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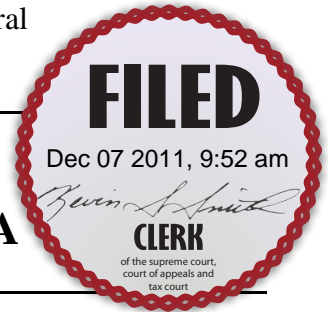
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**IN THE  
COURT OF APPEALS OF INDIANA**

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JESUS D. ZUNIGA,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 82A01-1103-CR-131

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APPEAL FROM THE VANDERBURGH CIRCUIT COURT  
The Honorable Kelli E. Fink, Magistrate  
Cause No. 82C01-1007-FB-838

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**December 7, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Jesus D. Zuniga (“Zuniga”) pleaded guilty to one count of burglary<sup>1</sup> as a Class B felony and was sentenced to twelve years executed. He appeals, raising the following restated issue: whether the trial court abused its discretion when sentencing him because it failed to consider two mitigating circumstances offered by Zuniga.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

In April, June, and July 2010, Zuniga committed several burglaries in Vanderburgh County. On July 12, 2010, the State charged Zuniga with eight counts of Class B felony burglary and two counts of Class C felony burglary. On January 20, 2011, Zuniga entered into a plea agreement, in which he would plead guilty to one count of burglary as a Class B felony and the remaining nine counts would be dismissed. Sentencing was left to the discretion of the trial court, with any sentence capped at twelve years and to be served consecutively to any possible parole revocation Zuniga received.

At the sentencing hearing, Zuniga testified that he would not burglarize a residence if people were present. *Tr.* at 15. He also testified that he would sell the items he stole from the homes to support his drug habit and that he had been using drugs since age 13. *Id.* at 15-16. Zuniga argued that these factors were mitigating circumstances. *Id.* at 18. The State argued that Zuniga’s criminal history and the fact that he was on parole when he committed the instant offense were aggravating circumstances. *Id.* at 19. The trial court accepted Zuniga’s guilty plea and entered judgment on the plea. The trial court found Zuniga’s criminal history and the fact that he was on parole at the time he

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<sup>1</sup> See Ind. Code § 35-43-2-1.

committed the burglary as aggravating circumstances. *Id.* at 21-22. It found Zuniga's guilty plea and the hardship on his children as mitigating circumstances. *Id.* at 22. The trial court found that the aggravating circumstances outweighed the mitigating circumstances and sentenced Zuniga to twelve years executed. *Id.* at 22. Zuniga now appeals.

### **DISCUSSION AND DECISION**

Trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Id.* If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id.* Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Id.* 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.*

One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. *Id.* Another example includes entering a sentencing statement that explains reasons for imposing a sentence, including mitigating and aggravating circumstances, which are not supported by the record. *Id.* at 490-91. A court may also abuse its discretion by citing reasons that are contrary to law. *Id.* at 491.

A trial court may abuse its discretion by entering a sentencing statement that omits mitigating factors that are clearly supported by the record and advanced for consideration. *Id.* at 490-91. Because the trial court no longer has any obligation to “weigh” aggravating and mitigating factors against each other when imposing a sentence, a trial court cannot now be said to have abused its discretion in failing to “properly weigh” such factors. *Id.* at 491. Once the trial court has entered a sentencing statement, which may or may not include the existence of aggravating and mitigating factors, it may then “impose any sentence that is . . . authorized by statute; and . . . permissible under the Constitution of the State of Indiana.” Ind. Code § 35-38-1-7.1(d).

Zuniga argues that the trial court abused its discretion when it sentenced him because it failed to consider mitigating circumstances that he offered at sentencing. He specifically contends that the trial court failed to find his struggles with drug addiction and the steps he took to avoid confrontation with victims during his crimes as mitigating circumstances. Zuniga asserts that this was an abuse of discretion because these mitigating factors were advanced for consideration and clearly supported by the record.

The finding of mitigating factors is not mandatory and rests within the discretion of the trial court. *Storey v. State*, 875 N.E.2d 243, 252 (Ind. Ct. App. 2007) (citing *O’Neill v. State*, 719 N.E.2d 1243, 1244 (Ind. 1999)), *trans. denied* (2008). The trial court is not obligated to accept the defendant’s arguments as to what constitutes a mitigating factor. *Id.* (citing *Gross v. State*, 769 N.E.2d 1136, 1140 (Ind. 2002)). An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to show that the mitigating evidence is both significant and clearly supported

by the record. *Id.* (citing *Carter v. State*, 711 N.E.2d 835, 838 (Ind. 1999)). “However, ‘if 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.’” *Anglemyer*, 868 N.E.2d at 493 (quoting *Fugate v. State*, 608 N.E.2d 1370, 1374 (Ind. 1993)).

Zuniga first argues that the trial court should have considered the fact that he only burglarized homes when he knew the residents were not present as a mitigating circumstance. Although he contends that this was a mitigating factor, we believe this was merely a pragmatic decision on Zuniga’s part. Burglarizing homes when the residents were not present ensured that Zuniga would not be confronted by someone who could hurt or catch him. Further, with the residents absent, Zuniga had more time to search the home for items to steal. Breaking into homes when no one was present also made it less likely that someone would be able to identify him to the police. Therefore, Zuniga’s decision to only burglarize homes when the residents were not present was not a significant mitigating circumstance that was clearly supported by the record.

Zuniga next argues that the trial court should have considered his struggles with drug addiction since age thirteen as a mitigating circumstance. A trial court is not required to consider as mitigating circumstances allegations of a defendant’s substance abuse or mental illness. *James v. State*, 643 N.E.2d 321, 323 (Ind. 1994). Zuniga claims that his crimes were the result of his substance abuse problem and were committed to support his drug habit. However, he has not explained any efforts he has taken to treat this addiction, which he has had since age thirteen and of which he was aware. *See Hape*

*v. State*, 903 N.E.2d 977, 1002 (Ind. Ct. App. 2009) (“While we have recognized that a history of substance abuse may be a mitigating circumstance, we have held that when a defendant is aware of a substance abuse problem but has not taken appropriate steps to treat it, the trial court does not abuse its discretion by rejecting the addiction as a mitigating circumstance.”), *trans. denied*; *Bennett v. State*, 787 N.E.2d 938, 948 (Ind. Ct. App. 2003) (finding that trial court did not err in failing to consider alcohol problem as mitigating factor, and could have found it as aggravating factor, when defendant was aware of problem and never sought help), *trans. denied*. Zuniga was aware of his substance abuse problem and never sought any drug treatment. We therefore do not believe that Zuniga’s drug addiction was a significant mitigating factor clearly supported by the evidence. The trial court did not abuse its discretion in failing to consider either of these factors as mitigating circumstances and in sentencing Zuniga to twelve years executed.

Affirmed.

BAKER, J., and BROWN, J., concur.