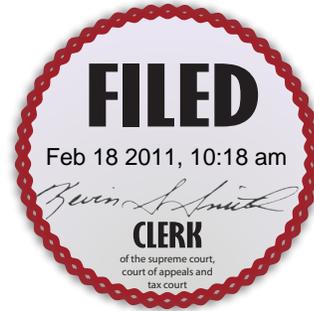


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

MARY K. LAYTON,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 90A02-1006-CR-681

APPEAL FROM THE WELLS CIRCUIT COURT
The Honorable David L. Hanselman, Sr., Judge
Cause No. 90C01-0812-FD-116

February 18, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Mary K. Layton appeals her sentence, following a guilty plea, for Class D felony theft.¹ Layton argues the trial court abused its discretion by ignoring mitigating circumstances and the sentence is inappropriate in light of her character and the nature of her offense. We affirm.

FACTS AND PROCEDURAL HISTORY

On December 18, 2009, Layton attempted to remove sixty-six items from a Wells County Wal-Mart without paying for them. She was arrested and charged with Class D felony theft. Layton entered a plea of guilty to the charge without a written agreement.²

The trial court held a sentencing hearing and found as aggravating circumstances she had an extensive criminal record and was on probation when she committed this crime. It found as mitigators her guilty plea and the lack of harm and damage. The trial court sentenced her to three years,³ all executed.

DISCUSSION AND DECISION

1. Abuse of Discretion

When the trial court imposes a sentence within the statutory range, we review 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). We may reverse a decision that is “clearly against

¹ Ind. Code § 35-43-4-2.

² The record indicates there was an oral agreement that Layton would enter a plea of guilty to theft and the State would make no recommendation regarding her sentence. *But see* Indiana Code § 35-35-3-3 (requiring plea agreements be in writing).

³ Three years is the maximum sentence for a Class D felony. Ind. Code § 35-50-2-7.

the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.” *Id.* at 490 (quoting *In re L.J.M.*, 473 N.E.2d 637, 640 (Ind. Ct. App. 1985)).

Our review of the trial court’s exercise of discretion in sentencing includes an examination of its reasons for imposing the sentence. *Id.* “This necessarily requires a statement of facts, in some detail, which are peculiar to the particular defendant and the crime . . . [and] such facts must have support in the record.” *Id.* The trial court is not required to find mitigating factors or give them the same weight that the defendant does. *Rascoe v. State*, 736 N.E.2d 246, 248-49 (Ind. 2000). However, a court abuses its discretion if it does not consider significant mitigators advanced by the defendant and clearly supported by the record. *See Anglemyer*, 868 N.E.2d. at 490. Once aggravators and mitigators have been identified, the trial court has no obligation to weigh those factors. *Id.* at 491.

Layton asserts the trial court should have found a mitigator in the fact that Wal-Mart did not suffer harm to person or property.⁴ The trial court stated:

So to the extent that [lack of damage to Wal-Mart] might be a mitigating factor the court is going to give it minimal weight. I assume since this is a Wal-Mart thing the reason that the goods were recovered was because [Layton] . . . probably didn’t get out of the store, [it] wasn’t that she took them home and then voluntarily took them back, so I don’t think that’s necessarily a reason for overlooking the aggravating factors in this matter.

⁴ Layton notes police recovered from the trunk of her car, and returned to Wal-Mart, merchandise she had removed from another Wal-Mart. This, she asserts, amounts to “restitution” for her crime. We decline to hold the recovery of stolen goods is “restitution” under Ind. Code 35-38-1-7(b)(9).

(Sentencing Tr. at 8.) Thus the trial court found a mitigating factor, albeit “minimal,” in the lack of harm suffered by Wal-Mart. As we do not review the weight assigned to aggravators and mitigators, *see Anglemeyer*, 868 N.E.2d. at 491, we cannot find an abuse of discretion in the court’s treatment of this mitigator.

Layton argues her incarceration will cause her undue hardship because of her health. The trial court recognized Layton’s health issues but declined to give these issues mitigating weight: “she has these health issues but [this] . . . hasn’t stopped her from continuing to commit crimes.” (Sentencing Tr. at 8.) Layton argues the trial court’s reasoning was “clearly” incorrect in this regard, but the trial court is not required to give the same weight to mitigating factors that the defendant does. *See Rascoe*, 736 N.E.2d at 248-49. Neither was it required to find a mitigator in Layton’s health issues. *See Henderson v. State*, 848 N.E.2d 341, 344 (Ind. Ct. App. 2006) (diagnoses of depression, anxiety, diabetes, acid reflux, bladder prolapse, hyperthyroidism, hypertension, and arthritis does not create a conclusive mitigating circumstance).

Nor was the trial court required to find Layton’s incarceration would result in undue hardship on her dependents. *See Davis v. State*, 835 N.E.2d 1102, 1116 (Ind. Ct. App. 2005) (trial court not required to find defendant’s incarceration would result in undue hardship upon his dependents) *trans. denied*. Indeed, “[m]any persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship.”

Dowdell v. State, 720 N.E.2d 1146, 1154 (Ind. 1999). The trial court noted that most of Layton's children have been adopted by others and the one remaining child to whom Layton has rights is in the custody of its father. As the record supports the trial court's statements regarding Layton's children, we cannot find the trial court erroneously overlooked this factor.

As each of Layton's arguments fails, she has not demonstrated the trial court abused its discretion.

2. Indiana Appellate Rule 7(B)

We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. *Williams v. State*, 891 N.E.2d 621, 633 (Ind. Ct. App 2008) (citing Ind. Appellate Rule 7(B)). We consider not only the aggravators and mitigators found by the trial court, but also any other factors appearing in the record. *Roney v. State*, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), *trans. denied*. The appellant bears the burden of demonstrating her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

When considering the nature of the offense, the advisory sentence is the starting point to determine the appropriateness of a sentence. *Anglemyer*, 868 N.E.2d at 494. The advisory sentence for theft, a Class D felony, is one and one-half years, with a sentencing range of six months to three years. Ind. Code § 35-50-2-7. When determining the appropriateness of deviations from the advisory sentence, one factor is whether there is

anything more or less egregious about the offense committed by the defendant that makes it different from the “typical” offense accounted for by the legislature when it set the advisory sentence. *Rich v. State*, 890 N.E.2d 44, 54 (Ind. Ct. App. 2008), *trans. denied*. Layton asserts nothing about the offense was “extraordinary,” but she offers no explanation or authority to support that argument. (Appellant’s Br. at 16.) Layton therefore has not provided the cogent argument supported by citation to authority that is required by our rules, *see* Ind. Appellate Rule 46(A)(8), nor has she demonstrated trial court error as is required for reversal. *See Childress*, 848 N.E.2d at 1080.

When considering the character of the offender, one relevant fact is the defendant’s criminal history. *Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007). The significance of criminal history in assessing a defendant’s character varies based on the gravity, nature, and number of prior offenses in relation to the current offense. *Id.* Layton has scores of convictions in Indiana and Ohio including theft in 1992, misdemeanor theft in 1993, complicity in 1996, petty theft in 1996, theft in 1997, receiving stolen property in 1997, obstructing official business in 1998, petty theft in 1999, petty theft in 1999, drug abuse in 1999, conversion in 2007, theft in 2007, and theft in 2008. At least two of those convictions were felonies. Layton was on probation at the time of this offense, and it is clear she has failed to benefit from prior rehabilitative efforts.

Based on Layton’s character and offense, we do not find her sentence

inappropriate.

CONCLUSION

Layton's three-year sentence for Class D felony theft was within the statutory range, and Layton has not demonstrated the trial court abused its discretion in identifying mitigating and aggravating circumstances. Neither has Layton demonstrated her sentence is inappropriate in light of her character and the nature of her offense. We accordingly affirm.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.