

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

BENJAMIN LOHEIDE
Columbus, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

GARY DAMON SECREST
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

DENNIS P. SILVERS,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee.

)
)
)
)
)
)
)
)
)
)
)

No. 40A01-0603-CR-0106

APPEAL FROM THE JENNINGS CIRCUIT COURT
The Honorable Jon W. Webster, Judge
Cause No. 40C01-0504-FB-68

November 28, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Appellant, Dennis Silvers, pleaded guilty to Robbery as a Class B felony,¹ and the trial court subsequently sentenced him to sixteen years, with three years suspended. Upon appeal, Silvers argues that in imposing an enhanced sentence, the trial court relied upon an improper aggravating factor and improperly weighed the remaining aggravating factors against the mitigating factors.

We affirm.

Just before 12:00 p.m. on April 8, 2005, Silvers, who at the time was high on crack cocaine, entered the National City Bank in North Vernon and, while armed with a .45 caliber semi-automatic handgun, which had one bullet in the chamber and had its hammer cocked, demanded money from a bank teller. Silvers eventually fled from the bank with \$8,040 in cash.

On April 14, 2005, the State charged Silvers with robbery and carrying a handgun without a license. On November 8, 2005, Silvers pleaded guilty to robbery as a Class B felony. Pursuant to the terms of the plea agreement, sentencing was left open to the trial court's discretion. Following a sentencing hearing, the trial court sentenced Silvers to sixteen years, with three years suspended to probation. In deciding to impose an enhanced sentence,² the trial court considered as aggravating circumstances, Silvers's

¹ Ind. Code § 35-42-5-1 (Burns Code Ed. Repl. 2004).

² Because Silvers committed the instant offense on April 8, 2005, sentencing in this case was controlled by the statutes in effect prior to the amendatory provisions which became effective on April 25, 2005. See Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), trans. denied; Ford v. State, 755 N.E.2d 1138, 1143 (Ind. Ct. App. 2001), trans. denied. At that time, Indiana Code § 35-50-2-5 (Burns Code Ed. Repl. 2004) provided that “[a] person who commits a Class B felony shall be imprisoned for a fixed term of ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances.”

criminal history; that he was high on crack cocaine at the time of the offense; that the bank teller suffered emotional trauma; that the robbery was premeditated; that he put the bank employees, the customers, the police officers, and the general public in significant danger; and that the gun used during the commission of the offense was loaded and cocked. The trial court also noted that Silvers was a convicted felon who was prohibited from owning or possessing a handgun. The trial court considered as mitigating that Silvers was an honorably discharged veteran, that he had a GED certificate, that he admitted to the crime, and that he suffers from physical and emotional disorders. After weighing the aggravating and mitigating factors, the trial court concluded that the aggravators outweighed the mitigators.

Upon appeal, Silvers challenges the sentence imposed. It is well established that sentencing decisions are within the sound discretion of the trial court, and upon appeal, such decisions are given great deference. Gasper v. State, 833 N.E.2d 1036, 1044 (Ind. Ct. App. 2005), trans. denied. When a trial court exercises its discretionary authority and imposes a sentence other than the statutorily prescribed presumptive sentence, we will examine the record to ensure that the trial court explained its reasoning for selecting the sentence imposed. Allen v. State, 743 N.E.2d 1222, 1237 (Ind. Ct. App. 2001), trans. denied. The court must identify all of the significant mitigating and aggravating circumstances, state the specific reason why each circumstance is considered to be mitigating or aggravating, and evaluate and balance the mitigating and aggravating circumstances. Id. In determining whether the trial court adequately explained the reasons for the sentence imposed, we examine both the written sentencing order and the

trial court's comments at the sentencing hearing. Loyd v. State, 787 N.E.2d 953, 960 (Ind. Ct. App. 2003).

Silvers first argues that the trial court improperly relied upon the fact that the firearm he possessed during commission of the offense was loaded and cocked as an aggravating factor. Silvers argues that such finding was improper because possession of a deadly weapon was an element of the offense to which he pleaded guilty. Indeed, it was his possession of a deadly weapon which served to elevate the robbery offense to a Class B felony. See I.C. § 35-42-5-1.

We begin by noting that in deciding to impose an enhanced sentence, it is improper for a trial court to rely upon a material element of a crime as an aggravating factor. Kien v. State, 782 N.E.2d 398, 414 (Ind. Ct. App. 2003), trans. denied. However, the trial court may properly consider the particularized circumstances of the material elements of the crime. Id.

Here, with regard to the firearm used by Silvers during commission of the theft, the trial court explained this aggravator in its oral sentencing statement as follows:

“[The offense] was committed and I’m going to go into a little detail on this with an illegally owned 45 caliber pistol with a loaded and fully cocked hammer with a live cartridge in the chamber at the time of the offense. Now, admittedly, possession of a firearm is an element of the offense, but the Court feels that when that firearm is fully loaded in a cocked position, that is an aggravating factor over and above the elements of the crime. . . . We were only a trigger pull away from someone getting hurt or killed here, Mr. Silvers.” Sentencing Tr. at 41-42.

We agree with the trial court's assessment. While we acknowledge that the robbery offense was elevated to a Class B felony based upon the fact that Silvers was armed with

a handgun, we think it is readily apparent that the level of danger was enhanced by Silvers's possession of a handgun which was cocked and loaded. As noted by the trial court in its written sentencing order, "[t]he fact this handgun was a 'trigger pull' from firing is well beyond the fact it was a deadly weapon." Appendix at 24. While perhaps not sufficient standing alone to support an enhanced sentence, we nevertheless conclude that the particularized circumstances—i.e., the fact that the gun in Silvers's possession during commission of the robbery was "a trigger pull" away from being fired—were properly identified and entitled to some aggravating weight.

Silvers also argues that the trial court abused its discretion in assigning weight to the remaining aggravating factors and in its weighing of the aggravating factors against the mitigating factors.

With regard to the trial court's identification of his criminal history as an aggravating circumstance, Silvers contends that the aggravating weight should have been minimal. In finding Silvers's criminal history to be an aggravating circumstance, the trial court noted that his criminal history consisted of two misdemeanors and one felony. The court further acknowledged that the felony was remote in time. Specifically, Silvers's criminal history includes a 1975 conviction for violating the Indiana Controlled Substances Act,³ a 1970 misdemeanor conviction for "OMUWI," and a 1999 misdemeanor conviction for public indecency. The significance of a defendant's criminal history varies based upon the gravity, nature, and number of prior offenses as they relate

³ Based upon Silvers's recollection that he served two years on his conviction for violating the Indiana Controlled Substances Act, the trial court treated this conviction as being for a felony offense.

to the current offense. Edmonds v. State, 840 N.E.2d 456, 461 (Ind. Ct. App. 2006) (citing Wooley v. State, 716 N.E.2d 919, 932 (Ind. 1999)), trans. denied, cert. denied, ___U.S. ___, 2006 WL 2415754. Here, we agree with Silvers in that the gravity, nature, and number of prior offenses does not translate into a finding that his criminal history was a significant aggravating factor, which, standing alone, may not justify an enhanced sentence. Nevertheless, we cannot say that Silvers's criminal history was not entitled to some, even if minimal, aggravating weight.

Silvers also argues that the trial court gave undue aggravating weight to its finding that Silvers put the employees and customers of the bank, the public in general, and the police at significant risk, asserting that such risk is accounted for in the fact that the robbery offense was elevated to a Class B felony because it was committed while armed with a deadly weapon. We note that this finding by the trial court appears to be a comment upon the particularized circumstances of the crime, and more specifically, the fact that Silvers committed the robbery while armed with a gun which was only "a trigger pull away from someone getting hurt or killed" As we concluded above, these particularized circumstances were entitled to some aggravating weight. In light of the numerous other aggravating circumstances relied upon by the court, and given the fact that the trial court enhanced the sentence by six years and not the maximum of ten which is permissible by statute, we cannot conclude that the trial court afforded undue aggravating weight to the particularized circumstances of the crime.

With regard to mitigating circumstances, Silvers argues that the trial court failed to afford sufficient mitigating weight to his poor physical and mental health and his military

service. Here, we note the trial court explicitly found Silvers's military service and physical and mental health to be mitigating circumstances. Further, in suspending three years of the sixteen-year sentence, the trial court explained that such was "[p]rimarily in recognition of [Silvers's] decorated service." Sent. Tr. at 43. In light of the trial court's explicit findings, Silvers's argument is that the trial court simply did not afford these mitigating factors as much mitigating weight as Silvers would have liked. It is well-settled that a trial court is not required to credit or weigh mitigating circumstances as a defendant suggests. Scott v. State, 840 N.E.2d 376, 382 (Ind. Ct. App. 2006), trans. denied. After reviewing the record and the trial court's sentencing statement, we cannot say that the trial court failed to give sufficient mitigating weight to these specific circumstances.

Silvers also argues that the trial court abused its discretion in failing to consider his expression of remorse as a mitigating factor. A finding of remorse as a mitigating factor is within the sound discretion of the trial court. See Ankney v. State, 825 N.E.2d 965, 973 (Ind. Ct. App. 2005), trans. denied. Our Supreme Court has held that a trial court's determination of a defendant's remorse is similar to a determination of credibility. Pickens v. State, 767 N.E.2d 530, 535 (Ind. 2002). Here, while Silvers stated that he was "really sorry" for what he put the bank teller through, the trial court was in the best position to judge the sincerity of such expression of remorse. Based upon the record before the trial court, we cannot say that the trial court abused its discretion in not finding Silvers's expression of remorse to be a significant mitigating factor.

Having reviewed the record and having considered the trial court's identification and assessment of the aggravators and mitigators as set forth in the trial court's written and oral sentencing statements, we conclude that the trial court did not abuse its discretion in weighing the aggravating and mitigating factors or in concluding that the aggravating factors outweighed the mitigating factors. The trial court adequately justified imposition of the enhanced sentence.

The judgment of the trial court is affirmed.

ROBB, J., and BARNES, J., concur.