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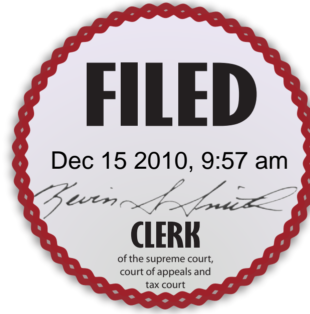

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IN THE
COURT OF APPEALS OF INDIANA

JENNIFER L. ODER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

No. 30A01-1004-CR-188

APPEAL FROM THE HANCOCK CIRCUIT COURT
The Honorable Richard D. Culver, Judge
Cause No. 30C01-1001-FB-21

December 15, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Jennifer L. Oder appeals her aggregate sentence of eight years with four years suspended to probation for Class B felony dealing in a controlled substance, Class D felony possession of a controlled substance, and Class A misdemeanor possession of marijuana. She contends that the trial court abused its discretion in failing to consider several mitigators and that her sentence is inappropriate. Finding no abuse of discretion and that Oder has failed to persuade us that her sentence is inappropriate, we affirm.

Facts and Procedural History

In January 2010, the State charged Oder with seven counts of various drug offenses (two Class B felonies, four Class D felonies, and one Class A misdemeanor). These charges stemmed from two controlled buys of Oxycontin that a confidential informant made from Oder at her New Palestine, Indiana, home. In March 2010, Oder pled guilty to Class B felony dealing in a controlled substance, Class D felony possession of a controlled substance, and Class A misdemeanor possession of marijuana.[1]

At the April 2010 sentencing hearing, evidence was presented that Oder was convicted of receiving stolen property in 2000 and driving while suspended in September 2009 and that she was on probation for the 2009 conviction at the time of the offenses in this case. Oder testified that while she was in jail awaiting sentencing, she participated in the Jail Intervention Program (JIP), which taught her about addiction. Oder also testified that she has a twelve-year-old son whose father has been out of the picture for five years.

[1] We have been presented with little background information in this case, as neither the plea agreement nor the guilty plea hearing (which includes the factual basis for the guilty plea) is included in the record on appeal.

She said that while she was in jail, she deeply missed her son, who was being cared for by her mother and aunt. *See* Tr. p. 16; *see also id.* at 28 (Oder's attorney's reference to Oder losing custody of son and grandmother obtaining guardianship). Oder explained that she started dealing drugs because she lost her $67,000 per year job and needed money to buy groceries. Oder said that she got her drugs from a man who lived with her and her son, but she kicked him out and he was now serving time in prison. Oder also admitted to using illegal drugs, such as marijuana and methamphetamine. Oder, who had never spent time in jail, "begg[ed]" the trial court for another chance:

> Because nothing means more to me in this world than my son, and even though I knew I was doing something wrong I just didn't know the severity of it. I had no idea it could end up like this, and had I known I – I wouldn't have made that mistake. And so now that I do know I won't make it twice.

Id. at 18, 12-13. Oder requested that any executed time be served on community corrections. The probation officer confirmed that Oder was a good candidate for community corrections home detention.

The trial court, however, ruled:

> [T]he decision of the Court is that um the offense of dealing um does require um executed sentences, um and so your sentence is going to be um more lengthy than what you would desire. Um but I do believe that the sentence that I'm contemplating is probably the – the second lightest uh sentence that uh I've ever imposed on someone convicted of dealing. Um and of the three counts um hopefully the um – the sentence on each will um send the appropriate message to you and – and uh everyone else on – on my thoughts on the big distinction between you having a personal problem and uh – and you spreading that problem to anyone else. . . . Um what I – I really cannot justify and – and cannot tolerate um is the dealing and the – and the spreading of your personal problem to anyone else.

Id. at 32-33. The court then sentenced Oder to eight years with four years suspended to probation for Class B felony dealing, 180 days for Class D felony possession, and 180

days for Class A misdemeanor possession, to be served concurrently. Oder now appeals her sentence.

Discussion and Decision

Oder raises two issues on appeal. She contends that the trial court abused its discretion in failing to identify several mitigators and that her below advisory sentence is inappropriate.

I. Abuse of Discretion

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal 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 circumstances before the court or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.* One way in which a court may abuse its discretion is by entering a sentencing statement that omits mitigating circumstances that are clearly supported by the record and advanced for consideration. *Id.* at 490-91. A trial court is not obligated to accept a defendant's claim as to what constitutes a mitigating circumstance. *Rascoe v. State*, 736 N.E.2d 246, 249 (Ind. 2000).

Oder first argues that the trial court failed to identify as a mitigator that she did not contemplate that the crimes caused or threatened serious harm to persons. Oder testified at sentencing that although she knew what she was doing was wrong, she did not realize the severity of it. Tr. p. 13. That is, she did not understand how dealing "a couple a pills" could hurt someone. *Id.* at 14. But Oder explained that she had since learned in

JIP that someone can be addicted after first using. Oder also points to the probation officer's testimony that Oder got in over her head. Given that Oder was a drug user herself, including of methamphetamine, Oder allowed a more significant drug user and dealer to live in her home, and Oder exposed her minor son to this environment, the trial court did not abuse its discretion in failing to identify this as a mitigator.

Oder next argues that the trial court failed to identify as a mitigator that imprisonment will result in an undue hardship on her minor son. We note that many persons convicted of crimes have one or more dependents and, "absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship." *Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999); *see also Benefield v. State*, 904 N.E.2d 239, 247-48 (Ind. Ct. App. 2009) (recognizing that incarceration "almost always" works a hardship on others and concluding that the defendant failed to show "special circumstances" because there were other people who could take care of the defendant's mother while she was incarcerated), *trans. denied*.

Here, Oder's attorney argued to the trial court that Oder lost custody of her son and that Oder's mother apparently had guardianship of him. *See* Tr. p. 28 ("[Oder's] lost significant things since that time, one of which is custody of her child which is not in the guardianship with uh her mother."). Oder testified at the sentencing hearing that her mother and aunt took care of her son while she was in jail awaiting sentencing. *Id.* at 16. Because there are arrangements for Oder's son to be cared for during her incarceration, Oder has failed to show special circumstances. The trial court did not abuse its discretion in failing to identify undue hardship as a mitigator.

Finally, Oder argues that the trial court failed to identify as mitigating circumstances that she is unlikely to commit another crime and that the crimes were the result of circumstances unlikely to recur. The trial court's sentencing order indicates that it considered the risk that Oder would commit another crime, Appellant's App. p. 17, yet the court did not articulate either one of these circumstances as mitigating. In support of her argument, Oder points out that she has taken steps since her arrest to change her life, such as lining up a new job and participating in JIP. Oder also testified at sentencing about the rude awakening jail has been for her. Also, Oder relies heavily on the probation officer's testimony that she would be a good candidate for community corrections home detention, where she could be closely supervised, because she did not realize the seriousness of what she was involved in.

Nevertheless, the trial court had before it evidence that Oder had two prior convictions and was on probation at the time of the instant offenses. The court was also in the best position to evaluate the credibility of Oder's promise to change. We conclude that the court did not abuse its discretion in failing to find as mitigating circumstances that Oder is unlikely to commit another crime and that the crimes were the result of circumstances unlikely to recur.

II. Inappropriate Sentence

Oder next contends that her aggregate sentence of eight years with four years suspended to probation is inappropriate.

Although a trial court may have acted within its lawful discretion in imposing a sentence, Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent

appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a 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." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer*, 868 N.E.2d at 491). The defendant has the burden of persuading us that his sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)). In assessing whether a sentence is inappropriate, appellate courts may take into account whether a portion of the sentence is ordered suspended or is otherwise crafted using any of the variety of sentencing tools available to the trial judge. *Davidson v. State*, 926 N.E.2d 1023, 1025 (Ind. 2010).

Here, Oder pled guilty to a Class B felony, a Class D felony, and a Class A misdemeanor. The statutory range for a Class B felony is between six and twenty years, with the advisory sentence being ten years. Ind. Code § 35-50-2-5. The statutory range for a Class D felony is between six months and three years, with the advisory sentence being one and a half years. Ind. Code § 35-50-2-7(a). And a person who commits a Class A misdemeanor shall be imprisoned for a fixed term of not more than one year. Ind. Code § 35-50-3-2. The trial court sentenced Oder to an aggregate sentence of eight years with four years suspended to probation. Thus, Oder's aggregate sentence is below the advisory term for just her Class B felony.

As for the nature of the offenses, Oder dealt a controlled a controlled substance from her home, where she lived with her son, on two occasions to a confidential informant. Oder's offenses were not otherwise exceptionally heinous or dangerous.

With regard to Oder's character, she is twenty-eight years old. She has two prior convictions and was on probation at the time of the offenses in this case. We recognize her guilty plea but also note that four charges were dismissed. Also, Oder admitted abusing illegal drugs, such as methamphetamine. While awaiting sentencing in this case, Oder participated in a class that taught her about drug addiction. Although Oder has a minor son, she exposed him to a rather significant drug environment. Despite Oder's claim that jail has been a rude awakening for her and her vow not to return to that life, the trial court heard Oder's plea first-hand and could assess its genuineness. Oder has failed to persuade us that her four-year executed sentence and four years of probation is inappropriate.

Affirmed.

BAKER, C.J., and BARNES, J., concur.