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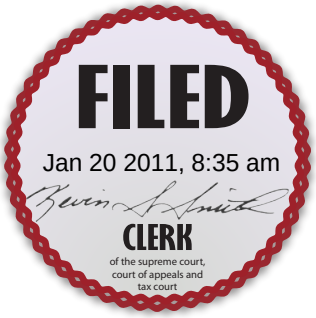

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IN THE
COURT OF APPEALS OF INDIANA

CHRISTOPHER M. LEE,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 24A01-1006-CR-282
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE FRANKLIN CIRCUIT COURT
The Honorable Steven Cox, Judge
Cause No. 24C01-0411-FB-774

January 20, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Christopher Lee ("Lee") was convicted in Franklin Circuit Court of Class B felony burglary and Class D felony theft and ordered to serve an aggregate sentence of twenty and one-half years, with sixteen years executed and four and one-half years suspended to probation. Lee appealed his sentence, and our court remanded the case to the trial court for clarification of the court's sentencing decision. On remand, the trial court held a new sentencing hearing, and ordered Lee to serve the same sentence. Lee appeals and argues that the trial court improperly considered the mitigating and aggravating circumstances and that his sentence is inappropriate in light of the nature of the offense and the character of the offender. We affirm.

Facts and Procedural History

This is Lee's second appeal of his sentence and facts pertinent to this case are found in our resolution of Lee's first direct appeal.

> On October 30, 2004, Lee and his girlfriend, Megan Harmon, were at Megan's mother's home with Megan's minor sister, Amanda. The three left the house to meet another friend, Josiah Huelsman, and the four then walked to another friend's house to ask if they could borrow a car. That friend, Samantha Pomante, was home alone while her parents were camping. At first, Samantha searched for the keys to the car, but could not find them. Samantha ultimately changed her mind thinking that it was a bad idea to loan out the car.
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> After spending approximately an hour at Samantha's house, Samantha, Amanda, and Megan left to ask some other friends if they could borrow a car while Lee and Huelsman remained at Samantha's house. The girls walked through the Lake in the Woods subdivision where Samatha's aunt and uncle, Kim and Chris Fledderman, lived. They stopped and entered the Fleddermans' house to use the restroom. The Fleddermans were gone camping with Samantha's parents. Samantha, who did not have a key to the Fleddermans' home, gained entry to the residence through the garage and locked the door when the girls left.
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> While the girls were gone, Lee went to Samantha's parents' bedroom and took a lock box which he hid by a creek near Samantha's

house. When the girls returned, Lee and Huelsman were sitting on the stairs where they had been sitting when the girls left. Samantha's cousins arrived, and Amanda, Megan, Huelsman, and Lee left. Samantha left to stay the night at her grandmother's house.

Lee, Megan, and Amanda returned to the Fledderman home and entered it. Once inside, Lee and Megan looked around and found alcohol, rings, a necklace, and a camera bag, which Lee and Megan took from the residence. After about fifteen to thirty minutes there, Lee, Megan, and Amanda returned to the home of Megan and Amanda's mother, Lisa Austing, and took the stolen items downstairs into the basement.

Lee and Megan asked Megan's brother, Justin, for a ride and he drove them into the Lake in the Woods subdivision. Megan and Lee exited the vehicle and walked in different directions toward separate driveways. When they returned, Lee was carrying a safe, which he pried open once inside Justin's car. The safe, containing papers, jewelry, and old coins, came from the home of Samantha's parents, Daphne and Bart Pomante.

When Austing arrived home later that day, she discovered the stolen property, including alcohol, jewelry, and coins, in her basement. Austing confronted Lee about what she had discovered and called the police. Lee told Austing that he could not believe that she had called the police and then he fled. The police responded and Austing allowed the officers to collect the items she had discovered in her basement. Although Austing had told Lee, Amanda, and Megan to remain in her home, they all left except for Justin, who remained until the police arrived. Megan ultimately returned to her home, and the police found Amanda one week later.

The Pomantes gave no one permission to remove their property from their home, some of which was still missing at the time of trial. Samantha, who had originally allowed Lee and Megan into her parents' home and her aunt and uncle's home, gave no one permission to remove property from either home. Samantha's aunt, Kim Fledderman, gave no one permission to enter her home or remove her property from it. Her missing property included a camera, jewelry consisting of a wedding band and engagement ring, and liquor from her liquor cabinet.

Officer Stanley Holt of the Batesville Police Department was the lead investigator for these crimes. Officer Holt interviewed suspects and witnesses. Lee's confession and those statements taken by Officer Holt were admitted into evidence at Lee's trial without objection. Officer Jeffrey Davis of the Batesville Police Department was the first officer to respond to Austing's call to the police and collected the stolen property from Austing's basement. While Officer Davis was there, Megan returned home and showed Officer Davis where she and Lee had dumped the safe. Davis then recovered the stolen safe. The State charged Lee with burglary of the Fledderman home and the State later amended the information to add the

> charge of theft from the Pomantes. Lee was tried *in absentia,* and the jury found Lee guilty as charged. The trial court sentenced Lee to an aggregate sentence of twenty and one half years, with sixteen years executed and four and one half years suspended to probation. The trial court ordered restitution of $1,000.00 for the theft from the Pomantes and $2,864.40 for the burglary of the Fledderman home.

Lee v. State, No. 24A01-0905-CR-249, Slip op. at *1-2 (Ind. Ct. App. Jan. 27, 2010).

In his first appeal, Lee challenged the adequacy of the trial court's sentencing statement. Our court agreed that both the written and oral sentencing statements were inadequate and remanded the case to the trial court "for a clarification or new sentencing determination which shall include reasonably detailed reasons or circumstances for the sentence imposed." Id. at *4. We then declined to address Lee's argument that his sentence was inappropriate. Id.

On May 19, 2010, the trial court held a new sentencing hearing. The court found the following aggravating circumstances:

> 1) having committed a crime back to back, 2) having time to reflect, 3) having a lack of moral or legal consciousness, 4) engaging the help of minors, 4) [sic] having fled jurisdiction twice, 5) criminal record consisting of one felony, three misdemeanors and two juvenile adjudications, 6) being on probation in Shelby County, 7) having a complete disregard for the law, 8) drugs being a constant in his life, 9) not responding affirmatively to probation, and 10) victim wanting the maximum penalty.

Appellant's App. p. 233. The trial court considered Lee's acceptance of responsibility for his actions and his expression of remorse as mitigating circumstances. Lee was then ordered to serve consecutive terms of eighteen years with four years suspended to probation for the Class B felony burglary conviction and two and one-half years, with six months suspended to probation for the Class D felony theft conviction, for an aggregate

sentence of twenty and one-half years with four and one-half years suspended to probation. Lee now appeals.

Discussion and Decision

First, Lee argues that the trial court abused its discretion when it failed to consider certain mitigating circumstances and improperly considered legally erroneous aggravators. Initially, we observe that our General Assembly amended Indiana's sentencing statutes, effective April 25, 2005, to eliminate fixed presumptive terms. See Anglemyer v. State, 868 N.E.2d 482, 488 (Ind. 2007). Because Lee committed the instant offenses before the sentencing statute was amended, we apply the former sentencing scheme to analyze Lee's sentence. See Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007).

On the date Lee committed his offenses, the sentencing range for a Class B felony was six to twenty years, with the presumptive sentence being a fixed term of ten years. Ind. Code § 35-50-2-5 (amended 2005). The statutory sentencing range for a Class D felony was one-half to three years, with the presumptive sentence being a fixed term of one and one-half years. Ind. Code § 35-50-2-7 (amended 2005).

Sentencing lies within the discretion of the trial court. Haddock v. State, 800 N.E.2d 242, 245 (Ind. Ct. App. 2003). If a trial court uses aggravating or mitigating circumstances to deviate from the presumptive sentence, it must identify all significant mitigating and aggravating circumstances, state the specific reason why each circumstance is determined to be mitigating or aggravating, and articulate its evaluation and balancing of the circumstances. Id. The trial court's assessment of the proper weight

of mitigating and aggravating circumstances and the appropriateness of the sentence as a whole is entitled to great deference on appeal and will be set aside only upon a showing of a manifest abuse of discretion. Id.

Lee argues that the trial court abused its discretion when it failed to consider the nature of the offenses as a mitigating circumstance because Lee knew the home he burglarized was unoccupied; therefore, he "threatened no violence or harm to anyone." Appellant's Br. at 10.

> It is well-settled that a trial court is not required to find mitigating circumstances, nor is it obligated to accept as mitigating each of the circumstances proffered by the defendant. Accordingly, the finding of a mitigating circumstance is within the trial court's discretion. A court does not err in failing to find mitigation when the presence of a mitigating circumstance is highly disputable in nature, weight, or significance.

Moon v. State, 823 N.E.2d 710, 717 (Ind. Ct. App. 2005).

We cannot conclude that the trial court abused its discretion when it refused to consider the nature of the offenses as mitigating. Lee burglarized the Fledderman home and stole their property worth nearly $3000. That same evening, Lee stole property from the Pomantes' home where he was an invited guest. Lee also engaged the assistance of two minors in the commission of the offenses. For these same reasons, we also cannot conclude that the trial court abused its discretion when it considered as aggravating that Lee committed his offenses "back to back" and had "time to reflect" between commission of the offenses.

Lee also argues that the court should not have considered as separate aggravating circumstances his "lack of a moral or legal consciousness," his "complete disregard for

the law," and his failure to respond affirmatively to probation as separate aggravating circumstances because they are simply derivative of his criminal history. In Morgan v. State, our supreme court held that aggravating circumstances that are derivative of criminal history, i.e. that prior punishments failed to rehabilitate the offender, are "legitimate observations about the weight to be given to facts appropriately noted by a judge" and they "cannot serve as separate aggravating circumstances." 829 N.E.2d 12, 17 (Ind. 2005).

Although we agree that the trial court improperly considered Lee's failure to respond to probation and "lack of moral consciousness" as separate aggravators, the other challenged aggravating circumstance is not simply derivative of Lee's criminal history. The trial court consideration of Lee's "complete disregard for the law" is supported by the fact that he fled the jurisdiction during the proceedings and was tried *in absentia*.

Lee also argues that the trial court improperly considered the victim's request for the maximum sentence as an aggravating circumstance. Our supreme court has observed that recommendations from the victim as to sentencing "do not constitute mitigating or aggravating circumstances of the customary sort . . ." but "they may properly assist the court in determining the sentence to be imposed." Serino v. State, 798 N.E.2d 852, 858 (Ind. 2003). The trial court certainly did not abuse its discretion when it considered the victim's testimony that she and her family still feel violated six years after the offense was committed in deciding what sentence to impose. See Tr. p. 13. But to the extent the court considered the victim's request for a maximum sentence as a separate aggravating

circumstance, we must conclude that the court abused its discretion. See Serino, 798 N.E.2d at 858.

The trial court also considered Lee's constant use of illegal substances as an aggravating circumstance, which Lee argues was improper because although Lee admitted to drug use, he is trying to "overcome his addiction." Appellant's Br. at 18. Courts may properly consider drug use as an aggravating circumstance. See Iddings v. State, 772 N.E.2d 1006, 1018 (Ind. Ct. App. 2002), trans. denied. Lee has not presented any compelling argument which would lead us to conclude that the trial court abused its discretion when it did so in this case.

Lee also challenges the trial court's consideration of the fact that Lee "engag[ed] the help of minors" as an aggravating circumstance. Lee argues that this aggravator was improper because he was also only nineteen when he committed his offenses. But Lee was legally an adult, and the minors who assisted Lee in the commission of the offenses were fourteen and sixteen years old. The trial court therefore did not abuse its discretion when it considered this aggravating circumstance.

Finally, Lee argues that the trial court improperly enhanced his sentence after considering his criminal history because his prior offenses were minor, he was only nineteen years old at the time of the offense, and he had a difficult childhood. However, Lee's prior criminal history is only one of several aggravating circumstances the trial court considered before imposing sentence.[1]

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[1] Lee also argues that the trial court improperly considered his juvenile adjudications during sentencing because the presentence investigation report did not provide any specific details about the adjudications

Although the trial court improperly considered the victim's request for a maximum sentence, Lee's failure to respond to probation, and his lack of moral character as aggravating circumstances, the trial court did not abuse its discretion in considering the other challenged aggravating circumstances. The properly considered aggravating circumstances more than support Lee's aggregate twenty and one-half year sentence with sixteen years executed and four and one-half years suspended to probation.

We now turn to Lee's argument that his aggregate twenty and one-half year sentence is inappropriate in light of the nature of the offense and the character of the offender. 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). 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).

Concerning the nature of the offense, we acknowledge Lee's argument that his offenses were not violent. However, Lee did steal thousands of dollars of items from the

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for theft and battery. In Lewis v. State, 759 N.E.2d 1077, 1086-87 (Ind. Ct. App. 2001), our court held that it was inappropriate to consider the defendant's juvenile record where the presentence investigation report failed to provide any information regarding the juvenile adjudication except that the defendant was adjudicated a delinquent for committing what would be theft if committed by an adult. In Lewis, the juvenile adjudication was the only prior criminal history cited as an aggravating circumstance. But in this case, Lee's prior criminal history consists of a Class D felony possession of cocaine conviction, and three other adult misdemeanor convictions in addition to the two juvenile adjudications.

Fleddermans during the commission of the burglary and from the Pomantes, while he was an invited guest in the Pomantes' home.

The character of the offender more than supports the trial court's decision to impose an enhanced sentence. Lee committed these offenses then fled the jurisdiction. He was tried *in absentia* as a result. Lee engaged the help of two minors in the commission of his offenses, and the offenses were committed while he was on probation. At the age of nineteen, Lee had already amassed one felony conviction and three misdemeanor convictions. Lee has not demonstrated an ability to lead a law abiding life.

For all of these reasons we conclude that the trial court did not abuse its discretion when it sentenced Lee, and Lee's aggregate sentence of twenty and one-half years with four and one-half years suspended to probation is not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

FRIEDLANDER, J., and MAY, J., concur.