

STATEMENT OF THE CASE

Will Dunlap appeals his sentence following his convictions for Failure to Stop After Accident Resulting in Death, a Class C felony, and Failure to Stop After Accident Resulting in Serious Bodily Injury, a Class D felony, pursuant to a plea agreement. Dunlap 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 November 19, 2005, after dark, Dunlap, whose driver's license was suspended at the time, was driving on Park 65 Drive in Indianapolis when his car struck two pedestrians, James Maxwell and Devon Mooney. Dunlap did not stay at the scene of the accident, but drove away. Approximately three hours later, Dunlap drove to the Sheriff's Department in downtown Indianapolis and turned himself in. As a result of the accident, Maxwell sustained a severe head injury, and his leg was broken in several places. Mooney died as a result of his injuries.

The State charged Dunlap with battery, as a Class B felony; failure to stop after accident resulting in death, a Class C felony; failure to stop after accident resulting in serious bodily injury, a Class D felony; and driving while license suspended, as a Class A misdemeanor. On August 14, 2006, Dunlap pleaded guilty to the two failure-to-stop counts and, in exchange, the State dismissed the remaining counts and agreed to recommend concurrent sentences. The plea agreement otherwise left sentencing open to the trial court's discretion.

The trial court identified two aggravators and three mitigators and sentenced Dunlap to concurrent sentences of four years for the Class C felony and one and one-half years for the Class D felony. This appeal ensued.

DISCUSSION AND DECISION

We note initially that the standard of reviewing a sentence imposed under the advisory sentencing scheme, when the trial court has identified an aggravating factor, is far from clear. As this court recently noted:

[The] after-effects [of Blakely v. Washington, 542 U.S. 296 (2004),] are still felt because the new [advisory sentencing] statutes raise a new set of questions as to the respective roles of trial and appellate courts in sentencing, the necessity of a trial court continuing to issue sentencing statements, and appellate review of a trial court's finding of aggravators and mitigators under a scheme where the trial court does not have to find aggravators or mitigators to impose any sentence within the statutory range for an offense, including the maximum sentence. The continued validity or relevance of well-established case law developed under the old "presumptive" sentencing scheme is unclear.

We attempted to address these questions in Anglemyer v. State, 845 N.E.2d 1087 (Ind. Ct. App. 2006), trans. granted. We observed that under the current version of Indiana Code Section 35-38-1-7.1(d), trial courts may impose any sentence that is statutorily and constitutionally permissible "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." [Anglemyer, 845 N.E.2d] at 1090. We also noted, however, that Indiana Code Section 35-38-1-3(3) still requires "a statement of the court's reasons for selecting the sentence that it imposes" if a trial court finds aggravating or mitigating circumstances. Id. In attempting to reconcile this language, we concluded that any possible error in a trial court's sentencing statement under the new "advisory" sentencing scheme necessarily would be harmless. Id. at 1091. Therefore, we declined to review Anglemyer's challenges to the correctness of the trial court's sentencing statement. Id. Nevertheless, we stated, "oftentimes a detailed sentencing statement provides us with a great deal of insight regarding the nature of the offense and the character of the offender from the trial court judge who crafted a particular sentence" and encouraged trial courts to continue issuing detailed sentencing statements to aid in our review of sentences under Indiana Appellate Rule 7(B). Id.

Our attempt in Anglemyer to analyze how appellate review of sentences imposed under the “advisory” scheme should proceed was met with a swift grant of transfer by our supreme court. Until that court issues an opinion in Anglemyer, we will assume that it is necessary to assess the accuracy of a trial court’s sentencing statement if, as here, the trial court issued one, according to the standards developed under the “presumptive” sentencing system, while keeping in mind that the trial court had “discretion” to impose any sentence within the statutory range for [the felony level of each conviction] “regardless of the presence or absence of aggravating circumstances or mitigating circumstances.” See Ind. Code § 35-38-1-7.1(d); see also Fuller v. State, 852 N.E.2d 22, 26 (Ind. Ct. App. 2006) (“a sentencing court is under no obligation to find, consider, or weigh either aggravating or mitigating circumstances.”)[, trans. denied]. We will assess the trial court’s recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed here was inappropriate. In other words, even if it would not have been possible for the trial court to have abused its discretion in sentencing [a defendant] because of any purported error in the sentencing statement, it is clear we still may exercise our authority under Article 7, Section 6 of the Indiana Constitution and Indiana Appellate Rule 7(B) to revise a sentence we conclude is inappropriate in light of the nature of the offense and the character of the offender. See Childress v. State, 848 N.E.2d 1073, 1079-80 (Ind. 2006); see also Buchanan v. State, 767 N.E.2d 967, 972 (Ind. 2002) (holding that Indiana Constitution permits independent appellate review and revision of a sentence even if trial court “acted within its lawful discretion in determining a sentence”).

In reviewing a sentencing statement, “we are not limited to the written sentencing statement but may consider the trial court’s comments in the transcript of the sentencing proceedings.” Corbett v. State, 764 N.E.2d 622, 631 (Ind. 2002).

Gibson v. State, 856 N.E.2d 142, 146-47 (Ind. Ct. App. 2006). Lacking further guidance to date from our supreme court on the standard of review to be applied, we apply the standard described above in Gibson.

Dunlap contends that the trial court relied on improper aggravators, failed to identify proffered mitigators, and failed to give sufficient weight to the mitigators. As a

result, Dunlap maintains that his sentence is inappropriate in light of the nature of the offenses and his character. We address each contention in turn.

Dunlap first contends that the trial court improperly relied on elements of the offenses as aggravators. In particular, Dunlap maintains that the court “view[ed] Mr. Mooney’s death and Mr. Maxwell’s injuries as aggravating circumstances.” Brief of Appellant at 6. The State responds that the trial court properly considered the nature and circumstances of the crimes as an aggravator. We agree with the State.

At sentencing, the trial court stated in relevant part:

The Court also believes the nature and circumstances of the crime is also aggravating to the extent that there were two victims in this, one young man, 14-year-old young man, lost his life as a result of this. A 25-year-old has gone through some three surgeries for a split head, both in the leg and numerous places, will [sic] suffer from the consequences of that for the rest of his life, so the Court believes to that extent, the nature and the circumstances of the crime committed were aggravating.

Transcript at 83. In other words, the trial court thought it significant that Mooney lost his life at such a young age and that Maxwell, who was also young at the time of the accident, would suffer from his serious injuries for the rest of his life. The age of the victims is not an element of either crime at issue here. The trial court properly considered the nature and circumstances of the crimes, namely, the victims’ ages, as an aggravator. See, e.g. Edwards v. State, 842 N.E.2d 849, 855 (Ind. Ct. App. 2006) (holding nature and circumstances of crime, namely, age of victim, valid aggravator).

Dunlap next contends that the trial court abused its discretion when it did not assess any mitigating weight to his young age. It is well settled that the finding of mitigating circumstances is within the discretion of the trial court. Hackett v. State, 716

N.E.2d 1273, 1277 (Ind. 1999). The trial court is not obligated to explain why it did not find a factor to be significantly mitigating. Chambliss v. State, 746 N.E.2d 73, 78 (Ind. 2001). An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Matshazi v. State, 804 N.E.2d 1232, 1239 (Ind. Ct. App. 2004), trans. denied. Additionally, trial courts are not required to include in the record a statement that it considered all proffered mitigating circumstances, only those that it considered significant. Id.

Dunlap was twenty-four years old at the time of the instant offense. In support of this proffered mitigator, Dunlap merely lists his accomplishments, including serving in the Navy, getting married, and the lack of a significant criminal history. But the trial court identified as mitigating Dunlap's "law abiding life" and "good background." Transcript at 83. Dunlap has not demonstrated that the trial court abused its discretion when it did not identify his young age as a separate mitigator.

Finally, Dunlap states, "[b]ecause of Mr. Dunlap's remorse and other mitigators, and because the nature of the offense was not unusual, the presumptive sentence is inappropriate." Brief of Appellant at 8. Initially, we observe that Dunlap was sentenced under the advisory sentencing scheme. The advisory sentence is four years for a Class C felony and one and one-half years for a Class D felony. See Ind. Code § 35-50-2-6 and – 7. Here, the trial court concluded that the aggravators and mitigators were in equipoise and imposed the advisory sentence on each conviction, to run concurrent.

Dunlap does not challenge the trial court's identification of his driving history as an aggravator. Neither does Dunlap acknowledge the existence of that aggravator in his argument on appeal. The trial court noted that Dunlap had accumulated ninety-two points on his driver's license, which the court found "very aggravating." Transcript at 82-83. As the trial court stated, Dunlap had "no business driving a car" at the time of these offenses. Id. at 82. Given the severity of the aggravators in this case, we cannot say that the trial court abused its discretion when it balanced the aggravators and mitigators and imposed the advisory sentences. Dunlap has not demonstrated that his sentence is inappropriate in light of the nature of the offenses and his character.

Affirmed.

RILEY, J., and BARNES, J., concur.