ATTORNEY FOR APPELLANT:

JOHN PINNOW
Special Assistant to State Public Defender
Greenwood, Indiana

ATTORNEYS FOR APPELLEE:

STEPHEN R. CARTER
Attorney General of Indiana
Indianapolis, Indiana

KELLY A. MIKLOS
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CURTIS MEDINA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0604-CR-163
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Sanford Brook, Judge
Cause No. 71D07-9701-CF-26

NOVEMBER 29, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Defendant-Appellant Curtis Medina appeals his conviction and sentence for conspiracy to commit robbery, a Class A felony. Ind. Code § 35-42-5-1.

We affirm.

Medina raises three issues, which we restate as:

I. Whether *Blakely v. Washington* applies to this case.

II. Whether the trial court properly and appropriately sentenced Medina.

III. Whether the trial court committed fundamental error in accepting Medina's guilty plea.

In December 1996, Medina, with three other men, agreed to rob the people in a trailer in Mishawaka, Indiana. The three men, armed with guns, entered the trailer while Medina waited outside. Shots were fired inside the trailer, and the robbers fled. A young woman inside the trailer died from a gunshot wound to the head. Based upon his involvement in this incident, Medina was charged with conspiracy to commit robbery, a Class B felony; robbery, a Class A felony, and murder. Subsequently, the State filed an additional charge of conspiracy to commit robbery as a Class A felony. This is the charge to which Medina pleaded guilty. Medina's plea agreement was an "open plea" that gave the trial court full discretion in determining his sentence. Pursuant to his guilty plea, the court sentenced him to thirty-five (35) years in prison on August 6, 1997. In March 2006, Medina filed a motion for leave to file a belated notice of appeal, which was granted by the trial court. In April 2006, Medina filed his belated notice of appeal, and this appeal ensued.

Medina first contends that his sentence violates the rule set forth in *Blakely v. Washington*, 124 S.Ct. 2531 (2004) because it is based upon aggravating circumstances that were neither found by a jury nor admitted by him. Medina argues that *Blakely* retroactively applies to his belated sentencing appeal.

Blakely applies and further explains the rule previously set forth in *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000). *Apprendi* requires that any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Id*. at 2536. *Blakely* instructs that "[t]he relevant statutory maximum for *Apprendi* purposes is the maximum a judge may impose based solely on the facts reflected in the jury verdict or admitted by the defendant." *Id*. at 2537. Our Supreme Court considered the retroactive application of the *Blakely* rule and determined that it applies retroactively to cases pending on direct review or not yet final at the time that the *Blakely* decision was announced. *See Smylie v. State*, 823 N.E.2d 679, 687 (Ind. 2005), *cert. denied*, 126 S.Ct. 545, 163 L.Ed.2d 459. Thus, in order to determine whether *Blakely* applies to this case, we must first ascertain whether this case was pending on direct review or not yet final at the time the decision in *Blakely* was handed down.

Medina was sentenced in 1997. *Blakely* was handed down on June 24, 2004, and Medina filed his belated notice of appeal in April 2006. Therefore, Medina's direct appeal was not pending at the time that *Blakely* was decided.

In determining whether Medina's case was final when *Blakely* was announced, we first note some important rules. "A conviction becomes final for purposes of retroactivity

analysis when the availability of direct appeal has been exhausted." *Robbins v. State*, 839 N.E.2d 1196, 1199 (Ind. Ct. App. 2005). In addition, a timely notice of appeal must be filed within thirty days after the entry of a final judgment. Ind. Appellate Rule 9(A)(1). Medina was sentenced in August 1997, making his notice of appeal due to be filed in September 1997. However, this did not occur. Therefore, Medina's conviction became final for purposes of retroactivity in 1997, more than six years prior to the issuance of *Blakely*. Accordingly, Medina is not entitled to raise a *Blakely* challenge because *Blakely* does not apply retroactively to this case. This is true even though, at the time *Blakely* was announced, Medina still had the option of pursuing a belated appeal. *See Robbins*, 839 N.E.2d at 1198-99 (holding that *Blakely* would not apply retroactively to defendant's case where direct appeal was not pending at time *Blakely* opinion was issued and where right to pursue timely appeal had lapsed although option of pursuing belated appeal still existed).

Having determined that the *Blakely* rule does not apply in this case, we now turn to Medina's claims of sentencing error. Sentencing is a determination within the sound discretion of the trial court, and we will not reverse the trial court's decision absent an abuse of discretion. *Allen v. State*, 722 N.E.2d 1246, 1250 (Ind. Ct. App. 2000). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances of the case. *Groves v. State*, 823 N.E.2d 1229, 1231 (Ind. Ct. App. 2005). The broad discretion of the trial court includes whether to increase the presumptive sentence, to impose consecutive sentences, or both. *Jones v. State*, 807 N.E.2d 58, 68-69 (Ind. Ct. App. 2004), *trans. denied*, 822 N.E.2d 969.

Medina alleges that the court used improper aggravating circumstances to enhance his sentence. At sentencing, the court determined the aggravating circumstances to be: a reduced sentence would depreciate the seriousness of the crime, the defendant is in need of correctional and rehabilitative treatment that is best provided by a penal facility, the defendant is at high risk for committing further offenses, the nature and circumstances of the crime, and, as something less than a full aggravator, the defendant's history of contact with the juvenile system. Medina challenges the court's use of only the first four of these five aggravators.

We first address the factor that a reduced sentence would depreciate the seriousness of the offense. Medina correctly asserts that the trial court erroneously relied on this aggravating circumstance. The aggravating factor that imposing a reduced sentence would depreciate the seriousness of the crime cannot be used to justify an enhanced sentence, but may only be used when the judge considers imposing a sentence shorter than the presumptive one. *Hatchett v. State*, 740 N.E.2d 920, 929 (Ind. Ct. App. 2000), *trans. denied*, 753 N.E.2d 8 (2001). We find no indication in the transcript that the judge was considering imposing a sentence that was shorter in duration than the presumptive term. Therefore, to the extent that the trial court used this aggravating factor to justify an enhanced sentence, it did so in error.

Similarly, Medina contends that the trial court improperly considered as an aggravating factor that he is in need of correctional and rehabilitative treatment that is best provided by a penal facility. We agree with Medina that this is not a proper aggravating factor in this particular case. In order for the aggravator regarding the need

for correctional treatment at a penal facility to support an enhanced sentence, the court must give a specific and individualized reason why the defendant is in need of correctional treatment that can best be provided by a period of incarceration in excess of the presumptive sentence. *Id*. at 928-29. In the present case, the court did not set forth any explanation of why Medina is in need of treatment that is best provided by a term of imprisonment that exceeds the presumptive term. Therefore, this factor is not a proper aggravator in the present case.

The trial court also found as aggravating factors the high risk that Medina would commit further offenses and the nature and circumstances of the crime. Medina avers that these aggravators were improper. At the time Medina was sentenced, Ind. Code 35-38-1-7.1 provided, in pertinent part:

> (a) In determining what sentence to impose for a crime, the court shall consider:
>
> (1) the risk that the person will commit another crime;
>
> (2) the nature and circumstances of the crime committed;
>
> **********

As evidenced by the use of the term "shall," the court's consideration of these factors was mandatory.[1]

At Medina's sentencing hearing, the court received evidence that Medina had come into contact with the criminal justice system on numerous occasions as a juvenile commencing in 1991 and continuing steadily through the years to the present offense,

[1] The statute was amended in 2005 and no longer mandates consideration of these elements.

which occurred in 1996. Additionally, records indicate Medina served time in the Indiana Boys' School and that he was on probation when he committed the instant offense. *See e.g.*, *Ketcham v. State*, 780 N.E.2d 1171, 1182 (Ind. Ct. App. 2003), *trans. denied*, 792 N.E.2d 41 (concluding that defendant's risk for committing another crime was high in that he committed current offense while on probation). The trial court properly cited the risk that Medina would commit another crime as an aggravating factor.

The court also considered the nature and circumstances of Medina's crime. Medina claims that this was an invalid aggravating circumstance. He specifically states that the circumstances considered by the court were improper because they comprised the material elements of the charged offense.

As we stated above, the nature and circumstances of a crime was a proper aggravating circumstance at the time Medina was sentenced. *See*, *supra*, Ind. Code § 35-38-1-7.1(a)(2). A trial court may appropriately consider the particularized circumstances of a criminal act as an aggravating factor. *Smith v. State*, 780 N.E.2d 1214, 1219 (Ind. Ct. App. 2003), *trans. denied*, 792 N.E.2d 41. However, a fact that constitutes a material element of an offense may not be used as an aggravating circumstance to support an enhanced sentence. *Id*.

In finding the nature and circumstances of Medina's crime to be an aggravator, the trial court here stated that the crime was "heinous and tragic." Tr. at 47. Medina pleaded guilty to conspiracy to commit robbery as a Class A felony, which involves serious bodily injury to a person other than a defendant. Although serious bodily injury can be severe, it does not always end in death as it did in this case, and the fact of a heinous or

tragic death is not a material element of the offense of conspiracy to commit robbery as a Class A felony. *See e.g.*, *Martin v. State*, 784 N.E.2d 997 (Ind. Ct. App. 2003), *reh'g denied* (holding that trial court, in citing extreme brutality of crime, properly considered nature and circumstances of crime as aggravating factor in sentencing defendant for conviction of battery resulting in serious bodily injury because extreme brutality was not element of crime). Therefore, the trial court did not err in relying on the nature and circumstances of the crime as an aggravating factor.

When a trial court improperly applies an aggravator but other valid aggravating circumstances exist, a sentence enhancement may still be upheld. *Hatchett*, 740 N.E.2d at 929. In the present case, two of the four challenged aggravating circumstances were properly used by the trial court. Thus, the enhancement of Medina's sentence is still supported by the remaining aggravating circumstances.

Medina also alleges that his sentence is inappropriate. Under Article VII, Section 6 of the Indiana Constitution, we have the constitutional authority to review and revise sentences. However, we will not revise the sentence imposed unless it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). Our review under Appellate Rule 7(B) is extremely deferential to the trial court. *Martin*, 784 N.E.2d at 1013. The "nature of the offense" refers to the statutory presumptive sentence for the class of crimes to which the offense belongs. *Id*. The "character of the offender" refers to the sentencing considerations in Ind. Code § 35-38-1-7.1, which sets forth general sentencing considerations, as well as aggravating and mitigating factors. *Id*.

Under the heading of "nature of the offense," the presumptive sentence is the starting point in our consideration of the appropriate sentence for the crime committed. *Martin*, 784 N.E.2d at 1013. In the present case, Medina was convicted of a Class A felony. At the time he was sentenced, the fixed term for a Class A felony was thirty years, with a maximum sentence of fifty years and a minimum sentence of twenty years.[2] *See* Ind. Code § 35-50-2-4. Thus, the presumptive sentence for Melina was thirty years. The trial court enhanced the presumptive sentence by five years and imposed a thirty-five year sentence for Medina.

With regard to the "character of the offender" factor, we look to Ind. Code § 35-38-1-7.1. Pursuant to this statute, the trial court must consider certain factors, including the risk that the defendant will commit another crime, the defendant's criminal history, and the nature and circumstances of the current offense. Here, as we have previously addressed in our discussion of the aggravating factors, the court considered the risk that Medina would commit another crime to be high. The court further noted that Medina had had contact with the criminal justice system as a juvenile, and records submitted on appeal show Medina spent a period of time at the Indiana Boys' School. Moreover, these records indicate that Medina was on probation at the time of the current offense. In addition, the court characterized the nature and circumstances of this offense as "heinous

[2] On April 25, 2005, statutory amendments took effect in order to bring Indiana's sentencing scheme in line with the rationale of *Blakely v. Washington*, 124 S.Ct. 2531 (2004) and its progeny. To that end, the legislature has replaced the term "fixed" with the term "advisory" in our statutory sentencing scheme. However, Medina was sentenced on August 6, 1997, prior to the amendment taking effect.

and tragic" due to the resulting death of a young woman who was in the trailer at the time of the robbery.

Medina asserts that his sentence is inappropriate because he had a lesser role in this incident than his codefendants. This might be true had Medina been sentenced to a maximum sentence; however, he was not so sentenced. Rather, he received a mere five-year enhancement to the presumptive sentence for his contribution to the senseless death of a young woman.

Further, he states that he accepted responsibility for his role in this crime by pleading guilty. Indeed, the court found Medina's acceptance of responsibility for his actions as one of the mitigating circumstances. However, a sentencing court need not agree with the defendant as to the weight or value to be given mitigating facts. *Bostick v. State*, 804 N.E.2d 218, 225 (Ind. Ct. App. 2004).

It is clear that despite Melina's previous contact with the criminal justice system, including his time at Boy's School, he has continued to disregard the law. Given these circumstances, we cannot say the sentence was inappropriate for the nature of the crime and the character of the offender.

As his final allegation of error, Medina contends that fundamental error occurred when the trial court accepted his plea of guilty to the Class A felony charge of conspiracy to commit robbery although the charging information alleged only the elements of a Class B felony of that charge.

The offense of robbery is defined as:

> A person who knowingly or intentionally takes property from another person or from the presence of another person (1) by using or threatening the use of force on any person; or (2) by putting any person in fear; commits robbery, a Class C felony. However, the offense is a Class B felony if it is committed while armed with a deadly weapon or results in bodily injury to any person other than a defendant, and a Class A felony if it results in serious bodily injury to any person other than a defendant.

Ind. Code § 35-42-5-1. The information for the present case provides, in pertinent parts:

> Count IV:
> INFORMATION FOR CONSPIRACY
> TO COMMIT ROBBERY,
> CLASS A FELONY
>
> On or about the 27th day of December, 1996, in St. Joseph County, State of Indiana, Curtis Medina, with intent to commit a felony, to-wit: robbery, did agree with Taurus Foster, James Wilder and Jimmy Bailey to commit the crime of robbery, that is: knowingly or intentionally, while armed with a deadly weapon, take property from or from the presence of another person by force, by threatening the use of force on any person, or by placing any person in fear, and Curtis Medina did perform an overt act, to-wit: he went to 1540 E. Jefferson St., Mishawaka, St. Joseph County, Indiana with Taurus Foster, Jimmy Bailey and James Wilder, knowing they were armed with deadly weapons, to-wit: firearms, in furtherance of the agreement, to commit the crime of robbery.

Tr. at 42.

During the guilty plea hearing, the court asked Medina whether it was his intention to enter a plea of guilty to conspiracy to commit robbery as a Class A felony, to which Medina answered affirmatively. The court further inquired whether the signature on the plea agreement was Medina's and whether Medina had read the agreement and talked to his attorney about the agreement. Medina replied in the affirmative to all of these questions. The court then read through the agreement, classifying the charge as conspiracy to commit robbery, as a Class A felony. In addition, the court correctly

expressed the possible penalties for a Class A felony, to which Medina acknowledged his understanding. The court then asked Medina to state what happened the night of the robbery in order to establish a factual basis for his plea. As part of his narrative, Medina explained that, while he was outside of the trailer and his codefendants were inside, he heard two shots fired and that, as they were leaving the scene, his co-defendants stated that they thought someone had been shot. Moreover, the plea agreement signed and acknowledged by Medina designates the offense as conspiracy to commit robbery as a Class A felony and lists the correct possible penalties.

Subsequently, at the sentencing hearing, Medina's counsel acknowledged to the court, "Judge, we feel that the conspiracy to commit robbery, appropriately fit[s] what happened in this case" and discussed what he termed the "tragic end result." Tr. at 35 and 37. The State voiced its agreement and discussed that "the death occurred as a result of the robbery, which is reflected in the plea of guilty to the A felony." Tr. at 39. Medina, too, addressed the resulting death by apologizing for the loss of the victim. Tr. at 39.

Thus, although the information charging Medina with the offense of conspiracy to commit robbery as a Class A felony does not mention that the robbery resulted in serious bodily harm, this appears to be merely an oversight. Based upon the transcript and the records before us, it is apparent that the mistake in the charging information is a clerical error. Neither the trial court, nor Medina's counsel, nor the State refer to the charge as anything but the offense of conspiracy to commit robbery as a Class A felony. Medina does not argue that he was not aware that he was pleading to a Class A felony; rather, in

his brief, he acknowledges that he pleaded guilty to a Class A felony pursuant to the plea agreement. He further makes no claim that his plea was not voluntary, knowing or intelligent, and he neither alleges nor makes any showing that this mistake affected his decision to plead guilty. Therefore, we find no error.

Based upon the foregoing discussion and authorities, we conclude that *Blakely v. Washington* does not apply to this case, that the trial court properly sentenced Medina and that his sentence is appropriate, and that the trial court properly accepted Medina's guilty plea.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.