ATTORNEY FOR APPELLANT:

PATRICIA CARESS McMATH
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEPHEN R. CARTER
Attorney General of Indiana
Indianapolis, Indiana

ANN L. GOODWIN
Special Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

STEPHEN L. HERRON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 21A01-0609-CR-392
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FAYETTE CIRCUIT COURT
The Honorable Ronald T. Urdal, Special Judge
Cause No. 21C01-0010-CF-211

OCTOBER 2, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Defendant-Appellant Stephen Herron appeals his sentences for his convictions of operating a vehicle while intoxicated causing death, a Class B felony, Ind. Code § 9-30-5-5; and two counts of operating a vehicle while intoxicated causing serious bodily injury, as Class C felonies, Ind. Code § 9-30-5-4.

We affirm.

Herron presents two issues for our review, which we restate as:

I. Whether the trial court abused its discretion in sentencing Herron.

II. Whether Herron's sentence is inappropriate.

In September 2000, Herron drove his vehicle while intoxicated. In doing so, he caused a collision that killed Elson Hobbs III and seriously injured Christopher Hobbs and Paul Fields, Jr. Based upon this incident, Herron was charged with Count I, operating a vehicle while intoxicated causing death, a Class B felony; Count II, operating a vehicle with ten-hundredths percent (.10%) of alcohol by weight in grams causing death, a Class B felony; Count III, operating a vehicle while intoxicated causing serious bodily injury, a Class C felony; Count IV, operating a vehicle with ten-hundredths percent (.10%) of alcohol by weight in grams causing serious bodily injury, a Class C felony; Count V, operating a vehicle while intoxicated causing serious bodily injury, a Class C felony; Count VI, operating a vehicle with ten-hundredths percent (.10%) of alcohol by weight in grams causing serious bodily injury, a Class C felony; Count VII, leaving the scene of an accident resulting in death, a Class C felony; Count VIII, leaving the scene of an accident resulting in serious bodily injury, a Class D felony; and Count IX, leaving the scene of an accident resulting in damage to a vehicle, a Class C

misdemeanor. On March 19, 2002, Herron pleaded guilty to Counts I, III and V. Herron was sentenced on June 28, 2002 to twenty (20) years on Count I and eight years each on Counts III and V, all to be served consecutively. Herron subsequently filed a motion to correct error, in response to which the trial court reduced his sentences on Counts III and V to five years each, with all counts to be served consecutively. In addition, following other filings, Herron filed a belated notice of appeal on August 23, 2006. Herron now appeals the sentences he received on Counts I, III and V.

We must first address Herron's claims that several aggravating factors found by the trial court violate his Sixth Amendment rights as set forth in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). *Blakely* applies and further explains the rule previously set forth in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). *Apprendi* requires that any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Blakely*, 124 S.Ct. at 2536. *Blakely* instructs that "[t]he relevant statutory maximum for *Apprendi* purposes is the maximum a judge may impose based solely on the facts reflected in the jury verdict or admitted by the defendant." *Id*. at 2537.

As one might imagine, there was a flurry of activity following the Supreme Court's decision in *Blakely*. A primary issue that state courts, including ours, were asked to deal with was the question of retroactive application. Following several opinions from this Court, our supreme court granted transfer and resolved this issue. With specific regard to the instant case, the supreme court recently decided *Gutermuth v. State*, 868

N.E.2d 427 (Ind. 2007) on June 20, 2007. In *Gutermuth*, the supreme court held that the belated appeal of a sentence entered before a new constitutional rule of criminal procedure was announced is not governed by the new rule. More specifically, the court held that belated appeals of sentences entered before *Blakely* are not subject to the holding in that case. *Id*. at 428.

The current appeal is a belated appeal that Herron filed on August 23, 2006. Herron pleaded guilty on March 19, 2002 and was sentenced on June 28, 2002, two years prior to the decision in *Blakely*. Therefore, pursuant to *Gutermuth*, Herron's sentence is not subject to the requirements of *Blakely*, and we need not address his arguments in this regard.

We take this opportunity to note that not only does *Blakely* not apply to Herron's sentence, but also the recent statutory amendments are not applicable. On April 25, 2005, statutory amendments took effect whereby the state legislature amended the sentencing scheme to provide for "advisory" sentences rather than "presumptive" sentences. These amendments constitute a substantive change in a penal statute and, therefore, may not be applied retroactively. *See Combs v. State*, 851 N.E.2d 1053, 1066 n.8 (Ind. Ct. App. 2006), *trans. denied*, 860 N.E.2d 595. Herron committed these offenses in September 2000, pleaded guilty in March 2002, and was sentenced in June 2002, all prior to the effective date of the legislature's amendments to our statutory scheme for felony sentencing. We are required to apply the statutes that were in effect at the time of commission of these offenses. Thus, in the present case, we are required to apply the "presumptive" sentencing scheme and the applicable case law.

We turn now to Herron's arguments regarding the discretion of the trial court. He first contends that the trial court abused its sentencing discretion by considering improper aggravating circumstances. Particularly, Herron argues that the trial court improperly found as aggravators his criminal history, the impact of his offenses upon the victims, and the fact that a reduced sentence would depreciate the seriousness of the offenses.

Sentencing is a determination within the sound discretion of the trial court, and we will not reverse the trial court's decision absent an abuse of discretion. *Allen v. State*, 722 N.E.2d 1246, 1250 (Ind. Ct. App. 2000). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances of the case. *Groves v. State*, 823 N.E.2d 1229, 1231 (Ind. Ct. App. 2005). The broad discretion of the trial court includes whether to increase the presumptive sentence, to impose consecutive sentences, or both. *Jones v. State*, 807 N.E.2d 58, 68-69 (Ind. Ct. App. 2004), *trans. denied*, 822 N.E.2d 969.

The trial court used Herron's criminal history as an aggravating circumstance to enhance his sentences. Herron points out that his 1997 conviction for operating while intoxicated (OWI) is the predicate offense that raised his current offenses to Class B and Class C felonies. Thus, Herron claims the trial court erred in using his criminal history as an aggravator.

Herron's convictions for one count of OWI causing death and two counts of OWI causing serious bodily injury were elevated from a Class C felony to a Class B felony and from Class D felonies to Class C felonies, respectively, because he had a 1997 conviction for operating while intoxicated. *See* Ind. Code §§ 9-30-5-5(a) and 9-30-5-4(a). A fact

that constitutes a material element of an offense may not also be an aggravating circumstance that supports an enhanced sentence. *See Davis v. State*, 851 N.E.2d 1264, 1267 (Ind. Ct. App. 2006), *trans. denied*, 860 N.E.2d 594. Here, the trial court stated at sentencing and in its sentencing order that Herron has a "history of juvenile and adult arrests, the most significant being a conviction of operating a vehicle while intoxicated in 1997." Tr. at 145-46; *see also* Appellant's App. at 84. Although the court cannot consider Herron's 1997 OWI conviction as an aggravating circumstance, the remainder of Herron's criminal and delinquent history is a valid aggravating factor that the trial court could consider in imposing sentence. *See Hatchett v. State*, 740 N.E.2d 920, 928 (Ind. Ct. App. 2000), *trans. denied*, 753 N.E.2d 8 (2001) (stating that although factor constituting material element of crime cannot be considered aggravating circumstance, remainder of defendant's criminal history is valid aggravator); *see also* Ind. Code § 35-38-1-7.1(b)(2). Herron's pre-sentence investigation report lists two juvenile adjudications for burglary, which, if committed by an adult, would be felony offenses. As an adult, Herron was convicted of carrying a handgun without a license, receiving stolen property, and a misdemeanor alcohol-related offense. Therefore, aside from Herron's OWI conviction, we conclude that the trial court properly considered his criminal and delinquent history as an aggravating factor.

Herron further claims that the trial court improperly considered the impact on the victims and their families as an aggravating circumstance. In its sentencing statement, the trial court described the impact of the accident as having a "devastating effect on the families and the victims involved." Tr. at 146.

Under normal circumstances, the impact upon a victim's family is not a proper aggravating factor for purposes of sentencing. *Comer v. State*, 839 N.E.2d 721, 727 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 1000 (2006). Because the impact on family members accompanies almost every case involving death, we have determined that such impact is already taken into account in the presumptive sentence. *Bacher v. State*, 686 N.E.2d 791, 801 (Ind. 1997). However, in certain cases, the impact may qualify as an aggravator. In such cases, the defendant's conduct must have had an impact of a destructive nature not normally associated with the commission of the offense in question, and the impact must be foreseeable to the defendant. *Id*.

In the present case, although this incident tragically took the life of one man and forever altered the lives of two other men, nothing in the trial court's statement at sentencing suggests that the impact on the family of Elson Hobbs is of the type so distinct as to rise to the level of an aggravating circumstance. In addition, although this aggravator has historically been reserved for cases of murder or causing a death, we acknowledge its applicability to cases involving very severe injuries, as in the present case. Having said that, we decline to apply the aggravator to Herron's sentences for the severe injuries of either Christopher Hobbs or Paul Fields because the impact does not rise to the level required.

Finally, the trial court found the aggravating factor that imposition of a reduced sentence would depreciate the seriousness of the crime. At the time of Herron's offense and sentencing, this aggravating factor was provided for by statute. *See* Ind. Code § 35-38-1-7.1. It is improper for a trial court to find this aggravating circumstance unless the

court is considering imposing a sentence of shorter duration than the presumptive term. *Means v. State*, 807 N.E.2d 776, 787-88 (Ind. Ct. App. 2004), *trans. denied*. Here, there is nothing in the transcript indicating that the trial court was considering imposing a sentence shorter in duration than the presumptive. Rather, the trial court listed this factor as an aggravator in support of imposition of an enhanced sentence. Therefore, this is an improper aggravating factor.

We now turn to the mitigating circumstances that Herron maintains were supported by sufficient evidence in the record but which the court did not find. With respect to mitigating factors, it is within a trial court's discretion to determine both the existence and the weight of a significant mitigating circumstance. *Allen*, 722 N.E.2d at 1251. Given this discretion, only when there is substantial evidence in the record of significant mitigating circumstances will we conclude that the sentencing court has abused its discretion by overlooking a mitigating circumstance. *Id*.

Herron alleges that the court erroneously rejected his remorse as a mitigating factor when it determined his sentence. On appeal, a trial court's determination of a defendant's remorse is similar to its determination of credibility: without evidence of some impermissible consideration by the trial court, we accept its determination. *Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002).

At Herron's sentencing hearing, defense counsel prompted him, "You personally apologize for your indiscretion that particular evening, do you not?" Herron responded: "Absolutely. I know that many of you stated that you didn't want an apology from me but … I ask for your forgiveness. For what it is worth. I will tell you that I'm sorry and I

ask for your forgiveness, and I accept full responsibility for what happened that night." Tr. at 90. Again, defense counsel encouraged Herron's testimony by asking, "You want to apologize to your family, but also the Hobbs family for this terrible tragedy, isn't that true?" To that question, Herron responded, "Yeah, I feel like I owe this entire community an apology. I've hurt a … I don't even know the extent of all of the people that I've hurt. I had no intentions of hurting anyone that night. Like I said, I take full responsibility for my actions. It was ignorant." Tr. at 93. This testimony was somewhat tempered by Herron's testimony of his difficulty throughout his lifetime of managing his diabetes and the fact of his low blood sugar levels the night of the collision. The trial court, having the ability to observe the defendant and listen to the tenor of his voice, is in the best position to judge the sincerity of a defendant's remorseful statements. *See Corralez v. State*, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004). Because we find no impermissible considerations with regard to this factor, we find no error.

Herron also contends that the trial court improperly refused to give mitigating weight to his guilty plea. The trial court is not automatically required to find defendant's plea of guilty mitigating or of great weight. *Farris v. State*, 787 N.E.2d 979, 984 (Ind. Ct. App. 2003). Further, a guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea. *Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 995 (2006).

Here, Herron received a benefit in return for his plea of guilty. In addition to other charges that would have merged into ones to which Herron pleaded guilty, the State dismissed a C felony charge, a D felony charge, and a C misdemeanor charge. Although

perhaps not affecting Herron's aggregate sentence, these charges certainly would be included in his permanent criminal record and would be considered in adjudicating him a habitual offender. We cannot say the trial court erred in determining the weight to assign Herron's guilty plea.

Although we have determined that two of the aggravating factors determined by the court are not proper, the remaining aggravating circumstances found by the trial court are sufficient to justify an enhanced sentence.[1] *Hatchett*, 740 N.E.2d at 929 (stating that when a trial court improperly applies an aggravator but other valid aggravating circumstances exist, a sentence enhancement may still be upheld). Moreover, a single aggravating circumstance may serve to enhance a sentence. *Allen*, 722 N.E.2d at 1253. In addition, the court found no mitigating circumstances.

Lastly, Herron claims that his sentence is inappropriate. Under Article VII, Section 6 of the Indiana Constitution, we have the constitutional authority to review and revise sentences. However, we will not revise the sentence imposed unless it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B).

Under the heading of "nature of the offense," the presumptive sentence is the starting point in our consideration of the appropriate sentence for the crime committed. *Martin v. State*, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003). Herron was convicted of a Class B felony and two Class C felonies. At the time he was sentenced, the presumptive

[1] In addition to Herron's criminal history, there are several aggravating circumstances enumerated by the court in its sentencing statement that Herron did not challenge.

term for a Class B felony was ten years, and the presumptive term for a Class C felony was four years. *See* Ind. Code §§ 35-50-2-5 and –6. Herron received twenty years for his Class B felony conviction and five years for each of the Class C felony convictions, to be served consecutively for an aggregate sentence of thirty years.

Further consideration of the nature of this offense reveals that after drinking excessively, Herron collided with another vehicle before hitting head-on the vehicle carrying the three victims of the instant offense. The vehicle was carrying two brothers and a cousin. As a result, a husband and father of two young children lost his life, and two other young men were severely injured. Their lives and those of their friends and families will never be the same. Christopher Hobbs's spleen was removed, and he has a steel rod in his leg. Paul Fields' face was crushed in the collision and had to be reconstructed with eleven titanium plates. He is not able to close his eyes completely, and he experiences recurring infections in his face.

With regard to Herron's character, we note, as did the trial court, that Herron is not a first-time offender. His record includes juvenile and adult convictions. In addition, Herron is an insulin-dependent diabetic who has admitted that he should completely abstain from consuming alcohol. Tr. at 91. However, his history discloses his refusal to do so. The pre-sentence investigation notes Herron's admission that he began using alcohol at age 15. He underwent a drug and alcohol evaluation following criminal offenses both as a juvenile and as an adult, and, at least once, completed an outpatient drug and alcohol program. Yet, at the sentencing hearing, Herron admitted to being a "full-blown alcoholic" at the time of the accident. Tr. at 91. Unable or unwilling to

control his diabetes, as well as his drinking, Herron made the decision on the day of the collision not only to drink alcohol, but also to drink excessively when his blood sugar was low. Thus, the nature of Herron's character is revealed in his inability or unwillingness to learn from his prior experiences and conform his actions to the letter of the law. In light of Herron's disregard for the law and the severe consequences of his criminal conduct in this incident, we conclude that the sentence is not inappropriate.

Based upon the foregoing discussion and authorities, we conclude that the trial court improperly found as aggravating the impact of Herron's offenses upon the victims and the fact that a reduced sentence would depreciate the seriousness of the offenses. The trial court properly found Herron's criminal history to be aggravating. In addition, the trial court did not err by failing to find any mitigating circumstances. Finally, we conclude that, based upon the nature of the offenses and the character of the offender, Herron's sentence is not inappropriate.

Affirmed.

NAJAM, J., and MAY, J., concur.