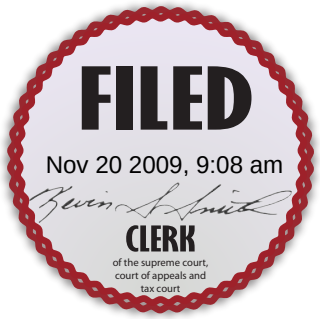

ATTORNEY FOR APPELLANT:

EARL MCCOY
Law Office of Earl McCoy
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ARTURO RODRIGUEZ, II
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

SERGIO NERI-ORTIZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0908-CR-803
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas Busch, Judge
Cause No. 79D02-0804-FA-20

November 20, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Sergio Neri-Ortiz appeals his sentence following a plea of guilty to dealing in cocaine as a class A felony.[1]

We affirm in part, reverse in part, and remand for clarification.

ISSUE

Whether the trial court erred in sentencing Neri-Ortiz.

FACTS

On April 14, 2008, officers executed an arrest warrant for Neri-Ortiz at his Lafayette residence. Officers found Neri-Ortiz at home and placed him under arrest. Officers also arrested Neri-Ortiz's wife, Amada Vasquez-Lopez. Upon finding Neri-Ortiz and Vasquez-Lopez's seven-year-old son in the home, officers contacted the department of child services to take custody of him due to his parents' arrest.

Following his arrest, Neri-Ortiz gave officers permission to search his residence and garage, informing them that there was cocaine in the garage. After the search of the garage failed to uncover cocaine, Neri-Ortiz informed the officers that they could find cocaine under a bathroom sink. Officers located a shaving kit under the sink, which contained a substance that appeared to be cocaine. A field test later determined that the substance was 298 grams of cocaine. Officers subsequently discovered approximately one gram of cocaine in Neri-Oritz's coat in addition to several sets of scales and sandwich bags elsewhere in the home.

[1] Ind. Code § 35-48-4-1.

After collecting some clothes for Neri-Oritz's child, an officer retrieved a child's backpack he found in the child's bedroom in order to pack the clothes in it. Upon opening the backpack, he discovered that it contained a substance that appeared to be cocaine. A field-test determined the substance to be approximately 2,300 grams of cocaine.

On April 16, 2008, the State charged Neri-Ortiz with Count I, dealing in cocaine as a class A felony; Count II, possession of cocaine as a class A felony; Count III, neglect of a dependent as a class C felony; and Count IV, maintaining a common nuisance as a class D felony. On November 8, 2008, the State and Neri-Ortiz entered into a plea agreement, whereby Neri-Ortiz agreed to plead guilty to Count I. In exchange, the State agreed to dismiss the remaining charges. The State also agreed to dismiss pending charges under a separate cause number for two counts of dealing in cocaine as a class A felony; possession of cocaine as a class A felony; and possession of cocaine as a class C felony. As to sentencing, the parties agreed to a sentence "deem[ed] appropriate after hearing any evidence or argument of counsel." (App. 15).

The trial court ordered a pre-sentence investigation report ("PSI") and held a sentencing hearing on March 6, 2009. According to the PSI, Neri-Ortiz had two prior convictions in 2001 and 2003 for class C misdemeanors. The PSI also reported that Neri-Ortiz had entered the United States illegally in 1998, when he was twenty years old.

During the sentencing hearing, Indiana State Police Trooper John Eads testified that the cocaine found in Neri-Ortiz's home had a street value of over $200,000.00; the

amount of cocaine found in the residence "would be enough to supply pretty much every student in the Tippecanoe County School Corporation"; Neri-Ortiz had refused to provide law enforcement with any information regarding his supplier; and that Neri-Ortiz had "delivered kilos of cocaine" to other Indiana communities. (Sentencing Hr'g Tr. 14, 15). He also testified that Neri-Ortiz's son tested positive for cocaine after he was removed from Neri-Ortiz's home.

After hearing evidence of mitigating and aggravating circumstances, the trial court found as follows:

> This is the largest quantity of cocaine that I've seen in my courtroom by a large factor. . . . [I]t wasn't intended to be a determination by the legislature that three grams constituted the most serious crime but somewhere below a thousand grams is where the crime becomes serious. And when we have well over two thousand grams this has got to be considered a very serious crime and that's a major aggravating factor. The second major aggravating factor is the reduced charges and the fact that a second or several additional counts of A felony were reduced and dismissed. And the third aggravating factor is the presence of a child in the home with cocaine and actually testing positive for cocaine. In terms of mitigating factors the defendant did plead guilty and take responsibility for his crime. The defendant does express remorse. And the defendant did have a good employment record and at least according to the defendant's own report he lost his job not in order to go into this business but because—he was fired because he couldn't supply the appropriate identification. So I take the good employment record as a mitigating factor. The hardship on the family is something I need to discount. When people go into this business they have to understand that they are risking a lengthy prison sentence. And certainly if I were inclined to consider that as a mitigating factor the fact that the child . . . tested positive for cocaine is something that . . . would have to cause me to discount that factor as a mitigator. . . . And while I understand your reasoning for not cooperating by not cooperating you're [sic] also passed up an opportunity to obtain consideration at sentencing . . . . And if you choose to remain on the side of the criminals then you don't get the consideration you'd have if you

> were on the side of the . . . government. For all those factors added together I'm going to find that the aggravating circumstances outweigh the mitigating circumstances.

Id. at 26-28. The trial court then sentenced Neri-Ortiz to forty years. The trial court declined to suspend any portion of the sentence to probation due to Neri-Ortiz's immigration status. The trial court also ordered Neri-Ortiz to pay a "countermeasure fee" in the amount of $1,000.00. *Id.* at 28.

DECISION

Neri-Ortiz asserts that the trial court erred in sentencing him. Specifically, he argues that the trial court failed to consider or give sufficient weight to mitigating circumstances; considered improper aggravating circumstances; and that his sentence is inappropriate. He also asserts that the trial court improperly imposed a countermeasure fee.

A sentence that is within the statutory range 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). A trial court may abuse its discretion if the sentencing statement

> explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law.

Id. at 490-91. However, the relative weight or value assignable to reasons properly found, or to those which should have been found, is not subject to review for abuse of discretion. *Id.*

1. Mitigating Circumstances

Neri-Ortiz first argues that the trial court failed to give adequate consideration to the undue hardship his incarceration would impose on his son; his expression of remorse; and his acceptance of responsibility. It is clear from the sentencing statement that the trial court considered these factors to be mitigators. As to the weight assigned to those mitigating circumstances, it is not subject to review for abuse of discretion. *See id.* at 490. Thus, we find no abuse of discretion.

Neri-Ortiz argues also that the trial court abused its discretion in omitting from consideration in its sentencing statement his limited criminal history; the fact that the crime was the result of circumstances unlikely to recur; that he is unlikely to commit another crime; and his cooperation with law enforcement.

> The failure to find a mitigating circumstance clearly supported by the record may imply that the trial court overlooked the circumstance. The trial court, however, is not obligated to consider "alleged mitigating factors that are highly disputable in nature, weight, or significance." The trial court need enumerate only those mitigating circumstances it finds to be significant. On appeal, a defendant must show that the proffered mitigating circumstance is both significant and clearly supported by the record.

Rawson v. State, 865 N.E.2d 1049, 1056 (Ind. Ct. App. 2007) (internal citations omitted), *trans. denied*.

Neri-Ortiz contends that his "sparce criminal history should have been viewed by the trial court as a mitigating circumstance" where he had only two convictions for class C misdemeanor offenses. Neri-Ortiz's Br. at 15. A lack of criminal history may be considered a mitigating circumstance. *Rawson*, 865 N.E.2d at 1058. Trial courts, however, "'are not required to give significant weight to a defendant's lack of criminal history,' especially 'when a defendant's record, while felony-free, is blemished.'" *Id.* (quoting *Stout v. State*, 834 N.E.2d 707, 712 (Ind. Ct. App. 2005), *trans. denied*).

Here, Neri-Ortiz had two prior convictions. Furthermore, he admitted to being in this country illegally, which indicates disregard for the law. *See, e.g., Samaniego-Hernandez v. State*, 839 N.E.2d 798, 806 (Ind. Ct. App. 2005) (stating that "being an illegal alien is itself more properly viewed as an aggravator than as a mitigator"). Thus, we cannot say that the trial court abused its discretion in failing to consider Neri-Ortiz's criminal history as a mitigating circumstance.

As to the remaining mitigating circumstances, Neri-Ortiz failed to propose these to the trial court. He therefore is precluded from advancing them on appeal. *See id.* at 805 (declining to acknowledge the defendant's proffered mitigators where he failed to propose them at the trial court level).

Waiver notwithstanding, Neri-Ortiz has failed to show these mitigating circumstances are significant, where he refused to cooperate fully with law enforcement; and the circumstances resulting in the crime are unlikely to recur and he is unlikely to

commit another crime only because he will be deported upon his release. Accordingly, we find no abuse of discretion in failing to consider these as mitigating circumstances.

2. Aggravating Circumstances

Neri-Ortiz also asserts that the trial court abused its discretion in finding the quantity of cocaine and that most charges were reduced or dismissed pursuant to the plea agreement to be aggravating circumstances. We agree.

A trial court may not use the amount of drugs as an aggravating circumstance when the amount of drugs is a material element of the offense charged. *Donnegan v. State*, 809 N.E.2d 966, 978 (Ind. Ct. App. 2004), *trans. denied*. Indiana Code section 35-48-4-1 provides that offense of dealing in cocaine is enhanced from a class B felony to a class A felony if the amount of the drug involved weighs three grams or more. Thus, the trial court improperly used the weight of the drugs as an aggravating circumstance.

Furthermore, where a trial court accepts a plea agreement under which the State agrees to dismiss charges, it may not then find as an aggravating circumstance that the defendant benefitted from charges being dismissed. *Roney v. State*, 872 N.E.2d 192, 201 (Ind. Ct. App. 2007), *trans. denied*. Doing so "in effect circumvents the plea agreement." *Id.* We therefore find that the trial court improperly considered the dismissal of charges as an aggravating circumstance; however, our analysis does not end here.

Where, as in this case, the trial court considers improper aggravating circumstances, this court has at least three courses of actions:

> 1) "remand to the trial court for a clarification or new sentencing determination", 2) "affirm the sentence if the error is harmless", or 3) "reweigh the proper aggravating and mitigating circumstances independently at the appellate level."

Scott v. State, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006) (quoting *Cotto v. State*, 829 N.E.2d 520, 525 (Ind. 2005)), *trans. denied*.

Here, the record clearly supports the finding of the nature and circumstances of Neri-Ortiz's crime as an aggravating circumstance, where his child was present in the home and was exposed to such a significant amount of cocaine that he subsequently tested positive for cocaine. A single circumstance may be sufficient to support an enhanced sentence. *Edwards v. State*, 842 N.E.2d 849, 855 (Ind. Ct. App. 2006). We find that such is the case here and the error, if any, was harmless.

3. Inappropriate Sentence

Neri-Ortiz also asserts that his sentence is inappropriate. We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). It is the defendant's burden to "'persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.'" *Anglemyer*, 868 N.E.2d at 494 (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

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." *Childress*, 848 N.E.2d at 1081. The advisory sentence for a class A felony

is thirty years. I.C. § 35-50-2-4. The potential maximum sentence is fifty years. *Id.* Here, the trial court sentenced Neri-Ortiz to forty years.

Regarding the nature of Neri-Ortiz's offense, the record discloses that he possessed over two kilograms of cocaine, with a street value exceeding $200,000.00, which he clearly intended to distribute throughout the communities of Indiana. He also exposed his young child to illegal drugs, resulting in the child testing positive for cocaine.

While Neri-Ortiz did accept responsibility for his crime by pleading guilty, we cannot say that this is a significant reflection of his character. He received a significant benefit when the State dismissed several felony charges, including four class A felony charges; two class C felony charges; and one class D felony charge; several of these charges were unrelated to the instant offense. Moreover, the substantial evidence against Neri-Ortiz indicates that his guilty plea was pragmatic. He also refused to cooperate fully with law enforcement. Accordingly, we do not find that his sentence is inappropriate.

4. Countermeasure Fee

Neri-Ortiz asserts that the trial court erred in imposing a countermeasure fee. "In general, the imposition of a fine is within the trial court's discretion, and we review the imposition of such for an abuse of discretion." *Johnson v. State*, 845 N.E.2d 147, 152 (Ind. Ct. App. 2006), *trans. denied*.

Regarding countermeasure fees, Indiana Code section 33-57-5-10 provides as follows:

> (a) The clerk shall collect an alcohol and drug countermeasures fee of two hundred dollars ($200) in each action in which:
>
> (1) a person is found to have:
> (A) committed an offense under IC 9-30-5;
> (B) violated a statute defining an infraction under IC 9-30-5; or
> (C) been adjudicated a delinquent for an act that would be an offense under IC 9-30-5, if committed by an adult; and
> (2) the person's driving privileges are suspended by the court or the bureau of motor vehicles as a result of the finding.
>
> (b) The clerk shall collect an alcohol and drug countermeasures fee of two hundred dollars ($200) in each action in which:
>
> (1) a person is charged with an offense under IC 9-30-5; and
> (2) by a plea agreement or an agreement of the parties that is approved by the court:
> (A) judgment is entered for an offense under:
> (i) IC 9-21-8-50;
> (ii) IC 9-21-8-52;
> (iii) IC 7.1-5-1-3; or
> (iv) IC 7.1-5-1-6; and
> (B) the defendant agrees to pay the alcohol and drug counter measures fee.

The State acknowledges, and we agree, that Indiana Code section 33-37-5-10 is inapplicable to this case as Neri-Ortiz was not charged with any of the offenses listed in the statute.

Pursuant to Indiana Code section 35-50-2-4, however, the trial court may fine Neri-Ortiz "not more than ten thousand dollars . . . ." Thus, we remand this cause to the trial court to determine whether a fine shall be imposed pursuant to Indiana Court section 35-50-2-4. *See Anglemyer*, 868 N.E.2d at 491 ("[R]emand for resentencing may be the appropriate remedy 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.").

Affirmed in part, reversed in part, and remanded.

MATHIAS, J., and ROBB, J., concur.