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IN THE
COURT OF APPEALS OF INDIANA

LIONEL MCELROY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A05-0511-CR-641
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Wayne J. Lennington, Judge
Cause No. 18C05-0506-MR-01

November 9, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Lionel McElroy appeals his sentence imposed following his plea of guilty to reckless homicide as a class C felony.

We affirm.

ISSUE

Whether the trial court abused its discretion in sentencing McElroy.

FACTS

On August 1, 2004, McElroy was riding in a pickup truck with his two friends, Phillip White and Juan Jackson. White drove the truck, Jackson sat in the middle, and McElroy sat on the passenger's side. At some point, White stopped the truck, and Ryan Ylovchan approached the driver's side and asked to buy some drugs. White asked if Ylovchan had some money, Ylovchan pulled out his wallet, and White grabbed the wallet and drove away. Ylovchan ran after the truck and held onto the driver's side of the truck for "a couple of seconds[.]" (Tr. 16). Ylovchan then fell, and McElroy felt "a couple of bumps" as the truck ran over Ylovchan. *Id.* White did not stop the truck, and McElroy did not tell White to stop the truck. White took the money from Ylovchan's wallet and split it between McElroy, Jackson, and himself. Ylovchan later died as a result of his injuries.

In June 2005, the State charged McElroy with murder and robbery as a class A felony. In September 2005, McElroy entered into a plea agreement in which he agreed to plead guilty to a count of reckless homicide as a class C felony in exchange for the State's dismissal of the murder and robbery charges. The plea agreement left sentencing

open to the trial court's discretion. As part of the plea agreement, McElroy also agreed to waive "his right to have a jury determine the aggravators beyond a reasonable doubt" as required by *Blakely v. Washington*. (Tr. 26). Thereafter, McElroy pleaded guilty, and the trial court accepted his guilty plea.

The trial court held McElroy's sentencing hearing in November 2005. During the hearing, McElroy testified that the crime against Ylovchan "wasn't [his] fault" and that he "was just there when it happened" and "had no control" over it. (Tr. 27-28). McElroy also testified that he had three pending misdemeanor charges and warrants for operating a vehicle without ever receiving a license. McElroy testified that he had called the court on one of the charges but had not done anything else to resolve the pending warrants and charges. McElroy testified that he learned from media reports that someone had been run over and died, but he did not call the police. McElroy also testified that even after White implicated him to police, he was not forthcoming with police during the investigation. Prior to sentencing McElroy, the trial court noted that the sentencing statutes had been amended and were in effect. The trial court then listed some of the aggravating and mitigating circumstances that "may" be considered by the trial court and further noted that "[t]he Court [wa]s not required to use the advisory sentence in imposing the sentence for the underlying offense." (Tr. 47). The trial court then stated:

> I do not believe that this defendant [McElroy] has any remorse over what happened here. He didn't steal this money. He didn't rob this young man. Somebody gave him the money. It's unfortunate. Not one word was said, "I'm sorry that we did this. I'm sorry that I participated." He's only sorry that he was there. He acknowledged his participation in this by signing a plea agreement, and I don't know why people keep saying that a plea agreement is a sign of repentance. I don't think it is. I think a plea

> agreement is a deal that we're going to get a better deal here than we are and this deal is certainly a hell of a lot better than murder. I can find no mitigating circumstances which would justify overriding the seriousness of a Reckless Homicide. I find no mitigating circumstance which shows me that this unfortunate situation happened because it was forced upon him or because the dead man was the aggressor. The driver, according to his testimony, grabbed the money, grabbed the billfold. They split the money up. And nobody called the police. Nobody stopped to see if any help could be rendered to this man. They drove on. They left him there in the road to die. It took him eight days to die, but he died. Could he have been helped? It could have all been avoided. All they had to do is drive away. They didn't have to grab his money. It's just a plain and simple robbery, force, and he participated in it.

(Tr. 47-48). The trial court then sentenced McElroy to eight years in the Indiana Department of Correction. When the trial court issued its written sentencing order, it did not recite any aggravating circumstances. McElroy now appeals.

DECISION

The sole issue is whether the trial court abused its discretion in sentencing McElroy. Before addressing McElroy's arguments, we address the State's contention that McElroy's challenge to the trial court's identification of aggravators is "moot" and any error is "harmless." (Appellee's Br. 3). To support its contention, the State cites to *Anglemyer v. State*, 845 N.E.2d 1087 (Ind. Ct. App. 2006), *trans. granted*. However, on June 22, 2006, following the State's filing of its brief on May 10, 2006, the Indiana Supreme Court granted transfer in *Anglemyer*.[1] Thus, the decision in *Anglemyer* has been vacated. *See* Ind. Appellate Rule 58(A).

[1] The Indiana Supreme Court held an oral argument in *Anglemyer* on September 7, 2006, but, as of the date of this opinion, has not yet issued an opinion in that case.

In addition, the State's mootness argument is based upon the premise that new advisory sentencing statutes apply. After McElroy committed the C felony offense to which he pleaded guilty, and before he was sentenced, Indiana's sentencing scheme was amended—effective April 25, 2005—to incorporate "advisory" sentences rather than "presumptive" sentences. *See* Ind. Code §§ 35-38-1-7.1, 35-50-2-1.3; 35-50-2-6. However, another panel of this Court recently held that the change from presumptive to advisory sentences constitutes a substantive, rather than procedural, change that should not be applied retroactively. *Weaver v. State*, 845 N.E.2d 1066, 1071-1072, (Ind. Ct. App. 2006), *trans. denied*; *but see Samaniego-Hernandez v. State*, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005). Therefore, we reject the State's argument that the advisory sentencing scheme applies, and we will apply the earlier presumptive sentencing scheme.[2]

We now address McElroy's argument that the trial court erred by enhancing his sentence for his class C felony to the maximum of eight years. Sentencing decisions rest within the discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Smallwood v. State*, 773 N.E.2d 259, 263 (Ind. 2002). An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." *Pierce v. State*, 705 N.E.2d 173, 175 (Ind. 1998). In order for a trial court to impose an enhanced sentence, it must: (1) identify the significant aggravating factors and mitigating factors; (2) relate the specific facts and reasons that the court found

[2] Although the trial court stated that the advisory sentencing scheme was in effect, we will review McElroy's sentence under the presumptive sentencing scheme that was in effect at the time McElroy committed his offense.

to those aggravators and mitigators; and (3) demonstrate that the court has balanced the aggravators with the mitigators. *Veal v. State*, 784 N.E.2d 490, 494 (Ind. 2003).

McElroy makes no argument that the trial court erred when it stated that there were no mitigating circumstances. Instead, McElroy argues that the trial court erred by enhancing his sentence because the trial court's written sentencing order does not list any aggravating circumstances. It is true that the trial court's written sentencing order does not explicitly list any aggravators. However, "[i]n reviewing a sentencing decision in a non-capital case, we are not limited to the written sentencing statement but may consider the trial court's comments in the transcript of the sentencing proceedings." *Corbett v. State*, 764 N.E.2d 622, 631 (Ind. 2002).

The State argues that a review of the trial court's statements during the sentencing hearing reveals that the trial court discussed at least two proper aggravating circumstances, specifically, McElroy's lack of remorse and the nature and circumstances of the crime. We agree.

We do not weigh the evidence or judge the credibility of witnesses. We defer to the trial court and recognize that it is in the best position after observing a witness's demeanor while testifying to determine issues of credibility. As shown above, during the sentencing hearing, the trial court discussed McElroy's lack of remorse and the nature and circumstances of the crime, both of which can be considered aggravating circumstances. *See Veal*, 784 N.E.2d at 494. Furthermore, McElroy's character was revealed by his pending misdemeanor charges and his refusal to be forthcoming with police once White implicated him. *See Tunstill v. State*, 568 N.E.2d 539, 545 (Ind. 1991)

(holding that pending charges—while not establishing the historical fact that the defendant committed the crime alleged—are relevant and may be considered by a sentencing court as being reflective of the defendant's character and as indicative of the risk that he will commit other crimes in the future and may properly be considered as an aggravating circumstance). Because the trial court discussed two proper aggravating circumstances and because McElroy does not challenge the trial court's lack of finding any mitigating circumstances, we conclude that the trial court did not err in enhancing McElroy's sentence. *See Powell v. State*, 769 N.E.2d 1128, 1135 (Ind. 2002) (holding that a single aggravating circumstance is adequate to justify a sentence enhancement); *Dumbsky v. State*, 508 N.E.2d 1274, 1278 (Ind. 1987) (affirming the trial court's enhancement of the defendant's sentence despite the trial court's failure to articulate a balancing of aggravators and mitigators and noting that where the trial court found one aggravator and no mitigators, "the balance was struck in favor of an enhanced sentence" and "[t]he balancing was complete because the trial court found nothing on one side of the scale"); *Berry v. State*, 819 N.E.2d 443, 453 (Ind. Ct. App. 2004) (holding that "[w]hen no mitigating circumstances are found, a trial court need not engage in a balancing calculus because the presence of even one aggravating circumstance is a sufficient basis for imposing an enhanced sentence"), *trans. denied*.

Affirmed.

RILEY, J., and VAIDIK, J., concur.