MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jermaine Tito Carr,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff,

April 12, 2021

Court of Appeals Case No. 20A-CR-1995

Appeal from the Lake Superior Court

The Honorable Diane R. Boswell, Judge

Trial Court Cause No. 45G03-1807-F4-43

Robb, Judge.

Case Summary and Issue

[1] Jermaine Carr pleaded guilty to dealing in a narcotic drug, a Level 5 felony, and the trial court sentenced him to serve five years in the Indiana Department of Correction ("DOC"). Carr appeals and raises two issues for our review, one of which we find dispositive: whether the trial court abused its discretion in sentencing Carr. Concluding the trial court abused its discretion by failing to identify a mitigating factor clearly supported by the record, we remand.

Facts and Procedural History

[2] On June 19, 2018, officers with the Hammond Special Deployment Division used a confidential informant ("CI") to set up a controlled drug buy from Carr. The CI had purchased narcotics from Carr in the past. The two met at a McDonald's. Carr was in the front passenger seat of a vehicle and the CI walked to the vehicle, and exchanged $120 of prerecorded buy money for 0.8 grams of heroin separated into five plastic baggies. On June 26, a second controlled buy took place. The CI purchased 0.6 grams of heroin split into four plastic baggies. On July 3, a third controlled buy occurred during which the CI purchased 1.2 grams of heroin from Carr.

[3] On July 11, 2018, the State charged Carr with dealing in a narcotic drug, a Level 4 felony; dealing in a narcotic drug, a Level 5 felony; and two counts of possession of a narcotic drug and two counts of maintaining a common nuisance, all Level 6 felonies.

[4] While the case was pending and as a condition of pre-trial release, Carr was ordered to participate in wrap around services/Vivitrol Program, which consists of a Vivitrol injection, medication assistant treatment, cognitive behavior therapy, and random drug screens. On November 4, 2019, Dr. Renecia Williams, Wrap Around Service Coordinator, filed a status report with the trial court indicating that Carr had been fully compliant with wrap around services and requested that he continue services and be removed from home detention and placed on GPS monitoring. *See* Appendix of the Appellant, Volume Two at 53. The next day, the trial court ordered Carr released from the home monitoring program and placed on GPS Monitoring.

[5] On June 23, 2020, Dr. Williams reported to the trial court that Carr was in compliance with wrap around services and was participating in the Medication Assistant Treatment Program. *See id.* at 64. In August, Dr. Williams again informed the trial court that Carr was compliant with services and recommended that he "be removed from the . . . wrap around service program and device. [Carr] should continue all substance abuse prevention services upon removal in order to maintain sobriety." *Id.* at 68.

[6] Pursuant to a plea deal, Carr agreed to plead guilty to dealing in a narcotic drug, a Level 5 felony, and the State agreed to dismiss the remaining charges. Sentencing was left to the discretion of the trial court. The trial court accepted Carr's guilty plea. A sentencing hearing was held on September 28. Carr argued placement in prison would not be beneficial, noting he completed a twelve-step course to resolve his drug problem, is in the Vivitrol program, has

steady employment, and cares for three dependent children. In announcing its sentence, the trial court stated:

> [Y]our comments about you don't know what good jail would do, . . . you may be right. It may not do any good, but at some point the Court . . . when you keep coming back after doing the same thing over and over again – we offered you services. You continue to deal.
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> Now, I don't know what his particular habit is. He's charged with dealing, so he may not even have a drug problem, okay? He's continuing to come back, and even if you have a drug problem, you don't have to deal, okay? That's a totally different aspect of your drug problem, so at some point the Court just says, well, what do I do with this person? They've been here several times. I've put them in programs. They continue to do the same thing, so, what, you just throw your hands up and say, well, he's just going to be a dealer on the street, and I can't do anything about that? That's not the answer.
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> At some point, . . . the Court has no other alternative. Like [the State] says, for some reason [Carr] just doesn't get it, and maybe he needs to go to the DOC and get involved in their program. The program here wasn't helping him that much apparently. He's got a charge.

Transcript, Volume 2 at 23-24.

[7] The trial court sentenced him to serve five years in the DOC to be served in the Purposeful Incarceration Program, if eligible. In sentencing Carr, the trial court

found Carr's criminal history an aggravating factor and found no mitigating factors.[1]

[8] On October 6, Carr filed a Motion to Reconsider requesting that he be re-sentenced after the court heard from Dr. Williams. Carr filed his Notice of Appeal from the sentencing order on October 28. On December 9, a hearing on the motion to reconsider was held via Zoom. Carr, by counsel, stated that he spoke with Dr. Williams about Carr's progress and asked her to write a letter about her experience with him "because there's not a lot of people who graduate from wrap-around services in this county. . . . He completed it, he graduated, and then he was sentenced." *Id.* at 31. Carr read the letter into evidence, which stated in part that Carr "demonstrated a willingness to remain sober [and] is considered a success story with the . . . wrap-around service program[.]" *Id.* at 33; App. of the Appellant, Vol. Two at 107. Based on this evidence, Carr requested that he be placed in Community Corrections. In response, the State acknowledged that Carr successfully completed the program but believed "that only reflects one period of his life when he had a petition to revoke probation against him and he had this case pending against him, so if he can't be good during that time, then there's not too much hope for him." Tr., Vol. 2 at 36. The trial court took the motion under advisement. On December 11, the trial court denied Carr's motion.

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[1] Specifically, with respect to Carr's criminal history, the trial court stated in its order "that the [DOC] is best equipped to provide services that [Carr] needs at this time." Appealed Order at 1.

Discussion and Decision

[9] Carr appeals from the sentencing order rather than from the denial of his motion to reconsider. As such, we consider only the evidence in the record and available to the trial court at the sentencing hearing.

[10] Carr contends the trial court abused its discretion "by failing to consider [his] successful rehab and sobriety as a mitigating factor during sentencing." Brief of the Appellant at 8. On the other hand, the State maintains that the trial court was not required "to find the proffered factors of Carr's pre-sentence sobriety and completion of rehabilitative treatment as significantly mitigating because Carr was required to take these steps towards sobriety to avoid incarceration." Brief of Appellee at 6. We agree with Carr.

[11] Sentencing decisions rest within the trial court's discretion and are afforded considerable deference. *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). Accordingly, we review sentencing decisions for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (2007). A trial court abuses its discretion when its 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*.

[12] There are several ways in which a trial court can abuse its discretion in sentencing:

> (1) failing to enter a sentencing statement, (2) entering a sentencing statement that explains reasons for imposing the

> sentence but the record does not support the reasons, (3) the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or (4) the reasons given in the sentencing statement are improper as a matter of law.

Phelps v. State, 24 N.E.3d 525, 527 (Ind. Ct. App. 2015). 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." *Guzman v. State*, 985 N.E.2d 1125, 1131 (Ind. Ct. App. 2013) (quoting *Anglemyer,* 868 N.E.2d at 491). "[A]n allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is not only supported by the record but also that the mitigating evidence is significant." *Anglemyer*, 875 N.E.2d at 220-21. The identification or omission of reasons provided for imposing a sentence are reviewable on appeal for an abuse of discretion; however, the weight given to those reasons is not subject to appellate review. *Weedman v. State*, 21 N.E.3d 873, 893 (Ind. Ct. App. 2014), *trans. denied*.

[13] Here, the record clearly demonstrates that Carr was compliant with the wrap around services and maintained sobriety. During Carr's time in the program, Dr. Williams filed several status reports with the trial court indicating that Carr was in full compliance with the program and had maintained sobriety. In fact, these status reports served as the basis for Carr's release to home detention and subsequent GPS monitoring. Although Carr was ordered to complete wrap

around services and the Vivitrol Program as a condition of pre-trial release, there is no question Carr's success is a mitigating factor that the trial court omitted from consideration in sentencing him. Therefore, we conclude the trial court abused its discretion by failing to identify Carr's history of compliance and sobriety as a mitigating factor, a significant factor clearly supported by the record.[2] *See Anglemyer*, 875 N.E.2d at 221 (a defendant must "establish that the mitigating evidence is not only supported by the record but also that the mitigating evidence is significant"); *see also Weedman*, 21 N.E.3d at 893 (stating that the omission of reasons provided for imposing a sentence are reviewable on appeal for an abuse of discretion, but the *weight* given to those reasons is not subject to appellate review).

[14] And because "we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered" Carr's history of compliance and sobriety, we remand this matter to the trial court with instructions to consider the aggravating factor, Carr's criminal history, against his recent compliance and sobriety, and resentence him. *Guzman*, 985 N.E.2d at 1131.

Conclusion

[2] Because we remand this cause to the trial court for resentencing, we need not determine whether Carr's five-year sentence is inappropriate.

[15] Based on the foregoing, we conclude the trial court abused its discretion by failing to find Carr's success and compliance with the wrap around services and his sobriety a mitigating circumstance in sentencing him. Therefore, we remand this matter to the trial court with instructions to consider this mitigating circumstance and resentence Carr.

[16] Remanded.

Bailey, J., and May, J., concur.