



## **STATEMENT OF THE CASE**

Antonio Washington appeals his sentence following his conviction for Possession of Cocaine, as a Class C felony, pursuant to a guilty plea. Washington raises a single issue for our review, which we restate as whether the trial court abused its discretion when it sentenced him.

We affirm.

## **FACTS AND PROCEDURAL HISTORY**

On November 30, 2007, Kokomo Police Department officers observed a blue Chevrolet Suburban closely following another vehicle for several blocks on Vaile Avenue in Kokomo. After the Suburban's left tires traveled into the middle of the roadway, the officers initiated a traffic stop. In response to a question from the officers, Washington answered that he had just been to the grocery store. But the officers had seen him leave a residence. Officers also observed that Washington's breathing was fast and labored, and they saw three cell phones on the middle console of the vehicle.

One of the officers retrieved his K-9, Tara, from the back of his patrol car and conducted a sniff search of the Suburban. The K-9 alerted to the front passenger side door seams. The officers asked Washington to exit the vehicle and conducted a more thorough search. Under cup holders in the front of the vehicle, an officer found a clear plastic bag containing two more clear plastic baggies, inside which was an off-white rock-like substance. The off-white substance field-tested positive for cocaine, and subsequent lab testing disclosed the amount to be 55.58 grams. Officers also found a fourth cell phone and a roll of small plastic baggies in the rear of the vehicle.

The State charged Washington with dealing in cocaine, as a Class A felony, and possession of cocaine, as a Class C felony. Nearly a year later, on October 23, 2008, Washington and the State filed their Recommendation of Plea Agreement. Under the agreement, Washington agreed to plead guilty to possession of cocaine, as a Class C felony; the State agreed to dismiss the charge of dealing in cocaine, as a Class A felony; and sentencing was to be left to the trial court's discretion. The court accepted the plea and entered judgment of conviction accordingly.

On December 10, the court held a sentencing hearing. After hearing testimony from Washington, the court sentenced him as follows:

There [are] a number of things that concern me about this case. First and foremost is the amount of drugs involved, fifty-six or almost fifty-six grams of crack cocaine. Coupled with the roll of small baggies and four cell phones that were in the defendant's vehicle, secreted in the console underneath the cup holder all is a pretty strong indication of dealing. I think simply the amount of drugs involved [is] an aggravating offense (inaudible) factor the defendant's prior criminal history, while minimal, is an aggravating factor. While he has accepted responsibility, Mr. Alden [defense counsel], I would agree that that is only minimally correct in that he pled guilty but in return for that he has accepted a substantial benefit of the difference between a Class C felony and a Class A felony. I find no mitigating factors. I'm also very concerned, Mr. Washington, that if in fact you have an addiction, a year ago you get arrested for a Class A felony and I am sure learned very quickly, at least by the time of initial hearing, the kind of time that you were facing[,] and your response to that was to continue to use with the idea that if we sentence you today and maybe if we put you on probation or in-home detention you'll seek some treatment. While I don't necessarily agree with Mr. Alter's [the State's] characterization that you've had ten years to seek treatment, you certainly had a wake-up call a year ago which you've ignored and in fact continued to use. I'm not confident at all with the supervision that's available in Cook County, Illinois. . . . I think the aggravating factors outweigh the mitigating factors. I'm going to sentence the defendant to the Indiana Department of Correction for a period of eight years. I think the fact that the defendant has never served significant jail time is something to be taken into consideration and so I don't think that entire eight years should be

executed[,] but I think we need to execute a substantial portion of that. Accordingly, I'm going to order six years executed. He's given credit for one actual day or two days day-for-day credit served while awaiting disposition in this matter. The balance of the sentence is suspended to be served on supervised probation. . . .

Transcript at 30-32. Washington now appeals.

## **DISCUSSION AND DECISION**

Washington contends that the trial court abused its discretion when it imposed an eight-year sentence. Review to determine whether the trial court abused its discretion in sentencing is a separate test from review of a sentence for inappropriateness under Indiana Appellate Rule 7(B). Although Washington sets out Rule 7(B) as governing our review and authorizing revision of his sentence, if any, he does not frame his argument under that rule. Thus, he has waived any argument under Rule 7(B), and we review his sentence only for an abuse of discretion.

“Subject 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), corrected on other grounds, 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. Washington contends that the trial court considered an improper aggravator and failed to identify certain mitigators. We address each contention in turn.

Under Indiana Code Section 35-50-2-6, a person who commits a Class C felony may be imprisoned “for a fixed term between two (2) and eight (8) years, with the

advisory sentence being four (4) years . . . .” Washington argues first that the trial court’s “reliance upon [his] prior misdemeanor convictions was misplaced” because those convictions were “unrelated in nature” to the conviction for which he was sentenced. Appellant’s Brief at 5. Washington contends that “the trial court’s imposition of an aggravated sentence [of eight years] based upon that history is error.” Id. We cannot agree.

The trial court identified as an aggravator Washington’s prior convictions in Illinois for possession of title or registration in 2004 and prostitution or soliciting in 2005. Washington is correct that the significance of criminal history depends on the number of offenses and the nature and gravity of the prior offenses. Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). But that goes to the weight assigned to that factor, not to the mere identification of criminal history as a factor in sentencing. See id. (“We do not find the aggravating weight of Neale’s criminal history sufficient to justify the maximum sentence for a Class A felony.”) (emphasis added). Under the advisory sentencing scheme a trial court no longer has an obligation to “weigh” aggravating and mitigating factors against each other when imposing sentence. See Brattain v. State, 891 N.E.2d 1055, 1058 (Ind. Ct. App. 2008) (citing Anglemyer, 868 N.E.2d at 491). As such, we cannot review the weight assigned to an aggravator. See id.

Moreover, here, the trial court found an additional aggravator, namely, the considerable amount of cocaine for which Washington was convicted.<sup>1</sup> Washington does not challenge that aggravator. Considering Washington’s criminal history together with

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<sup>1</sup> Again, officers found 55.58 grams of cocaine when they searched Washington’s vehicle, more than eighteen times the minimum amount necessary to convict him for possession of cocaine, as a Class C felony.

the amount of cocaine underlying the present conviction, we cannot say that the trial court abused its discretion when it imposed an eight-year sentence.

Washington also contends that the trial court abused its discretion because it “failed to consider the substantial mitigating factors[,]” namely, that he had accepted responsibility by pleading guilty and that his incarceration would be a hardship for his girlfriend and their son. Appellant’s Brief at 5. An 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 v. State, 875 N.E.2d at 220-21. Here, Washington has not cited to the record in support of his argument that the trial court should have found the named mitigators. As such, the argument is waived. See App. R. 46(A)(8)(a).

Waiver notwithstanding, Washington has not established that his guilty plea and the purported hardship to his girlfriend and son are substantial mitigators. First, a guilty plea does not automatically amount to a significant mitigating factor. See Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied. Indeed, a guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one. See id. Here, as the trial court noted, in return for Washington’s agreement to plead guilty to possession of cocaine, as a Class C felony, the State dismissed the charge of dealing in cocaine, as a Class A felony. As a result, Washington reduced his potential sentence from a range of twenty to fifty years down to a range of two to eight years. See Ind. Code §§ 35-50-2-4, -6. Because Washington

received a substantial benefit, the trial court did not abuse its discretion in not according his plea mitigating weight.

Washington also did not meet his burden of proving that the trial court should have identified the hardship on his girlfriend and son as a mitigator. Washington's self-serving testimony on that point, without more, is insufficient to show that the trial court abused its discretion when it did not find that factor to be significant. As such, Washington's argument must fail.

Affirmed.

FRIEDLANDER, J., and VAIDIK, J., concur.