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IN THE
COURT OF APPEALS OF INDIANA

MARK MOORE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0512-CR-749
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William Robinette, Master Commissioner
Cause Nos. 49G03-0507-FB-116922
49G03-0507-FB-117534
49G03-0508-FB-132667

December 19, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Mark Moore appeals his sentence imposed following his plea of guilty to two counts of robbery as class B felonies and one count of attempted robbery as a class B felony.

We affirm.

ISSUES

1. Whether the trial court abused its discretion in sentencing Moore by failing to consider various mitigators.

2. Whether the sentence imposed by the trial court was inappropriate in light of the nature of the offenses and character of the offender.

FACTS

On July 8, 2005, the State charged Moore, under cause number 49G03-0507-FB-116922, with: Count 1, attempted robbery as a class B felony; Count 2, attempted robbery as a class B felony; Count 3, theft as a class D felony; Count 4, interfering with reporting a crime as a class A misdemeanor; and Count 5, resisting law enforcement as a class A misdemeanor.[1] All of the charges related to events that occurred on July 7, 2005.

On July 11, 2005, the State charged Moore, under cause number 49G03-0507-FB-117534, with robbery as a class B felony.[2] The charge related to a robbery that occurred on July 7, 2005.

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[1] The attempted robbery charges were charged as class B felonies based upon the fact that Moore was armed with a deadly weapon, i.e., a BB gun. *See* Ind. Code § 35-42-5-1.

[2] The robbery was charged as class B felony based upon the fact that Moore was armed with a deadly weapon, i.e., a BB gun. *See* I.C. § 35-42-5-1.

On August 3, 2005, the State charged Moore, under cause number 49G03-0508-FB-132667, with: Count 1, robbery as a class B felony; Count 2, attempted robbery as a class B felony; and Count 3, carrying a handgun without a license as a class C felony.[3] All of the charges related to events that occurred on July 3, 2005.

The State later joined the three causes, and on October 14, 2005, Moore entered into a plea agreement covering all three causes. Under the written plea agreement, Moore agreed to plead guilty to Count 1 in all three causes—specifically, one count of attempted robbery as a class B felony and two counts of robbery as class B felonies—and the State agreed to dismiss the remaining six charges and to receive concurrent sentences on the three B felonies. That same day, the trial court held a guilty plea hearing, and Moore pleaded guilty to the two counts of robbery and the one count of attempted robbery.

In December 2005, the trial court held a sentencing hearing. Moore's counsel acknowledged that Moore had a criminal history that dated back to 1987, stated that Moore understood that there was a six-year non-suspendable sentence, and asked the trial court to impose a ten-year sentence and to recommend drug treatment. The trial court found no mitigating circumstances and found Moore's criminal history to be an aggravating circumstance. Specifically, the trial court stated:

> All right. So having accepted the Plea Agreement on all three of these cases and all three of them being class B felonies, I'm going to do the following. First of all on Cause Number ending in 117534, this is a class B

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[3] The robbery and attempted robbery charges were charged as class B felonies based upon the fact that Moore was armed with a deadly weapon, i.e., a handgun. *See* I.C. § 35-42-5-1. The handgun charge was charged as a class C felony based upon the fact that Moore had been convicted of a felony within fifteen years before the date of the offense, i.e., a 2003 conviction for dealing in cable TV theft device as a class D felony. *See* I.C. § 35-47-2-23(c)(2)(B).

> felony with a ten year stated term, I'm finding aggravating circumstances for the following reasons: convictions on 8-12-87 for resisting law enforcement; on 7-30-87 for conversion; on January 29, [19]90, for possession of marijuana; on battery on December 27, [19]93, A misdemeanor; driving while license suspended on March 24, [19]94; auto theft on September 18, [19]95; and there are others but that's the aggrav -- those convictions, I'm finding aggravating circumstances.

(Tr. 48-49).[4] The trial court applied the same criminal history aggravator to the other B felony convictions in cause numbers 116922 and 132667. The trial court then sentenced Moore to the Indiana Department of Correction for sixteen years, with thirteen years executed and three years suspended to probation on each of the three class B felonies and, pursuant to the plea agreement, ordered the sentences from the three convictions to be served concurrently. Thus, Moore received an aggregate executed term of thirteen years for his three class B felony convictions.

DECISION

1. Mitigators

The first issue is whether the trial court abused its discretion in sentencing Moore by failing to consider various mitigators. Sentencing decisions rest within the discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Smallwood v. State*, 773 N.E.2d 259, 263 (Ind. 2002). An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." *Pierce v. State*, 705

[4] The trial court's recitation of Moore's convictions apparently comes from the presentence investigation report ("PSI") that was prepared prior to sentencing. The table of contents in Moore's Appellant's Appendix indicates that he intended to provide a copy of his PSI in a separate envelope. However, he has failed to do so; thus, the PSI is not before us on this appeal. We remind Moore that, as the appellant, he bears the burden of presenting a record that is complete with respect to the issues raised on appeal. *Ford v. State*, 704 N.E.2d 457, 461 (Ind. 1998), *reh'g denied*.

N.E.2d 173, 175 (Ind. 1998). In order for a trial court to impose an enhanced or consecutive sentence, it must: (1) identify the significant aggravating factors and mitigating factors; (2) relate the specific facts and reasons that the court found those aggravators and mitigators; and (3) demonstrate that the court has balanced the aggravators with the mitigators. *Veal v. State*, 784 N.E.2d 490, 494 (Ind. 2003). A trial court is not obligated to weigh a mitigating factor as heavily as the defendant requests. *Smallwood*, 773 N.E.2d at 263. A single aggravating factor may support the imposition of an enhanced sentence. *Payton v. State*, 818 N.E.2d 493, 496 (Ind. Ct. App. 2004), *trans. denied*.

Moore argues that the trial court erred by failing to consider the following to be mitigating circumstances: (1) his drug problem; (2) his remorse; (3) "his children's reliance on him[;]" and (4) his guilty plea.[5] (Moore's Br. 5). Determining mitigating circumstances is within the discretion of the trial court. *Corbett v. State*, 764 N.E.2d 622, 630 (Ind. 2002). A trial court does not err in failing to find mitigation when a mitigation claim is "highly disputable in nature, weight, or significance." *Smith v. State*, 670 N.E.2d 7, 8 (Ind. 1996). The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. *Corbett*, 764 N.E.2d at 630. Nor is the court required to give the same weight to proffered mitigating factors as the defendant does.

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[5] Moore has failed to provide any analysis and citation to authority to support his argument that the trial court abused its discretion by failing to consider his drug use, remorse, and children's reliance on him as mitigators. Thus, he has waived review of any argument regarding these three alleged mitigators. *Moore v. State*, 827 N.E.2d 631, 642 n.13 (Ind. Ct. App. 2005) ("It is well established that a party's failure to provide proper citation to authority results in waiver."), *reh'g denied*, *trans. denied*. Waiver notwithstanding, we will address the merits of each below.

Id. Further, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. *Id.* at 630-631. The failure to find mitigating circumstances that are clearly supported by the record, however, may imply that they were overlooked and not properly considered. *Id.* at 631. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Id.*

A. *Drug Problem*

Moore first argues that the trial court abused its discretion by failing to assign his drug problem mitigating weight. During the hearing, Moore blamed his commission of the three crimes upon his use of drugs. Moore's sister and fiancée also testified that Moore committed the robberies because of his drug addiction and that he was not able to get treatment because of a lack of insurance. Moore's sister requested that the trial court sentence him in a "structured system" that would allow him to receive "drug recovery treatment[.]" (Tr. 33). Moore's fiancée also testified that she had previously called the police on Moore "when he pushed [her] around to -- when he was on drugs to get some money." (Tr. 45). Moore did not present any evidence about what type of drug he was addicted to or the duration of his addiction. Furthermore, Moore's counsel did not explicitly request the trial court to consider Moore's drug use to be a mitigating circumstance. Because Moore has failed to show that the evidence regarding his drug use was both significant and clearly supported by the record, we cannot say that the trial court abused its discretion by not assigning mitigating weight to the drug use. *See, e.g.*, *Bennett v. State*, 787 N.E.2d 938, 948 (Ind. Ct. App. 2003) (holding that the trial court

did not err by not considering the defendant's substance abuse as a mitigating factor where the defendant failed to argue why this factor warrants mitigation in his sentencing), *trans. denied*; *Mendoza v. State*, 737 N.E.2d 784, 788 (Ind. Ct. App. 2000) (holding that the trial court did not abuse its discretion by failing to consider the defendant's drug and alcohol use as a mitigating circumstance), *reh'g denied*.

B. *Remorse*

In regard to remorse, Moore stated the following during the sentencing hearing:

> I, you know, I [am] sorry for any inconvenience that I have, you know, caused the Court or the, uh, victim . . . Like I said, again, that I am sorry, very sorry and I would not have done what I did if, uh, I hadn't been on drugs.

(Tr. 45-46). Also during the hearing, Moore's sister and fiancée testified that Moore was remorseful but that he committed the robberies because of his drug addiction.

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, 534-535 (Ind. 2002). Without evidence of some impermissible consideration by the court, we accept its determination of credibility. *Id.* The trial court is in the best position to judge the sincerity of a defendant's remorseful statements. *Stout v. State*, 834 N.E.2d 707 (Ind. Ct. App. 2005), *trans. denied*.

Moore does not allege any impermissible considerations. Furthermore, Moore's alleged remorse was tempered by the fact that he blamed his actions on his drug problems. Thus, the trial court did not abuse its discretion by failing to consider Moore's alleged remorse to be a significant mitigating factor, especially, here, where Moore

robbed two people at gun point and attempted to rob another person at gunpoint during a four-day period. *See, e.g.*, *id*. (holding that the trial court did not err in refusing to find defendant's alleged remorse to be a mitigating factor, especially where he blamed his conduct on a drug problem).

C. *Hardship to Dependents*

Moore argues that the trial court abused its discretion by failing to consider the reliance of his four children upon him. Moore contends that "[w]ithout him, the mother of Moore's children was left as the family's sole breadwinner." (Moore's Br. 8-9). During the sentencing hearing, Moore's fiancée testified that she and Moore had four children—ages sixteen, thirteen, twelve, and ten. She also testified that Moore supported them when she was not working but that she was now working.

A sentencing court is not required to find a defendant's incarceration would result in undue hardship on his dependents. *Haun v. State*, 792 N.E.2d 69, 74 (Ind. Ct. App. 2003). The Indiana Supreme Court has explained that this mitigator can properly be assigned no weight when the defendant fails to show why incarceration for a particular term will cause more hardship than incarceration for a shorter term. *See Abel v. State*, 773 N.E.2d 276, 280 (Ind. 2002) (the "difference here between the presumptive . . . sentence and the enhanced sentence 'hardly can be argued to impose much, if any, additional hardship on the child.' . . . The trial court correctly declined to give this factor any mitigating weight.") (quoting *Battles v. State*, 688 N.E.2d 1230, 1237 (Ind. 1997)). Moore offered no such testimony, and we, therefore, cannot say that the trial court abused its discretion in declining to assign weight to this mitigator.

D. *Guilty Plea*

Finally, Moore contends that the trial court abused its discretion by not considering his guilty plea as a mitigating factor. A guilty plea does not automatically amount to a significant mitigating factor. *Sensback v. State*, 720 N.E.2d 1160, 1165 (Ind. 1999). "[A] guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one." *Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), *trans. denied*.

Here, Moore received a benefit in light of the State's dismissal of six criminal charges, including two B felonies, a D felony, a C felony, and two A misdemeanors. In addition, the State agreed that all of Moore's sentences would be served concurrently. Thus, Moore's potential prison time was substantially reduced by his entry of a guilty plea. Accordingly, we cannot say that the trial court abused its discretion when it did not give mitigating weight to his guilty plea. *See, e.g.*, *Wells*, 836 N.E.2d at 479-480 (holding that there was no abuse of discretion where the trial court did not accord mitigating weight to the defendant's guilty plea where the defendant's decision to plead guilty was pragmatic); *Gray v. State*, 790 N.E.2d 174, 177-180 (Ind. Ct. App. 2003) (finding no abuse of discretion where the trial court accorded no weight to the defendant's guilty plea).

2. Inappropriate Sentence

Here, the trial court sentenced Moore to the Indiana Department of Correction for sixteen years, with thirteen years executed and three years suspended to probation on

each of the three class B felonies and, pursuant to the plea agreement, ordered them to be served concurrently. Moore argues that his sentence for his three class B felonies is inappropriate because "[c]learly, he is not among the worst class of B felony robbers" given the fact that he committed his crimes with a BB gun. (Moore's Br. 9).

Indiana Appellate Rule 7(B) provides, "The Court 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."

Regarding the nature of Moore's two robbery offenses, the probable cause affidavit included in the record indicates that Moore approached his two victims in public—one on July 3, 2005, at 1 a.m. while the victim was getting into his truck after leaving The Jazz Kitchen and the other on July 7, 2005, at 9 a.m. in a grocery store parking lot while the victim was loading his groceries in his car – and demanded their wallets while pointing a gun at them. The only information in the record regarding the nature of Moore's attempted robbery is the charging information, which reveals that on July 7, 2005, Moore, while armed with a gun, attempted to rob the victim. Thus, Moore committed three crimes within a period of four days.

Regarding Moore's character, the record from the sentencing hearing reveals that Moore, who was thirty-seven years old at the time of sentencing, has a criminal history. As the trial court specified prior to imposing a sentence, Moore has convictions for resisting law enforcement, conversion, possession of marijuana, battery, driving while

license suspended, auto theft, and "there are others."[6] (Tr. 49). The record also reveals that Moore was addicted to drugs and has four children.

Given the record before us, we conclude that the trial court's imposition of an aggregate thirteen-year executed sentence for the commission of three class B felonies committed during a four-day period by a person who has several prior convictions is not inappropriate.

Affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.

[6] Again, we note that Moore has failed to include a copy of the PSI; therefore, it is unclear what the other convictions include.