ATTORNEY FOR APPELLANT:

L. ROSS ROWLAND
Public Defender's Office
Muncie, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MONIKA PREKOPA TALBOT
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

TIMOTHY RUNYON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A02-0704-CR-335
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Robert L. Barnet, Judge
Cause No. 18C03-0612-FD-158

December 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Timothy Runyon appeals his two-year sentence for intimidation as a Class D

felony.[1] Runyon claims the court improperly overlooked mitigators supported by the evidence in the record. We affirm.

FACTS AND PROCEDURAL HISTORY

The State charged Runyon with intimidation, resisting law enforcement as a Class A misdemeanor,[2] disorderly conduct as a Class B misdemeanor,[3] and public intoxication as a Class B misdemeanor.[4] Runyon agreed to plead guilty to intimidation, and the State agreed to dismiss the remaining counts. Sentencing was left to the court's discretion. After a hearing, the court found four aggravators and three mitigators,[5] then sentenced Runyon to two years with one year suspended to probation.[6]

DISCUSSION AND DECISION

Runyon asserts the court overlooked three mitigators: hardship to Runyon's family, Runyon's mental illness, and Runyon's efforts to control his illness with medication.[7] Runyon's analysis of this issue consists of a case law quotation and two

---

[1] Ind. Code §§ 35-45-2-1(a)(2) & 35-45-2-1(b)(1)(B).
[2] Ind. Code § 35-44-3-3(a)(1).
[3] Ind. Code § 35-45-1-3(1).
[4] Ind. Code § 7.1-5-1-3.
[5] The court found the following aggravators: Runyon has a substantial criminal history (five felony convictions and fourteen misdemeanor convictions), Runyon was on probation when he committed these offenses, Runyon has been on probation eleven times, and Runyon's pattern of offenses suggests disdain for authority. The mitigators identified were: Runyon's plea, Runyon's family support, and Runyon's genuine remorse.
[6] The advisory sentence for a Class D felony is 18 months, and the maximum sentence is three years. Ind. Code § 35-50-2-7(a).
[7] Runyon asserts "the Court did not explain why the Defendant deserved an enhanced sentence of two (2) years." (Appellant's Br. at 11.) We disagree. The sentencing order enumerates four aggravators and three mitigators. At the sentencing hearing, the judge explained:

> Five (5) felony convictions, on the other hand, fourteen (14) misdemeanors. Three (3) have to do with an Assault or Resisting Law Enforcement. Second conviction for Intimidation, this one today, second time. On probation at the time of this offense. Prior attempts at probation have not been successful. And as I told you, I counted them, and you've been placed on probation in various Courts throughout the United States for [sic]

sentences: "The Defendant argues that the Trial Court did not consider all of the possible mitigating circumstances. In fact, there was no mention of mental illness, hardship to family or Defendant's efforts to deal with his infirmities." (*See* Appellant's Br. at 10-11.) Runyon provided no citation to the Transcript or Appendix to support his allegation that he presented evidence to the trial court regarding these three alleged mitigators. Accordingly, he waived this allegation of error for appellate review. *See* Ind. Appellate Rule 46(A)(8) (In the argument section, "*[e]ach contention must be supported by citations to* the authorities, statutes, and *the Appendix or parts of the Record on Appeal relied on*, in accordance with Rule 22.") (emphases added).

> Waiver notwithstanding, we find no sentencing error.
>
> The trial court must consider all evidence of mitigating circumstances presented by a defendant. However, the finding of mitigating circumstances rests within the sound discretion of the trial court. When a trial court fails to find a mitigator clearly supported by the record, a reasonable belief arises that the trial court improperly overlooked that factor.

Long v. State, 865 N.E.2d 1031, 1037 (Ind. Ct. App. 2007), *reh'g denied*, *trans. denied*.

Regarding his mental illness and treatment, Runyon testified he has been treated "off and on for twenty (20) some years," he is currently being treated with medicine, and his physician is "Dr. Krause at the jail." (Tr. at 2.) He testified he functions "pretty well"

> eleven (11) times. A pattern of offenses involving a disdain for authority. I could very easily impose the maximum sentence here. Very easily.

(Tr. at 29-30.) That statement adequately explains Runyon deserved an enhanced sentence due to the circumstances surrounding his criminal history and his failure to modify his behavior in response to probation he had received in the past.

Runyon also claims his two-year sentence is an abuse of discretion because the court "did not find any aggravating factors pertaining to his character." (Appellant's Br. at 11.) The four aggravators found by the trial court relate to Runyon's criminal history, multiple violations of probation, and "disdain for authority" – as such, they do call into question his character.

when he is on his medications. (*Id*. at 21.) We note Runyon's trial counsel did not ask the court to find a mitigator in Runyon's mental illness. In contrast, the Prosecutor noted: "It looks like he's had a life long problem. I wish he was the individual full-time out there in Delaware County as he is setting [sic] up there today. I really do. But based on his record, there's no proof he's going to follow the rules this time." (*Id*. at 27-28.) In light of the testimony and argument, we find no abuse of discretion in the trial court's determination Runyon's mental illness and need for medication were not mitigators.

Regarding hardship to his family, Runyon testified:

> I have a fifteen (15) year old daughter, she's in foster care in Tampa, Florida and she needs, she needs my help right now. And my mom, my mom also needs some help. And I promise that if you will give me another opportunity that I will help my family and stay out of trouble.

(*Id.* at 18-19.) When asked about his daughter, Runyon explained:

> She's fifteen (15). Her, her mom took her to Florida and got a bunch of drug charges down there and then they took her. And she lost total custody. And there's only one (1), her grandpa on that side and he, he don't want nothing to do with her, so she's just got me and my family. So, so if I can't, you know, it, it - - that was a big part of my trouble. She's been in it like since June of last year and I wasn't in no situation to help her. I'm, you know, drinking and drugging and no place to live. And so I've got to get her out of foster care. And that's my mother that just walked in. And I'm going to put her in my mom's custody when I get her out.

(*Id*. at 19-20.) To help his mother, Runyon testified he mows her yard, does her plumbing, paints, plants flowers, washes her car, checks her oil, and goes out to eat with her.

"[T]he hardship to a defendant's dependents is not always a significant mitigating

factor." *McElroy v. State*, 865 N.E.2d 584, 592 (Ind. 2007). We will not find error when a defendant fails to present evidence demonstrating "definite hardship to a dependent." *See Stewart v. State*, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007) ("[Mother] did not testify that she relied in any way on [defendant's] income. To the extent [defendant's] mother will miss his help around the house while he is incarcerated, that is unfortunate but it [is not what we normally consider] hardship to a dependent.").

Runyon did not present evidence the authorities in Florida might release his daughter to him if he were released from incarceration. In light of his convictions of five felonies and fourteen misdemeanors, his admitted addiction issues, and his failure to consistently take his medications to control his mental illness, we question the likelihood that Florida would place a child in his custody. Neither did Runyon's testimony demonstrate his mother would suffer hardship if he could not paint and mow for her. Accordingly, we find no abuse of discretion in the trial court's failure to find his incarceration would create hardship for his dependents. *See, e.g.*, *Long*, 865 N.E.2d at 1037 (finding no abuse of discretion where Long failed to prove he was supporting the alleged dependents).

Affirmed.

CRONE, J., and DARDEN, J., concur.