MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Zachary D. Perry,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 24, 2022

Court of Appeals Case No. 22A-CR-56

Appeal from the Bartholomew Circuit Court

The Honorable Kelly S. Benjamin, Judge

The Honorable Marc R. Kellams, Senior Judge

Trial Court Cause No. 03C01-2012-F6-5766

Tavitas, Judge.

Case Summary

[1] Zachary D. Perry pleaded guilty to auto theft, a Level 6 felony, and operating a vehicle while intoxicated endangering a person, a Level 6 felony, and was sentenced to consecutive terms of two years executed on each count. Perry appeals and argues that the trial court failed to consider certain mitigating factors that were clearly supported by the record. Because we disagree, we affirm.

Issue

[2] Perry presents one issue, which we restate as whether the trial court abused its discretion by failing to consider certain factors as mitigating.

Facts

[3] In the early morning hours of November 26, 2020, Perry was intoxicated and on heroin when he drove a car he had stolen from his father into an apartment complex. Fortunately, the apartment unit Perry crashed into was vacant. Perry, however, crashed into the apartment with such force that the car went through the vacant unit and broke through the firewall separating that unit from the neighboring unit, which was occupied by six people: James Saunders, his girlfriend, his eleven-year-old daughter, his adult daughter, his adult daughter's boyfriend, and his adult daughter's one-year-old child. The crash created a hole in the utility closet of Saunders' apartment unit, where the water heater and furnace were located. The crash awoke Saunders, who smelled the odor of

natural gas and directed his family to exit the apartment. Saunders also called 911 to report the crash.

[4] When the police arrived, they observed the crashed car, which was unoccupied. The police soon learned that the car was registered to Jerry Perry, who is the father of the defendant. Jerry told the police that his son—without permission—had probably taken the car. One of Saunders' neighbors informed the police that he had a security camera that captured video of a man stumbling around shortly after the crash. The man depicted in the video was wearing sweatpants and a long-sleeved shirt. The police soon located Perry close to the scene of the accident. Perry, who was wearing sweatpants and a long-sleeved shirt, was argumentative with the police and appeared to be intoxicated. Perry had injuries on his head and was bleeding. Perry admitted to drinking alcohol but claimed to have been walking, not driving.

[5] On December 20, 2020, the State charged Perry with: Count I, auto theft, a Level 6 felony; Count II, operating a vehicle while intoxicated endangering a person with a prior unrelated conviction for operating a vehicle while intoxicated, a Level 6 felony; Count III, driving while suspended, a Class A misdemeanor; and Count IV, leaving the scene of an accident, a Class B misdemeanor.

[6] On November 8, 2021, Perry entered into an agreement with the State in which he would plead guilty to Counts I and II and the State would dismiss Counts III and IV. The trial court accepted the plea and held a sentencing hearing on

December 9, 2021. The trial court found as aggravating that: (1) Perry had a significant criminal history; (2) Perry had violated the terms of his probation in the past; (3) Perry had previously failed to seek treatment for his substance abuse problem; (4) the car crashed into an area in the apartment close to where Saunders' young daughter was playing; and (5) the crash displaced Saunders and his family from their home during the Thanksgiving holiday. The trial court found as mitigating that Perry pleaded guilty and showed some remorse. The trial court sentenced Perry to consecutive terms of two years executed on each count. Perry now appeals.

Analysis

[7] Perry contends that the trial court abused its discretion by failing to consider certain factors as mitigating. "[S]ubject to the review and revise power [under Indiana Appellate Rule 7(B)], 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) (citing *Smallwood v. State*, 773 N.E.2d 259, 263 (Ind. 2002)), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007); *Phipps v. State*, 90 N.E.3d 1190, 1197 (Ind. 2018). "An abuse of discretion occurs only 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." *Schuler v. State*, 132 N.E.3d 903, 904 (Ind. 2019) (citing *Rice v. State*, 6 N.E.3d 940, 943 (Ind. 2014)).

[8] A trial court may abuse its discretion in a number of ways, including:

> (1) "failing to enter a sentencing statement at all"; (2) entering a sentencing statement in which the aggravating and mitigating factors are not supported by the record; (3) entering a sentencing statement that does not include reasons that are clearly supported by the record and advanced for consideration; or (4) entering a sentencing statement in which the reasons provided in the statement are "improper as a matter of law."

Ackerman v. State, 51 N.E.3d 171, 193 (Ind. 2016) (quoting *Anglemyer*, 868 N.E.2d at 490-91). If we determine that the trial court has abused its sentencing discretion, we will remand for resentencing only 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. *Ackerman*, 51 N.E.3d at 194 (citing *Anglemyer*, 868 N.E.2d at 491).

[9] The trial court "'is not obligated to accept the defendant's contentions as to what constitutes a mitigating circumstance or to give the proffered mitigating circumstances the same weight the defendant does.'" *Weisheit v. State*, 26 N.E.3d 3, 9 (Ind. 2015) (quoting *Wilkes v. State*, 917 N.E.2d 675, 690 (Ind. 2009)). "An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." *Anglemyer*, 868 N.E.2d at 493.

[10] Perry first claims that the trial court should have considered as mitigating that he repaired his formerly broken relationship with his mother and stepfather after being released pending sentencing. Perry's mother testified that Perry was finally acting like himself again, and Perry's stepfather testified that Perry was

"on the right track" and no longer abusing illicit substances. Tr. Vol. II p. 79. Although we commend Perry for making amends with his family, we cannot say that the trial court was required to consider this as a mitigating factor, especially as Perry's relationship with his mother or stepfather is unrelated to the crimes for which Perry was convicted.

[11] Perry also notes that he testified that he was "clean"—a claim which was corroborated by Perry's stepfather—and that he had entered a drug treatment program. *Id.* at 66, 79. The trial court did not consider this as mitigating because Perry had a long history of criminal behavior and only recently sought treatment. Indeed, Perry did not seek treatment until he was out on pre-trial release in the present case, less than three months before sentencing. Under these circumstances, we cannot say that the trial court abused its discretion by not considering Perry's participation in a drug treatment program as mitigating. *See Gillem v. State*, 829 N.E.2d 598, 604 n.4 (Ind. Ct. App. 2005) (rejecting defendant's claims regarding voluntarily seeking treatment for his alcohol abuse where the defendant claimed to have stopped drinking only seven months prior to the sentencing hearing, which was more than two years after his offense).

[12] Perry next contends that the trial court should have considered as mitigating that Perry obtained full-time employment in a skilled-labor position. We have noted before, however, that most people are gainfully employed, and a trial court is not required to consider such employment as a mitigating factor. *Hale v. State*, 128 N.E.3d 456, 465 (Ind. Ct. App. 2019) (citing *Holmes v. State,* 86 N.E.3d 394, 399 (Ind. Ct. App. 2017), *trans. denied*).

[13] Perry next notes that he has two children. He then claims that "Indiana case law reflects that anytime a parent is incarcerated[,] it places a burden on those dependents." Appellant's Br. p. 11. Our case law holds that hardship to a defendant's dependents due to incarceration is not automatically a significant mitigating factor because incarceration will always be a hardship on dependents. *McElroy v. State*, 865 N.E.2d 584, 592 (Ind. 2007). Indeed, "[m]any persons convicted of crimes have dependents and, in the absence of special circumstances showing an excessive undue hardship, a trial court does not abuse its discretion by failing to consider [hardship to dependents] as a mitigating circumstance." *Benefield v. State*, 904 N.E.2d 239, 247 (Ind. Ct. App. 2009), *trans. denied*. Perry refers to no such special circumstances here, and we cannot say that the trial court abused its discretion by failing to consider the hardship on Perry's two children as a significant mitigating factor.

[14] Perry lastly claims that the trial court should have considered as mitigating that Perry had been undergoing cancer treatment around the time of the crime, which he claims was difficult for him. This was undoubtedly a stressor on Perry, however, he failed to argue that his cancer and cancer treatment were mitigating factors at sentencing. We have long held that "the trial court does not abuse its discretion in failing to consider a mitigating factor that was not raised at sentencing." *Anglemyer*, 868 N.E.2d at 492 (citing *Georgopulos v. State*, 735 N.E.2d 1138, 1145 (Ind. 2000); *Creekmore v. State*, 853 N.E.2d 523, 530 (Ind. Ct. App. 2006)). Additionally, Perry has not shown that his cancer will not be treated while he is incarcerated. Consequently, the trial court cannot be

said to have abused its discretion for not identifying Perry's health issues as mitigating. *See Henderson v. State*, 848 N.E.2d 341, 345 (Ind. Ct. App. 2006) (holding that the trial court did not abuse its discretion by failing to consider defendant's poor health where defendant presented no evidence that her medical conditions would be untreatable during incarceration).[1]

Conclusion

[15] The trial court did not abuse its discretion when it did not consider as mitigating factors Perry's reconciliation with his mother and stepfather, the fact that he sought drug treatment shortly before sentencing, his employment status, the hardship his incarceration would impose on his children, or his cancer and cancer treatment. Accordingly, we affirm.

[16] Affirmed.

Riley, J., and May, J., concur.

[1] Perry also notes that his aggregate four-year sentence is the maximum sentence the trial court could impose on two Level 6 felony convictions arising out of a single episode of criminal conduct. *See* Ind. Code § 35-50-1-2(d)(1). Perry does not, however, argue that his maximum sentence is inappropriate under Appellate Rule 7(B).