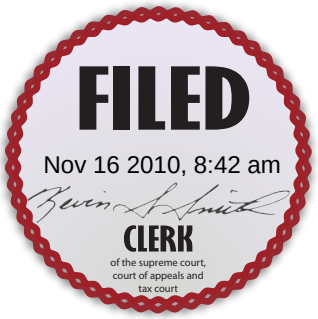

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IN THE
COURT OF APPEALS OF INDIANA

KENNETH W. ELLIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 25A03-1007-CR-407
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FULTON CIRCUIT COURT
The Honorable A. Christopher Lee, Judge
Cause No. 25C01-0707-FA-33

November 16, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Kenneth W. Ellis (Ellis), appeals his sentence following a guilty plea to dealing in cocaine, a Class B felony, Ind. Code § 35-48-4-1.

We affirm.

ISSUES

Ellis raises two issues for our review, which we restate as follows:

(1) Whether the trial court erred by not affording more weight to certain mitigators; and

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

FACTS AND PROCEDURAL HISTORY

On July 25, 2007, the State filed an Information charging Ellis with Count I, dealing in cocaine, a Class A felony, I.C. § 35-48-4-1(b)(1) and Count II, possession of cocaine, a Class C felony, I.C. § 35-48-4-6(b)(1)(A). On May 10, 2010, Ellis entered into a plea agreement with the State, whereby he agreed to plead guilty to Count I, which was amended to a Class B felony, in exchange for the State to dismiss Count II. The plea agreement also recommended a ten year sentence with four years suspended and two years probation. During the sentencing hearing on June 21, 2010, Ellis requested to serve his executed sentence on home detention. The trial court denied his request and imposed the six year executed sentence to be served in the Department of Correction.

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

DISCUSSION AND DECISION

I. *Mitigating Factors*

Ellis argues that the trial court erred when it sentenced him. Specifically, Ellis contends that the trial court failed to consider as mitigating factors his present employment and his remorse at the sentencing hearing.

As long as the sentence is within the statutory range, it is subject to review 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 factors 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. This is so because once the trial court has entered a sentencing statement, which may or may not include the existence of aggravating and mitigating factors, it may then "impose any sentence that is . . . authorized by statute; and . . . permissible under the [Indiana Constitution]." *Id.*

A trial court abuses its discretion if it (1) fails "to enter a sentencing statement at all[,]" (2) enters "a sentencing statement that explains reasons for imposing a sentence-including a finding of aggravating and mitigating factors if any-but the record does not support the reasons," (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration," or (4) considers reasons that "are

improper as a matter of law." *Id.* at 490-91. 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." *Id.* at 491. However, the relative weight or value assignable to reasons properly found is not subject to review for abuse of discretion. *Id.*

Here, the trial court found the hardship that the sentence would impose on Ellis' dependants as a sole mitigating factor. Nevertheless, Ellis argues that the trial court should have found as additional mitigating factors his employment and remorse.

While a sentencing court must consider all evidence of mitigating factors presented by a defendant, the finding of mitigating factors rests within the sound discretion of the court. *Newsome v. State*, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003), *trans. denied*. The trial court need not consider, and we will not remand for reconsideration of, alleged mitigating factors that are highly disputable in nature, weight, or significance. *Id.* A sentencing court need not agree with the defendant as to the weight or value to be given to proffered mitigating facts. *Id.* The trial court is not obligated to explain why it did not find a factor to be significantly mitigating. *Id.* Indeed, a sentencing court is under no obligation to find mitigating factors at all. *Id.*

Here, Ellis first argues that the trial court abused its discretion in failing to consider his employment as a mitigating factor. In *Newsome*, the defendant appealed the trial court's sentencing decision claiming that the trial court failed to consider his stable employment as a mitigating factor. The *Newsome* court found that the defendant's employment was not

necessarily as significant as the defendant had proposed it to be and affirmed the trial court's decision. *Id*. The court reasoned that many people are gainfully employed such that this would not require the trial court to note it as a mitigating factor. *Id*. Here, the fact that Ellis had a job was a positive factor; however, like in *Newsome*, it did not automatically become a mitigator. In addition, we are not persuaded by Ellis that his argument is distinct from the defendant's argument in *Newsome*. Although it is true that the defendant in *Newsome*, unlike Ellis, had no significant drug and criminal history, such unfortunate background does not make Ellis's present employment a "scarce and precious thing." (Appellant's Br. p. 5).

Next, Ellis argues that the trial court abused its discretion in failing to consider his remorse as a mitigating factor. Substantial deference must be given to a trial court's evaluation of remorse. *Corralez v. State*, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004). The trial court, which has the ability to directly observe the defendant and listen to the tenor of his voice, is in the best position to determine whether the remorse is genuine. *Id.* The record reflects that during the sentencing hearing Ellis said, "I apologize to everybody about the whole situation . . . that I put everybody through." (Appellant's Br. p. 6). Without any further evidence, we cannot say that the trial court abused its discretion in not considering Ellis's remorseful statement as a mitigating factor.

As such, we do not find that the trial court erred when it did not recognize his mitigating factors.

II. *Appropriateness of Sentence*

Ellis claims that the sentence imposed by the trial court is not appropriate in light of his character and the nature of the crime. Pursuant to Indiana Appellate Rule 7(B), we may revise a sentence otherwise 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." Although we have the power to review and revise sentences, "[t]he principal role of appellate review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes but not to achieve a perceived 'correct' result in each case." *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). As explained in *Anglemyer*, it is on the basis of Appellate Rule 7(B) 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 a particular sentence that is supported by the record, and the reasons are not improper as a matter of law, but has imposed a sentence with which the defendant takes issue." *Anglemyer*, 868 N.E.2d at 491. On appeal, it is the defendant's burden to persuade us that the sentence imposed by the trial court is inappropriate. *Id.* at 494.

With regard to the character of the offender, we note that Ellis has an extensive criminal history. His multiple convictions include: theft (January and March 1983, and 1996); forgery (1996); residential entry and battery (1996); reckless driving (1997); operating while intoxicated (1998); resisting law enforcement (2001); driving while suspended (2001,

2002, and 2007); invasion of privacy (June and December 2002); no valid operator's license (2005); and non-support of a dependent (2008). (Appellant's App. p. 149).

With regard to the nature of the offense, we observe that Ellis pled guilty to dealing in cocaine. Dealing in cocaine is a very serious offense. It is not a victimless crime; it places the entire community under the specter of drug usage. As such, Ellis has failed to show that his sentence is inappropriate in light of his character and the nature of the crime.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion when sentencing Ellis and that his sentence was not inappropriate when considering Ellis's character and the nature of the offense.

Affirmed.

KIRSCH, J., and BAILEY, J., concur.