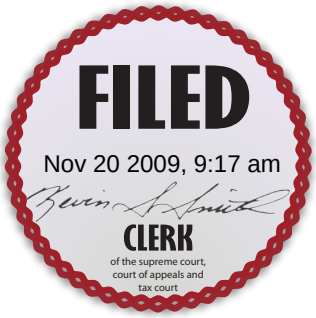

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IN THE COURT OF APPEALS OF INDIANA

BRIAN HEDBACK,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 48A02-0903-CR-254
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 48C01-0806-FB-332

November 20, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a guilty plea, Brian Hedback was convicted of arson, a Class B felony, and sentenced to fifteen years at the Indiana Department of Correction ("DOC"), with five years suspended. Hedback appeals, raising one issue that we expand and restate as two: 1) whether the trial court abused its discretion in sentencing him; and 2) whether his sentence is inappropriate in light of the nature of his offense and his character. Concluding the trial court did not abuse its discretion in sentencing Hedback and his fifteen year sentence is not inappropriate, we affirm.

Facts and Procedural History[1]

In the early morning hours of June 3, 2008, eighteen-year-old Hedback set fire to a residence in which Ronnie Smith and Michaela Snyder lived. Smith and Snyder were home when the fire started. Hedback and Smith had been involved in several altercations, including on the evening of June 2, when Hedback drove by the residence and threw something at the house, damaging the siding. When police questioned Hedback, he was found to be in possession of two empty gas cans and admitted setting the fire.

Hedback was charged with arson, a Class B felony. Hedback filed a Notice of Mental Disease or Defect and the trial court ordered Hedback to undergo evaluation by two psychologists. Both doctors determined that although Hedback might have a mental disorder, he was able to appreciate the wrongfulness of his conduct and did not have a mental disease or defect as defined by Indiana Code section 35-41-3-6(b). Hedback

[1] Because Hedback pled guilty to the offense, the facts are necessarily limited to those contained in the probable cause affidavit and adduced through the factual basis at the guilty plea hearing.

entered a plea of guilty and the trial court sentenced him to fifteen years at the DOC with five years suspended. Although there is no written sentencing order, from the trial court's statements at the sentencing hearing, it appears the trial court found Hedback's expression of remorse and his history of mental health issues to be mitigating factors, and found his criminal history as a juvenile, that the crime was retaliatory and resulted in harm greater than the elements of the offense, and that he committed additional offenses while on bond for this offense to be aggravating factors.[2]

Discussion and Decision

I. Sentencing Discretion[3]

A trial court may impose any legal sentence "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d). However, a trial court is still required to issue a sentencing statement when sentencing a defendant for a felony. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218. "If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." Id. The trial court may abuse its discretion if it 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. We will conclude the trial

[2] Within two months of the arson, Hedback committed additional crimes and was charged with four counts of receiving stolen property. He entered pleas of guilty to those charges at the same hearing at which he entered a plea of guilty to arson, transcript at 19, and was sentenced on the two cases simultaneously, id. at 61-62.

[3] Although Hedback states his only issue as whether his sentence is inappropriate, he argues that two of the aggravating circumstances found by the trial court are improper, and we will therefore address those contentions separately.

court has abused its discretion 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." Hollin v. State, 877 N.E.2d 462, 464 (Ind. 2007) (citation omitted).

In discussing the aggravating circumstances, the trial court noted Hedback's arrest and charge as a juvenile for dealing drugs, an offense that would have been a Class A felony if committed by an adult:

> He was charged with an act of delinquency that would of [sic] been an A felony if committed by an adult. Let's make sure I speak correctly. He was a juvenile and . . . and he was not charged with an A felony, but he was charged with an act of delinquency that if committed b[y] an adult would of [sic] been an A felony.

Transcript at 53. Hedback notes the charge was dismissed and claims the trial court erred in relying "on an aggravating factor which is contrary to the record." Brief of Appellant at 6. To the extent Hedback claims the trial court erred in considering the charge because it was dismissed, we disagree. It is true a record of arrest does not establish the fact that a defendant committed a criminal offense and may not properly be considered as evidence of criminal history. Cotto v. State, 829 N.E.2d 520, 526 (Ind. 2005). However, such information may be relevant to other considerations, such as "the trial court's assessment of the defendant's character in terms of the risk that he will commit another crime." Id. It is clear from the discussion at the sentencing hearing that the trial court was aware the charge was dismissed and was therefore not considering the arrest as part of Hedback's criminal history. It was not an abuse of discretion for the trial court to consider

Hedback's arrest for a crime that would have been a Class A felony if he had been an adult in determining his sentence.

Hedback also contends the trial court abused its discretion in considering the particularized circumstances of his crime; specifically, that the arson posed great danger to Smith and Snyder. Class B felony arson is defined by alternative sets of elements:

> A person who, by means of fire, explosive, or destructive device, knowingly or intentionally damages:
> (1) a dwelling of another person without the other person's consent;
> (2) property of any person under circumstances that endanger human life;
> (3) property of another person without the other person's consent if the pecuniary loss is at least five thousand dollars ($5,000); or
> (4) a structure used for religious worship without the consent of the owner of the structure;
> commits arson, a Class B felony.

Ind. Code § 35-43-1-1(a). Hedback was charged under subsection (1): arson by damaging the dwelling of another person without that person's consent. He argues because he could also have been charged under subsection (2) for endangering human life, the trial court improperly considered an element of the offense as an aggravating factor. See Hape v. State, 903 N.E.2d 977, 1002 (Ind. Ct. App. 2009) ("[A] trial court may not use a factor constituting a material element of an offense as an aggravating circumstance."), trans. denied. Although Hedback could have been charged with arson for endangering human life (as well as arson for causing over $5,000 in damage), he was not. Endangerment may in fact be inherent in a residential fire, Thacker v. State, 477 N.E.2d 921, 924 (Ind. Ct. App. 1985) ("[t]he fact the fire occurred in a residential area is alone sufficient to establish that human life was endangered."), but it is not an element of the offense with which Hedback was charged. Trial courts can consider particularized

circumstances relating to the nature of the crime when determining a sentence. Roney v. State, 872 N.E.2d 192, 203 (Ind. Ct. App. 2007), trans. denied. Therefore, the trial court did not abuse its discretion in considering the danger a house fire posed to sleeping residents when determining Hedback's sentence.

II. Inappropriate Sentence

This court has authority to revise a sentence "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." Ind. Appellate Rule 7(B). We may "revise sentences when certain broad conditions are satisfied," Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005), and recognize the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed," Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). In determining whether a sentence is inappropriate, we examine both the nature of the offense and the character of the offender. Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When making this examination, we may look to any factors appearing in the record. Roney, 872 N.E.2d at 206; cf. McMahon v. State, 856 N.E.2d 743, 750 (Ind. Ct. App. 2006) ("[I]nappropriateness review should not be limited … to a simple rundown of the aggravating and mitigating circumstances found by the trial court."). The burden is on the defendant to demonstrate that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Hedback was convicted of a Class B felony. "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." Ind. Code § 35-50-2-5. The trial court sentenced Hedback to ten years executed and five years suspended for a total sentence of fifteen years – midway between the advisory sentence and the statutory maximum. See Weaver v. State, 845 N.E.2d 1066, 1072 n.4 (Ind. Ct. App. 2006) (explaining that a defendant's total sentence includes both the executed and the suspended portion of the sentence), trans. denied. Hedback contends that with his "lifetime of mental health issues" and the fact there is nothing to distinguish this arson from any other, his sentence is inappropriate in light of his character and the nature of his offense and should be revised to the advisory sentence of ten years. Brief of Appellant at 8.

With respect to the nature of Hedback's offense, Hedback was charged with knowingly damaging Smith and Snyder's dwelling pursuant to Indiana Code section 35-43-1-1(a)(1). Hedback set fire to the residence at approximately 12:30 in the morning; Smith and Snyder were inside the home at that time. It appears from pictures of the damaged home introduced into evidence at the sentencing hearing that at least one other home was in close proximity to Smith's and Snyder's home. Smith told police that he had asked his neighbors if any of them had seen anything and no one had because they were all asleep at the time. The fire caused approximately $70,000 in damage to the structure and $20,000 in damage to Smith's and Snyder's personal property. The danger posed by this fire to Smith and Snyder as they were inside a burning house, as well as the danger posed to nearby sleeping neighbors and the extent of the damage caused by this fire are significant.

As to Hedback's character, we acknowledge, as the trial court did, that he suffers from some sort of mental disorder, but we note that two doctors determined the disorder did not affect his ability to distinguish right from wrong. We also note the trial court found his expression of remorse to be genuine. Hedback's criminal history consists of two true findings as a juvenile for possession of drugs, one which would have been a Class A misdemeanor and one which would have been a Class C felony if committed by an adult. These offenses do not relate in nature or gravity to the instant offense, Harris v. State, 897 N.E.2d 927, 930 (Ind. 2008), and the last offense occurred three years before this one. Hedback was only eighteen years old at the time he committed this offense, and he pled guilty. All of these factors reflect favorably on Hedback's character. However, it appears he did not successfully complete the terms of his disposition in either juvenile case. See Appellant's App. at 39-40 (showing Hedback failed formal probation and counseling with respect to Class A misdemeanor possession finding and failed formal probation and family support services with respect to Class C felony possession finding). He committed additional offenses while this case was pending. Hedback started the fire as part of an on-going dispute with Smith, although there appears to have been no immediate provocation, and procuring the gasoline he used to start the fire implies a plan rather than an impulsive act. Hedback also asked the person with whom he was residing to lie about what time he arrived home on the night of the fire in an effort to cover up his involvement. These factors weigh against Hedback's character.

In sum, Hedback's character is at best neutral and the nature of his offense is egregious. Hedback has failed to meet his burden of persuading us his fifteen-year sentence for Class B felony arson is inappropriate.

Conclusion

The trial court did not abuse its discretion in sentencing Hedback and his sentence is not inappropriate.

Affirmed.

DARDEN, J., and MATHIAS, J., concur.