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IN THE COURT OF APPEALS OF INDIANA

FRANCISCO O. CHAVEZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 46A05-0703-CR-131
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAPORTE CIRCUIT COURT
The Honorable Robert W. Gilmore, Judge
Cause No. 46C01-0507-FA-217

November 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Francisco O. Chavez appeals from his sentence after he pleaded guilty to Aggravated Battery, a Class B felony. Chavez raises a single issue on review, namely, whether his sentence is inappropriate.

We affirm.

FACTS AND PROCEDURAL HISTORY

On July 4, 2005, Chavez drove his three children, ages five years, four years, and eighteen months, to the home of his estranged wife, Kelly. After arriving at his wife's home, Chavez and Kelly began to argue. Chavez retrieved an axe/nail remover from his vehicle, where the children were waiting, and hit Kelly in the head with the tool four times. As a result, Kelly suffered lacerations to the top and back of her head, a fractured skull, a lacerated earlobe, and other injuries.

On July 6, 2005, the State charged Chavez with Attempted Murder, a Class A felony, and aggravated battery, a Class B felony. On April 21, 2006, Chavez and the State entered into a plea agreement, under which Chavez agreed to plead guilty to aggravated battery, a Class B felony, and in return the State agreed to dismiss the attempted murder charge. The agreement also provided that sentencing would be capped at sixteen years. The parties filed the agreement with the trial court on May 26, 2006.

On January 31, 2007, the trial court held a combined guilty plea and sentencing hearing. At the conclusion of the hearing, the trial court entered a judgment of conviction and sentenced Chavez to sixteen years in the Department of Correction. The trial court's sentencing statement provides, in relevant part:

> The court finds that the Defendant's intoxication does not rise to the level of an aggravator or a mitigator. To the extent it would tend to so [sic] would cut both ways and as such is not used to contribute to the ultimate sentence determination.
>
> The Court finds that the person recently violated the conditions of his probation, parole or pardon granted to the person, specifically, his probation out of Starke County in Cause 75C01-0405-FD-072. The Court finds this to be a relevant aggravator.
>
> The Court finds that the crime was committed in the presence or within hearing range of Defendant's three children, all of whom are less than 6 years old. The Court determines that this is an aggravator [sic] factor.
>
> The Court also finds the imposition of a reduced sentence or suspended sentence would probably depreciate the seriousness of this crime, but is not going to take that aggravator into its computation in determining the sentence.
>
> The Court finds there is no mitigator regarding the effects on the dependents, because there has been no finding that there would be substantially more than what would be anticipated.

Appellant's App. at 33-34. Chavez now appeals.

DISCUSSION AND DECISION

Chavez contends that his sentence is inappropriate because he was not the worst offender and his was not the worst offense. He also argues that the trial court should have identified his guilty plea as a significant mitigator. We cannot agree.

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 and revision of a sentence imposed by the trial court." Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007) (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. "The court may revise a sentence authorized by statute if, after

due consideration of the trial court's decision, the [c]ourt finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). In conducting our review under Rule 7(B), we assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, "a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." Anglemyer, 868 N.E.2d at 494 (quoting Childress, 848 N.E.2d at 1080) (alteration in original).

Chavez argues that, because he is not the worst offender and his offense is not the worst offense, the maximum sentence does not apply to him.[1] We addressed such arguments generally in Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), trans. denied:

> There is a danger in applying this principle . . . . If we were to take this language literally, we would reserve the maximum punishment for only the single most heinous offense. . . . This leads us to conclude the following with respect to deciding whether a case is among the very worst offenses and a defendant among the very worst offenders, thus justifying the maximum sentence: We should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character.

In other words, we consider the inappropriateness of Chavez's sentence under Appellate Rule 7(B).

[1] The trial court sentenced Chavez to the sixteen-year cap provided in the plea agreement, but the statutory maximum for aggravated battery, a Class B felony, is twenty years. See Ind. Code § 35-50-2-5. Thus, Chavez was not sentenced to the maximum possible sentence. Regardless, we consider whether his sentence at the top of the cap provided in the plea agreement is inappropriate.

Here, the trial court identified as aggravators that Chavez violated the conditions of his probation and that he battered his wife in the presence or within the hearing of Chavez's three children, all of whom are under the age of six. Chavez does not challenge either of those aggravators. Given those factors, we cannot say that the Chavez's sixteen-year sentence is inappropriate in light of his character.

Nor is the sentence inappropriate in light of the offense. At the plea and sentencing hearing, Chavez admitted to the following facts, as recited by the court:[2]

> Q: [E]arly in the morning on the 5th of July, [2005], in the town of Kingsford Heights, you drove a Plymouth Voyager with your kids in the car to your wife's house, and when she wasn't there you waited for her. And when she arrived you spoke to her and you began to argue. [Y]ou got mad, you went into the van where you parked – where your kids were and pulled out a combination ax[e]/hammer nail puller from the vehicle and struck your wife four times in the head, causing serious bodily injury and disfigurement with a deadly weapon. As a result of that your wife had nine lacerations to the top and back of her head. She had a fractured skull, lacerated earlobe amongst other injuries. Do you agree that that's in fact what you did?
>
> A: Yes, I agree.

Transcript at 20-21. Chavez savagely attacked his wife with a sharp construction tool in front of their three young children, and his wife suffered serious injuries as a result of the attack. We cannot say that Chavez's sentence is inappropriate in light of the nature of the offense.

Chavez also argues that "it was error for the trial court to fail to consider his guilty plea as a mitigating circumstance. Our supreme court recently held that a defendant may on appeal raise the trial court's failure to consider a guilty plea as a mitigator even if the

[2] Chavez was assisted by an interpreter at the trial court.

defendant had not argued to the trial court that his guilty plea was a mitigator. Anglemyer v. State, No. 43S05-0606-CR-230, ____ N.E.2d ____ (October 30, 2007) ("Anglemyer II"). The supreme court explained:

> We have held that a defendant who pleads guilty deserves "some" mitigating weight be given to the plea in return. McElroy v. State, 865 N.E.2d 584, 591 (Ind. 2007) (citing Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005)). But an allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is not only supported by the record but also that the mitigating evidence is significant. See Anglemyer, 868 N.E.2d at 490-91. And the significance of a guilty plea as a mitigating factor varies from case to case. [Francis v. State, 817 N.E.2d 235, 238 n.3. (Ind. 2004).] For example, a guilty plea may not be significantly mitigating when . . . the defendant receives a substantial benefit in return for the plea. Sesnback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999).

Anglemyer II at *3.

Here, the State agreed to dismiss the charge of attempted murder, as a Class A felony, in return for Chavez's guilty plea to aggravated battery, a Class B felony. The State also agreed to cap the maximum sentence, reducing Chavez's maximum possible sentence by four years. As such, Chavez received a substantial benefit by entering into the plea agreement. Thus, the trial court did not abuse its discretion when it did not identify his guilty plea as a significant mitigator.[3]

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.

[3] Chavez also argues that he received no benefit from the plea because he could not have been convicted of both attempted murder and aggravated battery. Chavez cites no authority in support of his contention that no benefit is conferred in such circumstances and, therefore, he has waived that argument. See Ind. Appellate Rule 46(A)(8)(a). In any event, regardless of whether Chavez could have been convicted of both attempted murder and aggravated battery, he received a benefit when the State dropped the greater charge of attempted murder in return for his guilty plea to aggravated battery.