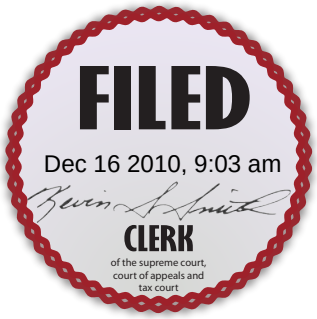

ATTORNEY FOR APPELLANT:

BROOKE N. RUSSELL
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JOSEPH PREWITT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 36A01-1004-CR-238
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE JACKSON CIRCUIT COURT
The Honorable William E. Vance, Judge
Cause No. 36C01-0810-FD-341

December 16, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Joseph Prewitt appeals his sentence of two and a half years for Class D felony operating a motor vehicle while privileges are suspended. Prewitt contends that the trial court abused its discretion by failing to identify his guilty plea as a significant mitigating circumstance and that his sentence is inappropriate. Even assuming that the trial court abused its discretion by failing to identify Prewitt's guilty plea as a significant mitigating circumstance, given Prewitt's history of convictions and probation violations, we are confident that the court would have imposed the same sentence even if it had recognized the plea as significantly mitigating. Further concluding that Prewitt's sentence is not inappropriate, we affirm.

Facts and Procedural History

In September 2008, Prewitt operated a motor vehicle knowing that his driving privileges were suspended for being a habitual traffic violator and allegedly failed to stop after hitting another vehicle. The next month, the State charged Prewitt with Class D felony operating a motor vehicle as a habitual traffic violator, Ind. Code § 9-30-10-16(a)(1), and Class C misdemeanor failure to stop after involvement in an accident resulting in damage to an attended vehicle, *id.* § 9-26-1-2(1).

In February 2010, Prewitt entered an open plea of guilty to Class D felony operating a motor vehicle as a habitual traffic violator. Prewitt also pled guilty to Class D felony theft under unrelated cause number 36C01-0901-FB-3 ("FB-3").[1] The trial court accepted the guilty pleas.

[1] Prewitt appeals his sentence in FB-3 as well. We are issuing an opinion in that case today. *Prewitt v. State*, No. 36A05-1004-CR-314 (Ind. Ct. App. Dec. 16, 2010).

At his sentencing hearing, Prewitt noted that he has been successful on probation in the past and that he has a dependent child.

Before pronouncing Prewitt's sentence, the trial court noted Prewitt's extensive criminal history and multiple probation violations:

> [I]n looking at the Defendant's prior criminal history, I noticed that today's convictions will be the, I believe, the fourteenth and 15th convictions that the Defendant has, maybe, maybe, no 13th and 14th, I suppose. Defendant prior to this has nine misdemeanor convictions and three felony convictions. I suppose umm he, after today has five felony convictions. I have heard both sides talking about probation. I've even heard the Defendant answer a question that his counsel, when his counsel asked him "have you been successful on probation in the past?", the Defendant answered that he has. That's a curious answer when one considers that nine times, nine times in the past petitions have been filed to revoke the Defendant's probation and five times of those the Defendant has been found to have violated the terms of probation. Three of those petitions were dismissed and there was one petition from what I can tell is still pending for probation revocation. In one particular case, [a]n auto theft case, the Defendant had four petitions to revoke probation filed in one action. Three of those he admitted to violating probation. Three different times, matters were done and probation continued.

Sent. Tr. p. 15. The trial court added that Prewitt was on probation at the time he committed this offense.

The trial court sentenced Prewitt to two and a half years, to be served consecutive to his sentence in FB-3, and ordered his driving privileges suspended for life.[2]

Prewitt now appeals his sentence.

Discussion and Decision

Prewitt contends that the trial court abused its discretion by failing to identify his guilty plea as a significant mitigating circumstance and that his sentence is inappropriate.

[2] The trial court's order also indicates that the State agreed to dismiss the Class C misdemeanor charge. *See* Appellant's App. p. 22.

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 trial 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. Under such a circumstance, "remand 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." *Id.* at 491.

Prewitt contends that the trial court abused its discretion by failing to identify his guilty plea as a significant mitigating circumstance. A defendant who pleads guilty generally deserves "some" mitigating weight to be afforded to the plea. *Anglemyer*, 875 N.E.2d at 220 (citing *McElroy v. State*, 865 N.E.2d 584, 591 (Ind. 2007)). However, our Supreme Court has recognized that a trial court does not necessarily abuse its discretion by failing to recognize a defendant's guilty plea as a significant mitigating circumstance. *See id.* at 221. Instead, a trial court is required only to identify mitigating circumstances that are both significant and supported by the record. *See id.* at 220-21.

Because the trial court underscored that Prewitt has amassed a significant number of prior convictions and probation violations, even if we assumed that the trial court

abused its discretion by failing to identify his guilty plea as a significant mitigator, we are confident that the court would have imposed the same sentence even if it had recognized his guilty plea as a significant mitigator.

II. Inappropriate Sentence

Prewitt next contends that his sentence of two and a half years 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)).

Prewitt pled guilty to a Class D felony. 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).

As for the nature of the offense, Prewitt operated a motor vehicle while he knew that his privileges were suspended.

While the nature of the offense is not particularly egregious, Prewitt's character alone justifies the sentence imposed by the trial court. Although Prewitt attempts to support his character by noting that he has a dependent child and that he pled guilty, these

facts do little to temper his extensive criminal record and history of substance abuse. The trial court noted that Prewitt has three prior felony convictions and nine prior misdemeanor convictions, that he has violated the terms of probation multiple times, and that he was on probation at the time he committed this offense. Prewitt does not contest any of these facts. In addition, Prewitt has a history of substance abuse, including the abuse of alcohol, methamphetamine, Xanax, Percocet, and Oxycontin.

Prewitt has failed to persuade us that his sentence of two and a half years is inappropriate.

Affirmed.

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