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IN THE
COURT OF APPEALS OF INDIANA

MAURICE D. BOATMAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A05-0606-CR-339
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause Nos. 48C01-0504-FB-165 and 48C01-0511-FB-460

December 27, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Maurice Boatman appeals his sentence following his conviction for Possession of Cocaine, as a Class D felony, pursuant to a plea agreement. He presents a single dispositive issue for our review, namely, whether the trial court abused its discretion when it imposed an enhanced sentence.

We affirm.

FACTS AND PROCEDURAL HISTORY

On November 18, 2005, an Indiana State Trooper initiated a traffic stop after he observed Boatman speeding. Because the officer smelled a strong odor of marijuana emanating from Boatman's vehicle, he asked Boatman to exit the vehicle and submit to a pat-down search. The officer found what was later determined to be six grams of cocaine in Boatman's shoes and $160 in cash in his pants' pocket.

The State charged Boatman with dealing in cocaine, as a Class B felony. Pursuant to a plea agreement, the State amended the charge to possession of cocaine, as a Class D felony, and Boatman pleaded guilty to that charge. The plea agreement left sentencing open to the trial court's discretion. At sentencing, the trial court imposed the maximum sentence of three years, stating that it "justifies the maximum sentence based on the amount of the cocaine that was in [Boatman's] possession." Transcript at 52. This appeal ensued.[1]

[1] Boatman also pleaded guilty to two convictions in another cause number, but he does not challenge those sentences on appeal. See Brief of Appellant at 17 ("The advisory sentence should be imposed on the cocaine offense.").

DISCUSSION AND DECISION

Boatman contends that the trial court improperly identified the amount of cocaine he possessed as an aggravator when it imposed an enhanced sentence. We note initially that the standard of reviewing a sentence imposed under the advisory sentencing scheme, when the trial court has identified an aggravating factor, is far from clear. As this court recently noted:

> [The] after-effects [of Blakely v. Washington, 542 U.S. 296 (2004),] are still felt because the new [advisory sentencing] statutes raise a new set of questions as to the respective roles of trial and appellate courts in sentencing, the necessity of a trial court continuing to issue sentencing statements, and appellate review of a trial court's finding of aggravators and mitigators under a scheme where the trial court does not have to find aggravators or mitigators to impose any sentence within the statutory range for an offense, including the maximum sentence. The continued validity or relevance of well-established case law developed under the old "presumptive" sentencing scheme is unclear.
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> We attempted to address these questions in Anglemyer v. State, 845 N.E.2d 1087 (Ind. Ct. App. 2006), trans. granted. We observed that under the current version of Indiana Code Section 35-38-1-7.1(d), trial courts may impose any sentence that is statutorily and constitutionally permissible "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." [Anglemeyer, 845 N.E.2d] at 1090. We also noted, however, that Indiana Code Section 35-38-1-3(3) still requires "a statement of the court's reasons for selecting the sentence that it imposes" if a trial court finds aggravating or mitigating circumstances. Id. In attempting to reconcile this language, we concluded that any possible error in a trial court's sentencing statement under the new "advisory" sentencing scheme necessarily would be harmless. Id. at 1091. Therefore, we declined to review Anglemyer's challenges to the correctness of the trial court's sentencing statement. Id. Nevertheless, we stated, "oftentimes a detailed sentencing statement provides us with a great deal of insight regarding the nature of the offense and the character of the offender from the trial court judge who crafted a particular sentence" and encouraged trial courts to continue issuing detailed sentencing statements to aid in our review of sentences under Indiana Appellate Rule 7(B). Id.
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> Our attempt in Anglemyer to analyze how appellate review of

> sentences imposed under the "advisory" scheme should proceed was met with a swift grant of transfer by our supreme court. Until that court issues an opinion in Anglemyer, we will assume that it is necessary to assess the accuracy of a trial court's sentencing statement if, as here, the trial court issued one, according to the standards developed under the "presumptive" sentencing system, while keeping in mind that the trial court had "discretion" to impose any sentence within the statutory range for [the felony level of each conviction] "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." See Ind. Code § 35-38-1-7.1(d); see also Fuller v. State, 852 N.E.2d 22, 26 (Ind. Ct. App. 2006) ("a sentencing court is under no obligation to find, consider, or weigh either aggravating or mitigating circumstances.")[, trans. denied]. We will assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed here was inappropriate. In other words, even if it would not have been possible for the trial court to have abused its discretion in sentencing [a defendant] because of any purported error in the sentencing statement, it is clear we still may exercise our authority under Article 7, Section 6 of the Indiana Constitution and Indiana Appellate Rule 7(B) to revise a sentence we conclude is inappropriate in light of the nature of the offense and the character of the offender. See Childress v. State, 848 N.E.2d 1073, 1079-80 (Ind. 2006); see also Buchanan v. State, 767 N.E.2d 967, 972 (Ind. 2002) (holding that Indiana Constitution permits independent appellate review and revision of a sentence even if trial court "acted within its lawful discretion in determining a sentence").
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> In reviewing a sentencing statement, "we are not limited to the written sentencing statement but may consider the trial court's comments in the transcript of the sentencing proceedings." Corbett v. State, 764 N.E.2d 622, 631 (Ind. 2002).

Gibson v. State, No. 48A04-0603-CR-165, 2006 Ind. App. LEXIS 2320, at *4-*8 (Nov. 8, 2006). Lacking further guidance to date from our supreme court on the standard of review to be applied, we apply the standard described above in Gibson.

Here, at sentencing, the trial court stated that it thought that Boatman "got a heck of a deal" with his plea and imposed the maximum sentence "based on the amount of cocaine that was in his possession." Transcript at 52. On appeal, Boatman contends that the use of the amount of cocaine as an aggravator was improper. In support of that

contention, Boatman relies on Conwell v. State, 542 N.E.2d 1024, 1025 (Ind. Ct. App. 1989), where this court held that "when a defendant pleads guilty to an included offense, the element(s) distinguishing it from the greater offense [with which he was charged] . . . may not be used as an aggravating circumstance to enhance the sentence." We went on to observe that a "trial court is entitled to refuse to accept the plea to the included offense, but it may not attempt to sentence as if the defendant had pled to the greater offense by using the distinguishing element(s) as an aggravating factor." Id.

Here, the State charged Boatman with Class B felony dealing in cocaine. The elements of that offense are: possessing cocaine with intent to deliver. See Ind. Code § 35-48-4-1(a)(2). The amount of cocaine possessed is not an element of Class B felony dealing in cocaine.[2] As such, Boatman's reliance on Conwell is misplaced. We hold that the trial court properly relied on the amount of cocaine Boatman possessed as an aggravator.

Boatman next contends that the trial court abused its discretion when it did not assess any mitigating weight to his lack of adult criminal history and his guilty plea. We address each contention in turn.

It is well settled that the finding of mitigating circumstances is within the discretion of the trial court. Hackett v. State, 716 N.E.2d 1273, 1277 (Ind. 1999). The trial court is not obligated to explain why it did not find a factor to be significantly mitigating. Chambliss v. State, 746 N.E.2d 73, 78 (Ind. 2001). An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish

[2] Possession of more than three grams of cocaine is an element of Class A felony dealing in cocaine, but the State did not charge Boatman with that offense. See Ind. Code § 35-48-4-1(b)(1).

that the mitigating evidence is both significant and clearly supported by the record. Matshazi v. State, 804 N.E.2d 1232, 1239 (Ind. Ct. App. 2004), trans. denied. Additionally, trial courts are not required to include in the record a statement that it considered all proffered mitigating circumstances, only those that it considered significant. Id.

Boatman was only eighteen years old at the time of the instant offense, so he had not had much of an opportunity to establish an adult criminal record before committing the instant offense. But his juvenile criminal history is not insignificant. Boatman was found delinquent on three misdemeanor charges and a Class D felony charge between 2003 and 2005. Boatman twice violated the terms of his probation stemming from those adjudications. Finally, Boatman pleaded guilty to Attempted Armed Robbery, as a Class B felony, which offense occurred only seven months prior to the instant offense. In sum, the trial court did not abuse its discretion when it did not assess mitigating weight to Boatman's criminal history.

Boatman contends that he "did not receive the full benefit of the plea bargain." Brief of Appellant at 13. We cannot agree. A guilty plea is not necessarily a significant mitigating factor. Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005). Here, in exchange for Boatman's plea to the Class D felony, the State dismissed the Class B felony charge. Thus, Boatman received a substantial benefit in exchange for his plea. See Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999) (holding no abuse of discretion where trial court did not find defendant's guilty plea mitigating where defendant received benefits

for plea). The trial court did not abuse its discretion when it did not identify Boatman's guilty plea as a mitigating circumstance.

Finally, Boatman contends that his sentence is inappropriate in light of the nature of the offense and his character. In support of that contention, he asserts that "[t]here was nothing about the act of possession which distinguished it from any other offenses of that type." Brief of Appellant at 16. And Boatman reiterates that his criminal history and guilty plea deserve mitigating weight. We cannot agree.

Boatman admitted to having possessed six grams of cocaine at the time of the instant offense. As the State correctly points out, six grams is twice the amount necessary for a Class A felony dealing conviction. See Ind. Code § 35-48-4-1(b). Given the large amount of cocaine Boatman possessed, we disagree with his suggestion that the offense is "run-of-the-mill." Further, Boatman's criminal history includes two probation violations and four juvenile adjudications. We cannot say that the three-year sentence is inappropriate in light of the nature of the offense and Boatman's character.

Affirmed.

MAY, J., and MATHIAS, J., concur.