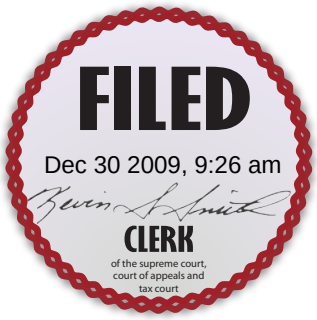

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IN THE
COURT OF APPEALS OF INDIANA

KENNETH RICKS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0909-CR-936
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0605-FB-27

December 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Kenneth Ricks appeals his convictions and sentence for Class B felony burglary and Class B felony arson. We affirm.

Issues

Ricks raises two issues, which we restate as:

I. whether the trial court made improper comments at his guilty plea hearing; and

II. whether he was properly sentenced.

Facts

On October 7, 2005, seventeen-year-old Ricks and his friend, Jacob Lewandowski, broke into Calvary Chapel in Lafayette and used a "sawzall" to remove a safe from an office floor. App. p. 35. Ricks and Lewandowski put the safe into the trunk of Ricks's car. Lewandowski then returned to the church, poured lighter fluid in the church, and set it on fire. Ricks went back into the church shortly after Lewandowski lit the fire, saw Lewandowski spray additional lighter fluid in the church, and knew the fire would probably burn the church to the ground. Ricks and Lewandowski left in Ricks's car.

On May 12, 2006, the State charged Ricks with two counts of Class B felony burglary, Class D felony theft, two counts of Class B felony arson, Class B felony conspiracy to commit burglary, and Class B felony conspiracy to commit arson. On June 8, 2007, Ricks pled guilty to one count of Class B felony burglary and one count of Class B felony arson. Pursuant to the plea agreement, the remaining charges would be dismissed, and the executed portion of Ricks's sentence would be capped at eighteen

years. On June 29, 2007, the trial court sentenced Ricks to ten years on the burglary conviction and eight years on the arson conviction. The trial court ordered the sentences to be served consecutively for a total sentence of eighteen years. The trial court also ordered fifteen years of the eighteen-year-sentence to be served in the Department of Correction and the remaining three years to be served with Tippecanoe County Community Corrections.

In September 2007, Ricks filed a notice of appeal, which was dismissed as untimely. Ricks then sought permission to file a belated appeal pursuant to Indiana Post-Conviction Rule 2, and the trial court granted Ricks's petition to file a belated notice of appeal. On appeal, we concluded that the trial court improperly granted Ricks permission to file a belated appeal without first holding a hearing on his petition. See Ricks v. State, 898 N.E.2d 1277 (Ind. Ct. App. 2009). On April 16, 2009, following a hearing, the trial court granted Ricks permission to file a belated notice of appeal, and Ricks now appeals his convictions and his sentence.

Analysis

I. Challenge to Convictions

Ricks first argues that the trial court made inappropriate comments at his guilty plea hearing and that the trial court was biased.

> It is well settled that a person who pleads guilty cannot challenge the propriety of the resulting conviction on direct appeal; he or she is limited on direct appeal to contesting the merits of a trial court's sentencing decision, and then only where the sentence is not fixed in the plea agreement. This is one of the consequences of pleading guilty. After all, "[a] defendant's plea of guilty is [ ] not merely a procedural event

> that forecloses the necessity of trial and triggers the imposition of sentence. It also, and more importantly, conclusively establishes the fact of guilt, a prerequisite in Indiana for the imposition of criminal punishment."

Alvey v. State, 911 N.E.2d 1248, 1249 (Ind. 2009) (citations omitted) (alterations in original). "Defendants who plead guilty to achieve favorable outcomes forfeit a plethora of substantive claims and procedural rights." Id. at 1250-51. "When a judgment of conviction upon a guilty plea becomes final and the defendant seeks to reopen the proceedings, the inquiry is normally confined to whether the underlying plea was both counseled and voluntary." Id. at 1249. Ricks's challenge to the trial court's conduct at the guilty plea hearing does not amount to a challenge that his guilty plea was unknowing or involuntary. As such, Ricks may not challenge the trial court's conduct at the guilty plea hearing on direct appeal.

II. Challenge to Sentence

Ricks claims that the trial court predetermined his sentence when it stated at the guilty plea hearing that Ricks was going to prison. Ricks refers to the following exchange between Ricks and the trial court:

> BY THE COURT: Well, it says you didn't see, you're not suffering from any symptoms of psychological disturbance. And of course you're blaming the other guy. They say you have the kind of personality that leaves you vulnerable to exploitation by others. Says you're so desperate for friendship that you allow yourself to be taken advantage of by others.
>
> Well, you're headed to prison, as you probably know. And people that can't think for themselves or use good judgment and commit crimes, and here you are. The kind of person that just goes along. I don't know – I'll know more about you when I get the Pre-Sentence but this is pitiful.

> Have you got anything to say? You ought to have something to say.
>
> BY THE DEFENDANT: Just that I'm very sorry for what happened.
>
> BY THE COURT: Are you sorry?
>
> BY THE DEFENDANT: Yes, sir.
>
> BY THE COURT: Why are you sorry? Cause you're gonna go to prison?
>
> BY THE DEFENDANT: No. Because the fact that it happened and that I didn't prevent it.

App. pp. 26-27.

Even if Ricks's sentence was suspendable, the trial court made these comments at the guilty plea hearing after Ricks admitted to the burglary and arson. The plea agreement called for Ricks's executed sentence to be capped at eighteen years. It was reasonable for the trial court to suggest that Ricks would receive at least some prison time for his crimes. Moreover, during this exchange, the trial court acknowledged that it would have to get more information from the pre-sentence investigation report. These statements do not show that the trial court predetermined Ricks's sentence.

Ricks also argues he was not given a meaningful opportunity to be heard because the trial court interrupted him during his allocution at the sentencing hearing. Regarding a defendant's right of allocution following a guilty plea, our supreme court has observed:

> Because a guilty plea is not based on "the verdict of the jury or the finding of the court" the trial judge is not required to ask the defendant whether the defendant wants to make a statement as provided by Indiana Code section 35-38-1-5. It is in that sense that there is no statutory right of allocution

> upon a plea of guilty. But when a defendant specifically makes a request of the court for the opportunity to give a statement, as the defendant did in this case, then the request should be granted.

Biddinger v. State, 868 N.E.2d 407, 412 (Ind. 2007) (footnote omitted).

In the context of a probation revocation hearing, our supreme court explained, "The purpose of the right of allocution is to give the trial court the opportunity to consider the facts and circumstances relevant to the sentencing of the defendant in the case before it." Vicory v. State, 802 N.E.2d 426, 429 (Ind. 2004) (quotation omitted). "When the defendant is given the opportunity to explain his view of the facts and circumstances, the purpose of the right of allocution has been accomplished." Id. at 430. The court observed that because Vicory had been given the opportunity to testify at his probation revocation hearing, the goal of allocution was largely accomplished. Id. The court concluded, "because Vicory testified at his hearing and because he has not identified any statement or argument he would have made had the court permitted him to read his statement, the court's refusal did not affect his substantive rights such that reversal is warranted." Id. (citing Ind. Trial Rule 61).

At the sentencing hearing, Ricks stated that he was sorry for his poor choice of friends, sorry for his poor judgment, sorry for destroying other people's property, and sorry that he hurt his family. He also stated that he fully cooperated with the police and fully accepted the responsibility for his actions. He stated, "I now understand that God knows what is in my heart and will support myself and my family through this event." App. pp. 57-58. At that point, the trial court questioned Ricks about why he does what

other people want him to do even if it is bad and stated, "The good Lord gave you brains. How come you don't use 'em?" Id. at 58. Ricks answered various questions posed by the trial court, and then the prosecutor, defense counsel, and the trial court proceeded to discuss how Ricks should be sentenced. The pre-sentence investigation report also contained Ricks's description of the offense and the circumstances he wanted the trial court to consider.

Even assuming the trial court "cut off" Ricks during his allocution, reversal is not warranted. App. Br. p. 16. Ricks was able to make at least a partial statement to the trial court and answered questions asked by the trial court. Moreover, like Vicory, Ricks has not identified any statement or argument he would have made had the court permitted him to make a complete statement. Thus, the trial court's interruption did not affect his substantive rights such that reversal is warranted. See Vicory, 802 N.E.2d at 430. See also Biddinger, 868 N.E.2d at 412-13 (concluding that even where, following a guilty plea, the defendant was denied the opportunity to give a statement at the sentencing hearing, any error was harmless because defendant failed "to establish how the excluded portion of his statement would have made a difference in the sentence the trial court imposed.").

Ricks also challenges the eighteen-year-sentence imposed by the trial court. We engage in a four-step process when evaluating a sentence. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). First, the trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Id. Second, the reasons or omission of reasons given for choosing a sentence

are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e. to particular aggravators or mitigators, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id. As we have recently stated, "inappropriate sentence and abuse of discretion claims are to be analyzed separately." King v. State, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008).

Ricks first argues that the trial court abused its discretion by considering the nature of the offense and the seriousness of the crime as aggravators. An abuse of discretion in identifying or not identifying aggravators and mitigators occurs if it 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.'" Anglemyer, 868 N.E.2d at 490 (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)). Additionally, an abuse of discretion occurs if the record does not support the reasons given for imposing a 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.

Ricks claims the record does not support the trial court's finding regarding the seriousness of the crime. We disagree. Ricks broke into a church, left the church to get a saw, returned to the church, used the saw to cut a hole in the floor to steal a safe, and then stood by as his cohort poured lighter fluid in the church and lit a fire to cover up the burglary. Based on the restitution order, it appears that the fire caused over $915,000.00

in damage.[1] The seriousness of this crime is evident. The trial court did not abuse its discretion in considering it as an aggravator.

To the extent Ricks argues the trial court overlooked significant mitigators, we are unconvinced. Ricks refers to his age, his lack of criminal history, the forgiveness of the victims, his cooperation with police, his guilty plea, and the fact that he did not start the fire as mitigators. The trial court specifically considered as mitigating the fact that Ricks had no prior convictions, his age, and his guilty plea. We are not convinced that the congregation's forgiveness of Ricks and the fact that he did not start the fire are significant mitigators overlooked by the trial court. See Anglemyer v. State, 875 N.E.2d 218, 220-21 (Ind. 2007) (clarifying "that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is not only supported by the record but also that the mitigating evidence is significant."). We also believe that Ricks's cooperation with police was not overlooked by the trial court because it acknowledged Ricks's guilty plea as a mitigator.

As for Ricks's claim that he should not have received the maximum sentence, we note that Rick received only the maximum executed sentence permitted by the plea agreement—eighteen years. He did not receive the maximum sentence for two consecutive Class B felony convictions—forty years. See Ind. Code § 35-50-2-5. This argument fails.

[1] Ricks argues, "The amount of restitution, however, is an element of the Class B offense and cannot be used as an aggravator." App. Br. p. 21. We note that Ricks was convicted of the count IV arson charge, which alleged that he, by means of fire, knowingly or intentionally damaged a structure used for religious worship. Ind. Code § 35-43-1-1(a)(4). The other arson allegation based on the amount of the damage was dismissed. Further, the $915,000 in damage is significantly more than the $5,000 loss described in the dismissed charge. See I.C. § 35-41-1-1(a)(3).

Finally, we address Ricks's claim that his sentence is inappropriate in light of the nature of the offense and the character of the offender. See Ind. Appellate Rule 7(B). Although Indiana Appellate Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. "Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id.

As for the nature of the offense, Ricks and his friend broke into a church, stole a safe, and set a fire. The nature of the offense does not warrant the reduction of the ten-year-sentence for burglary or the eight-year-sentence for arson.

Although various factors associated with Ricks's character are of mitigating weight—his lack of criminal history, his age, and his guilty plea—these factors were appropriately considered by the trial court when it sentenced Ricks to a total sentence of eighteen years. These factors do not require a reduction of that eighteen-year-sentence.

Conclusion

Because Ricks pled guilty, he may not challenge the trial court's comments during the guilty plea hearing on direct appeal. Ricks has not established that the trial court predetermined his sentence. Any error in the trial court interrupting Ricks's allocution is harmless. Finally, Ricks was properly sentenced. We affirm.

Affirmed.

MATHIAS, J., and BROWN, J., concur.