MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Paul Mark,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

December 13, 2021

Court of Appeals Case No. 21A-CR-1583

Appeal from the Monroe Circuit Court

The Honorable Valeri Haughton, Judge

Trial Court Cause No. 53C02-1903-F5-293

Vaidik, Judge.

Case Summary

[1] Paul Mark pled guilty to robbery and burglary, and the trial court sentenced him to nine years, with five years executed and four years suspended to probation. He now appeals his sentence, arguing the trial court erred in not considering certain mitigating factors and that his sentence is inappropriate. We affirm.

Facts and Procedural History

[2] In March 2019, K.M.W.[1] called the Bloomington Police Department and reported he had been robbed by Mark. K.M.W. stated he met up with Mark to purchase a video-game system, and that Mark led him to an apartment filled with many other people and told him the people would "jump" him if he did not hand over his money.[2] Appellant's App. Vol. II p. 61. K.M.W. was "battered" by some of the individuals, and his cash and vehicle were stolen. *Id.* Mark was arrested and charged with Level 5 felony robbery. *See* Cause No. 53C02-1903-F5-293 (Cause 293). A few days later, he was released on his own recognizance pending trial. In August, the State charged Mark with Class A misdemeanor battery, *see* Cause No. 53C02-1908-CM-1884 (Cause 1884), and Class C misdemeanor operating a motor vehicle without ever receiving a

[1] K.M.W.'s full name does not appear in the record.

[2] While K.M.W. originally told police he was planning to buy a video-game system, he later stated he intended to buy marijuana.

license, *see* Cause No. 53C02-1908-CM-1997 (Cause 1997), for events occurring in June.

[3] In December, while still on pretrial release, Mark and a friend, Michael Flinn, broke into the home of Samuel Arabia and took items. Neighbors called the police, who arrived as Mark and Flinn were leaving. A pursuit occurred, with Mark and Flinn fleeing police first in a car and then, after crashing the car, on foot until they were apprehended. Items from Arabia's home were found in the car, and Flinn admitted to police he and Mark took the items from Arabia's home. The State revoked Mark's pretrial release in Cause 293 and, under a separate cause number, charged him with Level 4 felony burglary and Class A misdemeanor resisting law enforcement. *See* Cause No. 53C02-2001-F4-001 (Cause 001). Mark was released on home detention in January 2020. In September, he was arrested for Level 6 felony intimidation in an unrelated matter. He pled guilty and was sentenced to probation, which was revoked after he violated in February 2021. *See* Cause No. 47D01-2009-F6-1550.

[4] A plea hearing on Causes 293, 1884, 1997, and 001 occurred in July 2021. The State orally moved to amend the charge in Cause 001 from a Level 4 felony to a Level 5 felony. Mark then pled guilty, pursuant to a plea agreement, to Level 5 felony robbery in Cause 293 and Level 5 felony burglary in Cause 001. In exchange, the State dismissed the remaining three misdemeanors in Causes 1884, 1997, and 001. Sentencing was left to the discretion of the trial court.

[5] At sentencing, Mark proposed the trial court consider the following mitigators: (1) he would respond well to a term of probation, (2) he recently earned his G.E.D., (3) he "help[s] out with" his fiancée's children, (4) he pled guilty and accepted responsibility for his actions, and (5) he was only eighteen at the time of the offenses and twenty at the time of sentencing. Tr. p. 20.

[6] The trial court identified the following aggravators: (1) the impact on the victims, (2) that Mark committed the burglary while on pretrial release, and (3) Mark's criminal history, which consists of three juvenile-delinquent adjudications for false informing, theft, and resisting arrest, four probation violations, and a conviction for Level 6 felony intimidation, which he committed while on home detention in Cause 001. As for mitigators, the court acknowledged Mark's age and stated,

> Mr. Mark as you have indicated is very young, [Defense counsel], which I have to say, unfortunately cuts two ways. One is that he is very young and he should [be] a good candidate for some sort of rehabilitative programs, et cetera. On the other hand, he has been in some rehabilitative programs and has not taken advantage of those programs. Um, it[']s dismaying, I would say, to have someone as young as Mr. Mark is, with such a history.

Id. at 24. The court went on to state that Mark's age is "maybe a mitigator, not a statutory mitigator, but something for the Court to consider." *Id.* The trial court sentenced Mark to five years, fully executed in the Department of Correction (DOC), for Level 5 felony robbery, and four years, fully suspended to probation, for Level 5 felony burglary, to be served consecutively, for an

aggregate sentence of nine years, with five years executed and four years suspended to probation.

[7] Mark now appeals his sentence.[3]

Discussion and Decision

I. Mitigating Factors

[8] Mark argues the trial court should have found five mitigating factors: (1) the likelihood he would have responded affirmatively to probation, (2) his "academic achievement," (3) his incarceration will cause hardship to his family, (4) that he pled guilty and accepted responsibility for his actions, and (5) his "young age." Appellant's Br. p. 11. The finding of aggravators and mitigators rests within the sound discretion of the trial court, and we review such decisions only for an abuse of that discretion. *Wert v. State*, 121 N.E.3d 1079, 1084 (Ind. Ct. App. 2019), *trans. denied*. One way a trial court abuses its discretion is by not recognizing mitigators that are clearly supported by the record and advanced for consideration. *Id.*

[9] Several of Mark's proposed mitigators are not supported by the record. While Mark argues he would have responded affirmatively to probation, the record

[3] Mark states he is only challenging his robbery sentence in Cause 293. But where, as here, a defendant pleads guilty via a single plea agreement to offenses charged under separate cause numbers, we review the defendant's aggregate sentence. *Moyer v. State*, 83 N.E.3d 136, 140 (Ind. Ct. App. 2017), *trans. denied*.

does not support this, as he has violated probation four times. He also argues his incarceration would cause hardship to his fiancée's children. However, he has failed to show he supports these children in any way, let alone that his incarceration would be an undue hardship to them. *See Nicholson v. State*, 768 N.E.2d 443, 448 n.13 (Ind. 2002) (holding the trial court did not abuse its discretion by not finding hardship to defendant's family to be a significant mitigating factor where defendant provided no evidence to demonstrate that the hardship to his family would be any worse than that normally suffered by the family of an incarcerated individual). Mark also argues the trial court should have considered his "academic achievement." Appellant's Br. p. 19. But while Mark had recently earned his G.E.D., we cannot say this is a significant mitigator that the trial court was required to use. *See Benefield v. State*, 904 N.E.2d 239, 248 (Ind. Ct. App. 2009) (trial court did not abuse its discretion in declining to find defendant's participation in higher education as a mitigator), *trans. denied*.

[10] Mark also argues the trial court should have considered his young age—eighteen at the time of the offenses and twenty at the time of sentencing—as a mitigating factor. However, the trial court noted Mark's age at the sentencing hearing, stating it was "maybe" a mitigator. The court went on to say Mark's age "cut two ways" because it makes him a good candidate for rehabilitation but shows his lengthy criminal involvement occurred in a short period of time. The trial court carefully considered Mark's age and its bearing on the sentence. While the court may not have given Mark's age the weight he wanted, it is not

required to. *Flickner v. State*, 908 N.E.2d 270, 273 (Ind. Ct. App. 2009) (the trial court is not "required to give the same weight to proffered mitigating factors as the defendant does").

[11] Finally, Mark argues the court erred in not finding as a mitigator that he accepted responsibility for his actions and pled guilty. A defendant's guilty plea is not automatically a mitigating circumstance. Rather, our Supreme Court has recognized that the significance of a defendant's guilty plea varies from case to case. *See Anglemyer v. State*, 875 N.E.2d 218, 221 (Ind. 2007). "[A] guilty plea may not be significantly mitigating when . . . the defendant receives a substantial benefit in return for the plea." *Id.* A guilty plea's significance is also diminished where the decision to plead guilty is likely a pragmatic one because the evidence of a defendant's guilt is overwhelming. *Id.*

[12] Here, the State agreed to drop three misdemeanor charges—resisting law enforcement in Cause 293, battery in Cause 1884, and operating a vehicle without ever receiving a license in Cause 1997—in exchange for Mark's guilty plea to Level 5 felony robbery and Level 5 felony burglary.[4] These dismissals reduced Mark's sentencing exposure by as much as two years and sixty days.[5]

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[4] The State also argues Mark received another benefit from the plea agreement: the reduction of the burglary charge from a Level 4 felony to a Level 5 felony. However, the plea agreement does not state this as a term of agreement, nor is it mentioned as being one during the hearing. As our Supreme Court has noted, the State's decision to reduce or dismiss charges could be for numerous reasons other than a benefit to the defendant under a plea agreement. *See Marlett v. State*, 878 N.E.2d 860, 866 (Ind. Ct. App. 2007) (noting that we cannot always assume the State's dismissal of charges is a substantial benefit of a plea agreement), *trans. denied*.

[5] The maximum sentence for a Class A misdemeanor is one year, and the maximum sentence for a Class C misdemeanor is sixty days. Ind. Code §§ 35-50-3-2, 35-50-3-4.

Furthermore, the evidence of Mark's guilt in both the robbery and burglary was overwhelming. In the robbery, the victim and multiple bystanders identified Mark as one of the perpetrators. In the burglary, Mark was seen by neighbors in the burglarized house, he was in a car that fled police and contained items from the home, and Flinn told police Mark committed the burglary with him. Given this evidence, Mark's guilty plea was likely pragmatic, and the trial court did not err in declining to find Mark's plea was a significant mitigator.

[13] And even if the trial court erred "we need not remand for resentencing if we can say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." *Vega v. State*, 119 N.E.3d 193, 203 (Ind. Ct. App. 2019). Here, we can say with confidence the trial court would have imposed the same sentence had it found Mark's guilty plea to be a mitigator. The primary basis for the court's chosen sentence was Mark's criminal history. By age twenty he had three juvenile-delinquency adjudications, four probation violations, and a Level 6 felony conviction. Mark also committed the burglary (and was charged with three misdemeanors) while on pretrial release and committed the Level 6 felony intimidation while on home detention. Given this history, we have no doubt the trial court would have sentenced him to five years executed and four years suspended regardless of his guilty plea.

II. Inappropriate Sentence

[14] Mark then argues that even if we don't reverse for an abuse of discretion, his sentence is inappropriate and should be reduced under Indiana Appellate Rule 7(B), which provides that an appellate court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." "Whether a sentence is inappropriate ultimately turns on the culpability of the defendant, the severity of the crime, the damage done to others, and a myriad of other factors that come to light in a given case." *Thompson v. State*, 5 N.E.3d 383, 391 (Ind. Ct. App. 2014) (citing *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008)). Because we generally defer to the judgment of trial courts in sentencing matters, defendants must persuade us their sentences are inappropriate. *Schaaf v. State*, 54 N.E.3d 1041, 1044-45 (Ind. Ct. App. 2016). Our task under Rule 7(B) is to "leaven the outliers," not to "achieve a perceived 'correct' result in each case." *Cardwell*, 895 N.E.2d at 1225.

[15] Mark pled guilty to Level 5 felony robbery and Level 5 felony burglary. A person who commits a Level 5 felony shall be sentenced to a fixed term of between one and six years, with an advisory sentence of three years. Ind. Code § 35-50-2-6. Because Mark committed the burglary while on pretrial release in the robbery case, the sentences were required to be served consecutively. I.C. § 35-50-1-2(e). Mark faced an aggregate sentence of between two and twelve years, with an advisory sentence of six years. The trial court sentenced Mark to

five years, fully executed, for Level 5 felony robbery, and four years, fully suspended to probation, for Level 5 felony burglary, to be served consecutively, for an aggregate sentence of nine years, with five years executed and four suspended to probation.

[16] We first note Mark's sentence was far from the maximum he could have received. While his aggregate sentence is three years above the advisory, four of those years were suspended to probation, leaving him to serve a below-advisory five-year sentence in the DOC.

[17] Nonetheless, Mark argues the nature of the offenses does not support this sentence because the "crime[s] lacked brutality" and his actions were not "particularly egregious." Appellant's Br. pp. 20, 21. Even if this were true, his criminal history alone supports the sentence. Between 2016 and 2019, Mark was found to be a juvenile delinquent three times—for false informing, theft, and resisting law enforcement—and violated probation three times. He committed the burglary in Cause 001 while out on pretrial release in Cause 293. And while these cases were pending, he committed and pled guilty to Level 6 felony intimidation. He was sentenced to probation in that case and later violated that probation. Mark points to more positive aspects of his character, such as earning his G.E.D., his age, and helping with his fiancée's children. But these do not outweigh his near-continuous criminal involvement over the last few years.

[18] Mark has failed to persuade us his sentence is inappropriate.

[19] Affirmed.

Najam, J., and Weissmann, J., concur.