class D felony receiving stolen property. Specifically, Baumgartner contends that the trial court abused its discretion in failing to recognize as mitigators his guilty plea and the undue hardship to his young daughter and that his sentence is inappropriate. Finding neither an abuse of discretion nor that his sentence is inappropriate, we affirm.

Facts and Procedural History

In May and June 2006, Stephanie Hershberger, while working at a Pak-A-Sak in Bluffton, Indiana, sold cigarettes to her brother and his girlfriend at an unauthorized discounted price on several occasions. On June 11, 2006, Hershberger's brother brought Baumgartner to the store, and Hershberger sold cigarettes to Baumgartner at an unauthorized discounted price.¹

The State charged Baumgartner with Class D felony theft and Class D felony receiving stolen property. On September 11, 2007, Baumgartner pled guilty to Class D felony receiving stolen property. In exchange, the State agreed not to make any sentencing recommendation and to dismiss the theft charge and a pending probation revocation matter (Baumgartner was on probation at the time of the instant offense). Sent. Tr. p. 12. The trial court made the following statement at the sentencing hearing:

I really don't know where to start on explaining all the thoughts I've got about this particular case. Your attorney is suggesting several mitigating factors and none of them . . . show up in the statutory mitigating factors. I guess where I will start is you know your attorney said it was a shaky deal and too good to be true and the way I am looking at that is even though you

¹ Because the factual basis for Baumgartner's guilty plea is not specific, the parties rely mainly on the police report attached to the probable cause affidavit for the underlying facts of this crime. So do we.

profess to want to be a different person and not do what you've done before there's always that underlying character flaw, you're going to get something for nothing and if you get away with it, fine, but the person who knows the deal is too good to be true and they're really a person of character they walk away from it because they've got honest[ly] drilled clear to the core of their so[ul] and you don't have that. Twenty-eight [license] suspensions, two felony convictions, one misdemeanor that was a felony conviction before it was reduced, so you really got three and now you're back in here at 30 years of age when this took place, you're 32 now and after all that time you're still committing criminal acts. I don't know about the companion cases in this matter, I suspect they probably had plea deals and maybe you would have been able to deal with the State and gotten a better deal than you're going to get this morning. I've been doing this for 30 years and I don't have a present recollection right now of any Defendant that came in front of me who didn't have some family, so somebody is going, everybody gets hurt when a criminal does a criminal act because they've got parents, they got brothers and sisters, they got children, they got aunts and uncles, cousins and that ripple effect goes out on the pond. You know taking good care of your daughter is a good thing, being a good citizen is even a better thing if you can instill that in your daughter. It's kind of a double[-]edged sword, I always wondered you know sometimes maybe it's better I send people to prison because they're not an influence on their kids. You've got a character flaw to the core of your soul. How much of that is going to rub off on your daughter I don't have any idea. Your daughter is so important to you, but yet you risked a criminal act and your loss of freedom, I gotta wonder where your head was when that happened. There's a [deterrent] portion of the sentencing that the Court needs to take into consideration. Other people coming in with two felony convictions this will be the third one and all those misdemeanors then all the traffic stuff shows to me you don't really have a regard, I mean sure it's a traffic offense no big deal, but the number you had just shows to me you got a dis[d]ain for whatever restrictions and authority are on you, you do whatever you darn well please and sure I've got the money, I'll pay for it, I'll do whatever is necessary to keep insurance and I'll go ahead and be a stand up guy, but it doesn't prevent you from doing those things that you shouldn't be doing in the first place. Keeping clean while this matter is pending, I wouldn't have expected anything less. If anybody's got an ounce of sense they don't go out and do other things when they got pending criminal charges

Mr. Baumgartner, it's going to be the decision of the Court this morning that you be sentenced to the Indiana Department of Correction[] for a period of 3 years. . . . My primary reason for giving this sentence is that I don't find any mitigating circumstances in this particular case and based upon your extensive criminal history . . . I believe that the three year

sentence is appropriate . . . , and is consistent with my previous sentencing patterns and philosophy

Id. at 22-24. Baumgartner now appeals his sentence.

Discussion and Decision

Baumgartner raises two issues on appeal. First, he contends that the trial court abused its discretion in failing to find as mitigators his guilty plea and the undue hardship to his young daughter. Second, he contends that his three-year sentence is inappropriate.

I. Mitigators

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal 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). 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.* One way in which a court may abuse its discretion is by entering a sentencing statement that omits mitigating circumstances that are clearly supported by the record and advanced for consideration. *Id.* at 490-91. 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).

Baumgartner first argues that the trial court abused its discretion in failing to recognize his guilty plea as a significant mitigating circumstance. A defendant who pleads guilty generally deserves "some" mitigating weight to be afforded to the plea. *Anglemyer*, 875 N.E.2d at 220 (citing *McElroy v. State*, 865 N.E.2d 584, 591 (Ind. 2007)). However, our Supreme Court has recognized that a trial court does not

necessarily abuse its discretion by failing to recognize a defendant's guilty plea as a significant mitigating circumstance. *Id.* at 221. Instead, a trial court is only required to identify mitigating circumstances that are both significant and supported by the record, and "a guilty plea may not be significantly mitigating when . . . *the defendant receives a substantial benefit in return for the plea.*" *Id.* (emphasis added) (citing *Sensback v. State*, 720 N.E.2d 1160, 1165 (Ind. 1999)).

Here, the record reveals that Baumgartner pled guilty on September 11, 2007, the very day his jury trial was scheduled to begin. *See* Appellant's App. p. 73. Thus, Baumgartner's claim that his guilty plea saved the State the time and expense of going to trial is dubious at best. Moreover, in exchange for pleading guilty, the State not only dismissed the theft charge but also a pending probation revocation matter. Given the substantial benefit Baumgartner received in return for his guilty plea, the trial court did not abuse its discretion by failing to recognize Baumgartner's guilty plea as a significant mitigating circumstance.

Baumgartner next argues that the trial court failed to recognize as a significant mitigator the undue hardship to his young daughter. Baumgartner had joint physical custody of his daughter and speculated at the sentencing hearing, "I mean if I, basically if I go to jail I'm going to lose my daughter. The first thing my ex is going to do is she is going to be in this Court with [petitions] to take all my joint custody." Sent. Tr. p. 21.

A trial court "is not required to find a defendant's incarceration would result in undue hardship on his dependents." *Davis v. State*, 835 N.E.2d 1102, 1116 (Ind. Ct. App. 2005), *trans. denied*. Indeed, "[m]any persons convicted of serious crimes have one or

more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship.” *Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999).

In essence, Baumgartner argues that losing physical custody of his daughter is a special circumstance. But, Baumgartner does not argue how the maximum sentence of three years is more of a hardship to his daughter than the advisory term of one and one-half years. Instead, he speculated that *any* jail time would result in losing physical custody of his daughter. Moreover, Baumgartner’s daughter will be with her mother during his incarceration. The trial court did not abuse its discretion in failing to identify the hardship to Baumgartner’s daughter as a significant mitigating circumstance.

II. Inappropriate Sentence

Although a trial court may have acted within its lawful discretion in imposing a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Appellate Rule 7(B), which provides that a 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.” *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer*, 868 N.E.2d at 491). The defendant has the burden of persuading us that his sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

The nature of this offense is not particularly troubling. However, the nature of the offender, as related by the trial court, is a different story. Although Baumgartner

presented evidence at the sentencing hearing that he was gainfully employed, a good worker, and had joint physical custody of his daughter, his criminal history and driving record paint a very different picture of him. Baumgartner has two felony convictions for possession of a bomb and theft, which is particularly relevant to this case. Although Baumgartner's felony convictions are over a decade old (from 1994), he has numerous misdemeanor convictions that are more recent, including convictions for resisting law enforcement (1997), invasion of privacy (2004), and false reporting (2004). In addition, Baumgartner has probation violations and, according to the trial court's calculations, twenty-eight license suspensions. Moreover, Baumgartner was on probation at the time he committed the instant offense. Although Baumgartner claimed at the sentencing hearing to have turned his life around in the period of time between the commission of this offense and sentencing, given his past history, his actions are too little too late. He has failed to persuade us that his three-year sentence is inappropriate.

Affirmed.

CRONE, J., concurs.

KIRSCH, J., dissents with separate opinion.

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APPEAL FROM THE WELLS CIRCUIT COURT
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KIRSCH, Judge, dissenting

It is a serious understatement to say that Jon Baumgartner is not a model citizen, and I can easily understand the learned trial judge's frustrations. That said, I believe that the nature of *this* crime renders the maximum sentence inappropriate. Accordingly, I respectfully dissent.