

STATEMENT OF THE CASE

Martin Russell appeals his sentence following his six convictions for theft, as Class C felonies, and three convictions for theft, as Class D felonies, pursuant to a plea agreement. He presents four issues for our review, each relating to his sentence. But we do not reach the merits of Russell's appeal because he waived his right to appeal his sentence.

We dismiss.

FACTS AND PROCEDURAL HISTORY

On September 10, 2010, Russell entered into a plea agreement whereby he pleaded guilty but mentally ill to nine counts of theft, six as Class C felonies and three as Class D felonies. The plea agreement provided that Russell's "total sentence shall be seventeen and one-half (17½) years. The terms and conditions of the Defendant's sentences and/or probationary periods shall be left to the discretion of the Court[.]" Appellant's App. at 81. In addition to signing the plea agreement, Russell wrote his initials next to a provision acknowledging that he thereby waived his right to appeal an adverse decision of the trial court. That provision also stated: "Furthermore, by his signature the Defendant acknowledges that he is waiving his right to appeal any sentence imposed by the Court that is within the range of penalties set forth in this Plea Agreement." Id.

At the hearing on Russell's plea and sentencing, the trial court engaged in the following colloquy with Russell:

COURT: . . . Mr. Russell, you've checked that you give up rights and those are outlined in the Plea Agreement, you give up the additional right, according to the Plea Agreement, the right to appeal an adverse decision of the trial court. Furthermore, by your signature, the Defendant

acknowledges that he's waiving his right to appeal any sentence imposed by the Court, that is within the range of penalties set forth in this Plea Agreement. Do you understand that?

RUSSELL: Yes, Your Honor.

COURT: So, if the Court sentences you from zero to . . . well, there will be a sentence of 17½ years. But, whatever portion or none of that is suspended, you do not . . . you're waiving your right to appeal that sentence of the Court. Do you understand that?

RUSSELL: Yes, Your Honor.

COURT: Okay. Any questions about that?

RUSSELL: No, Your Honor.

Transcript at 10-11. The trial court accepted Russell's plea of guilty but mentally ill and imposed an aggregate sentence of seventeen and one-half years, all executed. The trial court had considered several proffered mitigators, but declined to find any of them substantial enough to warrant a reduction in the executed portion of Russell's sentence. This appeal ensued.

DISCUSSION AND DECISION

Russell contends that in sentencing him, the trial court “did not follow statutory and case law guidelines for the rendering and imposition of an appropriate sentence”; “failed to properly and fully attribute on the record mitigating weight to Russell's uncontroverted mental illness”; and “improperly considered a non-statutory sentencing factor.” Brief of Appellant at 1. In addition, Russell asserts that his sentence is “manifestly unreasonable” and “excessive.” *Id.* Generally, a defendant who pleads guilty pursuant to an open plea agreement may challenge the trial court's sentencing decision on direct appeal. Tumulty v. State, 666 N.E.2d 394, 396 (Ind. 1996); see also

Childress v. State, 848 N.E.2d 1073 (Ind. 2006). Here, however, Russell's plea agreement contained a provision that explicitly waived his right to challenge his sentence on appeal, so long as the trial court sentenced him within the terms of the plea agreement.

In Creech v. State, 887 N.E.2d 73, 75 (Ind. 2008), our supreme court held that a defendant may waive the right to appellate review of his sentence as part of a written plea agreement. The waiver provision in Creech's plea agreement was similar to the one at issue here:

I understand that I have a right to appeal my sentence if there is an open plea. An open plea is an agreement which leaves my sentence to the Judge's discretion. I hereby waive my right to appeal my sentence so long as the Judge sentences me within the terms of my plea agreement.

Id. at 74 (emphasis added). The Creech court noted that such waivers are effective when the plea agreement is signed. See id. at 76 (citing United States v. Wenger, 58 F.3d 280, 282 (7th Cir. 1995)). The court also held that Creech's waiver was valid even though the trial court erroneously informed him at sentencing that he did have the right to appeal his sentence. Id. at 76–77.

Here, Russell signed a plea agreement which clearly stated that he was giving up his right to appeal his sentence. Moreover, the trial court read the waiver provision aloud to Russell during the hearing, and Russell stated that he understood it and had no questions about it. We agree with the State that Russell received the benefit of his bargain and hold that Russell's waiver of his right to appeal his sentence is valid. Because there is no allegation that Russell's sentence is outside the terms of the plea agreement, he may not now challenge the trial court's sentencing decision. Russell may,

however, challenge the validity of his plea in a post-conviction proceeding. See Creech, 887 N.E.2d at 75.

CONCLUSION

Russell may not challenge on direct appeal the validity of his guilty plea. The only issue available on direct appeal following a guilty plea is the propriety of the sentence imposed, but Russell's plea agreement contains an explicit waiver of his right to challenge his sentence on appeal. Because none of the issues Russell presents are properly before us, we dismiss this appeal.

Dismissed.

ROBB, C.J., and CRONE, J., concur.