MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Dewayne H. Mahone,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 21, 2021

Court of Appeals Case No. 21A-CR-309

Appeal from the Marion Superior Court

The Honorable Jennifer Prinz Harrison, Judge

Trial Court Cause No. 49D20-1907-F2-28792

Bradford, Chief Judge.

Case Summary

[1] After having been charged with a number of drug-related crimes under two different cause numbers and having been alleged to be a habitual offender, Dewayne Mahone pled guilty to Level 1 felony dealing in a controlled substance resulting in death. In exchange for Mahone's guilty plea, the State agreed to dismiss all of the remaining charges in both cause numbers as well as the habitual offender allegation. Mahone's plea also provided for a twenty-year cap on the executed portion of Mahone's sentence. The trial court accepted Mahone's guilty plea and sentenced him to a thirty-five-year sentence, with twenty years executed in the Department of Correction ("DOC") and fifteen years suspended. Mahone challenges his sentence on appeal, arguing that the trial court abused its discretion in sentencing him. We affirm.

Facts and Procedural History

[2] On May 14, 2019, the State charged Mahone under cause number 49G20-1905-F3-18751 ("Cause No. 18751") with Level 3 felony dealing a narcotic drug, Level 5 felony possession of a narcotic drug, Class A misdemeanor possession of marijuana, and Class C misdemeanor operating a motor vehicle without ever receiving a license. After being released on bond on these charges, on or about July 19, 2019, Mahone "knowingly or intentionally deliver[ed] Fentanyl in its pure or adulterated form … and the Fentanyl when was used, injected, inhaled, absorbed or ingested resulted in the death of Tony Harrell [("the decedent")]." Tr. Vol. II p. 12. The factual basis further provided that twenty-five grams of

Fentanyl and four grams of heroin were recovered from Mahone's home. Other items typically used in connection to dealing, including a blender used to mix heroin and Fentanyl, were also recovered from Mahone's home.

[3] On July 23, 2019, the State charged Mahone under cause number 49G20-1907-F2-28792 ("Cause No. 28792") with Level 2 felony dealing in a narcotic drug, Level 3 felony possession of a narcotic drug, two counts of Level 4 felony unlawful possession of a firearm by a serious violent felon, Level 5 felony possession of a narcotic drug, and Class B misdemeanor possession of marijuana. On August 20, 2019, the State added an allegation to Cause No. 28792 that Mahone was a habitual offender. On October 15, 2019, the State sought, and was subsequently granted, permission to add a charge of Level 1 felony dealing in a controlled substance resulting in death to Cause No. 28792.

[4] Mahone subsequently entered into a plea agreement, the terms of which provided that he would plead guilty to Level 1 felony dealing in a controlled substance resulting in death. In exchange for Mahone's guilty plea, the State agreed to dismiss all remaining charges in Cause No. 28792, the habitual offender allegation, and Cause No. 18751 in its entirety. The State also agreed that the executed portion of Mahone's sentence would be capped at twenty years. The trial court accepted Mahone's guilty plea and, on February 1, 2021, sentenced Mahone to a thirty-five-year term, with twenty years executed in the DOC and fifteen years suspended. The trial court also placed Mahone on probation for four years and indicated that "[u]pon successful completion of the clinically appropriate substance abuse treatment program as determined by

IDOC, the court will consider a modification after 15 years of the sentence have been served." Appellant's App. Vol. II p. 20.

Discussion and Decision

[5] Initially, we note that while Mahone frames his argument on appeal as an appropriateness challenge, his argument was solely focused on his contention that the trial court abused its discretion in sentencing him. We have previously concluded that "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). Thus, to the extent that Mahone raises an appropriateness challenge on appeal, we conclude that such challenge is waived because Mahone did not support the challenge with any cogent argument relating to the appropriateness of his sentence. *See Lee v. State*, 91 N.E.3d 978, 990–91 (Ind. Ct. App. 2017) (providing that failure to provide cogent argument waives the argument for appellate review).

[6] As for Mahone's contention that the trial court abused its discretion in sentencing him, generally speaking, sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *modified 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). The Indiana Supreme Court has held that

"[s]o long as the sentence is within the statutory range, it is subject to review only for abuse of discretion." *Id*.

I. Penalty for Dealing in a Controlled Substance Resulting in Death

[7] Again, Mahone pled guilty to Level 1 felony dealing in a controlled substance resulting in death. Pursuant to Indiana Code section 35-50-2-4(b), "a person who commits a Level 1 felony (for a crime committed after June 30, 2014) shall be imprisoned to a fixed term of between twenty (20) and forty (40) years, with the advisory sentencing being thirty (30) years." In sentencing a defendant, the trial court "may suspend only that part of a sentence for … a Level 1 felony conviction that is in excess of the minimum sentence for … the Level 1 felony conviction." Ind. Code § 35-50-2-2.2(c). By sentencing Mahone to a thirty-five-year term with twenty years executed and fifteen years suspended, the trial court complied with both of these statutes and sentenced Mahone within the statutory range.

[8] Mahone contends that the trial court abused its discretion in sentencing him because it failed "to consider that lesser sentences were available for those cases where death results from delivery of a different controlled substance." Appellant's Br. p. 21. In support, Mahone argued that although Indiana Code section 35-42-1-1.5, the statute that Mahone admitted to violating, makes distinctions between the level of felony committed by dealing different types of controlled substances resulting in death, "there is no rational basis for prescribing a greater penalty depending upon the drug that was delivered."

Appellant's Br. p. 21. We agree with the State that while "[t]he fact that [Mahone] could have received a lesser sentence if he had pled to a lesser crime may be true," it is irrelevant under the facts and circumstances of this case. Appellee's Br. pp. 11–12. As the State points out, "[a]lthough lesser sentences may have been available if he had pled to a different crime," once Mahone pled guilty and the trial court entered a judgment of conviction for a Level 1 felony, the trial court "was required to sentence [Mahone] within the statutory range for a Level 1 [f]elony." Appellee's Br. p. 11; *see also* Ind. Code § 35-35-3-3(e) ("If the court accepts a plea agreement, it shall be bound by its terms."). The trial court did not abuse its discretion in sentencing Mahone within the statutory range for a Level 1 felony, the level of crime for which he pled guilty and was convicted.

II. Mitigating and Aggravating Factors

[9] Mahone also contends that the trial court also abused its discretion in weighing certain mitigating and aggravating factors, failing to find certain mitigating factors, and finding certain aggravating factors.

> We review for an abuse of discretion the court's finding of aggravators and mitigators to justify a sentence, but we cannot review the relative weight assigned to those factors. *Anglemyer*, 868 N.E.2d at 490–91. When reviewing the aggravating and mitigating circumstances identified by the trial court in its sentencing statement, we will remand only if "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." *Id.*

Baumholser v. State, 62 N.E.3d 411, 416 (Ind. Ct. App. 2016). A single aggravating circumstance may be sufficient to enhance a sentence. *Id.* at 417.

[10] In sentencing Mahone, the trial court found the following to be mitigating factors: (1) the fact that Mahone was dealing to support his habit, (2) that Mahone accepted responsibility for his actions and showed remorse, and (3) the hardship that incarceration will put on Mahone's family and children. The trial court also found the following to be aggravating factors: (1) the harm the crime caused; (2) Mahone's criminal history, including his prior dealing conviction; (3) Mahone's choice to continue to deal drugs; (4) Mahone has committed prior violations of community-based programming, including testing positive and "picking up new cases;" and (5) Mahone was out on bond when he committed the instant offense. Tr. Vol. II p. 71.

[11] Mahone claims that the trial court abused its discretion in weighing certain mitigating and aggravating factors. Mahone also claims that the trial court abused its discretion by failing to find the following to be mitigating factors: (1) the fact that it was the decedent's decision to use drugs and (2) his guilty plea. Finally, he claims that the trial court abused its discretion in finding the fact that the trial court considered dealing to be a violent crime to be an aggravating factor.

A. Weight Assigned to Certain Mitigating and Aggravating Factors

[12] Mahone argues that the trial court did not assign enough weight to his expression of remorse and acceptance of responsibility. He also argues that the trial court assigned too much weight to his criminal history and prior dealing conviction, given the remote nature of his prior dealing conviction, which was entered in December of 1999. The Indiana Supreme Court has made it clear "that we cannot review the relative weight assigned to" mitigating and aggravating factors. *See Baumholser*, 62 N.E.3d at 416 (citing *Anglemyer*, 868 N.E.2d at 491). As the Indiana Supreme Court explained in *Anglemyer*, "[b]ecause the trial court no longer has any obligation to 'weigh' aggravating and mitigating factors against each other when imposing a sentence, unlike the pre-*Blakely* statutory regime, a trial court can not now be said to have abused its discretion in failing to 'properly weigh' such factors." *Anglemyer*, 868 N.E.2d at 491. Given the Indiana Supreme Court's clear holdings in *Anglemyer* and *Baumholser*, we cannot say that the trial court abused its discretion in assigning weight to the challenged mitigators and aggravators.

B. Mitigating Factors

[13] Mahone next argues that the trial court abused its discretion by failing to find two proffered mitigating factors. Although a sentencing court must consider all evidence of mitigating factors offered by a defendant, the finding of mitigating factors rests within the court's discretion. *Henderson v. State*, 769 N.E.2d 172, 179 (Ind. 2002). A trial court is neither required to find the presence of

mitigating factors, *Fugate v. State*, 608 N.E.2d 1370, 1374 (Ind. 1993), nor obligated to explain why it did not find a factor to be significantly mitigating. *Sherwood v. State*, 749 N.E.2d 36, 38 (Ind. 2001). "A court does not err in failing to find mitigation when a mitigation claim is highly disputable in nature, weight, or significance." *Henderson*, 769 N.E.2d at 179 (internal quotations omitted).

[14] While Indiana law "mandates that the trial judge not ignore facts in the record that would mitigate an offense, and a failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them," *Sherwood*, 749 N.E.2d at 38, an allegation that the trial court failed to find a mitigating factor "requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." *Carter v. State*, 711 N.E.2d 835, 838 (Ind. 1999). Furthermore, "the trial court is not required to weigh or credit the mitigating evidence the way appellant suggests it should be credited or weighed." *Fugate*, 608 N.E.2d at 1374.

1. The Decedent Chose to Ingest the Drugs

[15] Mahone asserts that the trial court abused its discretion by failing to find the fact that the decedent induced the harm by ingesting the drugs. In support, Mahone points to Indiana Code section 35-38-1-7.1(b)(3) which provides that the court "*may* consider the following factors as mitigating … [t]he victim of the crime induced or facilitated the offense." (Emphasis added). While the statute clearly states that the trial court "may" consider such to be a mitigating factor,

it does not say that the trial court "must" consider such to be a mitigating factor.

[16] In this case, it is clear that the trial court considered Mahone's assertion that the decedent induced the harm at sentencing, with the trial court stating:

> I get what they're saying is … that you're not a malicious person and you don't go out and you haven't gone out and you know, point blank shot someone in the head -- I understand that argument but when you deal drugs you are intending to hurt someone. I know that you're -- that -- that it's their choice to do the drugs and that they're – they're – they're making the choice but you're the person giving them that gun and I view that this way -- I view that that's what drug dealers do -- they are putting weapons into people's hands when they deal them drugs and so even though that might have been his choice to accept that weapon you gave him that weapon. Without you he would not have maybe had that weapon that day and certainly not the batch that caused him to lose his life so while I understand the argument that you were -- did not intentionally….

Tr. Vol. II p. 70. Ultimately, the trial court did not find this proffered mitigator to be significantly mitigating. Given that the trial court was not required to do so, *see Fugate*, 608 N.E.2d at 1374, we conclude that the trial court did not abuse its discretion in this regard.

2. Guilty Plea

[17] Mahone also asserts that the trial court abused its discretion in failing to find his guilty plea to be a significant mitigating factor. "[T]he significance of a guilty plea as a mitigating factor varies from case to case." *Anglemyer*, 875 N.E.2d at

221. For example, "[a] guilty plea saves significant court resources, and where the State reaps such substantial benefits from the defendant's act of pleading guilty, the defendant deserves to have a substantial benefit returned." *Patterson v. State*, 846 N.E.2d 723, 729 (Ind. Ct. App. 2006). "However, a trial court does not abuse its discretion by not finding a guilty plea as a mitigating factor when a defendant receives substantial benefits for pleading guilty." *Id.*

[18] Here, in exchange for Mahone's guilty plea, the State agreed to drop seven felony charges, three misdemeanor charges, and the allegation that Mahone was a habitual offender. We think it is fair to say that if Mahone had been found guilty of the dismissed charges and to be a habitual offender, he could have been subjected to a much more lengthy sentence. Thus, we find his decision to plead guilty reflects a pragmatic decision from which he received a substantial benefit. Given the pragmatic nature of Mahone's plea, we cannot say that the trial court abused its discretion in failing to find his guilty plea to be a significant mitigating factor.

C. Aggravating Factors

[19] Mahone last argues that the trial court abused its discretion by finding drug dealing to be a violent crime, asserting that it is not classified as a crime of violence by Indiana Code section 35-50-1-2. However, while the trial court indicated that it believes that drug dealing is a violent crime, it neither found dealing to be a statutorily-defined crime of violence nor included its belief that Mahone's criminal act was a violent act in its list of aggravating factors.

[20] Furthermore, we agree with the State that "[t]he court's comments regarding the 'violent' nature of [Mahone's] offense were made in the context of the court noting the harm caused in this case and that drug offenses are not 'victimless,' particularly here where a life was lost." Appellee's Br. p. 12. At the beginning of its sentencing statement, the trial court stated the following:

> Prior to April of 2020 this Court was only a major felony drug court and so frequently, Mr. Mahone, we had people come in and tell me that dealing was not a violent offense, that people have argued to me that it's a victimless crime and anyone who's practiced in front of me knows that I don't believe either of those things. I do find dealing to be violent. I do find there to be victims.

Tr. Vol. II p. 68. Before imposing Mahone's sentence, the trial court reiterated that it believed "that drug dealing is not a victimless crime, that drug dealing is a violent crime and I think that it's important that people – even user/dealers understand this crime hurts people." Tr. Vol. II pp. 68–69.

[21] The above-quoted comments, which again were made prior to the imposition of Mahone's sentence, merely seem to express the trial court's belief that dealing offenses are serious, violent offenses. In *Anglemyer*, the Indiana Supreme Court held that the seriousness of the offense, "which implicitly includes the nature and circumstances of the crime as well as the manner in which the crime is committed, has long been held a valid aggravating factor." 868 N.E.2d at 492. Thus, even if the trial court could be said to have found the serious, violent nature of dealing offenses to be an aggravating factor, we cannot say that the

trial court abused its discretion in doing so as the seriousness of the offense is a valid aggravating factor that the trial court may consider when sentencing a defendant.

[22] The judgment of the trial court is affirmed.

Robb, J., and Altice, J., concur.