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IN THE
COURT OF APPEALS OF INDIANA

CY OWEN SHERRILL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A04-0602-CR-78
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0503-FB-19

November 15, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Cy Owen Sherrill appeals his sentence for residential entry, a class D felony,[1] and possession of methamphetamine, a class D felony.[2] Sherrill raises one issue, which we restate as whether the trial court abused its discretion in sentencing him. We affirm.

The relevant facts follow. For a number of years, Sherrill and the victim, Beth Winsor, were romantically involved with each other. Following their breakup, several protective and no contact orders were granted on behalf of Winsor against Sherrill, but Sherrill repeatedly violated the orders by attempting to call or physically contact Winsor at her residence. On January 15, 2005, during one of Sherrill's attempts to contact Winsor, he entered Winsor's residence without her permission. That same day, Sherrill was also found in possession of methamphetamine. Following those incidents and others occurring on additional dates, the State charged Sherrill with the following: (1) Count I, stalking as a class C felony,[3] (2) Count II, residential entry as a class D felony, (3) Count III, invasion of privacy as a class A misdemeanor,[4] (4) Count IV, invasion of privacy while having a prior conviction as a class D felony,[5] (5) Count V, invasion of privacy as a class A misdemeanor, (6) Count VI, invasion of privacy while having a prior conviction as a class D felony, (7) Count VII, invasion of privacy as a class A misdemeanor, (8)

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[1] Ind. Code § 35-43-2-1.5 (2004).

[2] Ind. Code § 35-48-4-6 (2004) (subsequently amended by Pub. L. No. 151-2005, § 25 (eff. Mar. 24, 2006)).

[3] Ind. Code § 35-45-10-5 (2004).

[4] Ind. Code § 35-46-1-15.1 (2004).

Count VIII, invasion of privacy while having a prior conviction as a class D felony, (9) Count IX, invasion of privacy as a class A misdemeanor, (10) Count X, invasion of privacy while having a prior conviction as a class D felony, and (11) Count XI, possession of methamphetamine as a class D felony. Additionally, the State filed an habitual offender charge.[6]

Pursuant to a plea agreement, Sherrill agreed to plead guilty to residential entry as a class D felony, possession of methaphetamine as a class D felony, and to being an habitual offender. In exchange, the State agreed to dismiss all remaining charges. The plea agreement further provided that the trial court could impose whatever sentence it deems necessary except that the terms for Count II, residential entry, and Count XI, possession of methaphatamine, should be served concurrently to each other.

On January 18, 2006, the trial court held a sentencing hearing and accepted Sherrill's guilty plea. During the hearing, Sherrill affirmed that, on a number of occasions, he had contacted Winsor in violation of protective orders she had against him, that he had been arrested several times as a result, and that, despite his arrests, he had continued to contact her each time following his release from jail. Sherrill acknowledged that he has a criminal history, which includes convictions for offenses such as battery, possession of marijuana, residential entry, criminal recklessness and invasion of privacy. He further acknowledged that he has a history of substance abuse, namely, an addiction

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[5] Ind. Code § 35-45-1-15.1 (2004).

to methamphetamine. Sherrill claimed to have cooperated with law enforcement in drug investigations and in other matters and to have worked to help other methamphetamine addicts recover from their addictions. Finally, Sherrill expressed his desire to move away from Winsor, begin working again, and support his four minor children.

The trial court found Sherrill's criminal history to be the sole aggravating factor and found no mitigating factors. The trial court sentenced Sherrill to an enhanced sentence of three years on Count II, residential entry as a class D felony, and to one and one half years on Count XI, possession of methamphetamine as a class D felony. The trial court further ordered Sherrill to serve these sentences concurrently and enhanced the sentence for Count II by three years because of his status as an habitual offender. In summary, Sherrill was ordered to serve a six-year executed sentence in the Indiana Department of Correction.

The issue is whether the trial court abused its discretion in sentencing Sherrill. Generally, sentencing decisions rest within the discretion of the trial court and are reviewed on appeal only for an abuse of discretion. Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002). An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Pierce v. State, 705 N.E.2d 173, 175 (Ind. 1998). In order for a trial court to impose an enhanced sentence, it must: (1) identify the significant aggravating factors and mitigating factors; (2) relate the specific facts and reasons that the court found to those aggravators and mitigators; and (3) demonstrate that

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[6] Ind. Code § 35-50-2-8 (2004) (subsequently amended by Pub. L. No. 71-2005, § 11 (eff. Apr.

the court has balanced the aggravators with the mitigators. Veal v. State, 784 N.E.2d 490, 494 (Ind. 2003).

The trial court relied upon Sherrill's extensive criminal history in imposing an enhanced term for his residential entry conviction. Sherrill does not dispute the trial court's discretion in finding his criminal history as the sole aggravating factor relied on to enhance his sentence. See Sherwood v. State, 702 N.E.2d 694, 699 (Ind. 1998) (observing that only one valid aggravating factor is necessary to enhance the presumptive sentence), reh'g denied. Rather, Sherrill argues the trial court failed to consider certain mitigating circumstances. Sherrill characterizes the following as significant mitigating circumstances and argues that they warranted a lesser sentence: (1) the hardship his sentence will cause to his four minor children, (2) his prior work history and his willingness to return to work, (3) his admission to having an addiction to methamphetamine and that he has helped other methamphetamine addicts, and (4) his cooperation with law enforcement investigations in the past.[7]

"The finding of mitigating factors is not mandatory and rests within the discretion of the trial court." O'Neill v. State, 719 N.E.2d 1243, 1244 (Ind. 1999). The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating

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25, 2005)).

[7] Indiana's sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences. See Ind. Code §§ 35-38-1-7.1, 35-50-2-1.3. Under the amended sentencing scheme, trial courts may impose any sentence within the proper statutory range regardless of the presence or absence of aggravating or mitigating circumstances. Ind. Code § 35-38-1-7.1(d). Sherrill committed his offenses prior to the effective date and was sentenced on January 18, 2006. Applying the former sentencing statutes, we conclude that the trial court did not abuse its discretion. Moreover, application of the amended sentencing statutes would not change the result here.

factor. Gross v. State, 769 N.E.2d 1136, 1140 (Ind. 2002). "Nor is the court required to give the same weight to proffered mitigating factors as the defendant does." Id. Furthermore, a sentencing court is under no obligation to find mitigating factors at all. Echols v. State, 722 N.E.2d 805, 808 (Ind. 2000). However, the trial court may "not ignore facts in the record that would mitigate an offense, and failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them." Id. An allegation that the trial court failed to identify or find a mitigating factor requires that defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999).

We first address Sherrill's argument that the undue hardship to his four minor children should be a mitigating factor because of his financial and emotion support of them up to his arrest. "Many persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship." Dowdell v. State, 720 N.E.2d 1146, 1154 (Ind. 1999). The record reveals that Sherrill would see his children sporadically, sometimes on an "every other day basis," or "every third day." Transcript at 29-30. Sherrill admitted that there was a three year period in which he "neglected [his] kids a lot" to spend time with Winsor. Id. Moreover, it appears Sherrill's four children have been residing solely with their respective mothers for quite some time. Sherrill's financial support of his children has similarly been sporadic for the last several years due

to his inconsistent work history and continuous arrests; he is currently $8,000 past due on his court ordered child support payments. Sherrill has failed to establish that the proposed mitigating evidence is both significant and clearly supported by the record. Accordingly, the trial court did not abuse its discretion in failing to find undue hardship on his four children as a mitigating circumstance. See, e.g., Sayles v. State, 513 N.E.2d 183, 189 (Ind. Ct. App. 1987) (holding that trial court did not abuse its discretion by failing to find undue hardship on defendant's dependents as a mitigating circumstance where both of defendant's children already lived with their mother, who works and is able to support the children financially), reh'g denied, trans. denied.

We next address Sherrill's claim that his prior work history and earning potential should have been considered a mitigating factor. According to Sherrill, he is a certified automotive technician and is capable of earning good wages in the automotive and aviation industries. However, Sherrill did not argue during the sentencing hearing that his work history should be a significant mitigating factor, and he failed to present any evidence of a consistent work history, performance reviews, or attendance records. See Bennett v. State, 787 N.E.2d 938, 948 (Ind. Ct. App. 2003). According to the presentence report and his testimony, his work history has been irregular and inconsistent at best. Further, Sherrill's speculations as to his potential earning capacity in the aviation industry, without more, do little to demonstrate that the mitigating factor cited should be afforded significant mitigating weight. Sherrill has failed to show that the mitigating evidence is both significant and clearly supported by the record. Thus, the trial court did

not abuse its discretion by not finding Sherrill's work history and earning potential to be a significant mitigating factor. See, e.g., Bennett, 787 N.E.2d at 948 (Ind. Ct. App. 2003) (holding that the trial court properly did not find that defendant's employment was a significant mitigating circumstance where defendant did not present a specific work history, performance reviews, or attendance records), trans. denied.

Sherrill also argues that the trial court failed to consider his substance abuse problems, namely, his addiction to methamphetamine as a mitigator. A history of substance abuse is sometimes found by trial courts to be an aggravator, not a mitigator. Iddings v. State, 772 N.E.2d 1006, 1018 (Ind. Ct. App. 2002). Furthermore, a trial court is not required to consider as mitigating circumstances allegations of appellant's substance abuse or mental illness. James v. State, 643 N.E.2d 321, 323 (Ind. 1994). The presentence investigation report reveals that Sherrill has a long history of substance abuse beginning at age sixteen as well as a number of criminal convictions of involving illicit substances. However, despite Sherrill's extensive history of substance abuse, he has never voluntarily sought drug treatment and has continued to use illicit substances. Thus, we cannot say Sherrill has shown that the mitigating evidence is both significant and clearly supported by the record.

Lastly, we address Sherrill's contention that his work helping methamphetamine addicts and his cooperation with law enforcement authorities in unrelated investigations

should have been considered as mitigating.[8] We emphasize that the trial court is not obligated to accept a defendant's arguments as to what constitutes a mitigating factor, nor is it required to give the same weight to proffered mitigating factors as the defendant does. Gross, 769 N.E.2d at 1140. Sherrill offered nothing more than his own claims in support of mitigation and thus, failed to demonstrate to the trial court that the mitigating circumstances were both significant and clearly supported by the record.

For the foregoing reasons, we affirm Sherrill's sentence for residential entry as a class D felony and possession of methamphetamine as a class D felony.

Affirmed.

NAJAM, J. and KIRSCH, C. J. concur

[8] Sherrill stated that he wrote a series of articles in the local newspaper detailing "the effects of meth and how it affects people's lives" in order to help other addicts "clean up their act." Transcript at 34. In regard to his cooperation with law enforcement, Sherrill stated that he worked with the Harrison County Drug Task Force and Southern Indiana Drug Task Force to "take[] down a couple of meth labs." Id. Furthermore, he stated that he alerted officials to an alleged threat on a police officer's life. **(Transcript at 46)**