ATTORNEY FOR APPELLANT:

DAVID W. STONE, IV
Anderson, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JODI KATHRYN STEIN
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

JEFFREY L. MCNEIL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A05-0706-CR-325
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-0604-FB-92

November 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Jeffrey McNeil appeals his thirteen-year sentence for Class B felony burglary. We affirm.

Issues

McNeil raises two issues, which we restate as:

I. whether the trial court abused its discretion in sentencing him; and

II. whether his sentence is appropriate.

Facts

On April 5, 2006, the State charged McNeil with Class B felony burglary after he broke the window of house in an effort to steal a table he saw inside. On August 1, 2006, McNeil pled guilty but mentally ill. Pursuant to the agreement, McNeil's sentence was capped at fifteen years executed, and the State agreed not to file an habitual offender enhancement. The agreement also required McNeil to pay restitution.

On August 29, 2006, a sentencing hearing was held. The trial court sentenced McNeil to thirteen years. The trial court sentencing order provided:

> The Court finds aggravation: 1) the Defendant has a prior legal history, including 4 prior felonies; 2) the Defendant recently violated the terms of probation; 3) the Defendant's repetitive behavior of delinquent activity; and 4) Prior attempts at probation and/or community corrections have not changed his behavior. The Court finds mitigation: 1) the Defendant plead [sic] guilty to the instance [sic] offense, saving the State the time and cost of trial; 2) the Defendant will make restitution to the victim; and 3) the Defendant has a mental illness.

App. p. 22. McNeil now appeals his sentence.

Analysis

Our supreme court recently provided an outline for the respective roles of trial and appellate courts under the 2005 amendments to Indiana's sentencing statutes. See Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). First, a trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e. to particular aggravators or mitigators, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id.

I. Abuse of Discretion

McNeil argues that the trial court abused its discretion by considering his criminal history as three separate aggravators. Indeed, one's criminal history cannot be restated or described as multiple aggravators. See Williams v. State, 838 N.E.2d 1019, 1021 (Ind. 2005) (holding that likelihood to reoffend and need for rehabilitation stemmed from defendant's prior convictions and could not be used as separate aggravators). Nevertheless, we do not believe that the trial court was using McNeil's repetitive delinquent activity and failure of probation and/or community corrections programs to change his behavior as separate aggravating circumstances from his criminal history. Instead, we believe the trial court intended these "derivative" factors to go to the weight of McNeil's criminal history as an aggravating factor. See Morgan v. State, 829 N.E.2d 12, 17 (Ind. 2005) ("We conclude that such statements, which our Court of Appeals has

called 'derivative' of criminal history, are legitimate observations about the weight to be given to facts appropriately noted by a judge . . . ."). We may not reconsider the trial court's assignment of weight to a particular aggravator. See Anglemyer, 868 N.E.2d at 491.

McNeil also argues that the trial court abused its discretion by not giving adequate weight to his mental illness as a mitigating circumstance. The trial court acknowledged McNeil's mental illness as a mitigator. Pursuant to Anglemyer, we will not reconsider the weight assigned to it by the trial court. See id. In sum, the trial court did not abuse its discretion in the identification of the aggravating and mitigating circumstances, and we will not reassess the trial court's weighing of such.

II. Appropriateness

McNeil also asserts his sentence is inappropriate. Having concluded the trial court acted within its discretion in sentencing him, we now assess whether his sentence is inappropriate under Indiana Appellate Rule 7(B) in light of his character and the nature of the offense. See Anglemyer, 868 N.E.2d at 491. Although Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. "Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id.

McNeil provides little analysis as to why his sentence is inappropriate, and upon review we cannot agree with his assertion. Although the nature of the offense is not extraordinary, McNeil's character supports an enhanced sentence.

McNeil has a substantial criminal history that includes convictions beginning in 1974 until the instant offense was committed in 2006. During that time McNeil accrued over twenty convictions in Ohio and Indiana, including four felony convictions in Indiana since 1998. Further, McNeil has recent convictions for criminal conversion, receiving stolen property, and two incidents of burglary. These convictions are closely related in time and nature to McNeil's current conviction.

Although McNeil's mental illness was described as "severe"[1] and is entitled to mitigating weight, the gravity of McNeil's criminal history far outweighs his mental illness. Exhibit A p. 4. This, too, is true of McNeil's $75 restitution payment and his guilty plea, pursuant to which he received a capped sentence and the State's agreement not file an habitual offender enhancement. Unlike many, McNeil has had the benefit mental health treatment, substance abuse treatment, and participation in community correction programs, yet he has repeatedly failed to conform his behavior to that of a law-abiding citizen. Under these facts, we cannot conclude that McNeil's thirteen-year sentence is inappropriate.

[1] McNeil's diagnosis included polysubstance dependence, schizoaffective disorder, bipolar I disorder, posttraumatic stress disorder, schizoid personality disorder, and antisocial personality disorder.

Conclusion

The trial court did not abuse its discretion in considering the aggravating and mitigating circumstances. McNeil's thirteen-year sentence is not inappropriate. We affirm.

Affirmed.

KIRSCH, J., and ROBB, J., concur.