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IN THE
COURT OF APPEALS OF INDIANA

HANNAH RAE BIRDSONG,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A04-0708-CR-424
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable Stephen M. Jessup
Cause No. 34D02-0509-FC-00354

DECEMBER 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBERTSON, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Hannah Ray Birdsong appeals the sentence imposed after she pleaded guilty to four counts of Class C felony forgery. We affirm.

ISSUE

The sole issue for our review is whether the trial court erred in sentencing Birdsong.[1]

FACTS AND PROCEDURAL HISTORY

The State charged Birdsong with seven counts of Class C felony forgery after she forged seven checks totaling $1197.15 from Calvin Moss' account. Pursuant to the terms of a plea agreement, Birdsong pleaded guilty to four of the seven counts. On three of these counts, the trial court sentenced Birdsong to eight years, with three years executed and five years on probation. The court ordered these three sentences to run concurrently. The court sentenced Birdsong to a suspended eight-year sentence on the fourth count and ordered that sentence to run consecutive to the concurrent sentence imposed on the other three counts. The total executed sentence was therefore three years.

DISCUSSION AND DECISION

Birdsong argues that the trial court erred in sentencing her. Specifically, she first contends that her Sixth Amendment right to trial by jury under *Blakely v. State*, 542 U.S. 296 (2004), was violated when the trial court used aggravators that had not been found by a jury or admitted to by her to enhance her sentence. However, effective April 25, 2005, our legislature replaced the presumptive fixed term sentencing scheme with an advisory

[1] Birdsong also argues that her guilty plea was not voluntary. However, a challenge to the voluntariness of a guilty plea must be raised in a petition for post-conviction relief. *See Primmer v. State*, 857 N.E.2d 11, 15 (Ind. Ct. App. 2006), *trans. denied.*

scheme. This amended scheme allows a trial court to impose any lawful sentence within the stated range for the class of crime regardless of the presence or absence of aggravating circumstances. *See* Ind. Code § 35-38-1-7.1(d).

Here, Birdsong committed the forgeries in June 2005 and was sentenced in May 2007, both of which occurred after the enactment of the statute. The trial court therefore had the authority to sentence Birdsong to any sentence in the range without further explanation, and Birdsong's *Blakely* challenge presents no issue for our review. *See McDonald v. State*, 861 N.E.2d 1255, 1259 (Ind. Ct. App. 2007), *vacated in part on other grounds.*

Birdsong next contends that the trial court erroneously failed to find that her guilty plea and her $50.00 to $75.00 restitution payment over a twenty-month period were significant mitigating circumstances.[2] The restitution argument is waived because Birdsong failed to advance it to the trial court. *See Pennington v. State*, 821 N.E.2d 899, 905 (Ind. Ct. App. 2005) (stating that a defendant who fails to raise proposed mitigators to the trial court cannot advance them for the first time on appeal).

Birdsong did not advance the guilty plea factor to the trial court; however, our supreme court has explained that the defendant's failure to argue that her guilty plea

[2] Birdsong also argues that trial court erroneously failed to 1) recognize that she was likely to respond to probation and 2) order her to serve her time in in-home detention. However, our review of the sentencing order reveals that the trial court found Birdsong's inclination to fail on probation was an aggravating factor. Birdsong does not challenge this finding. Because this was a valid aggravating factor, the trial court did not err in failing to recognize that Birdsong was likely to respond to probation.

Regarding her home detention argument, we note that the execution of a sentence in an alternative program is a privilege, not a right. *Rivera v. State*, 841 N.E.2d 1169, 1172 (Ind. Ct. App. 2006), *affirmed in part and vacated in part on other grounds*. Here, our review of the evidence reveals that Birdsong failed to appear for court in three separate criminal proceedings. In addition, new charges were filed against Birdsong during the pendency of this case. Under these circumstances, we find no error in the trial court's failure to order Birdsong to serve her time in in-home detention.

should be considered as a mitigating circumstance is not subject to the normal waiver considerations, inasmuch as the trial court is inherently aware that a guilty plea is a mitigating factor. *Francis v. State*, 817 N.E.2d 235, 237, n. 2 (Ind. 2004).

Although Birdsong was entitled to have some mitigating weight extended to her guilty plea, the plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit for the plea or where there evidence is against her such that the decision to plead guilty is merely a pragmatic one. *Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), *trans. denied*. Here, Birdsong was charged with seven counts of class C felony forgery, which could have exposed her to a sentence of fifty-six years in prison. She pleaded guilty to four of the seven counts, and received a three-year executed sentence. Birdsong clearly received such a substantial benefit for pleading guilty that her guilty plea does not rise to the level of significant mitigation, and we find no error.

Birdsong also contends that the trial court erred in ordering the suspended eight-year sentence on count IV to run consecutive to the concurrent sentence imposed on for the other three counts. The trial court has wide discretion to impose consecutive sentences. *Creekmore v. State*, 853 N.E.2d 523, 529 (Ind. Ct. App. 2006), *clarified on other grounds on denial of reh'g*, 858 N.E.2d 230 (Ind. Ct. App. 2006). A single aggravating circumstance may support the imposition of consecutive sentences. *Id.* Here, the trial court found two aggravating circumstances: Birdsong's prior criminal history and her inclination to fail on probation. These two aggravating factors support the trial court's imposition of consecutive sentences, and we find no error.

Lastly, Birdsong argues that her sentence is inappropriate. This court has the authority to revise a sentence authorized by statute if, after consideration of the trial court's decision, the court finds that the sentence is inappropriate in light of the nature of the offenses and the character of the offender. Ind. Appellate Rule 7(B).

Here, regarding the character of the offender, we note that Birdsong has a 2005 theft conviction as well as a 2007 conversion conviction. While she was on probation for the theft conviction, her probation officer filed two petitions to revoke the probation. Birdsong has also failed to appear in court on five separate occasions, including one time in this case, and new charges were filed against her during the pendency of this case. Clearly, Birdsong's repeated contacts with the criminal justice system have had no impact on persuading her to reform. *See Weiss v. State,* 848 N.E.2d 1070, 1073 (Ind. 2006).

In addition, Birdsong admitted that she is a drug addict and blamed her addiction for her criminal activity. We agree with the State that Birdsong's use of illegal substances is another example of Birdsong's failure to abide by the law and the trial court could have considered it to be another aggravating circumstance. *See Bennett v. State*, 787 N.E.2d 938, 948 (Ind. Ct. App. 2003), *trans. denied.*

Regarding the nature of the offense, we note that Birdsong engaged in a check-writing frenzy during the course of one day when she wrote seven checks totally over $1,000.00 at the three major grocery stores in Kokomo. All of the checks were written on the account of one victim, who was deprived of a substantial sum of money. Based upon the foregoing, Birdsong's sentence in this case in not inappropriate.

CONCLUSION

The trial court did not err in the manner in which it determined Birdsong's sentence. Furthermore, the sentence is not inappropriate.

Affirmed.

NAJAM, J., and ROBB, J., concur.