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**IN THE
COURT OF APPEALS OF INDIANA**



THOMAS WEST,

Appellant- Defendant,

vs.

STATE OF INDIANA,

Appellee- Plaintiff,

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No. 34A02-1102-CR-111

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable Stephen M. Jessup, Judge
Cause No. 34D02-0604-FB-72

July 20, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issues

Following a guilty plea, Thomas West was convicted of burglary, a Class B felony, and sentenced to twenty years. West appeals his sentence, raising two issues for our review: whether the trial court abused its discretion when sentencing West, and whether West's sentence is inappropriate in light of the nature of the offense and his character. Concluding the trial court did not abuse its discretion in sentencing West and his sentence is not inappropriate, we affirm.

Facts and Procedural History

On November 17, 2005, and November 19, 2005, West entered through a window the residence of Howard Loudon, his grandfather, and stole a television set, camcorders, DVD players, and computer equipment. West later pawned the stolen items. On April 4, 2006, the State charged West with burglary, a Class B felony, and disposing of stolen property, a Class D felony.

On October 23, 2006, West pleaded guilty to the charge of burglary. In exchange for the plea of guilty, the State dismissed the disposing of stolen property charge in this case and also dismissed two other pending criminal cases against him. A pre-sentence investigation revealed that West had the following prior convictions: Class A felony dealing in a controlled substance, Class C felony robbery, Class D felony maintaining a common nuisance, and Class A misdemeanor operating a motor vehicle while intoxicated.

At his sentencing hearing, West testified that all the crimes he committed were drug-related, he voluntarily sought admission to a hospital after he committed the burglary, and he called his mother to tell her about the crime. West also stated that he

had completed the eighth grade in a special education curriculum and attended a program for people with learning disabilities; he had been employed prior to his arrest; he was married with two children and had a pregnant girlfriend. While West was incarcerated, he completed a Successful Self Direction Program. The State and West's probation officer recommended an executed term of twenty years at the Indiana Department of Correction.

In its oral sentencing statement, the trial court noted that West showed remorse for the incident, but that he had been on probation and in rehabilitation programs numerous times without positive results. The trial court also expressed the opinion that, as long as West had access to drugs, he was a danger to himself and others, and the best method of rehabilitation for West was "to get [him] where [he] can't have access to [drugs], at least in theory." Transcript at 19. West was sentenced to twenty years. On February 3, 2011, the trial court granted West's verified motion for permission to file a belated appeal. West now appeals his sentence.

Discussion and Decision

I. Abuse of Discretion in Sentencing

A. Standard of Review

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. (quotation and citation omitted). A trial court may abuse its

discretion by failing to enter a sentencing statement, entering findings of aggravating and mitigating factors unsupported by the record, omitting factors clearly supported by the record and advanced for consideration, or giving reasons that are improper as a matter of law. Id. at 490–91. “Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.” Id. at 491. The appellate court may review both written and oral statements in order to identify the findings of the trial court. See McElroy v. State, 865 N.E.2d 584, 589 (Ind. 2007).

B. Sentencing Pursuant to the Advisory Sentencing Scheme

West broke and entered the dwelling of Loudon and stole multiple electronic items, committing Class B felony burglary, to which he pleaded guilty. See Ind. Code § 35-43-2-1(1)(B)(i). “A person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years.” Ind. Code § 35-50-2-5. The trial court imposed a sentence of twenty years.

West committed his offense in November 2005. In April 2005, our legislature amended the sentencing statutes to replace the presumptive sentencing scheme with the advisory sentencing scheme. See Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006) (noting amendment to respond to Blakely v. Washington, 542 U.S. 296 (2004)). The law in effect at the time a crime is committed controls sentencing issues. Roush v. State, 875 N.E.2d 801, 810 n.6 (Ind. Ct. App. 2007). The current advisory sentencing scheme is different from the presumptive sentencing scheme in that the trial court can “impose any sentence within the statutory range set for the crime, ‘regardless of the

presence or absence of aggravating circumstances or mitigating circumstances.” Pedraza v. State, 887 N.E.2d 77, 79 (Ind. 2008) (quoting Ind. Code § 35-38-1-7.1(d)). “[T]he correlation between [aggravating and mitigating] factors and the given sentence is not as precisely tailored as it was under the presumptive sentencing scheme.” Id. at 80.

In arguing that the trial court abused its discretion in sentencing him, however, West relies primarily upon law and arguments made under Indiana’s presumptive sentencing scheme. For instance, West argues the trial court “made no comment about balancing of the factors at all.” Appellant’s Brief at 8. However, the trial court no longer has an obligation to “weigh” aggravating and mitigating circumstances. Anglemyer, 868 N.E.2d at 491. The appellate court may review the reasons given and the omission of reasons arguably supported by the record for an abuse of discretion; 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.” Cardwell v. State, 895 N.E.2d 1219, 1222 (Ind. 2008) (quotation omitted). In order to show the trial court abused its discretion in omitting a mitigating circumstance, the defendant must show the claimed mitigator is both significant and clearly supported by the record. Anglemyer, 868 N.E.2d at 493.

Of the arguments we can review, West contends that his guilty plea is a mitigating factor. West’s argument fails for two reasons: first, West requested a guilty plea hearing on August 10, 2006, only twelve days before the August 22, 2006, trial date. See Richardson v. State, 906 N.E.2d 241, 246 (Ind. Ct. App. 2009) (holding trial court not required to assign significant mitigating weight to guilty plea when, among other things, it was entered one week before trial was scheduled to begin). Second, West received a substantial benefit for pleading guilty, in that the State dismissed a second charge in this

case and charges in two separate cause numbers. See Edrington v. State, 909 N.E.2d 1093, 1100-01 (Ind. Ct. App. 2009) (holding trial court not obligated to find guilty plea significant where State dismissed a Class A felony count and recommended sentence on remaining two Class A felonies be served concurrently), trans. denied. Therefore, West's guilty plea is not a significant mitigating factor and the trial court did not abuse its discretion in failing to identify it as such.

West also argues that his remorse and apologies for his actions should have been considered as mitigating circumstances. The trial court's finding that West was remorseful does not signify that his remorse should have been considered as a significant mitigating factor. See Penick v. State, 659 N.E.2d 484, 489 (Ind. 1995) ("a finding of remorse is within the sound discretion of the trial court."). West fails to present a persuasive argument that his remorse should have been considered as a significant mitigating circumstance.

West also contends the trial court did not sufficiently articulate the aggravating factors. In Anglemyer, the sentencing statement did not include a reasonably detailed recitation of the trial court's reasons for imposing the sentence; however, our supreme court found that meaningful appellate review was possible because the sentencing statement identified both aggravating and mitigating circumstances. Id. at 492. A defendant's "history of criminal or delinquent behavior" can be considered as an aggravating circumstance in imposing a sentence. Ind. Code § 35-38-1-7.1(a)(2). The trial court's sentencing statement referred to West's criminal history, including multiple felony and misdemeanor convictions and numerous probation violations. It also described West's heavy drug use and failure to successfully treat his addiction despite

repeated attempts. The trial court concluded that these circumstances made it very likely that West's criminal activity would recur. Thus, the sentencing statement identifies aggravating circumstances that were extensively supported by the record and it allows for meaningful appellate review, and we conclude that the trial court sufficiently articulated the aggravating factors. In light of the facts mentioned by the trial court at the sentencing hearing, such as West's history of criminal activity, probation violations, and substance abuse, we conclude that the trial court did not abuse its discretion in sentencing West.

II. Inappropriate Sentence

A. Standard of Review

Article 7, sections 4 and 6 of the Indiana Constitution authorize independent appellate review of criminal sentences. Reid v. State, 876 N.E.2d 1114, 1116 (Ind. 2007). This authority is implemented through Indiana Appellate Rule 7(B), which provides that the appellate 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." The defendant bears the burden to persuade the appellate court that his or her sentence is inappropriate. Reid, 876 N.E.2d at 1116. "[W]hether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." Cardwell, 895 N.E.2d at 1224.

B. Nature of West's Offense and Character

West pleaded guilty to a Class B felony, which carries a sentencing range of six to twenty years, with an advisory sentence of ten years. Ind. Code § 35-50-2-5. The trial court imposed a sentence of twenty years.

Regarding the nature of the offense, West broke into his grandfather's house and stole multiple items from his grandfather, who was suffering from depression. Thus, West violated the trust of a vulnerable family member making the nature of West's offense somewhat worse than a typical burglary. In regard to his character, West has a long history of committing theft and drug-related crimes. For example, West was adjudicated for theft as a juvenile. He was later convicted of conversion in both 1988 and 2005. In 1998, West was convicted of Class A felony dealing in a controlled substance, Class C felony robbery, Class D felony maintaining a common nuisance, and Class A misdemeanor operating a motor vehicle while intoxicated. In exchange for his plea in the instant case, two other pending cases against him were dismissed: one for theft and fraud, and another for theft and check deception. West also failed to successfully complete probation and home detention on multiple occasions.

Further, West has a long-term pattern of drug use. From 1990 until his 2005 arrest in this case, West was ordered to attend several alcohol and drug treatment programs as part of his sentence for previous convictions; however, West has been unable to overcome his addictions. He stated that he used controlled substances on a daily basis until his arrest. West's inability to overcome his drug habit and continued criminal activity to support his addiction reflects poorly on his character. Therefore, West's behavior is unlikely to be better reformed solely by treatment for his addictions. For the

foregoing reasons, we conclude West's sentence is not inappropriate in light of the nature of his offense and his character.

Conclusion

We conclude the trial court did not abuse its discretion in sentencing West and his twenty-year sentence is not inappropriate.

Affirmed.

NAJAM., J., and CRONE, J., concur.