

STATEMENT OF THE CASE

Roy Lee Bennett appeals his sentence following a plea of guilty to two counts of class C felony forgery.¹

We affirm.

ISSUE

Whether the trial court erred in sentencing Bennett.

FACTS

On or about January 12, 2004, the State charged Bennett with fifteen counts of child molestation; four counts of child exploitation; and one count of child solicitation in Tippecanoe County. Between October 10 and October 14, 2004, while released on bond and awaiting trial, Bennett deposited several checks into a commercial account he had opened at Lafayette Savings Bank (the “Bank”). The deposits totaled more than \$50,000.00. Bennett then withdrew more than \$40,000.00 from his account.

Bennett was scheduled to appear for trial on October 20, 2004. He, however, fled Indiana. Subsequently, the checks he had deposited into his account were returned to the Bank as fraudulent. Bennett was arrested in Mississippi in July of 2006, living under an assumed name.

On October 27, 2006, the State charged Bennett with thirteen counts of class C felony forgery; ten counts of class D felony theft; and one count of fraud on a financial institution, a class C felony. On April 4, 2008, Bennett and the State entered into a plea

¹ Ind. Code § 35-43-5-2.

agreement, whereby Bennett agreed to plead guilty to two counts of class C felony forgery. In return, the State agreed to dismiss all remaining counts. Regarding sentencing, the parties agreed “[t]hat the defendant shall receive the sentence [the trial court] deems appropriate after hearing any evidence or argument of counsel. However, the executed portion of the sentence shall be capped at ten (10) years.” (App. 37).

On April 4, 2008, the trial court took the plea agreement under advisement and ordered a pre-sentence investigation report (“PSI”). According to the PSI,² Bennett had been convicted of two counts of class D felony child exploitation and three counts of class C felony child molesting on March 30, 2007, for which he was sentenced to an executed sentence of twenty years.³

On May 13, 2008, the trial court found Bennett guilty of two counts of class C felony forgery and held a sentencing hearing. The trial court found as follows:

[I]n terms of aggravators and mitigators here, the first aggravator is that the harm, loss, and damage suffered by the victim was significant and greater than the elements necessarily [sic] to prove the commission of the offense. So a lot more money than I usually see in the forgery case This goes far beyond that and there are more than two instances of harm over a long period of time. The second aggravator is the defendant recently violated the conditions of pretrial release in committing this crime. And then what I believe to be three other aggravators, the crime was committed for the purpose of flight from prosecution so it shows a measure of disrespect for

² We remind Bennett’s counsel that Appellate Rule 9(J) requires that documents and information excluded from public access pursuant to Administrative Rule 9(G)(1) be filed in accordance with Trial Rule 5(G). Presentence investigation reports are excluded from public access and are confidential. *See* Ind. Administrative Rule 9(G)(1)(viii). Presentence investigation reports therefore shall be “tendered on light green paper or have a light green coversheet attached to the document, marked ‘Not for Public Access’ or ‘Confidential.’” Ind. Trial Rule 5(G)(1).

³ This Court affirmed Bennett’s conviction and sentence in a decision handed down on April 9, 2008. *See Bennett v. State*, 883 N.E.2d 888 (Ind. Ct. App. 2008), *trans. denied*.

the court and the legal system. . . . [F]inally, that it was committed with pre-meditation and it wasn't a spur of the moment, it wasn't casual, but it was something that was planned and carried out for a particular purpose. . . . I understand the defendant . . . intends to make restitution. There's an awful lot of money there and as you've pointed out he's going to . . . have a hard time making any money because of his conviction and limitation placed on him because of his other conviction. So I'm disregarding that as a mitigator. I do find that the defendant is remorseful and . . . that's a mitigator and the defendant does have family support and that that's a mitigator as well. . . . I do find that the aggravating circumstances outweigh the mitigating circumstances

(Sentencing Tr. 15-17). The trial court then sentenced Bennett to consecutive sentences of six years on each count, with five years suspended. Thus, Bennett received an executed sentence of seven years.

DECISION

Bennett asserts that the trial court erred in sentencing him to six years on each count.⁴ Specifically, he argues that the trial court erred in the finding of mitigating and aggravating circumstances and that his sentence is inappropriate.

We review a trial court's sentencing decision for an abuse of discretion. *Edmonds v. State*, 840 N.E.2d 456, 461 (Ind. Ct. App. 2006), *trans. denied, cert. denied*, 127 S. Ct. 497 (2006). "The trial court's sentencing discretion includes determining whether to increase the sentence, to impose consecutive sentences on multiple convictions, or both."

Id. In order for a trial court to impose enhanced sentences, it must 1) identify the

⁴ Subsequent to the date of Bennett's offense and prior to the date of his sentencing, the legislature amended Indiana Code section 35-50-2-6 to provide for an "advisory" rather than a "presumptive" sentence. See P.L. 71-2005, § 7 (eff. Apr. 25, 2005). As Bennett committed his offense prior to the amendment, we shall analyze the propriety of his sentence under the presumptive sentencing scheme. Pursuant to the former sentencing scheme, the statutory sentencing range for a class C felony was two to eight years, with the presumptive sentence being a fixed term of four years. I.C. § 35-50-2-6.

significant aggravating and mitigating circumstances; 2) relate the specific facts and reasons that the trial court found those to be aggravating and mitigating circumstances; and 3) demonstrate that the trial court has balanced the aggravating and mitigating circumstances. *Bostick v. State*, 804 N.E.2d 218, 225 (Ind. Ct. App. 2004). We may revise a sentence authorized by statute if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B).

1. Mitigating and Aggravating Circumstances

Bennett asserts the trial court overlooked three significant mitigating circumstances: his guilty plea, desire to make restitution, and personal life. A trial court must consider all evidence of mitigating circumstances presented by a defendant. *Sipple v. State*, 788 N.E.2d 473, 480 (Ind. Ct. App. 2003), *trans. denied*. The finding of mitigating circumstances, however, rests within the sound discretion of the trial court. *Id.* The failure to find a mitigating circumstance clearly supported by the record may imply that the trial court overlooked the circumstance. *Id.*

The trial court, however, is not obligated to consider “alleged mitigating factors that are highly disputable in nature, weight, or significance.” *Id.* Furthermore, the trial court need not agree with the defendant as to the weight or value to be given to proffered mitigating circumstances. *Id.* The trial court need enumerate only those mitigating circumstances it finds to be significant. *Ross v. State*, 835 N.E.2d 1090, 1093 (Ind. Ct. App. 2005), *trans. denied*.

a. *Guilty plea*

Bennett argues that the trial court abused its discretion in failing to identify Bennett's guilty plea as a mitigating circumstance. "Our courts have long held that a defendant who pleads guilty deserves to have some mitigating weight extended to the guilty plea in return." *Cotto v. State*, 829 N.E.2d 520, 525 (Ind. 2005). A guilty plea, however, is not necessarily a significant mitigating factor. *Id.*

Here, Bennett received a significant benefit from his guilty plea. In exchange for his guilty plea, the State dropped twenty-two charges, the majority of which were class C felonies. Thus, we do not find that the trial court abused its discretion in failing to identify Bennett's guilty plea as a mitigating circumstance as we cannot say that it was significant. *See Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005) ("[A] guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea"), *trans. denied*.

b. *Desire to make restitution*

Bennett argues that the trial court abused its discretion in disregarding his desire to make restitution as a mitigator. Indiana Code section 35-38-1-7.1(b)(9) provides that a court may consider as a mitigating circumstance that "the person has made or will make restitution to the victim of the crime for the injury, damage, or loss sustained."

In this case, Bennett wrote several thousands of dollars worth of bad checks and then fled to Mississippi, where he lived on the proceeds of those bad checks. The trial court need not give Bennett's wish to now make restitution the same significance as he would give it. *See Creekmore v. State*, 853 N.E.2d 523, 530 (Ind. Ct. App. 2006)

(finding no abuse of discretion in failing to attribute significant weight to the defendant's desire to make restitution where the defendant knowingly wrote bad checks), *trans. denied*. Furthermore, it is clear from his statement that he "just want[s] to be able to get back out so [he] can pay this money back. [He] can't do it from inside the prison," that Bennett expressed a desire to make restitution not due to any remorse but in order to receive a lesser sentence. (Sentencing Tr. 6). Finally, we agree with the trial court that Bennett's willingness to make restitution means little where he neither has made restitution nor has any foreseeable means of making restitution. We find no abuse of discretion in disregarding it as a significant mitigator.

c. Personal life

Bennett also argues that the trial court abused its discretion in failing to identify as mitigating the fact that he "had three dependent children, was a high school graduate who attended technical school, had joined the Marine Corp and served 1985-1990 and attends church weekly." Bennett's Br. at 9-10. He, however, provides no authority in support of these mitigating circumstances. Thus, these issues are waived. *See Bonner v. State*, 776 N.E.2d 1244, 1251 (Ind. Ct. App. 2002) (stating that a party waives any issue raised on appeal where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record), *trans. denied*.

Furthermore, Bennett has failed to show that the proffered mitigating circumstances are both significant and clearly supported by the record; and a trial court is not obligated to weigh or credit proffered mitigating circumstances the same as the

defendant requests. *See Fitzgerald v. State*, 805 N.E.2d 857, 862 (Ind. Ct. App. 2004). Thus, we find no abuse of discretion in failing to find Bennett’s personal circumstances and history to be mitigating.

d. *Improper aggravating circumstance*

Bennett also asserts that the trial court considered an improper aggravating circumstance. He contends that the trial court improperly found premeditation to be an aggravator as “forgery is a specific intent crime and therefore every forgery offense is ‘premeditated’ in nature by definition.” Bennett’s Br. at 10.

We agree that “a trial court may not use a material element of the offense as an aggravating circumstance.” *Shane v. State*, 769 N.E.2d 1195, 1199 (Ind. Ct. App. 2002). “‘However, the trial court may find the nature and circumstances of the offense to be an aggravating circumstance.’” *Id.* (quoting *Lemos v. State*, 746 N.E.2d 972, 975 (Ind. 2001)).

Here, the trial court found that Bennett’s crime “wasn’t a spur of the moment, it wasn’t casual, but it was something that was planned and carried out for a particular purpose.” (Sentencing Tr. 16). Clearly, the aggravator found by the trial court describes not the material elements of the offenses but the nature and circumstances—that in the weeks before his trial, Bennett forged numerous checks for large amounts of money and then used the money to support himself as a fugitive. We therefore find no abuse of discretion.

The trial court also identified additional aggravating circumstances, including that Bennett was out on bond when he committed his offenses. A single circumstance may be sufficient to support an enhanced sentence. *Edwards v. State*, 842 N.E.2d 849, 855 (Ind. Ct. App. 2006). We find that such is the case here.

2. Inappropriate Sentence

Bennett next asserts that his sentence is inappropriate. We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. App. R. 7(B). It is the defendant's burden to "persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007) (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)), *clarified on reh 'g*, 875 N.E.2d 218 (Ind. 2007).

The "nature of the offense" refers to the statutory presumptive (now advisory) sentence for the class of crimes to which the offense belongs. *Id.* Thus, the presumptive (advisory) sentence is meant to be the starting point for the trial court's consideration of the appropriate sentence for the particular crime or crimes committed. *Id.* The "character of the offender" refers to the sentencing considerations in Indiana Code section 35-38-1-7.1, which contains general sentencing considerations, the balancing of aggravating and mitigating circumstances, and other factors within the trial court's discretion. *Id.* "This court is mindful of the principle that 'the maximum sentence enhancement permitted by law should be reserved for the very worst offenses and offenders.'" *Matshazi v. State*,

804 N.E.2d 1232, 1241 (Ind. Ct. App. 2004) (citing *Borton v. State*, 759 N.E.2d 641, 648 (Ind. Ct. App. 2001), *trans. denied*), *trans. denied*.

The record reflects that Bennett deposited more than \$50,000.00 in forged checks before absconding to Mississippi. It further shows that when he committed the instant offenses, he was already awaiting trial on twenty other charges, on five of which he was later convicted. Furthermore, the trial court sentenced him to six years for each class C felony—two years less than the maximum he could have received. We find that Bennett’s sentence is not inappropriate.

Affirmed.

RILEY, J., and VAIDIK, J., concur.