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IN THE
COURT OF APPEALS OF INDIANA

BRANDON PHILLIPS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-1004-CR-267
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Roland W. Chamblee, Jr., Judge
Cause No. 71D08-0901-MR-6

November 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Brandon Phillips was convicted of criminally confining Marcus Rice to a car trunk and murdering him at the side of a country road. The trial court imposed an aggregate sentence of sixty-one and one-half years. Phillips argues on appeal that the trial court failed to recognize significant mitigating factors and that his sentence is inappropriate. We affirm.

Facts and Procedural History

The facts most favorable to the verdict show that on February 4, 2008, Phillips received a phone call from Latrice King, who wanted to purchase a pound of marijuana. Phillips then called Mike Anderson, who said that he had a half pound of marijuana and that Mario Ellis, currently with him, knew where another half pound could be purchased. Ellis's friend, Marcus Rice, set up a drug deal with his sister. Ellis, Rice, King, and King's cousin went to meet Rice's sister at Castle Point Apartments. However, instead of carrying out a drug deal, they became victims of an unsuccessful robbery attempt.

King was angry and blamed Rice for the ambush. King called Phillips from either Ellis's car or his apartment at LaSalle Park Homes. Phillips called Anderson, and he and Wallace Wilson picked up Phillips in Anderson's car with Wilson driving. They drove to LaSalle Park Homes where King was. When they arrived in the parking lot, King was outside with a group of people. She yelled to Phillips, Anderson, and Wilson that Rice was inside. At that point, Rice and Ellis came outside. Phillips pointed a revolver at Rice's face and ordered him to walk to the car and get in the trunk. Wilson, Anderson, Phillips, King, and two other individuals got into the car. Wilson drove the car, and Anderson directed him

to a secluded road a short distance into the country. Anderson told Wilson to stop, and everyone except Wilson exited the car. Someone opened the trunk, and Phillips ordered Rice to kneel on the side of the road. Phillips shot Rice in the back three times. Anderson said, "He's still breathing," so Phillips shot him again. Feb. 8-10, 2010, Tr. at 304.[1] Rice was discovered the following morning on the side of the road. A day or two later, Phillips gave Wilson the gun to discard.

On January 23, 2009, the State charged Phillips with murder[2] and class B felony criminal confinement, resulting in serious bodily injury.[3] Following a three-day trial, a jury found him guilty as charged. On March 17, 2010, a sentencing hearing was held. Phillips's class B felony criminal confinement conviction was treated as a class D felony for sentencing purposes. In sentencing Phillips, the trial court stated,

> When I sentence a person, I sentence them based on the jury's finding. The jury found you committed a crime, which quite frankly is – I'm not going to try to characterize it. Killing a person is killing a person in some respects but when a person is executed, I agree with that characterization, the man is either on the ground – well, soon to be on the ground shot in the back more than once on a foggy, dirty, cold, country road as a result of somebody being pissed off because they got ripped off. Whether it's $100 as Ms. King testified or $800 as I believe somebody in your trial testified, doesn't make any difference.
>
> The sentence on the murder, 60 years. And the aggravating circumstance is just the nature of this offense itself. The criminal confinement, I can't think of a worse D felony way to be confined is a guy getting put in a trunk of a car, probably anticipating that he's going to be hurt or killed, driven out to the country and shot. So the sentence on the confinement is 18 months,

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[1] The record on appeal consists of the trial transcript and the sentencing transcript that are not identified by volume nor are the pages numbered consecutively regardless of the number of volumes as required by Indiana Appellate Rule 28(A)(2). Therefore, we cite the transcript by date.

[2] Ind. Code § 35-42-1-1(1).

[3] Ind. Code § 35-42-3-3.

> which is the advisory. It will be consecutive to the murder count because it was a separate and I think recognizable harm. So the total sentence is 61 and a half years, class one credit 387. I'm not suspending any part of the sentence. It is what it is.

March 17, 2010, Tr. at 6-7. In its written sentencing order, the trial court found that "the circumstances of the case reflecting a premeditated retaliation over a perceived wrong warrant an enhanced sentence; and the victim's separate confinement at gunpoint support a consecutive sentence." Appellant's App. at 6-7. Phillips appeals.

Discussion and Decision

I. Failure to Find Mitigators

Phillips first contends that the trial court failed to provide an adequate sentencing statement. Trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense, and such statements must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218; *see also* Ind. Code § 35-38-1-1.3 ("After a court has pronounced a sentence for a felony conviction, the court shall issue a statement of the court's reasons for selecting the sentence that it imposes."). Sentencing statements serve to guard against arbitrary and capricious sentencing and provide an adequate basis for appellate review. *Anglemyer*, 868 N.E.2d at 489.

We review the trial court's sentencing decision for an abuse of discretion. *Id.* at 490. An abuse of discretion occurs if the trial court fails to issue an adequate sentencing statement. *Id*. A trial court's sentencing statement is adequate if it is "sufficient for this Court to conduct meaningful appellate review." *Id.* at 491. If the recitation includes the 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.* at 490. An abuse of discretion occurs if the record does not support the reasons given for imposing sentence, 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. On appeal, we may consider both the trial court's written statement and its comments at the sentencing hearing. *Gibson v. State*, 856 N.E.2d 142, 146 (Ind. Ct. App. 2006).

Specifically, Phillips asserts that the trial court failed to recognize the following mitigating factors that he contends are supported in the record: (1) his voluntary surrender to police; (2) his minimal criminal history; (3) his age; and (4) his remorse. We observe that Phillips did not offer his age or remorse as mitigating factors at sentencing. A trial court does not abuse its discretion in failing to consider a mitigating factor that was not advanced at sentencing. *Anglemyer*, 868 N.E.2d at 492. As to Phillips's criminal history, we note that at sentencing Phillips admitted that his minimal prior criminal history was offset by new charges pending against him since his arrest for the current offense. March 17, 2010, Tr. at 4.

The remaining proffered mitigator is Phillips's voluntary surrender to police. Surrender to authorities can be a mitigating factor, but a sentencing court does not necessarily abuse its discretion in failing to give it significant mitigating weight. *Brown v. State*, 698 N.E.2d 779, 783 (Ind. 1998). Unlike other cases in which voluntary surrender was found to

be a significant mitigating factor, Phillips did not confess to the crime. *See Evans v. State*, 598 N.E.2d 516, 519 (Ind. 1992) (defendant's voluntary surrender to police entitled to substantial mitigating weight where he surrendered immediately to police and freely confessed); *Brewer v. State*, 646 N.E.2d 1382, 1386 (Ind. 1995) (after escaping detection for fifteen years, defendant voluntarily went to police and reported crime and such surrender was entitled to significant mitigating weight). Also, Phillips turned himself in only after he found out that he was suspected of being involved in the murder. We conclude that the trial court was in the best position to assess the significance of Phillips's surrender to police, and we find no abuse of discretion in its assessment here. *See Brown*, 698 N.E.2d at 783 (stating that trial court was in best position to assess mitigating weight and finding no abuse of discretion where trial court did not give defendant's voluntary surrender significant mitigating weight).

II. Appropriateness of Sentence

Phillips also challenges the appropriateness of his sentence. Article 7, Section 6 of the Indiana Constitution authorizes this Court to independently review and revise a sentence imposed by the trial court. *Anglemyer* 868 N.E.2d at 491. Indiana Appellate Rule 7(B) states, "The 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." "Although appellate review of sentences must give due consideration to the trial court's sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." *Purvis v.*

State, 829 N.E.2d 572, 588 (Ind. Ct. App. 2005) (internal citations omitted), *trans. denied*. The defendant bears the burden of persuading us that the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

"[R]egarding the nature of the offense, the advisory sentence is the starting point our legislature has selected as an appropriate sentence for the crime committed." *Anglemyer*, 868 N.E.2d at 494. "[W]hen the trial court imposes the presumptive sentence, the defendant bears a heavy burden in persuading us that his or her sentence is inappropriate. " *McKinney v. State*, 873 N.E.2d 630, 647 (Ind. Ct. App. 2007), *trans. denied*.

Phillips was sentenced for class D felony criminal confinement. The advisory sentence for a class D felony is one and one-half years, with a fixed term of between six months and three years. Ind. Code § 35-50-2-7. Phillips received the advisory sentence for his criminal confinement conviction. The advisory sentence for murder is fifty-five years, with a fixed term of between forty-five and sixty-five years. Ind. Code § 35-50-2-3. Phillips received a sixty-year sentence.

As to the nature of the criminal confinement offense, Phillips forced Rice into the car trunk by pointing a gun at his face. The trunk was slammed down, and Rice had no idea where he was being taken. Rice must have known that he was going to be badly injured or perhaps killed. As to the nature of the murder, it was premeditated and committed in cold blood. Phillips did not even know Rice, but killed him at the request of a drug dealer. Rice was ordered to his knees and was murdered execution style. The nature of these crimes supports a sentence above the advisory.

Finally, as to Phillips's character, the cold-blooded manner in which this murder was carried out shows that he lacks compassion, has no consideration for the value of human life, and has no respect for the rule of law. Moreover, after this crime was committed, Phillips was charged with resisting arrest, criminal mischief, and domestic battery, and his probation for domestic battery was revoked. Accordingly, based on the nature of the offenses and his character, we conclude that his sentence is not inappropriate.

Affirmed.

KIRSCH, J., and BRADFORD, J., concur.