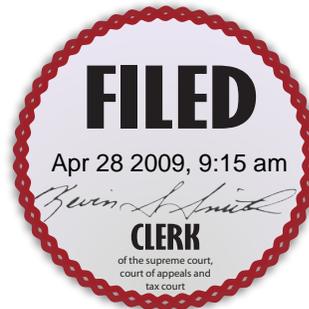


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

LEANNA WEISSMANN
Lawrenceburg, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ANGELA N. SANCHEZ
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

JOSHUA WYNN,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)
)

No. 58A04-0810-CR-629

APPEAL FROM THE OHIO CIRCUIT COURT
The Honorable James D. Humphrey, Judge
Cause No. 58C01-0803-FA-001

April 28, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Joshua Wynn pled guilty pursuant to a plea agreement to dealing in a schedule II controlled substance within 1000 feet of school property. In exchange, the State dismissed five other counts arising out of the same series of drug transactions. The trial court sentenced Wynn to thirty years in the Department of Correction with ten years suspended to probation. On appeal, Wynn argues that the trial court abused its discretion by failing to recognize his drug addiction and hardship on his dependents as significant mitigating circumstances and that his sentence is inappropriate. Concluding that the trial court did not abuse its discretion in rejecting his proffered mitigators and that Wynn's sentence is not inappropriate, we affirm.

Facts and Procedural History

On July 29, 2008, Wynn pled guilty pursuant to a plea agreement to dealing in a schedule II controlled substance within 1000 feet of school property, a Class A felony.¹ In exchange, the State dismissed charges for two other counts of Class A felony dealing in a schedule II controlled substance within 1000 feet of school property,² two counts of conspiracy to deal in a schedule II controlled substance within 1000 feet of school property, a Class A felony,³ and one count of possession of a controlled substance as a Class D felony.⁴ At the guilty plea hearing, the State laid a factual basis, establishing that on February 12, 2008, Wynn sold Oxycontin to Detective Nicholas Beetz of the

¹ Ind. Code § 35-48-4-2(b)(2)(B)(i).

² I.C. § 35-48-4-2(b)(2)(B)(i).

³ Ind. Code §§ 35-48-4-2(b)(2)(B)(i); -41-5-2.

⁴ Ind. Code § 35-48-4-7(a).

Lawrenceburg Police Department, who was working undercover. Wynn chose the location of the transaction, a BP gas station in Rising Sun, Indiana, and the pair met two more times at the gas station, where Detective Beetz purchased more Oxycontin from Wynn. The BP gas station in question was found to be 873 feet from the SEIOC Head Start school building. The trial court accepted the plea agreement.

After a sentencing hearing, the trial court sentenced the defendant as follows:

Again, I want to note for the record that the defendant has entered a plea of guilty to dealing in a schedule II controlled substance within one thousand feet of the property, a Class A felony, and I have considered the evidence presented, the pre-sentence investigation, and I have determined that the criminal history prepared in the pre-sentence investigation constitutes an aggravating factor, and it includes two prior probation violations. The Court does, however, find and considers the fact that the defendant has no prior felony convictions. The Court also considers as a mitigating factor the defendant's age and the Court has considered other possible mitigating factors and finds insufficient evidence to support additional mitigating factors. The Court considers the balance between aggravating and mitigating factors to be that they weigh equally and the Court now sentences the defendant as follows: Defendant shall be sentenced to the Indiana Department of Correction for classification and confinement for a period of thirty years, of which ten years shall be suspended. Defendant shall be placed on active probation for a period of ten years upon date of release from incarceration

Tr. p. 82-83. Wynn now appeals his sentence.

Discussion and Decision

Wynn raises two issues on appeal. First, he argues that the trial court abused its discretion by failing to recognize his drug addiction and the hardship on Wynn's dependents as significant mitigating circumstances. Second, he argues that his sentence is inappropriate.

I. Abuse of Discretion

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), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). 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.* We review the presence or absence of reasons justifying a sentence for an abuse of discretion, but we cannot review the relative weight given to these reasons. *Id.* at 491. One way in which a court may abuse its discretion is by entering a sentencing statement that omits mitigating circumstances that are clearly supported by the record and advanced for consideration. *Id.* at 490-91. However, a trial court is not obligated to accept a defendant's claim as to what constitutes a mitigating circumstance. *Rascoe v. State*, 736 N.E.2d 246, 249 (Ind. 2000).

As for Wynn's proffered drug addiction mitigator, Wynn's pre-sentence investigation report reflects that he started using heroin about a year before his conviction in this case, that he quickly developed an addiction which led to heroin use on a daily basis, and that he received methadone treatments for about six months during the year before his conviction. Appellant's App. p. 62. However, Wynn does not explain the nexus between his drug problem and his offense. When asked why Wynn committed his crime, he answered that he needed money to pay his rent. Tr. p. 53. Only on cross-examination did Wynn state that he was dealing drugs in order to support his drug addiction as well. *Id.* at 55. We cannot say that the trial court abused its discretion by

declining to find Wynn's drug addiction a significant mitigating circumstance. *See James v. State*, 643 N.E.2d 321, 323 (Ind. 1994) ("A trial court is not required to consider as mitigating circumstances allegations of appellant's substance abuse or mental illness."). Indeed, drug addiction can even be found to be an aggravating circumstance. *Roney v. State*, 872 N.E.2d 192, 199 (Ind. Ct. App. 2007), *trans. denied*.

As for Wynn's proffered hardship on dependents mitigator, Wynn argues that the trial court should have recognized undue hardship on Wynn's two young children, whom Wynn alleges he helps support. A trial court "is not required to find a defendant's incarceration would result in undue hardship on his dependents." *Davis v. State*, 835 N.E.2d 1102, 1116 (Ind. Ct. App. 2005), *trans. denied*. Indeed, "[m]any 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).

Prison is always a hardship on dependents, and Wynn fails to demonstrate how his incarceration results in particularized hardship on his dependents. Although Wynn's pre-sentence investigation report reflects that he is ordered to pay \$60 weekly in child support for one of his children, Wynn points to no special circumstances which would require the trial court to find this proffered mitigator and does not show why incarceration for his term of thirty years with ten years suspended will cause more hardship than incarceration for a shorter term. *See Weaver v. State*, 845 N.E.2d 1066, 1074 (Ind. Ct. App. 2006), *trans. denied*. Thus, the trial court did not abuse its discretion in not finding undue

hardship to be a mitigating factor. We cannot say the trial court abused its discretion in sentencing Wynn.

II. Inappropriate Sentence

Wynn also argues that his sentence is inappropriate. Although a trial court may have acted within its lawful discretion in imposing a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a court “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer*, 868 N.E.2d at 491). The burden is on the defendant to persuade us that his or her sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

As for the nature of Wynn’s offense, Wynn engaged in multiple transactions wherein he sold a controlled substance to an undercover officer. Wynn chose the location of the sales, and the gas station he chose for the transactions was less than 1000 feet away from a school. Although Wynn argues that we should consider that the record does not reflect that Wynn knew the location was near a school, Wynn was not required under the statute defining the offense to know that the location was near a school. *Walker v. State*, 668 N.E.2d 243, 245 (Ind. 1996), *reh’g denied*. Nothing about the nature of the offense otherwise renders the advisory sentence with ten years suspended inappropriate.

As for Wynn's character, the pre-sentence investigation report reflects that Wynn, twenty-two years old at the time of the offense, has a history of delinquent and criminal activity. Appellant's App. p. 58-60. As a juvenile, Wynn received an informal adjustment for theft and formal adjudications for battery, arising out of an incident in which he pushed his mother to the ground, and conversion. He also violated his probation by testing positive for marijuana. As an adult, Wynn was convicted of battery against his mother, possession of marijuana, and driving while suspended. He also violated his probation three times. Although we recognize that none of these convictions are felonies, nothing about Wynn's character renders his sentence inappropriate. Thus, Wynn's sentence is not inappropriate pursuant to Indiana Appellate Rule 7(B).

Affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.