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IN THE
COURT OF APPEALS OF INDIANA

ROSS A. MOSSTELLER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A02-0604-CR-357
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable Douglas A. Tate, Judge
Cause No. 34D03-0205-FC-765

November 9, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Ross A. Mossteller appeals the sentence imposed following his plea of guilty to operating a motor vehicle while privileges are forfeited for life, a class C felony.[1]

We affirm.

ISSUE

Whether the trial court erred in sentencing Mossteller.

FACTS

On May 5, 2002, Officer Troy Hintz with the Kokomo Police Department activated his emergency lights after Mossteller failed to stop at a stop sign while operating a motorcycle. Mossteller continued, disregarding a traffic signal and driving erratically. Mossteller still did not stop after Officer Hintz activated his siren. Officer Hintz followed Mossteller to a private residence. When Officer Hintz approached Mossteller, he smelled the odor of alcohol. Mossteller staggered as he dismounted his motorcycle, and his speech was slurred. Mossteller admitted he had been drinking and did not have a driver's license. Mossteller refused a chemical test.

On May 6, 2002, the State charged Mossteller with Count 1, operating a motor vehicle while privileges are forfeited for life, a class C felony; Count 2, operating a vehicle while intoxicated, endangering a person, a class A misdemeanor; Count 3, operating a vehicle while intoxicated with a previous conviction, a class D felony; and Count 4, resisting law enforcement, a class D felony.

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[1] Ind. Code § 9-30-10-17.

On May 8, 2002, the trial court held an initial hearing, during which Mossteller expressed his desire to plead guilty. The trial court informed Mossteller that it would not accept his plea until Mossteller consulted with an attorney. Therefore, the trial court appointed a public defender to Mossteller, entered a plea of not guilty on his behalf, and set a pre-trial conference for September 9, 2002 and trial for September 27, 2002.

Mossteller failed to appear for trial on September 27, 2002, and the trial court issued a warrant for Mossteller's arrest. On February 1, 2005, Mossteller appeared at a hearing and informed the trial court that he had been incarcerated. The trial court set a pre-trial conference for June 20, 2005 and a jury trial for July 22, 2005. Mossteller failed to appear at the pre-trial conference on June 20, 2005. The trial court determined that Mossteller was incarcerated, and at his counsel's request, rescheduled the pre-trial conference for December 5, 2005 and reset the jury trial for January 6, 2006. Mossteller appeared at the pre-trial conference on December 5, 2005 and stated that he wished to enter a guilty plea. The trial court set a plea and sentencing hearing for January 31, 2006. Mossteller sought a continuance of the plea and sentencing hearing, which the trial court granted.

On February 21, 2006, the trial court held a plea and sentencing hearing. Mossteller pled guilty to Counts 1, 2 and 3. The State dismissed Count 4. For purposes of sentencing, the trial court merged Count 2 with Count 3. The trial court found one mitigating circumstance: that Mossteller had not offended since May of 2002. The trial court, however, found Mossteller's prior convictions to be an aggravating circumstance that outweighed the mitigating circumstance. On Count 1, the trial court sentenced

Mossteller to eight years in the Department of Correction. On Count 3, the trial court sentenced Mossteller to a concurrent sentence of three years in the Department of Correction.

DECISION

Mossteller asserts the trial court erred in sentencing him to eight years on Count 1[2] by failing to find his guilty plea constituted a mitigating circumstance. Mossteller also asserts that his sentence is inappropriate pursuant to Indiana Appellate Rule 7(B).

1. Mitigating Circumstance

Where a trial court relies on aggravating or mitigating circumstances to enhance or reduce a presumptive sentence, the sentencing statement must include the following elements: (1) all significant aggravating and mitigating circumstances; (2) the reason why each circumstance is determined to be mitigating or aggravating; and (3) a demonstration that the mitigating and aggravating circumstances have been evaluated and balanced. *Cotto v. State*, 829 N.E.2d 520, 523-24 (Ind. 2005). Where we find an irregularity in the trial court's sentencing decision, we may (1) remand to the trial court for a clarification or new sentencing determination, (2) affirm the sentence if the error is harmless, or (3) reweigh the proper aggravating and mitigating circumstances independently at the appellate level. *Id.* at 525.

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[2] The statutory sentencing range for a class C felony is two to eight years, with the presumptive sentence being a fixed term of four years. I.C. § 35-50-2-6. Subsequent to the date of Mossteller's offense and prior to the date of his sentencing, the legislature amended Indiana Code section 35-50-2-5 to provide for an "advisory" rather than a "presumptive" sentence. *See* P.L. 71-2005, § 7 (eff. Apr. 25, 2005). We agree with *Patterson v. State*, 846 N.E.2d 723 (Ind. Ct. App. 2006), and *Weaver v. State*, 845 N.E.2d 1066 (Ind. Ct. App. 2006), *trans. denied*, which held that the change from presumptive to advisory sentences should not be applied retroactively because the change is substantive, not procedural.

The finding of mitigating circumstances rests within the sound discretion of the trial court. *Sipple v. State*, 788 N.E.2d 473, 480 (Ind. Ct. App. 2003), *trans. denied*. The failure to find a mitigating circumstance clearly supported by the record may imply that the trial court overlooked the circumstance. *Id.* The trial court, however, is not obligated to consider "alleged mitigating factors that are highly disputable in nature, weight, or significance." *Id.* Furthermore, the trial court need not agree with the defendant as to the weight or value to be given to proffered mitigating circumstances. *Id.* The trial court need enumerate only those mitigating circumstances it finds to be significant. *Ross v. State*, 835 N.E.2d 1090, 1093 (Ind. Ct. App. 2005), *trans. denied*.

"Our courts have long held that a defendant who pleads guilty deserves to have some mitigating weight extended to the guilty plea in return." *Cotto*, 829 N.E.2d at 525. A guilty plea, however, is not necessarily a significant mitigating factor. *Id.* Where the State had spent significant time and resources on a case, there is no abuse of discretion in according a guilty plea no weight. *See Gillem v. State*, 829 N.E.2d 598, 605 (Ind. Ct. App. 2005) (finding guilty plea not a significant mitigating circumstance where State reaped no substantial benefit and it did not save court's time), *trans. denied*.

In this case, the State filed charges in 2002, but Mossteller did not enter his guilty plea until four years later, causing the State to spend significant time and resources on Mossteller's case. Thus, it is unlikely that the trial court would have imposed a lesser sentence, even if it had acknowledged Mossteller's guilty plea as a mitigating circumstance. Accordingly, any error in omitting the guilty plea as a mitigator was harmless error.

2. Inappropriate Sentence

Mossteller contends that his sentence is inappropriate pursuant to Indiana Appellate Rule 7(B). "Appellate courts have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, the court concludes the sentence is inappropriate in light of the nature of the offense and the character of the offender." *Gornick v. State*, 832 N.E.2d 1031, 1035 (Ind. Ct. App. 2005), *trans. denied*.

As to the nature of the offense, Mossteller drove his motorcycle while intoxicated and without a license. Mossteller drove in an erratic manner on city streets, failing to stop at a stop sign and traffic signal.

As to Mossteller's character, the record shows that Mossteller had sixteen prior convictions for driving violations. Several convictions were for operating while intoxicated, two were for operating while an habitual traffic violator, and one was for failure to stop after an accident resulting in injury. We conclude that the sentence imposed by the trial court was not inappropriate in light of the nature of Mossteller's offense and his character.

Affirmed.

BAKER, J., and NAJAM., concur.