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IN THE COURT OF APPEALS OF INDIANA

TERRY TAYLOR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-1102-CR-162
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-1008-FA-11

October 25, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Terry Taylor appeals following his conviction for Class A felony Dealing in Cocaine[1] and two counts of Class A misdemeanor Resisting Law Enforcement.[2] Specifically, Taylor contends that the evidence is insufficient to sustain his Class A felony dealing in cocaine conviction, that the trial court abused its discretion in sentencing him, and that his sentence is inappropriate. We affirm.

FACTS AND PROCEDURAL HISTORY

In the early morning hours of August 14, 2010, Lafayette police officers were dispatched to Rhiele Brother's Bar ("Rhiele's"). Upon arriving at Rhiele's, Officer Jeff Webb observed a large group of people exiting the bar with several Rhiele's security personnel chasing the individuals and attempting to grab them. Officers Jeff Tislow and Zachary Hall arrived shortly thereafter and were informed by Officer Webb that Rhiele's security personnel were attempting to take custody of a person who had battered the bartender. Officers Webb, Tislow, and Hall approached a vehicle after Rhiele's security personnel indicated that the individual who battered the bartender was inside the vehicle.

As the officers approached, Taylor exited the vehicle and fled. Officer Tislow ordered Taylor to stop and attempted to grab him, but Taylor "took a swing at [him]" and escaped. Tr. p. 40. Officer Tislow continued to pursue Taylor as Taylor fled, and was no more than two or three feet from Taylor throughout the pursuit. At some point, Taylor tripped and fell. Taylor attempted to continue to flee, but fell to the ground and was handcuffed after Officer

[1] Ind. Code § 35-48-4-1 (2010).

[2] Ind. Code § 35-44-3-3(a)(1) (2010).

Tislow used his taser on Taylor. Upon searching the area through which Taylor fled, officers found twenty-one dollars, Taylor's crumpled social security card, and a plastic bag containing seven smaller baggies, each containing a white, rock-like substance that was later determined to be cocaine.

On August 19, 2010, the State charged Taylor with Class A felony dealing in cocaine, Class C felony possession of cocaine, and two counts of Class A misdemeanor resisting law enforcement. Following trial, a jury found Taylor guilty of all charges. The trial court ordered that the Tippecanoe County Probation Department complete a pre-sentence investigation report ("PSI"),[3] and set the matter for sentencing. On February 4, 2011, the trial court merged the Class C felony possession of cocaine conviction into the Class A felony dealing in cocaine conviction, and sentenced Taylor to "a period of thirty-five (35) years for the crime of Dealing in Cocaine, as charged in Count I, a Class A felony, one (1) year for the crime of Resisting Law Enforcement, a Class A misdemeanor and one (1) year for the crime of Resisting Law Enforcement, a Class A misdemeanor." Appellant's App. p. 81. The trial court ordered that the sentences "shall run concurrently for a total of thirty-five (35) years." Appellant's App. p. 81. This appeal follows.

DISCUSSION AND DECISION

I. Whether the Evidence is Sufficient to Sustain Taylor's Conviction

[3] Taylor included a copy of the PSI in his appendix on white paper. We remind Taylor that Indiana Appellate Rule 9(J) requires that documents and information excluded from public access pursuant to Indiana Administrative Rule 9(G)(1), which includes pre-sentence investigations reports, must be filed in accordance with Indiana Trial Rule 5(G). That rule provides that such documents must be tendered on light green paper or have a light green coversheet and be marked "Not for Public Access" or "Confidential." Ind. Trial Rule 5(G)(1).

Taylor contends that the evidence presented at trial is insufficient to sustain his conviction for Class A felony dealing in cocaine.

> Our standard of review for a challenge to the sufficiency of the evidence is well-settled. When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the conviction. *Boyd v. State*, 889 N.E.2d 321, 325 (Ind. Ct. App. 2008). We do not assess witness credibility or reweigh the evidence. *Id*. We consider conflicting evidence most favorably to the trial court's ruling. *Id*. We affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Id*. The evidence is sufficient if an inference may reasonably be drawn from it to support the conviction. *Id*. "Where the evidence of guilt is essentially circumstantial, the question for the reviewing court is whether reasonable minds could reach the inferences drawn by the jury; if so, there is sufficient evidence." *Whitney v. State*, 726 N.E.2d 823, 825 (Ind. Ct. App. 2000). Further, we need not determine if the circumstantial evidence is capable of overcoming every reasonable hypothesis of innocence, but whether the inferences may be reasonably drawn from that evidence which supports the conviction beyond a reasonable doubt. *Bustamante v. State*, 557 N.E.2d 1313, 1318 (Ind. 1990).

Jones v. State, 924 N.E.2d 672, 674-75 (Ind. Ct. App. 2010).

In order to convict Taylor of Class A felony dealing in cocaine, the State was required to prove that Taylor possessed cocaine in an amount greater than three grams with intent to deliver it. *See* Ind. Code § 35-48-4-1(a)(2)(C)(b)(1). Taylor does not contest the jury's determination that he possessed more than three grams of cocaine, but rather the determination that he possessed the cocaine with the intent to deliver. "Intent is a mental function; therefore, absent an admission, the trier of fact must resort to reasonable inferences based upon an examination of the surrounding circumstances to determine whether, from the person's conduct and the natural consequences thereof, a showing or inference of intent to commit that conduct exists." *Stokes v. State*, 801 N.E.2d 1263, 1272 (Ind. Ct. App. 2004)

(citing *Isom v. State*, 589 N.E.2d 245, 247 (Ind. Ct. App. 1992)). Intent to deliver may be proved by circumstantial evidence. *Id*. (citing *Frierson v. State*, 572 N.E.2d 536, 537 (Ind. Ct. App. 1991)).

In *Lampkins v. State*, 682 N.E.2d 1268, 1276 (Ind. 1997), *clarified on other grounds on re'hg*, 685 N.E.2d 698 (Ind. 1997), the Indiana Supreme Court held that the evidence was sufficient to support the defendant's conviction for Class A felony dealing in cocaine where the evidence demonstrated that the defendant possessed 4.28 grams of cocaine which was divided into twenty-one rocks.[4] The rocks were sorted and packaged according to price and size. *Id*. In *Lampkins*, a narcotics investigator testified that he was familiar with the methods of packaging and selling illegal drugs and that the cocaine seized from the defendant was consistent with dealing. *Id*. In affirming the defendant's conviction, the Indiana Supreme Court held that "a jury could infer intent to deal from this evidence." *Id*.

Here, the facts most favorable to the judgment show that Taylor possessed 4.17 grams of crack cocaine which was divided into seven individual rocks. Each rock was packaged in a separate small plastic baggie and placed in one larger plastic bag. Detective Shumaker testified that he was familiar with the packaging and selling of cocaine, and that the packaging the seven rocks in individual baggies seized from Taylor was consistent with dealing. Detective Shumaker acknowledged that it was possible that a heavy user could possess over four grams of cocaine packaged as described above for personal use, but that it

[4] Detective Daniel Shumaker of the Lafayette Police Department testified that crack cocaine is sold by the "rock." Tr. p. 94.

was more consistent with dealing. Detective Shumaker further testified that in Lafayette, an individual possessing cocaine for personal use would generally also possess means to ingest the cocaine, known as a "crack pipe," and that here, police did not find a crack pipe. Tr. p. 95.

In light of the Indiana Supreme Court's decision in *Lampkins* considered together with Detective Shumaker's testimony that the amount and packaging of the cocaine seized from Taylor was more consistent with dealing than personal use, we conclude that the jury could infer intent to deliver from the above-stated evidence. Thus, we further conclude that the evidence is sufficient to sustain Taylor's conviction for Class A felony dealing in cocaine. Taylor's claim on appeal effectively amounts to an invitation for this Court to reweigh the evidence, which we decline. *Jones*, 924 N.E.2d 672, 674.

II. Whether the Trial Court Abused its Discretion in Sentencing Taylor

Taylor also contends that the trial court abused its discretion in sentencing him following his conviction for Class A felony dealing in cocaine. In raising this claim, Taylor challenges the aggravating factors relied on by the trial court at sentencing. Taylor also argues that the trial court abused its discretion by failing to find any mitigating factors.

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *modified on other grounds on reh'g*, 875 N.E.2d 218 (Ind. 2007). "An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be

drawn therefrom." *Id*. (quotation omitted). When imposing a sentence in a felony case, the trial court must provide a reasonably detailed sentencing statement explaining its reason for imposing the sentence. *Id*.

> One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that explains reasons for imposing a sentence-including a finding of aggravating and mitigating factors if any-but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.

Id. at 490-91.

In sentencing Taylor, the trial court found the following aggravating factors: (1) Taylor's criminal history; (2) Taylor's illegal use of drugs and alcohol; (3) Taylor failed to take responsibility for his actions; (4) Taylor's poor Level of Service Inventory-Revised ("LSI-R") score;[5] (5) the minimum sentence is non suspendable; (6) prior attempts at rehabilitation have failed; and (7) Taylor was out on bond at the time he committed the instant offense. The trial court found no mitigating factors. After considering each of these

[5] In *Malenchik v. State*, 928 N.E.2d 564, 571 (Ind. 2010), the Indiana Supreme Court noted that the product description and explanation regarding intended use provides that:

> [The LSI-R] is a quantitative survey of offender attributes and their situations relevant to level of supervision and treatment decisions. Designed for ages 16 and older, the LSI–R helps predict parole outcome, success in correctional halfway houses, institutional misconducts, and recidivism.... [It] can be used by probation and parole officers and correctional workers in jails, detention facilities, and correctional halfway houses to assist in the allocation of resources, help make decisions about probation and placement, make appropriate security level classifications, and assess treatment progress.

quoting (LSI–R: Level of Service Inventory–Revised, Product Description, http://www.mhs.com/product.aspx?gr=saf&prod=lsi-r&id=overview (last visited June 9, 2010)).

factors, the trial court imposed an enhanced thirty-five-year term.[6]

A. Aggravating Factors

On appeal, Taylor concedes that the trial court properly considered his criminal history and the fact that he was out on bond at the time he committed the instant offenses to be aggravating factors at sentencing. Taylor argues, however, that the trial court improperly considered his history of illegal drug and alcohol use, his poor LSI-R score, his failure to accept responsibility for his actions, previous attempts at rehabilitation have failed, and the fact that his minimum sentence was non-suspendible to be aggravating factors.

1. History of Drug and Alcohol Use

Taylor claims that the trial court abused its discretion in considering his history of drug and alcohol use as an aggravating factor at sentencing. Taylor argues that the trial court abused its discretion in considering this factor because it demonstrated criminal activity and thus should not be considered separate from his criminal history. However, despite Taylor's claim, this court has previously held that "[a] history of substance abuse may constitute a valid aggravating factor." *Roney v. State*, 872 N.E.2d 192, 199 (Ind. Ct. App. 2007) (citing *Iddings v. State*, 772 N.E.2d 1006, 1018 (Ind. Ct. App. 2002)), *trans. denied*. Accordingly, we conclude that the trial court acted within its discretion in finding Taylor's history of drug and alcohol use to be an aggravating factor. *See id.*

2. Poor LSI-R Score

[6] Indiana Code section 35-50-2-4 (2010) provides that a person who commits a Class A felony shall be imprisoned for a fixed term of between twenty and fifty years, with the advisory sentence being thirty years.

Taylor next argues that the trial court abused its discretion by considering his LSI–R score as an aggravating factor. In *Malenchik*, the Indiana Supreme Court held that an LSI-R score does not by itself constitute a separate aggravating or mitigating factor because neither the data selection and evaluations upon which a probation officer or other administrator's assessment is made nor the resulting scores are necessarily congruent with a sentencing judge's findings and conclusion regarding relevant sentencing factors. *Malenchik*, 928 N.E.2d at 573. However, the Indiana Supreme Court further held that an LSI-R score should be considered to supplement and enhance a judge's evaluation, weighing, and application of the other sentencing evidence in the formulation of an individualized sentencing program appropriate for each defendant. *Id*. Accordingly, we conclude that while the trial court abused its discretion in finding Taylor's poor LSI-R score to be a separate aggravating factor, the trial court did not abuse its discretion in considering the LSI-R score as a supplement in conjunction with the aggravating factors supported by the evidence. *See id.* at 575.

3. Failure to Accept Responsibility for His Actions

Taylor further claims that the trial court abused its discretion in finding his failure to accept responsibility for his actions to be an aggravating factor. In raising this claim, Taylor cites to *Smith v. State*, 655 N.E.2d 532, 539 (Ind. Ct. App. 1995), *trans. denied*, for the proposition that he was not required to admit his crimes and could maintain his innocence, even after conviction. While we agree that Taylor was entitled to maintain his innocence, even after conviction, we observe that the Indiana Supreme Court has held that lack of remorse is a proper factor for a trial court to consider in imposing a sentence. *Deane v. State*,

759 N.E.2d 201, 205 (Ind. 2001). In *Deane*, the Indiana Supreme Court rejected the defendant's claim that the trial court abused its discretion in finding his lack of remorse to be an aggravating factor, finding that the trial court's finding of lack of remorse was not based solely upon the defendant's denial of guilt. *Id*.

Similarly here, we cannot conclude that the trial court's determination that Taylor lacked remorse was based solely upon his denial of guilt. Taylor showed no regret and tried to downplay his actions by explaining to the court that at the time of his arrest, he ran from police because he started the fight in the bar, not because of any drug activity. Taylor did not dispute Officer Tislow's testimony that Taylor "took a swing at [him]" while fleeing. Tr. p. 40. In considering Taylor's explanation, the trial court was in the best position to evaluate its plausibility, Taylor's appreciation for the seriousness of the charged offenses, as well as Taylor's demeanor and truthfulness during the sentencing hearing. Accordingly, we cannot say that the trial court abused its discretion in considering Taylor's failure to accept responsibility for his actions to be an aggravating factor.

4. Previous Attempts at Rehabilitation Have Failed

Taylor argues that the trial court may not use prior unsuccessful attempts at rehabilitation as a separate aggravating factor because it is a derivative of his criminal history. In *McMahon v. State*, 856 N.E.2d 743, 751 n.8 (Ind. Ct. App. 2006), this court recognized that under the former presumptive sentencing scheme, a defendant's criminal history and a judicial statement that prior attempts to rehabilitate him have been unsuccessful could not serve as separate aggravating circumstances because of the restrictions imposed by

Blakely v. Washington, 542 U.S. 296 (2004). (citing *Morgan v. State*, 829 N.E.2d 12, 17 (Ind.2005)). However, because our legislature has remedied the *Blakely* infirmities in our sentencing scheme, this claim of error is not available to defendants sentenced under the new statutes. *McMahon*, 856 N.E.2d at 751 n.8.

Here, Taylor's crimes were committed in August of 2010, well after the Indiana General Assembly remedied the *Blakely* issues in our sentencing statute. Thus, Taylor's claim that the trial court abused its discretion in considering his prior failed attempts at rehabilitation as a separate aggravator from his criminal history is no longer available. Accordingly, we conclude that the trial court did not abuse its discretion in this regard.

5. Minimum Sentence Non-Suspendible

Taylor also claims that the trial court abused its discretion in finding the fact that the minimum sentence for his Class A felony conviction was non-suspendible to be an aggravating factor. Indiana Code section 35-50-2-2 (2010) provides, in relevant part, that the trial court "may suspend only that part of the sentence that is in excess of the minimum sentence" if "[t]he crime committed was a Class A felony … and the person has a prior unrelated felony conviction." It is undisputed that Indiana Code section 35-50-2-2 applies to the instant matter because Taylor's criminal history includes a prior unrelated felony conviction. Thus, the non-suspendible nature of the sentence for Taylor's instant conviction would seem to be derived, at least in part, from his criminal history. Accordingly, we conclude that the trial court abused its discretion in finding the non-suspendible nature of Taylor's sentence to be an aggravating factor separate from his criminal history.

B. Mitigating Factors

Taylor also argues that the trial court abused its discretion in failing to find any mitigating factors. Specifically, Taylor claims that the trial court abused its discretion by failing to find his history of drug and alcohol abuse and his young age to be mitigating factors. The allegation that the trial court failed to find a mitigating factor requires Taylor to establish that the mitigating evidence is both significant and clearly supported by the record. *Anglemyer*, 868 N.E.2d at 493. "However, '[i]f the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist.'" *Id.* (quoting *Fugate v. State*, 608 N.E.2d 1370, 1374 (Ind. 1993)). Likewise, the trial court is not "obligated to weigh or credit the mitigating factors the way a defendant suggests they should be weighed or credited." *Abel v. State*, 773 N.E.2d 276, 280 (Ind. 2002).

1. History of Drug and Alcohol Abuse

Taylor claims that the trial court abused its discretion in failing to find his history of drug and alcohol abuse to be a mitigating factor. However, the Indiana Supreme Court has held that a trial court is not required to consider a defendant's substance abuse to be a mitigating factor. *See James v. State*, 643 N.E.2d 321, 323 (Ind. 1994). In addition, as is discussed above, we have already concluded that the trial court acted within its discretion in finding Taylor's history of drug and alcohol use to be an aggravating factor at sentencing. Moreover, to the extent that Taylor argues that he was unaware of his prior drug and alcohol abuse, the record demonstrates that Taylor admitted that he had used drugs since the age of

seventeen and that Taylor had numerous prior drug-related convictions. Thus, we conclude that the trial court did not abuse its discretion in failing to find Taylor's history of drug and alcohol abuse to be a mitigating factor at sentencing.

2. Young Age

Taylor also claims that the trial court abused its discretion in failing to find his young age to be a mitigating factor.

> "[A] defendant's youth, although not identified as a statutory mitigating circumstance, is a significant mitigating circumstance in some circumstances." *Brown v. State*, 720 N.E.2d 1157, 1159 (Ind. 1999). However, youth is not automatically a significant mitigating circumstance. *Gross v. State*, 769 N.E.2d 1136, 1141 n. 4 (Ind. 2002). As our supreme court has observed, "There are both relatively old offenders who seem clueless and relatively young ones who appear hardened and purposeful." *Ellis v. State*, 736 N.E.2d 731, 736 (Ind. 2000).

Smith v. State, 872 N.E.2d 169, 178 (Ind. Ct. App. 2007). Moreover, in *Bryant v. State*, 802 N.E.2d 486, 502 (Ind. Ct. App. 2004), *trans. denied*, this court described a defendant who was one month shy of his eighteenth birthday as "not so 'youthful.'"

Here, Taylor was twenty years old when he committed the instant offense, by which time Taylor had amassed a substantial criminal history. Nothing in the record suggests that Taylor's actions were in any way related to his age or naiveté that sometimes accompanies youthfulness. Under these circumstances, we cannot say that the trial court abused its discretion in not finding Taylor's relatively young age to be a mitigating factor at sentencing.

C. Taylor's Thirty-Five-Year Sentence

Having concluded that the trial court abused its discretion in finding Taylor's poor

LSI-R score and the fact that the minimum sentence for his Class A felony conviction was non-suspendible to be aggravating factors, we must next determine what effect, if any, these abuses of discretion should have on Taylor's thirty-five-year sentence. It is well-established that a single aggravating factor may be sufficient to sustain an enhanced sentence. *Workman v. State*, 716 N.E.2d 445, 449 (Ind. 1999); *Sauerheber v. State*, 698 N.E.2d 796, 806 (Ind. 1998); *Williams v. State*, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008); *Rembert v. State*, 832 N.E.2d 1130, 1133 (Ind. Ct. App. 2005). Further, "[w]hen a trial court improperly applies an aggravator but other valid aggravating circumstances exist, a sentence enhancement may still be upheld." *Hackett v. State*, 716 N.E.2d 1273, 1278 (Ind. 1999) (citing *Shields v. State*, 699 N.E.2d 636, 639 (Ind. 1998)). Again, remand for resentencing is only appropriate "if we cannot say with confidence that the trial court would have imposed the same sentence if it had properly considered reasons that enjoy support in the record." *Anglemyer*, 868 N.E.2d at 491.

Here, the trial court found five valid aggravating factors: (1) Taylor's criminal history; (2) Taylor's illegal use of drugs and alcohol; (3) Taylor failed to take responsibility for his actions; (4) prior attempts at rehabilitation have failed; and (5) Taylor was out on bond at the time he committed the instant offense. Additionally, we again note that while the trial court abused its discretion in finding Taylor's poor LSI-R score to be a separate aggravating factor, the trial court did not abuse its discretion in considering Taylor's poor LSI-R score as a supplement in conjunction with the five valid aggravating factors. The trial court also acted within its discretion in finding no mitigating factors. Thus, in light of the numerous valid

aggravating factors, including Taylor's substantial criminal history, as well as the supplemental consideration of Taylor's poor LSI-R score, we confidently conclude that the trial court would have imposed a thirty-five-year sentence upon considering only the valid aggravators.

III. Whether Roberts's Sentence Is Appropriate

In addition, Taylor challenges his thirty-five-year sentence by claiming that it is inappropriate in light of the nature of his offense and his character. Indiana Appellate Rule 7(B) provides that "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." The defendant bears the burden of persuading us that his sentence is inappropriate. *Sanchez v. State*, 891 N.E.2d 174, 176 (Ind. Ct. App. 2008).

Taylor claims that his thirty-five-year sentence is inappropriate in light of the nature of his offenses because the nature of his offenses was not overly egregious as there was no evidence of violence or use of weapons associated with the offenses. With respect to Taylor's offenses, the record demonstrates that Taylor possessed 4.17 grams of cocaine which was divided into seven approximately equal parts, all of which were packaged for individual sale. The record further demonstrates that Taylor "took a swing" at Officer Tislow and fled from officers, requiring Officer Tislow to use his taser to apprehend Taylor. Tr. p. 40.

With regard to his character, Taylor claims that although he has a criminal history, his

thirty-five-year sentence was nonetheless inappropriate. Taylor concedes that he was twenty years old at the time he committed the instant offenses, by which time he had amassed a substantial criminal record including four felony robbery convictions, and misdemeanor convictions for resisting arrest and possession of marijuana. Taylor also concedes that he had a history of substance abuse and was out on bond at the time he committed the instant offense. In addition, when Police first encountered Taylor, he swung at and fled from the officers after starting a bar fight. In light of these circumstances, the trail court's imposition of a sentence only five years over the advisory seems wholly appropriate.

The judgment of the trial court is affirmed.

ROBB, C.J., and BARNES, J., concur.