



## Case Summary and Issue

George Minter appeals his aggregate twenty-three year sentence after a bench trial in which he was found guilty but mentally ill of theft, a Class D felony, and dealing in cocaine, a Class B felony.<sup>1</sup> The trial court sentenced Minter to three years for theft and twenty years for dealing in cocaine, served consecutively. On appeal, Minter raises for review the issue of whether the trial court properly imposed his sentence. Specifically, he argues his mental illness was given insufficient mitigating weight. Concluding that the trial court identified Minter's mental health as a significant mitigating factor, which was not entitled to the same weight assigned by Minter, we affirm the sentences as imposed by the trial court.

## Facts and Procedural History

On July 30, 2003, Minter was arrested after attempting to use a stolen credit card. On August 12, 2003, Minter was arrested after selling cocaine to an undercover police officer, and asking the officer to smoke some of it with him. The matters were consolidated for a bench trial. Minter asserted an insanity defense, and the trial court appointed a psychologist and psychiatrist to examine Minter. During trial both experts testified that Minter suffered from mental illness, but was of sound mind at the time he committed the offenses. Both experts also testified that Minter could distinguish between right and wrong at the time of the offenses. The trial court found Minter guilty but mentally ill of both theft and dealing in

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<sup>1</sup> The trial court found Minter guilty but mentally ill of all the charges against him, which included those for theft and dealing in cocaine as well as attempted credit card fraud, a Class D felony, conspiracy to commit dealing in cocaine, a Class B felony, and possession of cocaine, a Class D felony. However, the trial court merged the attempted fraud charge into the theft charge, and the conspiracy to deal in cocaine and

cocaine. At sentencing, the trial court identified one significant aggravating factor, Minter's extensive criminal history, and one significant mitigating factor, Minter's mental illness. Concluding that the aggravator outweighed the mitigator with regard to both sentences, the trial court imposed an executed three-year sentence for theft, served consecutively with a twenty-year sentence for dealing in cocaine, of which six years were ordered executed and fourteen suspended.<sup>2</sup> Minter now appeals his sentence.

### Discussion and Decision

At the outset, we note that "a high level of discernment" is required when assessing the mitigating weight warranted by mental illness. Covington v. State, 842 N.E.2d 345, 349 (Ind. 2006). Nonetheless, a defendant is not automatically entitled to any particular credit or deduction from an aggravated sentence even if he is found to be guilty but mentally ill. Archer v. State, 689 N.E.2d 678, 684 (Ind. 1997). The trial court has broad discretion to impose sentences, which we will reverse only for an abuse of that discretion. Dixon v. State, 825 N.E.2d 1269, 1272 (Ind. Ct. App. 2005), trans. denied. This discretion extends to enhancement of a sentence, or imposition of consecutive sentences, where warranted by aggravating circumstances. Id.

Here, Minter committed the crimes in July and August of 2003, was convicted on December 12, 2005, and sentenced on January 10, 2006. Indiana amended its sentencing

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possession of cocaine charges into the charge of dealing in cocaine. The trial court entered judgment only for the charges of theft and dealing in cocaine, thereby avoiding any potential double jeopardy issues.

statutes during the timeframe between Minter’s crimes and sentencing. Thus, before considering the propriety of the sentencing court’s decision, we must address which sentencing statute is applicable in this case.

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 on 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

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<sup>2</sup> The sentencing order was not included in the Brief of the Appellant or the Appellant’s Appendix. Counsel is urged to comply with Indiana Appellate Rule 46(A)(10). Due to the absence of the order, we rely solely upon the transcript of the sentencing hearing.

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.

In this case, the outcome is the same regardless of which sentencing scheme is applied, and therefore we need not decide the issue of retroactivity herein.

#### A. Presumptive Sentencing Scheme

Prior to amendment of Indiana's sentencing scheme, Minter's theft conviction subjected him to imprisonment "for a fixed term of one and one-half (1 1/2) years, with not more than one and one-half (1 1/2) years added for aggravating circumstances or not more than one (1) year subtracted for mitigating circumstances." Ind. Code § 35-50-2-7. Minter's conviction for dealing in cocaine subjected him to imprisonment "for a fixed term of ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances." Ind. Code § 35-50-2-5.

Modification of the presumptive sentence based upon aggravating or mitigating circumstances requires the sentencing court to: (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. White v. State, 847 N.E.2d 1043, 1045 (Ind. Ct. App. 2006). Generally, any

mitigating weight is assigned at the discretion of the trial court, which is under no obligation to assign the same weight to a mitigating circumstance as the defendant. Covington, 842 N.E.2d at 348. In addition, “[o]ne valid aggravator alone is enough to enhance a sentence or to impose it consecutive to another,” and “the same factor may be used both to enhance a presumptive sentence and to justify consecutive sentences.” Dixon, 825 N.E.2d at 1272.

Here, Minter’s criminal history was given significant weight as an aggravating factor. It includes true findings for auto theft, attempted criminal conversion, burglary, fleeing law enforcement, and two for theft. His criminal history also includes convictions for auto theft, possession of cocaine, and burglary. Minter violated probation on each of his convictions. The trial court identified Minter’s mental illness as a significant mitigating factor, outweighed by his extensive criminal history.

Minter argues that more mitigating weight should have been given to his mental illness. Our supreme court has identified several factors to consider in weighing the mitigating force of a mental health issue, which include: (1) the extent of the inability to control behavior; (2) the overall limit on function; (3) the duration of the illness; and (4) the nexus between the illness and the crime. Covington, 842 N.E.2d at 349. The trial court noted that it had given Minter a past opportunity to “conform his behavior” by seeking treatment, which he did for a short period before quitting. Transcript at 67. Besides the trial court’s awareness of Minter’s psychiatric disorders, it also heard evidence of Minter’s psychiatric history dating back at least a decade. However, testimony by expert witnesses indicated that he was “not responding to command hallucinations at the time” of the

incidents, and that he was aware of the wrongness of his actions. Id. at 9, 12. In light of the evidence at trial, and because the trial court is not obligated to give Minter's mental illness the same mitigating weight he assigns to it, we cannot say the trial court abused its discretion. Therefore, the trial court properly enhanced Minter's sentences, and ordered them served consecutively.

### B. Advisory Sentencing Scheme

Application of Indiana's sentencing statutes as amended results in the imposition of a sentence for "a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 1/2) years" for Minter's theft conviction, Ind. Code § 35-50-2-7, and a sentence "for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years" for Minter's conviction for dealing in cocaine. Ind. Code § 35-50-2-5. An advisory sentence is "a guideline sentence that the court may voluntarily consider as the midpoint between the maximum sentence and the minimum sentence." Ind. Code § 35-50-2-1.3(a). Moreover, "regardless of the presence or absence of aggravating circumstances or mitigating circumstances," a trial court may impose any sentence that is authorized by statute, and permissible under Indiana's constitution. Ind. Code § 35-38-1-7.1(d). Under this sentencing scheme, regardless of aggravators or mitigators, the trial court could not abuse its discretion by imposing upon Minter a three-year term for theft or a twenty-year term for dealing in cocaine, both of which are within the range authorized by statute for his offenses.

### Conclusion

The trial court did not abuse its discretion when assigning mitigating weight to Minter's mental illness, and finding it outweighed by his extensive criminal history. We therefore affirm Minter's enhanced consecutive sentences.

Affirmed.

BARNES, J., concurs.

SULLIVAN, J., concurs in result.