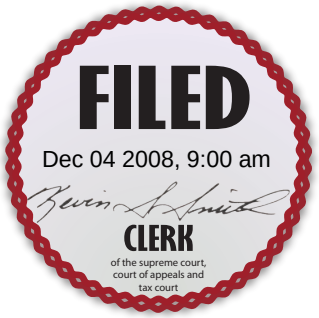

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IN THE
COURT OF APPEALS OF INDIANA

JEROME REED,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A05-0802-CR-113
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Judge
Cause No.02D04-9205-CF-230

December 4, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a guilty plea and a remand from this court, Jerome Reed appeals his enhanced sentence of fifty years for murder, a felony. On appeal, Reed raises two issues, which we consolidate and restate as whether the trial court properly sentenced Reed. Concluding the trial court improperly found that the nature and circumstances of the crime were an aggravating circumstance, we reverse and remand with instructions to revise Reed's sentence to a presumptive term of forty years.

Facts and Procedural History

On May 14, 1992, Reed shot and killed his girlfriend, Nichelle Ludy, in his apartment. According to Reed's statements at his guilty plea hearing, Reed and Ludy had been arguing when Ludy "pulled [a] [hand]gun on [him]." Transcript at 13 (April 7, 1993, guilty plea hearing). A struggle for the handgun ensued, and during the struggle the handgun fired striking Ludy. While Ludy was lying on the floor, Reed stood over Ludy and shot her two more times in the chest.

On May 15, 1992, the State charged Reed with murder, a felony, and criminal confinement, a Class B felony. On April 7, 1993, the parties entered into a plea agreement under which Reed agreed to plead guilty to murder and the State agreed to dismiss the criminal confinement charge and stand mute at sentencing. The trial court accepted Reed's guilty plea and, at a June 10, 1993, sentencing hearing, found as aggravating circumstances Reed's lack of remorse and that a lesser sentence would depreciate the seriousness of the offense. Based on these findings, the trial court

sentenced Reed to an enhanced term of fifty years.[1] On belated appeal, we concluded that because the trial court never considered imposing a reduced sentence, it abused its discretion when it found as an aggravating circumstance that such a sentence would depreciate the seriousness of the offense. Reed v. State, No. 02A04-0702-CR-113, 2007 WL 2728924, at *2 (Ind. Ct. App., Sept. 20, 2007). We also concluded the trial court did not abuse its discretion when it found that Reed's lack of remorse was an aggravating circumstance and when it refused to find that Reed's purported remorse and guilty plea were mitigating circumstances. See id. at *3-4. However, we remanded to the trial court with instructions that it "either find Reed's lack of criminal history to be a mitigating circumstance, or explain why it finds that such minimal criminal history does not constitute a mitigating circumstance," id. at *4, and that it "issue a new sentencing statement consistent with this opinion," id. at *5 (footnote omitted).

On January 7, 2008, the trial court conducted another sentencing hearing, at which it did not reiterate its earlier finding that Reed's lack of remorse was an aggravating circumstance. The trial court did, however, find that the nature and circumstances of the crime were aggravating, describing the nature and circumstances as evidence that Reed was "cold blooded[]." Transcript at 21 (January 7, 2008, sentencing hearing). The trial court also found that Reed's lack of criminal history and guilty plea were mitigating circumstances, but that the aggravating circumstance "outweigh[s] the rather nominal

[1] At the time Reed committed his crime, the presumptive sentence for murder was forty years. See Ind. Code § 35-50-2-3 (1993). The statute has been amended twice, increasing the presumptive sentence to fifty and fifty-five years, respectively, and currently provides for an advisory sentence of fifty-five years. See Ind. Code § 35-50-2-3(a).

effects of the . . . mitigators." Id. Based on these findings, the trial court again sentenced Reed to an enhanced term of fifty years. Reed now appeals.

Discussion and Decision

I. Standard of Review

Under Indiana's presumptive sentencing scheme,[2] if the trial court imposes an enhanced sentence, it must identify and explain all significant aggravating and mitigating circumstances and explain its balancing of circumstances. Rose v. State, 810 N.E.2d 361, 365 (Ind. Ct. App. 2004). A trial court abuses its discretion in imposing a sentence if its decision is clearly against the logic and effect of the facts and circumstances before it. Id. If the trial court abuses its discretion, "we have the option to remand to the trial court for a clarification or new sentencing determination, to affirm the sentence if the error is harmless, or to reweigh the proper aggravating and mitigating circumstances independently at the appellate level." Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005).

II. Propriety of Sentence

Reed argues the trial court improperly found that the nature and circumstances of the crime were aggravating because 1) the trial court lacked authority to make this "new" finding on remand and 2) even if the trial court had such authority, it relied on improper evidence to support its finding. Reed's second argument is dispositive, but to resolve it, some background information is in order.

[2] Effective April 25, 2005, the legislature amended our sentencing scheme to replace "presumptive" sentences with "advisory" sentences. See Reed, 2007 WL 2728924, at *2 n.5. Because Reed committed his crime before the effective date, the presumptive sentencing scheme applies to his sentence. See id. (citing Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007)).

During the guilty plea hearing, Reed stated that he intended to murder Ludy when he fired the second and third shots and implied that the first shot had been an accident:

> [Reed's Counsel]: You and Nichelle were having an argument that day, weren't you?
> A Yes.
> [Reed's Counsel]: And was there a time that a gun appeared in this argument?
> A Yes.
> [Reed's Counsel]: She produced it, didn't she?
> A Yes.
> [Reed's Counsel]: And did you get that gun from her?
> A I took it.
> [Reed's Counsel]: You took the gun from her?
> A Yes
> [Reed's Counsel]: And did you shoot her with the gun?
> A Yes.
> [Reed's Counsel]: You knew what you were doing when you shot her?
> A Yes I did.
> [Reed's Counsel]: How many times?
> A The gun . . . first the gun went off, it struck her in the chest, then me, –
> [Reed's Counsel]: I'm having trouble understanding.
> A Well, the gun, we struggled for the gun, the gun went off once, hit her in the chest. I just felt like –
> [Reed's Counsel]: Now wait. And then after the first shot struck her, you had the gun, didn't you?
> A Yes.
> [Reed's Counsel]: And she was on the floor?
> A Yes.
> [Reed's Counsel]: And did you shoot her again?
> A Yes I did.
> [Reed's Counsel]: How many more times?
> A Twice.
> [Reed's Counsel]: You knew what you were doing?
> A Yes si[r].

Tr. at 11-12 (April 7, 1993, guilty plea hearing). Reed then stated that he shot Ludy "[o]ut of the heat of the moment" because he was angry at her for "pulling the gun on [him]," id. at 13, but then reiterated that he intended to kill her when he fired the second and third shots:

> [Reed's Counsel]: Mr. Reed, was it your intent to kill her when you fired the two additional shots?
> A Yes.
> [Reed's Counsel]: And you fired them of your own volition?
> A Yes.
> [Reed's Counsel]: And as I understand at that time she had already been struck once?
> A Yes sir.
> [Reed's Counsel]: And she was on the ground or on the floor?
> A Yes.

Id. at 14.

At the January 7, 2008, sentencing hearing following remand, the trial court painted a very different picture of the nature and circumstances of the crime than the exchanges quoted above. Relying on the probable cause affidavit, the trial court apparently found that the nature and circumstances of the crime were aggravating because Reed intended to kill Ludy with the first shot and then finished her off with the second and third shots: "not only did he shoot her once, she went down and he went over and shot her twice more. The nature of this offense is an aggravating circumstance." Tr. at 20 (January 7, 2008, sentencing hearing). Describing the crime in this manner certainly renders the nature and circumstances aggravating, cf. Angleton v. State, 714 N.E.2d 156, 160 (Ind. 1999) (affirming trial court's finding that nature and circumstances of crime were "calculated and cold-blooded," and thus aggravating, where the defendant shot the victim in the head while she slept), cert. denied, 529 U.S. 1132 (2000); Darby v. State, 514 N.E.2d 1049, 1056 (Ind. 1987) (concluding trial court properly found nature and circumstances of the crime were aggravating where the defendant shot the victim "at least twice more" while he was "helpless"); the problem, however, is that Reed's guilty plea established that the first shot was an accident and that he intended to kill Ludy only

when he fired the second and third shots. In our earlier opinion, we warned the trial court that because the probable cause affidavit "may relate a different set of facts than those set out" at the guilty plea hearing, it should not rely on the statements contained in the affidavit. Reed, 2007 WL 2728924, at *1 n.2. We also suggested that "if the trial court was not satisfied with the factual basis supplied by Reed at his guilty plea hearing, it was free to elicit further details from Reed or to reject the plea." Id. But having accepted Reed's guilty plea and, by extension, the factual basis supporting it, we do not think the trial court was at liberty to then find that the nature and circumstances of the crime were aggravating based on a document that conflicted with the factual basis.[3] As such, we conclude the trial court abused its discretion when it found that the nature and circumstances of the crime were aggravating.[4]

Having concluded the trial court abused its discretion in finding that the nature and circumstances of the crime were aggravating, we are left with the trial court's original

[3] The State argues the trial court properly relied on the probable cause affidavit because it was attached to the pre-sentence investigation report (the "PSI"), and Reed conceded during the June 10, 1993, sentencing hearing that the contents of the PSI were accurate. Although such a concession by Reed renders the information contained in the PSI fair game for purposes of imposing a sentence, see Ind. Code §§ 35-38-1-8 and -12 (1993); Idle v. State, 587 N.E.2d 712, 714 (Ind. Ct. App. 1992), trans. denied, the record before us does not indicate whether the probable cause affidavit was attached to the PSI. Indeed, the only information in the PSI relating to the nature and circumstances of the offense is Reed's version, which is consistent with his statements at the guilty plea hearing: "I shot my female companion, Nichelle, while we were struggling over the gun it went off once. Then somehow I fired two more times. This resulted in her death." Appellant's Appendix at 39.

[4] The Dissent would conclude the nature and circumstances of the crime were aggravating even if the trial court had relied on Reed's statements during the guilty plea hearing. See Dissent, slip op. at 9 ("Looking only to the facts admitted by Reed during his guilty plea hearing, I see no grounds to revise Reed's sentence.") To support this conclusion, the Dissent characterizes the offense as "ruthless and cold-blooded" and analogizes it to the offense in Darby. However, the Dissent overlooks that in Darby, the victim was rendered helpless when the defendant intentionally shot him, see 514 N.E.2d at 1051 ("[The defendant] told police that at that point 'she lost it' and admitted shooting [the victim]."), whereas in this case, at least according to Reed, Ludy was rendered helpless due to an accidental shooting.

Our supreme court has cautioned that a trial court should find the nature and circumstances of an offense aggravating only if the offense involves "particularly heinous facts or situations." Smith v. State, 675 N.E.2d 693, 698 (Ind. 1996). Although we do not condone the severity of Reed's offense and recognize that all murders are inherently heinous, the facts elicited from Reed's guilty plea hearing are too limited to permit a finding that the nature and circumstances of the offense were more egregious than the nature and circumstances of a typical murder.

finding that Reed's lack of remorse was an aggravating circumstance[5] and that Reed's lack of criminal history and guilty plea were mitigating circumstances. We stated in our earlier opinion that lack of remorse is of relatively low weight, see Reed, 2007 WL 2728924, at *2, and the trial court found that the mitigating circumstances also were of relatively low weight. Exercising our authority to reweigh these circumstances independently, see Cotto, 829 N.E.2d at 525, we conclude that the circumstances balance out and that the trial court should therefore enter a presumptive sentence of forty years.

Conclusion

The trial court improperly found that the nature and circumstances of the crime were an aggravating circumstance. Accordingly, we reverse and remand with instructions to revise Reed's sentence to a presumptive term of forty years.

Reversed and remanded with instructions.

MAY, J., concurs.

NAJAM, J., dissents with opinion.

[5] We reiterate that although the trial court originally found that Reed's lack of remorse was an aggravating circumstance, it did not address that finding on remand. Because it does not affect our decision (the mitigating circumstances are of insufficient weight to warrant a sentence below the presumptive), we will assume for purposes of this opinion that the trial court found as such on remand, and remind the trial court that perhaps the best way to avoid such a discrepancy is to reinforce oral findings with a written sentencing statement. As the Seventh Circuit recently observed in the context of federal sentencing,

> We suggest that when a judge decides to impose an out-of-guidelines sentence . . . he write out his reasons rather than relying entirely on the transcript of his oral remarks to inform the reviewing court of his grounds. The discipline of committing one's thoughts to paper not only promotes thoughtful consideration but also creates a surer path of communication with the reviewing court.

United States v. Higdon, 531 F.3d 561, 565 (7th Cir. 2008).

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	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

NAJAM, Judge, dissenting.

I respectfully dissent. The majority holds that the "nature and circumstances" aggravator is invalid simply because the trial court considered the probable cause affidavit. But that aggravator is equally supported by Reed's own admissions during the guilty plea hearing. Reed expressly admitted that he shot Ludy once, accidentally, and then, while she lay helpless on the ground, he shot her twice in the chest with the intent to kill her. That kind of ruthless and cold-blooded action is a legitimate aggravator. See, e.g., Darby v. State, 514 N.E.2d 1049, 1056 (Ind. 1987) ("Darby was sufficiently violent to allow her to press the weapon against a person who must already have been helpless and shoot at least twice more."). Looking only to the facts admitted by Reed during his guilty plea hearing, I see no grounds to revise Reed's sentence. Accordingly, I would affirm the trial court's decision.