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IN THE COURT OF APPEALS OF INDIANA

JUSTIN M. ADDLER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

No. 79A02-0601-CR-41

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0410-FA-8

November 30, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Justin M. Addler appeals the forty-six year sentence he received after pleading guilty to dealing in cocaine as a Class A felony[1] and carrying a handgun while a convicted felon as a Class C felony.[2] He asserts the court erroneously found and balanced the aggravators and mitigators and the sentence is inappropriate in light of his character and offense. Because the court neither abused its discretion nor gave Addler an inappropriate sentence, we affirm.

FACTS AND PROCEDURAL HISTORY

On October 15, 2004, some Lafayette residents reported they believed their houseguest, Addler, had stolen cash from their house. The next day they again called police, this time to report that Addler was back at their house. Officer Cudworth arrived and attempted to apprehend Addler. Addler ran, and Officer Cudworth chased him on foot. Addler tried to jump over a fence, but fell. As he stood up, he pointed a .357 Magnum at Officer Cudworth. Officer Cudworth drew his weapon and ordered Addler to drop the gun. Addler lowered his weapon and ran.

A short time later, police apprehended Addler within one thousand feet of a school. A search of Addler and the surrounding area uncovered a digital scale, 59 grams of cocaine, 20 grams of marijuana, and the .357 Magnum.

The State charged Addler with dealing in cocaine as a Class A felony, possession of cocaine as a Class A felony,[3] carrying a handgun while a convicted felon as a Class C felony, pointing a firearm as a Class D felony,[4] resisting law enforcement as a Class D

[1] Ind. Code § 35-48-4-1.
[2] Ind. Code §§ 35-47-2-1; 35-47-2-23(c).
[3] Ind. Code § 35-48-4-6.
[4] Ind. Code § 35-47-4-3(b).

felony,[5] possession of marijuana as a Class A misdemeanor,[6] use of a firearm in a controlled substance offense,[7] and being an habitual offender.[8] Addler agreed to plead guilty to dealing in cocaine and carrying a handgun while a felon in exchange for the State dismissing the remaining charges.

The court sentenced Addler as follows:

> The Court finds as mitigating factors the defendant has taken responsibility for his actions and the Defendant has strong family support.
>
> The Court finds as aggravating factors the nature and circumstances of the crime, the Defendant has a history of criminal or delinquent activity, the Defendant has a long term substance abuse history and there have been prior attempts at rehabilitation that have been unsuccessful.
>
> The Court finds the aggravating factors outweigh the mitigating factors.
>
> The Court having considered the written Pre-Sentence Report and argument of counsel, now accepts the recommendation of the Probation Department and sentences the Defendant to the Indiana Department of Correction for a period of forty (40) years on Count I, a Class A felony, and six (6) years on Count III, a Class C felony to run consecutively with Count I for a total sentence of forty-six (46) years.

(App. at 6-7.)

DISCUSSION AND DECISION

1. Aggravators and Mitigators

Sentencing lies within the discretion of the trial court. *Hayden v. State*, 830 N.E.2d 923, 928 (Ind. Ct. App. 2005), *trans. denied* 841 N.E.2d 184 (Ind. 2005). If a trial court uses aggravating or mitigating circumstances to enhance the presumptive

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[5] Ind. Code § 35-44-3-3(a)(3)(b)(1).
[6] Ind. Code § 35-48-4-11.
[7] Ind. Code § 35-50-2-13(a).
[8] Ind. Code § 35-50-2-8.

sentence,[9] it must (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. *Id.* The trial court's assessment of the proper weight of mitigating and aggravating circumstances and the appropriateness of the sentence as a whole is entitled to great deference and will be set aside only upon a showing of a manifest abuse of discretion. *Id.* Even a single aggravating circumstance may support the imposition of an enhanced sentence. *Id.*

Addler claims the trial court erroneously labeled as an aggravator the fact he pointed a firearm at a police officer, because an element of one of his offenses cannot be an aggravator. *See Henderson v. State*, 769 N.E.2d 172, 180 (Ind. 2002) (a trial court may not use as an aggravating circumstance a material element of an offense). Addler pled guilty to carrying a handgun while a convicted felon, which required only that he "carry a handgun in any vehicle or on or about the person's body." Ind. Code § 35-47-2-1. Pointing a .357 Magnum at a police officer is not an element of that offense and accordingly the court did not abuse its discretion when finding this aggravator.

The other aggravators were that "the Defendant has a history of criminal or delinquent activity, the Defendant has a long term substance abuse history and there have been prior attempts at rehabilitation that have been unsuccessful." (App. at 6.) Addler asserts those represent not three, but one aggravator – he has a criminal history.

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[9] In 2005, in response to *Blakely v. Washington*, 542 U.S. 296 (2004), *reh'g denied* 542 U.S. 961 (2004), our legislature modified the sentencing statutes to provide for "advisory" rather than "presumptive" sentences. Because Addler's crime occurred prior to the enactment of those new sentencing statutes, we apply the prior versions. *See Creekmore v. State*, 853 N.E.2d 523, 528-29 (Ind. Ct. App. 2006) ("the application of the new sentencing statutes to crimes committed before the effective date of the amendments violates the prohibition against *ex post facto* laws"), *reh'g petition pending*.

However, the record provides sufficient information independent of Addler's criminal history from which the court could find Addler has a long history of substance abuse. The presentence investigation report outlines Addler's drug use and abuse since he was twelve, including use of alcohol, marijuana, cocaine, crack cocaine, methamphetamines, LSD, Oxycontin, Xanax, Valium, Klonopin, and Lortab. That report notes fifteen treatment programs Addler entered to receive assistance with his substance abuse. Accordingly, this aggravator was independent of his criminal history.

As for the finding "prior attempts at rehabilitation . . . have been unsuccessful," (*id.*), it is not explicit whether the court was referring to criminal rehabilitation or substance abuse rehabilitation. If the former, Addler is correct that our Indiana Supreme Court has decided in the context of *Blakely* analyses that this fact cannot be cited as a separate aggravator; rather, it is "more properly characterized as" an observation about the weight to be given the defendant's criminal history. *Williams v. State*, 838 N.E.2d 1019, 1021 (Ind. 2005). However, Addler waived his *Blakely* rights and submitted to fact-finding by the court. Because he has not provided citation to authority suggesting this aggravator was improper under that circumstance, we decline to find the trial court abused its discretion. *See id.* (suggesting the facts might constitute separate aggravators if there was "a jury determination").

Addler also asserts the court abused its discretion when it failed to find as mitigators that he pled guilty and had a "turbulent childhood." (Br. of Appellant at 12.) The trial court is not required to find mitigating circumstances. *Bocko v. State,* 769 N.E.2d 658, 667 (Ind. Ct. App. 2002), *trans. denied* 783 N.E.2d 702 (Ind. 2002). When a

defendant offers evidence of mitigators, the trial court has the discretion to determine whether the factors are mitigating, and it is not required to explain why it does not find the proffered factors to be mitigating. *Id.*

"A guilty plea is not automatically a significant mitigating factor." *Sensback v. State*, 720 N.E.2d 1160, 1165 (Ind. 1999). In fact, "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*. In exchange for Addler's guilty plea, the State dismissed a Class A felony, two Class D felonies, a Class A misdemeanor, and two sentencing enhancements. Because Addler received a significant benefit in exchange for his pleas, we cannot find the court abused its discretion in declining to find this mitigator.

Neither can we find the court erred when it declined to find a mitigator in Addler's turbulent childhood. The death of Addler's father when Addler was young and his mother's remarriage to an alleged alcoholic are sad circumstances; nevertheless, the court is not obliged to find mitigating factors or explain why it has chosen not to do so. *Wilkie v. State*, 813 N.E.2d 794, 799 (Ind. Ct. App. 2004), *trans. denied* 822 N.E.2d 981 (Ind. 2004), *disapproved on other grounds by Childress v. State*, 848 N.E.2d 1073 (Ind. 2006).

We affirm the court's finding of aggravators and mitigators. In light of the properly found aggravators and mitigators, we cannot find an abuse of discretion in the trial court's balancing of those factors and imposition of two enhanced sentences ordered to run consecutively.

2. Inappropriateness

A sentence that is authorized by statute will not be revised unless it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B); *Kien v. State*, 782 N.E.2d 398, 416 (Ind. Ct. App. 2003), *reh'g denied, trans. denied* 792 N.E.2d 47 (Ind. 2003). When considering the appropriateness of the sentence for the crime committed, the sentencing court should focus initially on the presumptive sentence. *Id.* It may then consider deviation from the presumptive sentence based on a balancing of the factors that must be considered pursuant to Ind. Code § 35-38-1-7.1(a)[10] together with any discretionary aggravating and mitigating factors found to exist. *Id.*

The presumptive sentence for a Class A felony was thirty years, and the court could add twenty years for aggravators or delete ten years for mitigators. Ind. Code § 35-50-2-4 (Burns' 2004 Replacement Volume). For a Class C felony, the presumptive sentence was four years, and the court could add four years for aggravators or subtract

[10] When Addler's crime was committed, that section provided:

> (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;
> (3) the person's:
> (A) prior criminal record;
> (B) character; and
> (C) condition;
> (4) whether the victim of the crime was less than twelve (12) years of age or at least sixty-five (65) years of age;
> (5) whether the person committed the offense in the presence or within hearing of a person who is less than eighteen (18) years of age who was not the victim of the offense;
> (6) whether the person violated a protective order issued against the person under IC 31-15, IC 31-16, or IC 34-26-5 (or IC 31-1-11.5, IC 34-26-2, or IC 34-4-5.1 before their repeal); and
> (7) any oral or written statement made by a victim of the crime.

Ind. Code § 35-38-1-7.1(a) (Burns' 2004 Replacement Volume).

two years for mitigators. Ind. Code § 35-50-2-6 (Burns' 2004 Replacement Volume). The court sentenced Addler to forty years for the Class A felony and six years for the Class C felony, to be served consecutively.

Addler claims his forty-six year sentence is inappropriate, but we cannot agree. Twenty-two-year-old Addler's criminal history includes three adjudications as a delinquent child and adult convictions of two counts of attempted theft as a Class D felony and of one count of illegal consumption as a Class C misdemeanor. Addler was released to probation after all three adult convictions, and each time his probation was revoked. His one term of probation as a juvenile was also revoked. Addler had other charges pending when he was sentenced for these crimes. In light of his criminal history and his substance abuse problems outlined above, we cannot find his sentence inappropriate in light of his character.

As for his crime, Addler disobeyed an officer's order to stop, he resisted arrest, he pointed a firearm at a police officer, and he possessed significant quantities of cocaine and marijuana in the vicinity of a school. In light of all the crimes he committed, we cannot find his sentence inappropriate.

Affirmed.

RILEY, J., concurs.

BAILEY, J., concurs in result.