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IN THE
COURT OF APPEALS OF INDIANA

SHAWN D. DOWNS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 09A02-1011-CR-1246
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CASS SUPERIOR COURT
The Honorable Thomas C. Perrone, Judge
Cause No. 09D01-0908-FD-210

June 30, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Shawn D. Downs was convicted of failure to pay support for his two children. He was placed in a community corrections program, but violated the conditions of his placement and was sent to prison. After his release, he continued his pattern of not meeting his support obligations, even when he had a job. In August 2009, the State charged him with class D felony nonsupport of a dependent child. As of May 2009, Downs owed more than $12,000 in child support.

Downs pled guilty and was scheduled for a psychiatric evaluation prior to sentencing. In the interim, he was charged with four new offenses, all related to drugs or alcohol. At sentencing, the trial court cited his criminal record as an aggravating factor and sentenced him to a three-year term. Upon Downs's request, the trial court concluded that if eligible, he could serve his sentence on work release. The court also ordered Downs to pay the arrearage as restitution.

Downs now appeals and makes the following claims: that he received ineffective assistance of counsel, that the arrearage was miscalculated, and that the trial court committed sentencing errors. Finding no error, we affirm.

Facts and Procedural History

In the early 1990s, Downs began a relationship with Jennifer Beane. The couple married after Beane gave birth to S.D. in April 1996, and I.D. in July 1999. They eventually divorced, and Downs was ordered to pay child support for both children. In 2005, he was convicted of class C felony nonsupport of a dependent child and sentenced to four years'

work release. On January 2, 2007, he violated his work release conditions and was remanded to the Indiana Department of Correction ("DOC"). His child support arrearage increased during his incarceration. He was released on July 7, 2009, whereupon he obtained employment and earned approximately $18,000. Nonetheless, he did not make child support payments.

On August 18, 2009, the State charged Downs with class D felony nonsupport, alleging that between August 31, 2005, and May 31, 2009, he knowingly or intentionally failed to provide support for S.D. and I.D. The State contemporaneously filed an affidavit executed by Beane, stating that as of May 31, 2009, Downs had made $0 in total direct child support payments and had an arrearage of $12,427.74. Appellant's App. at 28.

Downs pled guilty on January 21, 2010. While awaiting sentencing, he was charged with Xanax possession, paraphernalia possession, public intoxication, and operating while intoxicated ("OWI") endangering a person. In May 2010, he underwent a psychiatric evaluation and was diagnosed with polysubstance dependence and mood disorder not otherwise specified ("NOS").

At his November 1, 2010 sentencing hearing, Downs requested work release. The trial court found his criminal history to be a "dramatic" aggravating factor and his guilty plea to be the sole mitigating factor. Tr. at 68. The court imposed a three-year executed sentence, but specified that he could serve his term on work release if he were found to be eligible. Without objection, the trial court ordered Downs to pay Beane $12,421.74 in restitution. This appeal ensued. Additional facts will be provided as necessary.

Discussion and Decision

I. Ineffective Assistance of Counsel

Downs first contends that he was denied his constitutional right to effective assistance of counsel. He bases his ineffective assistance claim on three alleged errors by his defense counsel: (1) failure to follow up regarding Downs's eligibility for work release; (2) failure to interpose an "inability to pay" defense; and (3) failure to file a motion to dismiss the class D felony charge. At the outset, we note that Downs pled guilty as charged. Citing *Collins v. State*, 676 N.E.2d 741, 743 (Ind. Ct. App. 1996), the State argues that by pleading guilty, Downs waived the right to raise on direct appeal any ineffectiveness assistance claims that are based on his guilty plea. Although his second and third claims relate to the basis of his guilty plea, we nevertheless address all three of his claims on the merits.

A defendant must satisfy two components to prevail on an ineffective assistance claim. *Smith v. State*, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005), *trans. denied*. He must demonstrate both deficient performance and prejudice resulting from it. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance is representation that fell below an objective standard of reasonableness, wherein counsel has "committ[ed] errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment." *Brown v. State*, 880 N.E.2d 1226, 1230 (Ind. Ct. App. 2008), *trans. denied*. We assess counsel's performance based on facts that are known at the time and not through hindsight. *Shanabarger v. State*, 846 N.E.2d 702, 709 (Ind. Ct. App. 2006), *trans. denied*. "[C]ounsel's performance is presumed effective, and a defendant must offer strong and convincing

evidence to overcome this presumption." *Ritchie v. State*, 875 N.E.2d 706, 714 (Ind. 2007). Prejudice occurs when a reasonable probability exists that "but for counsel's errors the result of the proceeding would have been different." *Brown*, 880 N.E.2d at 1230. We can dispose of claims upon failure of either component. *Id*.

As stated, Downs raises his ineffective assistance claim on direct appeal. A post-conviction proceeding is normally the preferred forum for adjudicating ineffective assistance claims, since the presentation of such claims often requires the development of new facts not present in the trial record. *McIntire v. State*, 717 N.E.2d 96, 101 (Ind. 1999). On direct appeal, we do not have the benefit of extrinsic evidence to overcome the presumption of competence; as such, "[i]t is no surprise that [ineffective assistance] claims [brought on direct appeal] almost always fail." *Woods v. State*, 701 N.E.2d 1208, 1216 (Ind. 1998) (citation and quotation marks omitted). In examining Downs's ineffectiveness claim, we are limited to the facts contained in the record of proceedings through trial and judgment. *Jewell v. State*, 887 N.E.2d 939, 941 (Ind. 2008).[1]

First, Downs contends that defense counsel was ineffective for failing to follow up with the court and DOC concerning Downs's work release eligibility. This claim is difficult to assess on direct appeal, as the record before us is devoid of any evidence regarding any

[1] If a defendant elects to raise ineffective assistance of trial counsel "on direct appeal, the appellate resolution of the issue acts as *res judicata* and precludes its relitigation in subsequent post-conviction relief proceedings." *Jewell*, 887 N.E.2d at 941.

steps that defense counsel did or did not take to assess such eligibility.[2] Without any extrinsic evidence, we are left to speculate whether Downs remained in the DOC due to any failure by counsel to follow up or due to a determination that Downs in fact was not eligible for work release. Without such evidence, we must conclude that Downs has not overcome the presumption of competence.

Likewise, without extrinsic evidence, we find it impossible to assess Downs's claim that defense counsel was ineffective for not raising an inability to pay defense. At the initial hearing, defense counsel indicated that Downs intended to maintain his innocence. Subsequently, Downs pled guilty. "A petitioner alleging ineffective assistance of counsel in overlooking a defense leading to a guilty plea must show a reasonable probability that, had the defense been raised, the petitioner would not have pleaded guilty and would have succeeded at trial." *Helton v. State*, 907 N.E.2d 1020, 1023 (Ind. 2009). Without testimony from Downs and/or defense counsel concerning the reasons for Downs's ultimate decision to plead guilty rather than proceed to trial, we cannot say that defense counsel overlooked an "inability to pay" defense. Likewise, to the extent Downs's "inability to pay" defense was based on his previous incarceration, we note that he continued to accumulate arrearages even when he was employed in 2009 and earned nearly $18,000. In short, Downs has not presented evidence sufficient to overcome the presumption of his counsel's competence regarding this possible defense.

[2] At sentencing, community corrections representative Dave Wagner testified that he was uncertain if Downs would be eligible for work release because Downs: (a) had been arrested for drug- and alcohol-related offenses while awaiting sentencing; and (b) had wavered on whether to pursue work release at all because he did not want to pay the county fees associated with that program. Tr. at 59-60.

Finally, Downs asserts that defense counsel was ineffective for failing to file a motion to dismiss the class D felony nonsupport charge. He argues that he was entitled to a dismissal based on double jeopardy concerns, namely that some of the arrearage in this case is carried over from his class C felony conviction for the same offense. Article 1, Section 14 of the Indiana Constitution states that "[n]o person shall be put in jeopardy twice for the same offense." Two or more offenses are deemed the same offense "if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." *Lee v. State*, 892 N.E.2d 1231, 1233 (Ind. 2008) (citation and quotation marks omitted).

In addition to the constitutional test, our supreme court has adhered to a series of rules of statutory construction and common law often described as double jeopardy. *Guyton v. State*, 771 N.E.2d 1141, 1143 (Ind. 2002). Among these are categories barring "[c]onviction and punishment for an enhancement of a crime where the enhancement is imposed for the very same behavior or harm as another crime for which the defendant has been convicted and punished" and "[c]onviction and punishment for a crime which consists of the very same act as another crime for which the defendant has been convicted and punished." *Id*.

Downs asserts that certain unspecified portions of the total arrearage in this case were already included to reach the threshold amount of $15,000 to establish his conviction for class C felony nonsupport in 2005.[3] As such, he argues that the same evidence (arrearage)

[3] Ind. Code § 35-46-1-5.

was being used here in violation of his protection against double jeopardy. He relies on *Sanquenetti v. State*, 917 N.E.2d 1287 (Ind. Ct. App. 2009), in which we held that because certain portions of the defendant's support arrearage accrued within the timeframe for which she had already been charged, convicted, and sentenced, it was error to consider those portions again when assessing the nature of the offense for sentencing purposes. In that case, we were careful to point out

> that nonsupport of a dependent child is a continuous act, and where a parent fails to provide child support following an earlier conviction, the parent commits another offense. However, the Fifth Amendment to the United States Constitution and Article 1, Section 14 of the Indiana Constitution protect individuals from being put in jeopardy twice for the same offense. Accordingly, [the defendant] cannot be punished again for the amount of nonsupport and time periods of nonsupport upon which her class D felonies are based. In other words, the child support arrearage under the class D felony convictions cannot be added to the subsequent arrearage to achieve the $15,000 needed to elevate nonsupport of a dependent child to a class C felony.

Id. at 1290 n.4 (citations and quotation marks omitted).

We find *Sanquenetti* to be distinguishable. First, in *Sanquenetti*, the double jeopardy argument was raised within the framework of assessing the inappropriateness of the defendant's sentence. Moreover, in *Sanquenetti*, the defendant's previous conviction was for class D felony nonsupport, and her current conviction was for class C felony nonsupport, which carries a $15,000 threshold arrearage. In that case, we were clearly concerned about using some of the arrearage upon which the prior class D felony conviction was based to reach the threshold arrearage necessary to convict Sanquenetti on the subsequent class C felony charge. *Id*. at 1290. Here, Downs's previous conviction was for class C felony nonsupport, and his current conviction was for the class D felony version of that offense,

which does not carry any threshold amount. In the current class D felony charging information, the State did not specify an amount of arrearage, nor was it necessary to do so. Because Downs had arrearage that accrued after the date of his 2005 class C felony conviction, the statutory elements and actual evidence of the two offenses are not shared. Thus, Downs's current conviction did not violate double jeopardy principles. As such, his counsel was not ineffective when he failed to file a motion to dismiss.

II. Amount of Restitution

Downs next contends that the trial court based its restitution order on a miscalculation of the child support arrearage.[4] At the outset, we note that at sentencing, Downs did not object when the trial court ordered him to pay $12,421.74 in restitution. Tr. at 70. A defendant who fails to object to the trial court's imposition of restitution at the first opportunity waives his right on appeal. *Markland v. State*, 865 N.E.2d 639, 642-43 (Ind. Ct. App. 2007), *trans. denied*. Thus, Downs has failed to preserve this issue for appeal.

Waiver notwithstanding, an order of restitution is a matter within the trial court's discretion, and we will reverse it only upon a finding of abuse of that discretion. *Id*. at 643. An abuse of discretion occurs when the trial court misinterprets or misapplies the law. *Lang v. State*, 911 N.E.2d 131, 135 (Ind. Ct. App. 2009).

In this case, the restitution order is based on arrearage accrued due to Downs's

[4] We note that Downs has improperly included in the appellant's appendix two documents never admitted as evidence. *See* Appellant's App. at 21-22 ("Payment History Detail" and "Support Record Summary"). Downs relies on these documents in challenging the amount of arrearage. However, these documents are not properly considered part of the record before us on appeal. The only competent evidence in the record is that Downs was paying $0 in child support and that he had accumulated an arrearage of $12,427.74. Appellant's App. at 28.

nonpayment of court-ordered child support. Downs asserts that he has been unable to pay child support due to his incarceration and other financial hardships. *See* Ind. Code § 35-46-1-5 ("It is a defense that the accused person was unable to provide support."). He contends that his support should be reduced to account for the time that he spent in prison or was otherwise unable to work. He relies on *Lambert v. Lambert*, 861 N.E.2d 1176, 1177 (Ind. 2007), where our supreme court held that "in determining support orders, courts should not impute potential income to an imprisoned parent based on pre-incarceration wages or other employment-related income, but should rather calculate support based on the actual income and assets available to the parent." However, we note that Indiana courts have long held that after support obligations have accrued, a court may not retroactively reduce or eliminate them. *Whited v. Whited*, 859 N.E.2d 657, 661 (Ind. 2007). In fact, our supreme court has emphasized that "[n]othing in *Lambert* … suggests a contrary rule for modifications due to incarceration." *Becker v. Becker*, 902 N.E.2d 818, 820 (Ind. 2009). Thus, a "trial court only has the discretion to make a modification of child support due to incarceration effective as of a date no earlier than the date of the petition to modify." *Id*. at 821.

Here, the record is devoid of any evidence that Downs ever filed a petition to modify his child support obligation. As such, any modification by the trial court in its restitution order would have amounted to an improper retroactive modification of a child support obligation. *See Culbertson v. State*, 929 N.E.2d 900, 906 (Ind. Ct. App. 2010) (holding that court acted within its discretion in not retroactively modifying criminal nonsupport defendant's support obligation due to incarceration where defendant never petitioned for

modification of such obligation), *trans. denied*. Based on the foregoing, we conclude that the trial court acted within its discretion in ordering Downs to pay $12,421.74 in restitution.

III. Sentencing

A. Mitigating Factors

Downs next asserts that the trial court erred by failing to consider certain mitigating circumstances before sentencing him to a maximum three-year term.[5] Sentencing decisions are within the trial court's discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. "So long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion." *Id*. 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*. (citations and quotation marks omitted). One of the ways that a trial court may abuse its discretion is by failing to consider aggravating or mitigating factors that are clearly supported by the record and advanced for consideration during sentencing. *Id*. at 490-91.

Downs argues that the trial court abused its discretion by failing to consider his mental illness as a mitigating factor. However, we note that at sentencing, he did not advance mental illness as a mitigating factor for consideration. As such, he "is precluded from advancing it as a mitigating circumstance for the first time on appeal." *Id.*(quoting *Creekmore v. State*, 853 N.E.2d 523, 530 (Ind. Ct. App. 2006)).

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[5] Here, Downs pled guilty to class D felony nonsupport of a dependent, which carries a sentencing range of six months to three years, with an advisory term of one and a half years. Ind. Code § 35-50-2-7(a).

Waiver notwithstanding, our supreme court has outlined factors to consider when assessing the effect of a defendant's mental illness on sentencing: (1) the extent of the defendant's inability to control his behavior due to the disorder or impairment; (2) overall limitations on functioning; (3) the duration of the mental illness; and (4) the extent of any nexus between the disorder or impairment and the commission of the crime. *Weeks v. State*, 697 N.E.2d 28, 30 (Ind. 1998). Here, Downs suffered from polysubstance dependence and mood disorder NOS, and his mental health assessor said that the mood disorder could have been caused by his drug use. The record shows that despite these conditions, his overall ability to function was not severely impaired, as he was able to work in 2009 and earn about $18,000. Thus, a direct nexus between his impairment and his ongoing crime of nonpayment is not readily apparent from the evidence. As such, we conclude that the trial court did not abuse its discretion in not finding Downs's mental illness to be a mitigating factor. To the extent that Downs's argument addresses the weight given to his mental illness, we note that the trial court is no longer obligated to weigh mitigating and aggravating factors when imposing a sentence. *Anglemyer*, 868 N.E.2d at 491.

Downs also contends that the trial court abused its discretion in failing to cite his previous incarceration as a mitigating factor. Undoubtedly, a cause-and-effect relationship exists between one's incarceration and his ability to earn wages to help meet his financial obligations. However, in the present case, Downs's incarceration was due to his failure to pay child support, and the record shows that whether he was in or out of prison, he was not meeting his support obligation. Finally, we reiterate that the trial court is no longer obligated

to weigh aggravating and mitigating factors when imposing a sentence, and we decline Downs's invitation to engage in a balancing process on appeal. In sum, we find no abuse of discretion here.

B. Appropriateness of Sentence

Finally, Downs challenges the appropriateness of his sentence pursuant to Indiana Appellate Rule 7(B), which provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [this] Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." When a defendant requests appellate review and revision of his sentence, we have the power to affirm, reduce, or increase the sentence. *Akard v. State*, 937 N.E.2d 811, 813 (Ind. 2010). We do not look to see whether the defendant's sentence is appropriate or if another sentence might be *more* appropriate; rather, the test is whether the sentence is "inappropriate." *Fonner v. State*, 876 N.E.2d 340, 344 (Ind. Ct. App. 2007). A defendant bears the burden of persuading this Court that his sentence meets the inappropriateness standard. *Anglemyer*, 868 N.E.2d at 490; *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

In considering the nature of a defendant's offense, "the advisory sentence is the starting point the Legislature has selected as an appropriate sentence." *Anglemyer*, 868 N.E.2d at 494. As stated, Downs pled guilty to a class D felony, which carries an advisory one-and-a-half-year term, with an overall sentencing range of six months to three years. Ind. Code § 35-50-2-7(a). Here, the offense is nonsupport of dependent children—Downs's second conviction for this offense. The record shows that with regard to the instant

conviction alone, he failed to meet his support obligations for more than four years, and he accumulated an arrearage exceeding $12,000. Although he spent some of that time in prison, he did not meet his support obligations, whether in or out of prison. "The length of time for nonpayment of child support and the amount of arrearage go to the severity of the crime and the proper length of the sentence." *Jones v. State*, 812 N.E.2d 820, 826 (Ind. Ct. App. 2004).

Our review of Downs's character indicates a disregard for both the well-being of his children and for the law in general. He has a long history of failure to pay support, which includes a prior conviction for class C felony nonsupport. After his release from prison for that offense, he obtained employment yet failed to meet his support obligations, choosing instead to receive his wages in a manner that did not include garnishment as a means of paying support. For years, he failed to pay child support, yet at the same time he managed to find money to purchase drugs and alcohol. His criminal history includes numerous drug- and alcohol-related offenses, and he has continued this pattern of conduct, with arrests for four such offenses while awaiting sentencing in this case. He also has convictions for domestic battery and invasion of privacy.

Moreover, Downs's previous failures in alternative sentencing programs do not reflect positively on his character. Over the years, he has committed numerous probation violations and has had his probation revoked at least twice. After his first nonsupport conviction, he violated the conditions of his work release and was remanded to the DOC. Even when he was granted an early release in order to work to support his children, he chose not to have his wages subject to garnishment for the benefit of his children. In short, he has failed to meet

his burden of establishing that his sentence is inappropriate. Accordingly, we affirm.

Affirmed.

NAJAM, J., and ROBB, C.J., concur.