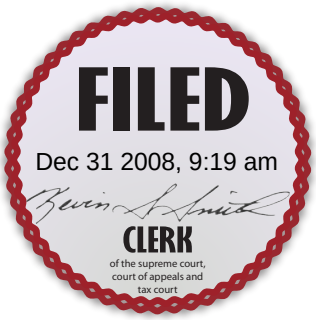

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IN THE
COURT OF APPEALS OF INDIANA

DEANA I. POWELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 11A01-0808-CR-364
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CLAY CIRCUIT COURT
The Honorable Joseph D. Trout, Judge
Cause No. 11C01-0510-FA-417

December 31, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Deana Powell appeals her sentence following her convictions for Possession of Methamphetamine, as a Class C felony, and Possession of a Sawed-off Shotgun, a Class D felony, under a guilty plea. Powell presents two issues for our review:

1. Whether the trial court abused its discretion when it sentenced her.

2. Whether her sentence is inappropriate in light of the nature of the offenses and her character.

We affirm.

FACTS AND PROCEDURAL HISTORY

On October 17, 2005, Clay County Sheriff's deputies executed a search warrant at Powell's residence. During the course of that search, deputies found sixteen guns, including a sawed-off shotgun, and methamphetamine. The State charged Powell with dealing in a schedule I, II, or III controlled substance, as a Class A felony, dealing in a schedule IV controlled substance, as a Class B felony, possession of methamphetamine, as a Class B felony, possession of methamphetamine, as a Class C felony, and possession of a sawed-off shotgun, a Class D felony. In exchange for Powell's guilty plea on the Class C felony possession of methamphetamine and possession of a sawed-off shotgun charges, the State agreed to dismiss the remaining charges. The plea agreement left sentencing to the trial court's discretion. At sentencing, the trial court imposed concurrent, advisory sentences, resulting in an aggregate four-year sentence, with two years suspended. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Abuse of Discretion

Powell first contends that the trial court abused its discretion in sentencing her. Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of that discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on other grounds 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. (quotation omitted).

> One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons, 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. Under those circumstances, 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 490-91.

Here, the trial court identified the following aggravators: Powell used methamphetamine while she was out on bond for these offenses, and the nature and circumstances of the crime. And the court identified the following mitigators: her remorse, and lack of significant criminal history. In light of those factors, the trial court imposed the advisory sentence on each conviction (four years and one and one-half years, respectively) and ordered that the sentences would run concurrently. In addition, the trial

court ordered that two years of the total four-year sentence would be suspended to probation.

On appeal, Powell first contends that the nature and circumstances of the crime aggravator was improper as a matter of law. In explaining that aggravator, the trial court noted that Powell had a large quantity of drugs in her home at the time of her arrest. But Powell points out that there was no evidence of the quantity of drugs she possessed. She did not admit to the possession of a certain quantity of drugs at either the guilty plea hearing or the sentencing hearing. While the probable cause affidavit described the amount of drugs, the affidavit was not submitted as evidence.[1]

However, in explaining this aggravator, the trial court also said, "I think the nature and circumstances of this particular crime, according to the probable cause affidavit and your own statements, far exceed what is necessary to convict you of the charges for which you have pled guilty." Transcript at 60 (emphasis added). Powell admitted to possessing a total of sixteen guns and methamphetamine in her home, where her two children reside with her. Her possession of methamphetamine conviction was elevated to a Class C felony based upon her concurrent possession of a firearm. See Ind. Code § 35-48-4-6(b)(1)(B). In addition, Powell admitted to a long history of drug abuse, starting at age seventeen, when she started using methamphetamine. Powell was thirty-five years old at the time of her arrest in this case. Thus, Powell's possession of methamphetamine offense was not an isolated incident, but the culmination of her drug abuse during her

[1] We reject the State's argument that Powell "admitted" to the contents of the probable cause affidavit when she told the trial court that she had no corrections to make to the presentence investigation report and the affidavit was attached as an exhibit thereto.

entire adult life. Given those admitted facts, we cannot say that the aggravator is invalid as a matter of law.

Powell also contends that the trial court abused its discretion when it did not identify four proffered mitigators, namely: the recommendation of a substance abuse evaluator that Powell undergo treatment while on home detention; Powell's consistent employment; the hardship her incarceration would impose on her children; and her guilty plea. But the trial court was free to disregard mitigating factors it did not find to be significant. See Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999). And Powell carries the burden on appeal of showing that such a disregarded mitigator is significant. See id. We address each proffered mitigator in turn.

Powell points out that after she underwent a substance abuse evaluation, the evaluator concluded that Powell was "very committed to remain substance[-]free" and recommended that she be placed in a Relapse Prevention program. Appellant's App. at 61. And Powell's counsel informed the trial court that no such program was available to Powell if she were incarcerated. But the evaluator also concluded that there was a "high probability of methamphetamine relapse." Id. at 62. And on appeal, Powell concedes that "the trial court was not obligated to accept [the evaluator's] recommendations[.]" Brief of Appellant at 13. Powell has not demonstrated that this proffered mitigator is significant, and the trial court did not abuse its discretion on this issue.

Next, Powell contends that the trial court should have found her consistent employment to be a mitigating factor. But, as this court observed in Newsome v. State, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003), "[m]any people are gainfully employed such

that this would not require the trial court to note it as a mitigating factor[.]" And while Powell has demonstrated that her children will suffer hardship while she is incarcerated, the trial court is not required to find that a defendant's incarceration will result in undue hardship upon her dependents. See Davis v. State, 835 N.E.2d 1102, 1116 (Ind. Ct. App. 2005), trans. denied.

Finally, with regard to Powell's guilty plea, it is well settled that a guilty plea does not automatically amount to a significant mitigating factor. See Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied. Indeed, a guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against her is such that the decision to plead guilty is merely a pragmatic one. Id. Here, because of the overwhelming evidence of her guilt, Powell made a pragmatic decision to plead guilty. And the State dismissed three felony charges in exchange for her plea. Thus Powell received a substantial benefit. The trial court did not abuse its discretion in not according her plea mitigating weight.

Issue Two: Inappropriateness of Sentence

Powell also contends that her sentence is inappropriate in light of the nature of the offenses and her character. Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review and revision of a sentence imposed by the trial court." Roush v. State, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007) (alteration original). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Revision of a sentence under Appellate Rule 7(B) requires the appellant

to demonstrate that his sentence is inappropriate in light of the nature of his offenses and his character. See Ind. Appellate Rule 7(B); Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, "a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." Roush, 875 N.E.2d at 812 (alteration in original).

Powell's sentence is not inappropriate in light of the offenses. Powell admitted to possessing methamphetamine and sixteen guns, including a sawed-off shotgun. The trial court imposed the advisory sentence on each conviction and ordered them to run concurrently. Powell's attempt to minimize the nature of the offenses because her possession of the sawed-off shotgun was "constructive" is not persuasive. Brief of Appellant at 16.

With regard to her character, Powell points out that she has been employed "at the same grocery store for most of the past twenty years and [has] lived in the same home for five years." Brief of Appellant at 17. And Powell has only one prior misdemeanor conviction. Powell also emphasizes her recent success in fighting her drug abuse and her remorse for the instant offenses.

But Powell admitted to using methamphetamine since the age of seventeen, and she stated that she would use it up to twelve times per day. In addition, she has a history of smoking marijuana and taking Vicodin. And Powell does not direct us to any evidence

that she has tried to stop abusing illegal drugs before her arrest in this case. Despite her recent history of being drug-free, she used methamphetamine when she was out on bond for these offenses. We cannot say that the advisory, concurrent sentences for her convictions are inappropriate in light of the nature of the offenses or her character.

Affirmed.

BAKER, C.J., and KIRSCH, J., concur.