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ATTORNEY FOR APPELLANT:

ANTHONY C. LAWRENCE
Anderson, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General Of Indiana

MONIKA PREKOPA TALBOT
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

JEROME POOLE,)

Appellant-Defendant,)

vs.)

No. 48A02-0603-CR-186

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0504-FB-162
48D03-0506-FD-280

November 30, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Jerome Poole was convicted following a guilty plea of dealing cocaine, a Class B felony, and maintaining a common nuisance, a Class D felony, and sentenced to an aggregate of fifteen years. At the same hearing, he pled guilty to possession of marijuana, a Class A misdemeanor, driving while suspended, a Class A misdemeanor, and possession of marijuana, a Class D felony, all arising out of a separate case. He was sentenced to an aggregate of three years for these offenses, with this sentence to be served consecutive to the aggregate fifteen-year sentence imposed above. He appeals, raising one issue that we expand and restate as two: whether the trial court properly declined to find the guilty plea as a mitigating factor; and whether the trial court imposed an inappropriate sentence. Concluding that the trial court did not err in its determination regarding mitigating circumstances and that the eighteen-year combined sentence is not inappropriate, we affirm.

Facts and Procedural History

In January 2005, Poole was arrested and charged with one count of resisting law enforcement, a Class D felony, one count possession of marijuana, a Class A misdemeanor, and one count of driving while suspended, a Class A misdemeanor (“Cause 280”). In February 2005, the State added a fourth count of Class D felony possession of marijuana. While awaiting trial on these charges, Poole was arrested and charged with one count of dealing cocaine, a Class B felony, and one count of maintaining a common nuisance, a Class D felony (“Cause 162”). On October 31, 2005, Poole pled guilty to both counts under Cause 162 and to both possession of marijuana charges and driving while suspended under Cause

280. The final remaining charge, resisting law enforcement, was dismissed.

At the sentencing hearing, the trial court sentenced Poole for both cause numbers. For Cause 162, Poole was sentenced to fifteen years for dealing cocaine and thirty months for maintaining a common nuisance, the sentences to be served concurrently. Under Cause 280, Poole was sentenced to one year for driving while suspended, one year for misdemeanor possession of marijuana, and three years for felony possession of marijuana, also to be served concurrently. The sentences for the two causes were to be served consecutively, resulting in an aggregate eighteen-year sentence. The trial court cited Poole's criminal history as an aggravating circumstance justifying the enhanced sentence on both causes and did not cite any mitigating circumstances. Poole now appeals his sentence.

Discussion and Decision

I. Guilty Plea as Mitigating Circumstance

Poole contends that the trial court erred in failing to find his guilty plea as a significant mitigating factor. In evaluating Poole's contention, we must first address a recent change in criminal sentencing in Indiana. Our legislature responded to Blakely v. Washington, 542 U.S. 296 (2004), by amending our sentencing statutes to replace "presumptive" sentences with "advisory" sentences, effective April 25, 2005. Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), trans. denied. Under the new advisory sentencing scheme, "a court may impose any sentence that is authorized by statute and permissible under the Indiana Constitution 'regardless of the presence or absence of aggravating circumstances or mitigating circumstances.'" Id. (quoting Ind. Code § 35-38-1-7.1(d)). Thus, while under the

previous presumptive sentencing scheme, a sentence must be supported by Blakely-appropriate aggravators and mitigators, under the new advisory sentencing scheme, a trial court may impose any sentence within the proper statutory range regardless of the presence or absence of aggravators or mitigators.

There is a split in this court as to whether the advisory sentencing scheme should be applied retroactively. Compare Settle v. State, 709 N.E.2d 34, 35 (Ind. Ct. App. 1999) (sentencing statute in effect at the time of the offense, rather than at the time of conviction or sentencing, controls) and Weaver, 845 N.E.2d at 1070 (concluding that application of advisory sentencing statute violates the prohibition against *ex post facto* laws if defendant was convicted before effective date of the advisory sentencing statutes but was sentenced after) with Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (concluding that change from presumptive sentences to advisory sentences is procedural rather than substantive and therefore application of advisory sentencing scheme is proper when defendant is sentenced after effective date of amendment even though offense was committed before). Our supreme court has not yet had the opportunity to resolve this issue.

Poole was charged in Cause 280 on January 14, 2005, and in Cause 162 on April 5, 2005. He was sentenced on December 12, 2005. The change in our sentencing statutes was effective on April 25, 2005. If the different sentencing statutes would produce a difference in outcomes, this case would force the issue of whether or not the amendment should be enforced retroactively. In this case, however, the outcome is the same regardless of which sentencing scheme is applied, and therefore we need not decide the issue of retroactivity

herein. Rather, we will address Poole's argument under each scheme.

A. Presumptive Sentencing Scheme

Prior to the April 25, 2005, amendments, sentencing was within the discretion of the trial court. Cotto v. State, 829 N.E.2d 520, 524 (Ind. 2005). "If a trial court uses aggravating or mitigating circumstances to enhance or reduce the presumptive sentence, it must: (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate its evaluation and balancing of the circumstances." Patterson v State, 846 N.E.2d 723, 727 (Ind. Ct. App. 2006). "The trial court's assessment of the proper weight of mitigating and aggravating circumstances is entitled to great deference on appeal and will be set aside only upon a showing of a manifest abuse of discretion." Id.

If we find an irregularity in a trial court's sentencing decision, "we have the option to remand to the trial court for a clarification or new sentencing determination, to affirm the sentence if the error is harmless, or to reweigh the proper aggravating and mitigating circumstances independently at the appellate level."

Hope v. State, 834 N.E.2d 713, 718 (Ind. Ct. App. 2005) (quoting Cotto, 829 N.E.2d at 525).

During sentencing, a trial court is not obligated to weigh or credit mitigating factors in the manner a defendant suggests. Frey v. State, 841 N.E.2d 231, 234 (Ind. Ct. App. 2006). Nevertheless, if the trial court does not find a factor clearly supported by the record, a reasonable belief arises that the mitigating factor was improperly overlooked. Id.

The trial court need only identify the mitigating circumstances it finds significant. Sensback v. State, 720 N.E.2d 1160, 1163 (Ind. 1999). Our supreme court has noted that a

defendant's guilty plea may be a significant mitigating factor as it saves court time and judicial resources, and can demonstrate a willingness to accept responsibility. Widener v. State, 659 N.E.2d 529, 534 (Ind. 1995). However, not every guilty plea must be credited as a significant mitigating circumstance, and the determination is necessarily fact sensitive. Trueblood v. State, 715 N.E.2d 1242, 1257 (1999), cert. denied, 531 U.S. 858 (2000).

Where the State receives a substantial benefit from the defendant's plea of guilty, the defendant is entitled to a substantial benefit in return. Patterson, 846 N.E.2d at 729. The State dropping charges in exchange for a guilty plea can be considered a substantial benefit to the defendant. Id.

The trial court in this case did not abuse its discretion in declining to find Poole's guilty plea a significant mitigating factor. In light of the amount of time it took Poole to enter his guilty plea, the State did not receive a substantial benefit. It was over ten months after Cause 280 was filed and six months after Cause 162 was filed that Poole pled guilty, and the State did have to prepare a case against him. The State also dropped the Class D felony charge of resisting arrest. Therefore, although the State did receive a minimal benefit from Poole's plea, Poole also received a benefit from his plea, and the trial court was within its discretion not to consider Poole's guilty plea a significant mitigating factor.

B. Advisory Sentencing Scheme

The amended sentencing statutes provide that for a Class B felony, a person "shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years." Ind. Code § 35-50-2-5. For a Class D felony, a person "shall

be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1/2) years.” Ind. Code § 35-50-2-7. For a Class A misdemeanor, a person “shall be imprisoned for a fixed term of not more than (1) year.” Ind. Code § 35-50-3-2.

Under the advisory sentencing scheme, a court may impose any legal sentence “regardless of the presence or absence of aggravating circumstances or mitigating circumstances.” Ind. Code § 35-38-1-7.1(d). Although our supreme court has not yet interpreted this statute, its plain language seems to indicate that “a sentencing court is under no obligation to find, consider, or weigh either aggravating or mitigating circumstances.” Fuller v. State, 852 N.E.2d 22, 26 (Ind. Ct. App. 2006). Each of Poole’s sentences was within the prescribed statutory range; therefore the trial court’s identification and balancing of the aggravators and mitigators in this case cannot be error under the new sentencing scheme. Even if the trial court still has an obligation to identify and balance aggravating and mitigating circumstances, as discussed above, the trial court acted within its discretion in identifying and balancing the aggravators and mitigators in this case.

II. Inappropriate Sentence

Poole also contends his eighteen-year sentence is inappropriate. According to Indiana Appellate Rule 7(B), we “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” The “nature of the offense” portion of the standard speaks to the statutory sentence for the class of crimes to

which the offense belongs. Williams v. State, 782 N.E.2d 1039, 1051 (Ind. Ct. App. 2003), trans. denied. The “character of the offender” portion of the standard refers to the general sentencing considerations and the relevant aggravating and mitigating circumstances. Id.

Poole has a significant criminal history, one that has not stopped growing even while he was awaiting sentencing. The circumstances of these crimes demonstrate an escalation in criminal activity, from possession of marijuana to dealing cocaine. In light of this history and the absence of significant mitigating factors, it was reasonable for Poole’s sentence to be enhanced. We cannot say that an eighteen-year sentence is inappropriate in this case.

Conclusion

Based on the foregoing, we conclude that the trial court did not err in failing to find Poole’s guilty plea as a significant mitigating factor. Further, the eighteen-year sentence was not inappropriate in light of Poole’s character and the nature of the offenses.

Affirmed.

BARNES, J., concurs.

SULLIVAN, J., concurs in result.