ATTORNEY FOR APPELLANT:

ANDREW J. VANDENBOSCH
Chief Deputy Public Defender
Kokomo, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MARA McCABE
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

STEVEN KISER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A02-0706-CR-538
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable George A. Hopkins, Judge
Cause No. 34D04-0606-FB-95

November 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Steven Kiser appeals his sentence for five counts of burglary, a Class B felony.[1] We affirm.

FACTS AND PROCEDURAL HISTORY

On the morning of May 1, 2006, Kiser burglarized five homes. Although most of the residents were absent from their homes during the burglaries, Beverly Daly confronted him while he was in her home. Daly called the police, who apprehended Kiser nearby and found several valuable items on his person.

Kiser was sixteen years old at the time of the offenses, but juvenile jurisdiction was waived. Kiser agreed to plead guilty in exchange for dismissal of theft and possession of marijuana charges that were filed while Kiser was out on bond for the burglaries. On April 20, 2007, the trial court accepted the plea agreement and sentenced Kiser to ten years on each count, to be served concurrently.[2] The trial court found his criminal history was an aggravating circumstance and his guilty plea was a mitigating circumstance.

DISCUSSION AND DECISION

1. Aggravators and Mitigators

Kiser argues the trial court abused its discretion by failing to find his age a mitigating circumstance and by improperly considering certain aspects of his criminal

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[1] Ind. Code § 35-43-2-1(1)(B)(i).

[2] Ten years is the advisory sentence for a Class B felony. I.C. § 35-50-2-5.

history. 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). "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*. (*quoting K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2005)). A trial court may abuse its discretion by omitting mitigating circumstances that are "clearly supported by the record and advanced for consideration" or by using an aggravator that is "improper as a matter of law." *Id*. at 490-91.

Kiser contends his age is entitled to significant weight as a mitigator, citing *Brown v. State*, 720 N.E.2d 1157, 1159 (Ind. 1999). However, Brown had a minimal criminal history and was under the influence of an older adult. Age is not entitled to significant mitigating weight when a defendant has a substantial criminal history, has committed a serious crime, or is a "hardened and purposeful" offender. *Monegan v. State*, 756 N.E.2d 499, 504-05 (Ind. 2001).

Kiser was acting independently, and he strategically targeted wealthy residences. He burglarized five homes, collecting gold and diamond jewelry, a digital camera, cellular phones, an iPod, a gift card, and coin collections before he was apprehended. Kiser has several prior juvenile adjudications, including six for burglary, all Class B felonies if committed by an adult. Under the circumstances, the trial court did not abuse its discretion by failing to find his age a mitigating factor.

Nor did the trial court err by considering that Kiser had previously violated probation and was arrested twice while out on bond for this case.[3] Kiser argues the trial court violated *Blakely v. Washington*, because these facts were not proven to a jury and are not prior convictions. 542 U.S. 296, 301 (2004), *reh'g denied* 542 U.S. 961 (2004). However, Kiser committed his offenses after our felony sentencing statutes were revised to remedy *Blakely* problems by giving judges discretion to impose any sentence within the statutory range. *See Anglemyer*, 868 N.E.2d at 487-88 (discussing our legislature's response to *Blakely*). Sentencing factors no longer need to be proven to a jury because they do not increase the penalty beyond the statutory maximum. *See id*. at 489. Therefore, the trial court did not abuse its discretion by attaching aggravating weight to these facts. *See also Field v. State*, 843 N.E.2d 1008, 1011 (Ind. Ct. App. 2006) (violation of terms of bond or probation are proper aggravators because they are violations of a court order), *trans. denied* 843 N.E.2d 1007 (Ind. 2006).

2. Appropriateness of Sentence

Kiser also argues his sentence is inappropriate.

> Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review of a sentence imposed by the trial court." This appellate authority is implemented through Appellate Rule 7(B), which provides that the "Court may revise a sentence authorized by statute if, after due consideration of the trial court's

[3] This information is taken from Kiser's pre-sentence investigation report, which was located in the appendix on white paper. We remind counsel a pre-sentence investigation report should be filed on light green paper and marked "Not for Public Access" or "Confidential." Ind. Appellate Rule 9(J).

> decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender."

Anglemyer, 868 N.E.2d at 491 (citations omitted). We recognize the special expertise of the trial court in making sentencing decisions. *Barber v. State*, 863 N.E.2d 1199, 1208 (Ind. Ct. App. 2007), *trans. denied* __ N.E.2d __ (Ind. 2007). The defendant bears the burden of persuading us the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

Kiser's spree of burglaries is a serious matter. Kiser claims he committed the offenses to support his drug habit and is now in counseling. We note he received substance abuse counseling in the past, but proceeded to commit eleven burglaries within the next two years.

Kiser also claims he is working on his GED and wants to join the Army. Nearly a year elapsed between the charging of these offenses and the sentencing, but Kiser had made no progress toward obtaining his GED, which is required for him to join the Army. Kiser testified the Army was prepared to accept him if he obtained his GED, but the letter he submitted from the recruiter stated "we would have to see what charges are on his record." (Defendant's Ex. C.) Furthermore, Kiser received a reduced bond on the condition he would re-enroll in high school, which he did not do. The record does not reflect Kiser was making progress toward his GED or was likely to join the Army.

Kiser received the concurrent advisory sentences for his offenses. In light of the nature of the offenses and his character, we cannot say his sentence is inappropriate.

Affirmed.

CRONE, J., concurs.

DARDEN, J., concurring in result.