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IN THE
COURT OF APPEALS OF INDIANA

CRAIG HARTMAN,)
)
Appellant-Defendant,)
)
vs.) No. 69A01-0605-CR-197
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE RIPLEY CIRCUIT COURT
The Honorable Carl H. Taul, Judge
Cause No. 69C01-0412-FC-34

October 27, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Craig Hartman appeals his sentence after he pleaded guilty to Theft, as a Class D felony. Hartman presents two issues for review, namely:

1. Whether the trial court abused its discretion when it identified and balanced aggravating and mitigating circumstances.

2. Whether his sentence is inappropriate under Indiana Appellate Rule 7(B).

We affirm.

FACTS AND PROCEDURAL HISTORY

In February 2004, Hartman and another man stole cigarettes, lottery tickets, and car keys from Borgman's Auto Sales. When police interviewed Hartman in October 2004, he admitted that he had participated in the theft but said that he did not enter the premises. In December 2004, the State charged Hartman with theft, as a Class D felony, and Burglary, as a Class C felony.

Hartman negotiated a plea agreement with the State, but withdrew his consent to the agreement before the plea hearing. In March 2006, Hartman submitted another plea agreement, which the trial court rejected. The State subsequently moved to dismiss the burglary count for lack of prosecutorial merit. Following the dismissal of that count, Hartman entered an open plea to theft in April 2006. The trial court entered judgment of conviction accordingly and sentenced him to an enhanced term of three years. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Mitigating Circumstances

Hartman first contends that the trial court abused its discretion when it did not find certain circumstances mitigating. Specifically, he maintains that the trial court abused its discretion when it did not find as mitigators his guilty plea and the hardship to his family. We address each argument in turn.

Sentencing decisions rest within the sound discretion of the trial court, and we generally review sentencing only for an abuse of discretion. Archer v. State, 689 N.E.2d 678, 683 (Ind. 1997), amended on other grounds, 1998 Ind. LEXIS 8. "The trial court's discretion includes the ability to determine whether the presumptive[1] sentence for a crime will be increased or decreased because of aggravating or mitigating circumstances, and whether sentences on different counts will be served concurrently or consecutively." Id. (citations omitted). "When the trial court imposes a sentence other than the presumptive sentence, or imposes consecutive sentences where not required to do so by statute, we will examine the record to ensure that the court explained its reasons for selecting the sentence it imposed." Id. The trial court's statement of reasons must include the following three elements: (1) identification of all significant mitigating and aggravating circumstances found; (2) specific facts and reasons which lead the court to find the existence of each such circumstance; and (3) articulation demonstrating that the

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[1] Although the sentencing statutes were amended in April 2005 to provide for an advisory sentence within a range, the sentencing statutes in effect in 2004, when Hartmann committed the instant offense, provided for a presumptive sentence within a range. The law that was in effect at the time of the commission of the crime controls the resolution of sentencing issues. Peace v. State, 736 N.E.2d 1261, 1267 (Ind. Ct. App. 2000), trans. denied. Thus, we analyze the sentencing issues using the presumptive sentencing scheme in effect in 2004.

mitigating and aggravating circumstances have been evaluated and balanced in determination of the sentence. Id.

A finding of mitigating circumstances lies within the trial court's discretion, and the court is not obligated to find that mitigating circumstances exist at all. Widener v. State, 659 N.E.2d 529, 533 (Ind. 1995). "Inclusion of mitigators in the sentencing statement is mandatory only if they are used to reduce the presumptive sentence or to offset aggravators." Battles v. State, 688 N.E.2d 1230, 1236 (Ind. 1997) (citation omitted). And only those mitigators found to be significant must be enumerated. Id. In addition, the sentencing court is not required to place the same value on a mitigating circumstance as does the defendant. Beason v. State, 690 N.E.2d 277, 283-84 (Ind. 1998). Indeed, "the 'proper' weight to be afforded by the trial court to the mitigating factors may be to give them no weight at all." Crain v. State, 736 N.E.2d 1223, 1242 (Ind. 2000). Although a trial court must consider evidence of mitigating circumstances presented by the defendant, it is not obligated to explain why it has found that the mitigator does not exist. Allen v. State, 722 N.E.2d 1246, 1252 (Ind. Ct. App. 2000).

First, Hartman maintains that the trial court abused its discretion when it did not consider his guilty plea as a mitigating circumstance. A guilty plea is a significant mitigating factor in some circumstances. Ruiz v. State, 818 N.E.2d 927, 929 (Ind. 2004). And guilty pleas may be accorded significant mitigating weight because they save judicial resources and spare the victim from a lengthy trial. Id. However, as our supreme court has frequently observed, a plea is not necessarily a significant mitigating factor. Id. (holding that trial court's failure to accord substantial weight to defendant's guilty plea

was not abuse of discretion where defendant's statements after pleading "undermined his acceptance of responsibility for the crime").

Here, Hartman negotiated a plea agreement but withdrew the agreement before the plea hearing. The trial court rejected a subsequent plea agreement, and the State later dismissed the burglary charge.[2] Hartman then entered an open guilty plea to the remaining theft charge, sixteen months after the information was filed. Up to that point, the State had spent time and resources to negotiate two plea agreements and to prepare for trial for over one year. Again, the sentencing court is not required to place the same value on a mitigating circumstance as does the defendant. Beason, 690 N.E.2d at 283-84. On the record before us, we conclude that Hartman has not shown that the trial court abused its discretion when it failed to identify his guilty plea as a significant mitigator.

Hartman also contends that the trial court should have considered the hardship to his family when it imposed an enhanced sentence. "A sentencing court is not required to find a defendant's incarceration would result in undue hardship on his dependents." Weaver v. State, 845 N.E.2d 1066, 1074 (Ind. Ct. App. 2006), trans. denied. "Our Indiana Supreme Court has often noted 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." Id. (citation omitted). Here, Hartman has not shown how imprisonment for an enhanced term of three years will cause more

[2] The State also argues that Hartman's guilty plea is not a proper mitigator because he received a benefit from the State's dismissal of the burglary charge. But the record does not indicate that the State dismissed the burglary charge in order to induce Hartman to plead guilty to the remaining charge. Instead, the record clearly shows that the State dismissed the burglary charge for lack of prosecutorial merit. Thus, the State's argument in this regard must fail.

hardship than incarceration for the presumptive term of one and one-half years. Thus, his argument on this issue fails.

Issue Two: Indiana Appellate Rule 7(B)

Hartman also maintains that his sentence is inappropriate in light of the nature of the offense and his character. As noted above, sentencing decisions lie within the trial court's discretion. Archer, 689 N.E.2d at 683. If the sentence imposed is authorized by statute, we will not revise or set aside the sentence unless it is inappropriate in light of the nature of the offense and the character of the offender. Ind. App. R. 7(B). "When considering the appropriateness of the sentence for the crime committed, courts should initially focus upon the presumptive sentence." Asher v. State, 790 N.E.2d 567, 570 (Ind. Ct. App. 2003). That sentence is meant to be the starting point for the trial court's consideration of the sentence that is appropriate for the crime committed. Id. "The trial court may then consider deviation from the presumptive sentence based upon a balancing of the factors that must be considered in accordance with Indiana Code Section 35-38-1-7.1(a), together with any discretionary aggravating and mitigating factors found to exist." Id. The presumptive sentence for a Class D felony is one and one-half years, but the trial court may enhance the sentence to a maximum of three years or reduce it to a minimum of six months. Ind. Code § 35-50-2-7.

Under the "character of the offender" prong of Rule 7(B), we note Hartman's criminal history:

1. 1994: Juvenile adjudication for Theft (committed to the Indiana Boys School; unsatisfactory discharge from probation in 1997)

> 2. 1997: Receiving Stolen Property, as a Class D felony (dismissed upon payment of restitution)
>
> 3. 1997: Two counts of Forgery, as Class C felonies (sentenced to four years on each count with two years suspended, to run concurrently); Theft, as a Class D felony (sentenced to one year with one year suspended)
>
> 4. 1997: Burglary, as a Class C felony (sentenced to four years with three years suspended and probation; probation was later revoked and sentence was ordered to be served consecutive to other sentences)
>
> 5. 1997: Theft, as a Class D felony (sentenced to one year)
>
> 6. 1998: Possession of Marijuana, a Class A misdemeanor (dismissed)
>
> 7. 2000: Conversion, as a Class A misdemeanor (sentenced to one year)
>
> 8. 1999: Resisting Law Enforcement, a Class A misdemeanor (dismissed)
>
> 9. 2004: Theft, as a Class D felony (sentenced to three years with one year suspended)
>
> 10. 2004: Receiving Stolen Property, as a Class D felony (pending at the time of sentencing in the instant case)

And at Hartman's sentencing in this case, the trial court stated as follows:

> A review of your files not only indicates the dates on which [you committed prior offenses], it also indicates your every effort to avoid punishment. Your every effort through and including today. You are an habitual criminal. You are not charged as such, but you have accumulated in your short lifetime five felony convictions. It only takes three to become an habitual criminal. I believe that this court has given you every opportunity to straighten your life out. Today as we sit here, the State has dismissed a Class C felony which is eight years in prison [of] which I'm sure you are aware. How many breaks do you think you are entitled to? How many times do you think this court, this prosecutor's office, this probation department need[] to try to work with you so that you can quit or keep your hands off of other people's stuff? Maybe you have turned the corner. If you haven't by now, you're not going to. It would be my prediction that if you have not, in fact, done so as we sit here today, you will steal again and you will continue to steal unless you are in prison. I'm going to give you the maximum sentence of three years, credit for twenty-two days and in eighteen months or less, probably less, you will be free.

> And as far as this court is concerned, you'll have no further obligation to it or to the people of this county other than to keep your hands off their stuff. I think if you talk about what's in your heart of hearts, you know you've got it coming. I've tried to make it clear to you on previous occasions that you were going to have it coming and yet you continue to beg for leniency. I've sentenced people to the maximum who have done far less than you have. I wish you good luck. I hope you have turned the corner. Once you have paid this debt, we're clear. . . . I direct that you make restitution in the amount of $587.50 to Borgman's Auto Sales and that restitution will be deducted from your bail.

Transcript at 43-45.

Hartman argues that he is "not the worst of all offenders." Appellant's Brief at 7. We addressed such arguments generally in Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), trans. denied:

> There is a danger in applying this principle . . . . If we were to take this language literally, we would reserve the maximum punishment for only the single most heinous offense. . . . This leads us to conclude the following with respect to deciding whether a case is among the very worst offenses and a defendant among the very worst offenders, thus justifying the maximum sentence: We should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character.

Here, Hartman's criminal history, as evidenced in the record and by the trial court's statement when it pronounced sentence, shows that Hartman is a repeat offender. At the time of sentencing, Hartman had six felony convictions, one misdemeanor conviction, and a pending felony case, and his history included the dismissal of one felony and two misdemeanor charges. Five of Hartman's prior convictions are for felonies related in kind to the present offense. And the trial court noted twice that Hartman cannot seem to "keep [his] hands off other people's stuff." Transcript at 44. On such facts, we cannot

say that the trial court abused its discretion when it imposed an enhanced three-year sentence.

Hartman also argues that his sentence is inappropriate in light of the nature of the offense. Specifically, he contends that the theft was "not particularly egregious." Appellant's Brief at 7. Although the instant offense may not be "particularly egregious," we conclude that the enhancement of Hartman's sentence was based primarily on his character. Given that fact, as well as our determination above that the enhancement was not improper in light of Hartman's character, we hold that the sentence imposed by the trial court is not inappropriate.

Affirmed.

DARDEN, J., and BAKER, J., concur.