

STATEMENT OF THE CASE

Charles Evans appeals his sentence following his convictions for dealing in a narcotic drug, as a Class B felony, and dealing in marijuana within 1000 feet of a public park, a Class C felony, pursuant to a plea agreement. Evans presents a single issue for our review, namely, whether his sentence is inappropriate in light of the nature of the offenses and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

On May 20 and June 3, 2010, an undercover police officer with the Indiana State Police Drug Enforcement Section purchased heroin from Evans at his home. Evans' two-year-old daughter was present during both transactions. On June 15, a confidential informant ("CI") working with the Dearborn County Sheriff's Department Special Crimes Unit purchased marijuana from Evans. That controlled buy occurred within 1000 feet of a public park. And on June 16, sheriff's deputies executed a search warrant of Evans' residence and recovered 1.83 grams of marijuana, \$1,130.20 in cash from Evans' person, a razor blade, digital scale, marijuana cigarettes, plastic baggies, and a cell phone, among other items. Deputies reviewed several text messages stored in the cell phone, which indicated that Evans was dealing in prescription drugs, marijuana, and heroin.

In cause number 15C01-1011-FB-20 ("FB-20") the State charged Evans with dealing in a narcotic drug, as a Class B felony. And in cause number 15C01-1006-FC-17 ("FC-17"), the State charged Evans with dealing in marijuana within 1000 feet of a public park, a Class C felony; maintaining a common nuisance, a Class D felony; neglect

of a dependent, as a Class D felony; possession of marijuana, as a Class A misdemeanor; and possession of paraphernalia, as a Class A misdemeanor. On November 3, 2010, Evans entered into a plea agreement whereby he pleaded guilty to dealing in a narcotic drug, as a Class B felony, and dealing in marijuana within 1000 feet of a public park, a Class C felony. In exchange for his plea, the State dismissed the other charges. The plea agreement left sentencing open to the trial court's discretion.

After accepting the plea, the trial court conducted a sentencing hearing and identified the following aggravating circumstances:

1. The Court considers Defendant's criminal history to be a substantial aggravating factor. What is most concerning to the Court is the fact that Defendant has a 1996 conviction for Cocaine selling. The Pre-Sentence Investigation indicates, for the 1996 conviction, that the Defendant received a term of incarceration of approximately eight (8) years. The Court finds this prior offense involving [the] sale of drugs is particularly significant in light of the fact that Defendant is charged with two (2) separate dealing offenses in the current causes of action. The Court also finds it particularly significant that Defendant appears to have violated his probation or parole in the State of Tennessee three (3) times. These violations include Absconding from Parole (7/16/02). This history of convictions and probation violations indicates that he is not a good candidate for future probation.

2. The Court considers the nature and circumstances of the crime to also constitute an aggravating circumstance.

- A. The Court finds it significant that Defendant conducted sales of drugs in the presence of his children, ages one (1), five (5) and seven (7). In fact, one of the described sales of drugs took place while a child was holding on to the Defendant's leg. The Court also finds that drugs and drug paraphernalia were present in the residence, in the presence of the children.

- B. The Court also finds the Defendant's level of drug selling activity to be significant. The transactions themselves (for which pleas of guilty have been entered) do not adequately describe Defendant's level of drug involvement. Defendant has admitted that

he conducted drug sales to make money. The Court also considers the amount of drugs and manner of packaging, which were present at the residence.

C. The Court also considers the forensic analysis of Defendant's cell phone to be significant. These messages included discussion of purchase and sale of approximately two hundred (200) pills and a pound of marijuana. These facts and circumstances indicate the Defendant was not a casual user and occasional seller. These facts and information indicate that the Defendant was a significant dealer.

Appellant's App. at 89-90. And the trial court identified a single mitigating circumstance, namely, Evans' guilty plea. But the trial court accorded only "some weight" to that mitigator since Evans benefitted from the plea by the State's dismissal of the remaining charges. Id. at 91. The trial court found that the aggravators "substantially" outweighed the mitigators and imposed sentence as follows: twenty years executed for dealing in a narcotic drug, a Class B felony, and eight years executed for dealing in marijuana within 1000 feet of a public park, a Class C felony. And the trial court ordered those sentences to run consecutively, for an aggregate term of twenty-eight years executed. This appeal ensued.

DISCUSSION AND DECISION

Evans contends that his sentence is inappropriate in light of the nature of the offenses and his character. Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize [] independent appellate review and revision of a sentence imposed by the trial court." Roush v. State, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007) (alteration original). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Revision of a sentence under Appellate Rule 7(B) requires the appellant

to demonstrate that his sentence is inappropriate in light of the nature of his offenses and his character. See App. R. 7(B); Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We assess the trial court’s recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, “a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.” Roush, 875 N.E.2d at 812 (alteration original).

The Indiana Supreme Court has stated that “sentencing is principally a discretionary function in which the trial court’s judgment should receive considerable deference.” Cardwell v. State, 895 N.E.2d 1219, 1222 (Ind. 2008). Indiana’s flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented. See id. at 1224. The principal role of appellate review is to attempt to “leaven the outliers.” Id. at 1225. Whether we regard a sentence as inappropriate 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 facts that come to light in a given case.” Id. at 1224.

Evans first contends that his sentence is inappropriate in light of the nature of the offenses. But the crux of his argument in support of that contention is actually a challenge to the validity of the aggravators identified by the trial court. In essence, then, Evans’ true contention on appeal is that the trial court abused its discretion when it sentenced him. See Anglemeyer v. State, 868 N.E.2d 482, 491-92 (Ind. 2007) (holding trial court may abuse its discretion where aggravators are improper as a matter of law),

clarified on other grounds on reh'g, 875 N.E.2d 218 (Ind. 2007). But Evans does not set out an abuse of discretion standard of review or make cogent argument to persuade us that the trial court abused its discretion. Accordingly, the issue is waived.

Waiver notwithstanding, we address Evans' contention that the trial court identified improper aggravators in support of his sentence. In particular, Evans asserts that the trial court considered "evidence of other acts of alleged wrongdoing that Mr. Evans did not admit, and which were dismissed as part of the plea negotiations[,]” which, he alleges, is “inappropriate.” Brief of Appellant at 7. He cites to this court's opinions in Farmer v. State, 772 N.E.2d 1025 (Ind. Ct. App. 2002), and Miller v. State, 709 N.E.2d 48 (Ind. Ct. App. 1999), for the principle that a trial court may not rely on facts or elements of charges that are dismissed as part of a plea agreement in identifying aggravators at sentencing. And Evans maintains that, here, the trial court improperly relied on the following facts that, he alleges, are related to the dismissed charges: “other drug selling activity,” including the evidence obtained after forensic analysis of Evans' cell phone; the presence of his children during the drug transactions; and the presence of paraphernalia in the home where the children lived. Brief of Appellant at 7. We address each set of facts in turn.

In its sentencing statement, the trial court found Evans' “level of drug selling activity to be significant.” Appellant's App. at 89. And the court observed, “[t]he transactions themselves (for which pleas of guilty have been entered) do not adequately describe Defendant's level of drug involvement. Defendant has admitted that he conducted drug sales to make money. The Court also considers the amount of drugs and

manner of packaging, which were present at the residence.” Id. at 89-90. Further, the trial court found “the forensic analysis of Defendant’s cell phone to be significant.” Id. at 90. And the court noted that the text messages found on Evans’ phone included the “discussion of purchase and sale of approximately two hundred (200) pills and a pound of marijuana.” Id. Thus, the trial court concluded that Evans was “not a casual user and occasional seller” but was “a significant dealer.” Id.

First, Evans has not demonstrated that any of those facts considered by the trial court were related to any of the dismissed charges. So his reliance on Farmer and Miller is unavailing on this point. Second, we reject Evans’ attempt to stretch the holdings in those cases to mean that the trial court is precluded from considering any and all evidence that was known to the State during plea negotiations but not included in a formal charge. The holdings in those cases are limited to facts underlying charges that were dismissed as part of a plea agreement. Evans argues that the evidence of “other dealing” included in the cell phone records was “consideration” for his guilty plea and was, therefore, improperly considered as an aggravator. Brief of Appellant at 9. But he does not cite to relevant authority in support of that assertion. Moreover, Evans did not object to the admission of the cell phone forensic analysis into evidence at sentencing. Evans has not demonstrated that the trial court improperly considered evidence of “other dealing” as an aggravator.

Likewise, Evans cannot prevail on his contention that the trial court improperly considered the facts that his children were present during the transactions and that drug paraphernalia was found in the presence of his children. He asserts that “these same facts

or elements were used to charge” him with possession of paraphernalia and neglect of a dependent, and both charges were dismissed as part of the plea agreement. Brief of Appellant at 10. But the charging information for those charges belies Evans’ argument. To prove possession of paraphernalia, the State had only to prove that Evans knowingly possessed instruments or devices for ingesting marijuana and other controlled substances. That charge was silent regarding the presence of children. And to prove neglect of a dependent, the State had only to prove that Evans knowingly used marijuana multiple times in a home where children resided. The charge was silent regarding the sale of drugs in the presence of children. The trial court properly considered those facts as aggravators because they went to the nature and circumstances of Evans’ admitted crime. See McCann v. State, 749 N.E.2d 1116, 1120 (Ind. 2001) (stating nature and circumstances of a crime is generally a proper aggravator).

Accordingly, we conclude that the trial court did not consider improper aggravators at sentencing. But even if we were to hold that the challenged aggravators were improper, a sentence may be upheld if other valid aggravators exist. See Pickens v. State, 767 N.E.2d 530, 535 (Ind. 2002). We need not remand for resentencing if we can 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. Evans does not challenge the trial court’s finding that his criminal history is a “substantial aggravating factor.” Appellant’s App. at 89. In particular, Evans had a prior conviction for dealing in cocaine, which is relevant to the present convictions. Evans’ criminal history also

includes a prior conviction for possession of marijuana. And Evans “appears” to have violated his probation or parole three times. Id.

Moreover, any error in sentencing is harmless if the sentence is not inappropriate. See Mendoza v. State, 869 N.E.2d 546, 556 (Ind. Ct. App. 2007), trans. denied. First, Evans has not demonstrated that his sentence is inappropriate in light of the nature of the offenses. Again, Evans’ two-year-old daughter was present during both transactions that led to the conviction in FB-20. Our supreme court has held, in the context of neglect of a dependent child, that the “knowing exposure of a dependent to an environment of illegal drug use poses an actual and appreciable danger to that dependent[.]” White v. State, 547 N.E.2d 831, 836 (Ind. 1989). And this court has extended the holding in White and held that “the dangers inherent in drug dealing are much worse than those associated with drug use alone[.]” Cleasant v. State, 779 N.E.2d 1260, 1262-63 (Ind. Ct. App. 2002). We cannot say that Evans’ sentence is inappropriate in light of the nature of the offenses.

Finally, Evans contends that his sentence is inappropriate in light of his character. He directs us to various evidence of his good character, including his care for his family, his role as a “positive father figure” to his wife’s older children, his history of employment, and his remorse for his conduct. See Brief of Appellant at 10. We are incredulous that Evans would describe himself as a positive role model for children in light of the evidence that he sold drugs in the presence of children and opted to support his family by selling drugs. Further, Evans’ history of dealing and possession of drugs,

including possession of drugs while on probation, reflects a very poor character. We cannot say that Evans' sentence is inappropriate in light of his character.¹

Affirmed.

RILEY, J., and MAY, J., concur.

¹ Evans mentions, without cogent argument or citation to authority, that the trial court should have found mitigating the hardship of his incarceration on his family and his remorse, guilty plea, and "willingness to abide by court rules and participate in alternative programming[.]" Brief of Appellant at 11. Despite Evans' waiver of that issue, it is well settled that the trial court is not required to give the same weight to mitigating factors as does the defendant. See Felder v. State, 870 N.E.2d 554, 558 (Ind. Ct. App. 2007). On appeal, the defendant must show that the proffered mitigating circumstance is both significant and clearly supported by the record. Id. Evans has not shown that any of the proffered mitigators were either significant or clearly supported by the record. And we note that it is an unfortunate but not unusual fact that incarceration works a hardship on a defendant's family and, thus, is not necessarily a significant mitigator.