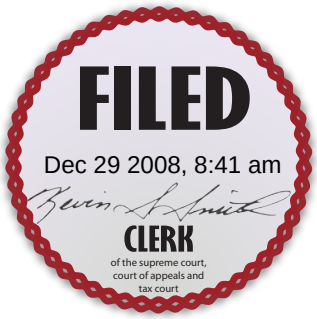

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IN THE
COURT OF APPEALS OF INDIANA

MARVIN GUY RIDDLE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A02-0807-CR-642
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable William C. Menges, Jr., Judge
Cause No. 34D01-0603-FA-00212

December 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Marvin Guy Riddle appeals his twenty-year sentence with five years suspended to probation for Class B felony possession of cocaine. Specifically, he contends that the trial court abused its discretion in finding several aggravators and that his sentence is inappropriate. Although we conclude that the trial court found one improper aggravator, in light of the remaining proper aggravators and lack of mitigators, we conclude that the trial court did not abuse its discretion in sentencing Riddle. In addition, in light of Riddle's prior misdemeanor conviction, the fact that he committed the instant offense while he had a felony theft charge pending, and the fact that he was charged with two felonies while out on bond in this case and on probation in the theft case, he has failed to persuade us that his sentence is inappropriate. We therefore affirm.

Facts and Procedural History

On March 9, 2006, the State charged Riddle with Count I: Class A felony dealing in cocaine and Count II: Class A felony possession of cocaine. In April 2008, the State and Riddle entered into a plea agreement whereby Riddle agreed to plead guilty to Count II: possession of cocaine as a Class B felony (as a lesser included offense of Class A felony possession of cocaine), and the State agreed to dismiss the other charge and not file additional charges. According to the plea agreement, "The Defendant shall be sentenced after evidence and arguments." Appellant's App. p. 53 (emphasis removed).

At the sentencing hearing, the State presented as a factual basis for Class B felony possession of cocaine[1] that around 3:30 a.m. on April 8, 2006,[2] police officers

[1] For Class B felony possession of cocaine, the State had to prove that Riddle knowingly or intentionally possessed *less than* three grams of cocaine within 1000 feet of school property. *See* Ind.

encountered Riddle at Circle K on 1800 East Markland in Kokomo, Indiana, which was within 1000 feet of a school, and found cocaine weighing in excess of three grams, specifically, ten grams. At the conclusion of the sentencing hearing, the trial court made the following statement:

> I think the fact that the defendant has a history of criminal activity, that he recently has violated probation, that he was arrested for a new offense while he was on bond for this offense and on probation out of Hamilton County are aggravating factors. I find no mitigating factors. . . . In normal situations the maximum sentence is reserved for those who have committed the most heinous violations of that class of felony but in this case the defendant was charged with an A felony and while not necessarily germane to proving a factual basis for the B felony, we had evidence introduced that would have provided the factual basis for the A felony and the reduction from an A felony to a B felony I think provides ample justification to impose the maximum sentence available for a B felony. I think that is appropriate in this case.

Tr. p. 105, 107. Accordingly, the trial court sentenced Riddle to the maximum term of twenty years but suspended five years to probation. Riddle now appeals his sentence.

Discussion and Decision

Riddle raises two issues on appeal. First, he contends that the trial court abused its discretion in sentencing him. Second, he contends that his sentence is inappropriate.

I. Abuse of Discretion

Though the Argument section of Riddle's brief is difficult to decipher, it appears that he argues that the trial court abused its discretion in finding as aggravators his history

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Code § 35-48-4-6(a), (b)(2)(B)(i). Contrary to Riddle's argument, there is no requirement of "the presence of someone under the age of eighteen." Appellant's Br. p. 10.

[2] Because Riddle committed his crime in 2006, Indiana's new sentencing scheme, which went into effect on April 25, 2005, applies. *Gutermuth v. State*, 868 N.E.2d 427, 431 n.4 (Ind. 2007). Therefore, Riddle's *Apprendi*/*Blakely* argument fails. *See Robertson v. State*, 871 N.E.2d 280, 283 (Ind. 2007).

of criminal activity, violation of probation, and commission of a new offense while out on bond in this case and that the evidence supported Class A felony possession of cocaine but he pled guilty to Class B felony possession of cocaine. In general, sentencing decisions lie within the discretion of the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). As such, we review sentencing decisions only for an abuse of discretion. *Id.*

As for the aggravators history of criminal activity, violation of probation, and commission of a new offense while out on bond in this case, Riddle's PSI reflects that he has a 2003 conviction for Class A misdemeanor check deception. Riddle also had a pending felony theft charge in Hamilton County at the time of his 2006 arrest in this case (for which he was sentenced in 2007), and he was arrested for two counts of felony theft while out on bond in this case and on probation in the Hamilton County case. Hamilton County then filed a notice of probation violation. In light of this evidence, the trial court did not abuse its discretion in finding these aggravators.[3]

Riddle next argues that the trial court abused its discretion in finding as an aggravator that he could have been convicted of Class A felony possession of cocaine because he possessed more than three grams, specifically, ten grams. Riddle pled guilty to Class B felony possession of cocaine for possessing less than three grams of cocaine within 1000 feet of school property; however, it is a Class A felony if at least three grams are involved. *Compare* Ind. Code § 35-48-4-6(b)(2)(B)(i) *with* I.C. § 35-48-4-6(b)(3). In sentencing Riddle to the maximum term of twenty years with five years suspended, the

[3] To the extent that Riddle challenges the weight of his prior convictions, we note that the relative weight of aggravators properly found by the trial court is not subject to review for abuse of discretion. *Cardwell v. State*, 895 N.E.2d 1219, 1223 (Ind. 2008).

trial court relied on the fact that he could have been convicted of an A felony. *See* Tr. p. 107.

If a trial court accepts a plea agreement under which the State agrees to drop or not file charges and then uses facts that gave rise to those charges to enhance a sentence, it in effect circumvents the plea agreement. *Roney v. State*, 872 N.E.2d 192, 201 (Ind. Ct. App. 2007), *trans. denied*; *see also Farmer v. State*, 772 N.E.2d 1025, 1027 (Ind. Ct. App. 2002) (noting that if a defendant is sentenced more harshly based upon facts comprising the dismissed charges, the defendant does not receive the full benefit of the plea agreement); *Carlson v. State*, 716 N.E.2d 469, 473 (Ind. Ct. App. 1999) (where the defendant pled guilty to dealing cocaine as a Class B felony, and the State dropped dealing cocaine as a Class A felony, "[t]he trial court could not circumvent the plea agreement by sentencing defendant using the distinguishing element as an aggravator"). Therefore, we conclude that the trial court abused its discretion by finding the amount of cocaine, which distinguished the A felony from the B felony, as an aggravator.

In sum, although the trial court found one improper aggravator, it properly found Riddle's history of criminal activity, violation of probation, and commission of a new offense while out on bond in this case as aggravators. In light of the remaining proper aggravators and the fact that there are no mitigators,[4] we are confident that the trial court would have imposed the same sentence had it not found the improper aggravator. *See Robertson v. State*, 871 N.E.2d 280, 287 (Ind. 2007). The trial court did not abuse its discretion in sentencing Riddle.

[4] Riddle does not argue that the trial court abused its discretion in failing to identify a specific mitigator.

II. Inappropriate Sentence

Riddle next contends that his sentence is inappropriate. Although a trial court may have acted within its lawful discretion in imposing a sentence, Article VII, 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 burden is on the defendant to persuade us that his or her sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

Here, the trial court sentenced Riddle to twenty years with five years suspended for Class B felony possession of cocaine. "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.

As for the nature of Riddle's offense, police officers found Riddle in possession of ten grams of cocaine at Circle K, which was within 1000 feet of a school. As for Riddle's character, he argues that his criminal history is limited and has no nexus to the current offense. The significance of a criminal history in assessing a defendant's character and appropriate sentence varies based on the nature, gravity, and number of prior offenses in relation to the current offense. *Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007). Specifically, Riddle had a conviction for Class A misdemeanor

check deception and a pending charge for felony theft in Hamilton County at the time he committed the current offense. While out on bond in this case and on probation in Hamilton County for his newly-entered theft conviction, Riddle was charged with two counts of felony theft. Hamilton County then filed a notice of probation violation. Although check deception, theft, and possession of cocaine do not appear to be related on the surface, Riddle's crimes are increasing in frequency, and he was charged with two felonies while on probation *and* out on bond. This shows an utter disregard for the law and its consequences. Riddle has failed to persuade us that his twenty-year sentence with five years suspended is inappropriate.

Affirmed.

DARDEN, J., and RILEY, J., concur.