

Leonard Williams appeals his twenty-five year sentence for one count of Operating a Vehicle While Intoxicated (OWI) Causing Death,¹ as a class B felony, four counts of OWI Causing Serious Bodily Injury,² as class C felonies, and one count of Failure to Remain at Scene of Accident Resulting in Death,³ a class C felony.

We affirm.

On November 30, 2007, Williams was driving a Chevy Blazer in Kosciusko County while intoxicated. Williams had three passengers in his vehicle – Michael Nelson, Anthony Blankenship, and Anthony Hackworth. Williams was driving at a high rate of speed and had disregarded a stop sign. Despite pleas from the passengers in his car to slow down, Williams continued driving. As Williams disregarded a second stop sign, his vehicle collided with a vehicle driven by Jon Kamp. Kamp died as a result of the accident. A passenger in Kamp’s vehicle and the three passengers in Williams’s vehicle were seriously injured, with one passenger being airlifted to the hospital. Williams climbed from his vehicle and fled the scene on foot before police or medical personnel arrived. The Kosciusko Sheriff’s Department eventually located Williams at his home three hours after the crash. Williams initially told officers that he was not the driver of the vehicle, but rather, was a victim. Williams later admitted that he was the driver of the Chevy Blazer.

On December 3, 2007, the State charged Williams with Count I, OWI causing death, as a class B felony, Counts II, III, and IV, OWI causing serious bodily injury, as class C

¹ Ind. Code Ann. § 9-30-5-5(a) (West, Premise through 2008 2nd Regular Sess.).

² I.C. § 9-30-5-4(a) (West, Premise through 2008 2nd Regular Sess.).

³ Ind. Code Ann. § 9-26-1-8(a)(2) (West, Premise through 2008 2nd Regular Sess.).

felonies, and Count V, failure to remain at scene of accident resulting in death, a class C felony. On January 22, 2008, the State amended the charging information to add Count VI, class C felony OWI causing serious bodily injury. Williams entered into a plea agreement with the State whereby he agreed to plead guilty to all counts. Under the terms of the plea agreement, sentencing was left to the trial court's discretion except that the sentences for the five class C felony offenses would run concurrent with one another.

On September 4, 2008, the trial court accepted Williams's guilty plea and conducted a sentencing hearing. The trial court found Williams's guilty plea to be a mitigating factor for all counts, but refused to find any mitigating remorse. The court also considered the following aggravating factors: (1) Williams was on probation at the time of the instant offense; (2) probation is not likely a tool for rehabilitation; and (3) Williams's criminal history. The trial court sentenced Williams to eighteen years for Count I and seven years for each of Counts II through VI. Pursuant to the terms of the plea agreement, the court ordered the sentences on Counts II through VI to run concurrently with each other. Based on its finding that Williams acted with reckless disregard for the safety of others, the trial court ordered that the sentences on the class C felonies run consecutively to the sentence imposed for Count I, for an aggregate sentence of twenty-five years.

Although citing Ind. Appellate Rule 7 and asking this court to review the propriety of his sentence, Williams does not present any arguments on the nature of the offense or

character of the offender.⁴ Rather, Williams challenges the trial court's finding and weighing of aggravating and mitigating circumstances.

We note that sentencing decisions rest within the sound discretion of the trial court. *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g* by 875 N.E.2d 218. With the exception of our authority to review sentences under App. R. 7(B), as long as a defendant's sentence is within the statutory range, it is reviewed only for an abuse of discretion. *Id.* An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances and the reasonable inferences to be drawn therefrom. *Id.* With regard to aggravating and mitigating circumstances, however, "[t]he relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse." *Anglemyer v. State*, 868 N.E.2d at 491.

In sentencing Williams, the trial court identified three aggravating factors: Williams's criminal history, that Williams was on probation at the time of the instant offense, and that probation is not likely a tool for rehabilitation. Williams does not challenge the trial court's reliance on the fact that he was on probation at the time he committed the instant offense or its consideration of his criminal history. Williams challenges the court's further aggravation of his sentence upon its finding that "probation has failed". *Transcript* at 96. Williams contends that this aggravating factor is duplicative of the court's reliance on the fact that he was on probation at the time of the instant offenses as an aggravating factor. Williams

⁴ Having failed to address the nature of the offense or character of the offender, Williams has waived his right to challenge his sentence as inappropriate. See Ind. Appellate Rule 46(A)(8); *Hollowell v. State*, 707 N.E.2d 1014 (Ind. Ct. App. 1999).

therefore argues that this “double aggravation” of his sentence was improper.⁵ *Appellant’s Brief* at 5.

We disagree with Williams’s contention. The trial court determined that probation was not likely a tool for rehabilitation essentially because of Williams’s criminal history since committing the offense of criminal recklessness resulting in serious bodily injury in January 2006, the crime for which Williams was on probation when he committed the instant offense. Indeed, less than six months after committing the crime of criminal recklessness, Williams was charged (and ultimately convicted) of OWI. Williams was again arrested in December 2006 for trespass and criminal mischief, although those charges were ultimately dismissed. *See Bailey v. State*, 763 N.E.2d 998 (Ind. 2002) (noting that trial court may consider evidence that defendant has committed other crimes even if those acts were not reduced to judgment). The trial court also mentioned that Williams has a pending offense for sale or possession of a switchblade. Thus, in addition to Williams’s criminal history dating back to 1983 (which includes two additional convictions for OWI in 1986 and 1987), the trial court also considered his more recent criminal transgressions.⁶ The trial court’s consideration in this regard is wholly separate from the court’s finding that Williams was on

⁵ The trial court engaged in a unique approach to explaining the sentence imposed. The trial court explained its sentence for each offense in minute detail, assigning a term of years to each aggravating and mitigating factor it identified and then calculating the sentence imposed. Specifically, for purposes of Williams’s argument, the court added four years of imprisonment on Count I and two years on the remaining counts based upon its finding that Williams was on probation at the time he committed the instant offense. The trial court further added two years and one year, respectively, based upon its finding that “probation has failed” as evidenced by Williams’s violations thereof. *Transcript* at 96.

⁶ We observe that the parties refer to these criminal acts as constituting violations of the probation Williams was sentenced to serve for the criminal recklessness conviction. The record reveals, however, that Williams was not sentenced to seven years and 294 days of probation for the criminal recklessness charge until March 1,

probation at the time he committed the instant offense. While perhaps not so eloquently stated, we think the trial court's explanation was part and parcel of its consideration of Williams's criminal history, not a double aggravation for a finding that Williams had violated his probation.

Here, the trial court fully articulated its findings and explained in detail how it arrived at the sentence it imposed on each charge. That the trial court assigned a term of years to each part of the criminal history it considered does not render such consideration "double aggravation" as asserted by Williams.⁷ *Appellant's Brief* at 5. The trial court was simply being cautious in setting forth its sentencing statement.

Williams also argues the trial court abused its discretion in refusing to assign mitigating weight to his expression of remorse. During the sentencing hearing, Williams, in a short statement, apologized for the "pain" he cause to the decedent's family and everyone involved. *Transcript* at 54. Additionally, Williams wrote a letter to his pastor in Mississippi that the trial court found to be "very sincere." *Id.* at 94. The trial court found it curious that Williams asked his pastor to pray for his mother, but did not ask that he pray for the decedent's family or the victims. The trial court discounted Williams's expression of remorse based on comments made by the victim's family. The trial court further explained that it found Williams's demeanor "difficult to read" during the sentencing hearing, thus indicating that the trial court did not fully believe Williams's expression of remorse. *Id.* at

2007. It thus appears that Williams was not on probation at the time he committed the 2006 OWI offense or when he was arrested on the trespass and criminal mischief charges.

⁷ Williams does not dispute that the trial court could consider his criminal history.

95. The trial court also counterbalanced Williams's expression of remorse against his lack of demonstrated remorse on the fateful night.

Undoubtedly, remorse is a valid mitigating favor. Nevertheless, remorse, or lack thereof, by a defendant is something that is better gauged by a trial judge who views and hears a defendant's apology and demeanor first-hand and determines the defendant's credibility. *See Pickens v. State*, 767 N.E.2d 530 (Ind. 2002); *Allen v. State*, 875 N.E.2d 783, 788 (Ind. Ct. App. 2007) ("trial court, which has the ability to directly observe the defendant and listen to the tenor of his or her voice, is in the best position to determine whether the remorse is genuine" (quoting *Corralez v. State*, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004))).

We find no abuse of discretion in the trial court's consideration of remorse. To the extent Williams is challenging the weight, or lack thereof, which the trial court attributed to his expression of remorse, such a challenge is no longer subject to review. *See Anglemyer v. State*, 868 N.E.2d 482.

Finally, Williams argues that the trial court abused its discretion in deciding that the sentences imposed for Counts II through VI should be served consecutive to the sentence imposed on Count I. The decision to impose consecutive or concurrent sentences is within the trial court's discretion. *Williams v. State*, 891 N.E.2d 621 (Ind. Ct. App. 2008). If a trial court imposes consecutive sentences when not required to do so by statute, we will examine the record to insure the trial court adequately explained its reasons for selecting the sentence imposed. *Marshall v. State*, 832 N.E.2d 615 (Ind. Ct. app. 2005), *trans. denied*. A trial court may, however, rely on the same reasons to impose an enhanced term and also impose consecutive sentences. *See Williams v. State*, 891 N.E.2d 621.

Williams maintains that the trial court improperly considered his flight from the scene of the accident, which constituted the elements of the offense contained in Count V, in deciding to order the sentences served consecutively. Williams is correct in asserting that the elements of a crime may not be used to enhance a sentence. *See Marshall v. State*, 832 N.E.2d 615. The particularized individual circumstances of an offense, however, may constitute a separate aggravating circumstance sufficient to support imposition of consecutive sentences. *Id.*

During the sentencing hearing, the trial court explained as follows:

At the crash, there was a decision to make. Do you stay and help? Do you stay and just cry? Do you try to assist? Do you call somebody? Do you flag somebody down? Or do you run? And because you ran, I'm going to add these as consecutive sentences. I don't have anywhere to go with that. I just think, when the chips are [sic] down, these people needed you. And I'm not disputing you were terrified. I'm not disputing that you were intoxicated. . . . But I'm not going to give you a pass on Richard Shoemaker, free ride on Mr. Hackworth, Mr. Blankenship and Mr. Nelson after they were pleading with you to slow that thing down and stop. So your reckless disregard for the safety of your passengers, other motorists and the public at large is the finding of the Court as to the reason to order the C felonies to be served consecutively.

Transcript at 110-111. A close reading of the trial court's statement reveals that, contrary to Williams's claim, the trial court did not solely consider the fact that Williams fled from the scene in deciding to impose consecutive sentences. The trial court considered the fact that Williams was travelling at a high rate of speed, had blown through one stop sign, and that his passengers had pleaded for him to stop. The trial court appropriately deemed Williams's conduct as a demonstration of his extraordinarily reckless disregard for the safety of his passengers and others. The trial court's consideration of the particularized circumstances of

the instant offenses supports the trial court's decision to order the sentences served consecutively.

Judgment affirmed.

NAJAM, J., and VAIDIK, J., concur.