



Richard D. DeWitt appeals his sentence for attempted theft, a class D felony,<sup>1</sup> and failure to register as a sex offender, a class C felony.<sup>2</sup> DeWitt raises one issue, which we revise and restate as whether the trial court abused its discretion in sentencing him. We affirm.

The relevant facts follow. DeWitt was charged with two separate offenses stemming from unrelated events. On March 25, 2005, the State charged DeWitt with attempted theft, a class D felony, for his attempt to exert unauthorized control over anhydrous ammonia from Trico Farm Supply, Inc. (“Trico”), with the intent to deprive Trico of any part of the use or value of this property. The State alleged that on March 24, 2005, police saw a suspicious vehicle drop off an individual (later identified as Robert Sullivan) near Trico who the police then saw attempt to steal anhydrous ammonia. The driver of the vehicle was identified as DeWitt who, upon arrest, confessed to police that he had the “dropped off [Sullivan] at Tri[]co to steal some anhydrous ammonia.” Appellant’s Appendix at 8.

On June 28, 2005, the State charged DeWitt with failure to register as a sex offender, a class C felony, and alleged DeWitt knowingly or intentionally failed to register himself as a sex offender in Bartholomew County, Indiana, between October 2004 and March 2005. The State contended that DeWitt failed to register himself with

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<sup>1</sup> Ind. Code § 35-43-4-2(a) (2004).

<sup>2</sup> Ind. Code § 5-2-12-9 (2004).

the sex offender registry in Bartholomew County after previously being convicted of child molestation as a class D felony in 1995.

Pursuant to a plea agreement, on August 22, 2005, DeWitt pleaded guilty to the following offenses: (1) attempted theft as a class D felony under cause number 03D01-0503-FD-475; and (2) failure to register as a sex offender as a class C felony under cause number 03D01-0506-FC-1073. In exchange for DeWitt's guilty pleas, the State agreed to dismiss an additional unspecified charge under cause number 03D01-0504-CM-616. The trial court accepted DeWitt's guilty plea, and the State dismissed the remaining charge.

At the sentencing hearing on October 5, 2005, DeWitt testified that he suffers from a variety of physical and mental ailments. Specifically, he alleged he suffers from: (1) a back injury as a result of a car accident for which he took Hydrocodone for pain; (2) a hand injury as a result of his employment prior to his incarceration; (3) mental depression, which he is currently being treated with Zoloft prescribed through the jail; and (3) that he is a recovering alcoholic. On the other hand, during the compilation of the presentence report, DeWitt indicated that he did not have "any major health problems" or "any mental health issues and has never received treatment." Appellee's Appendix at 10; Appellee's Brief at 5.

In regard to the attempted theft charge, DeWitt's counsel asked him whether "it worth the ten dollars" for him to help Sullivan steal the ammonia. Sentencing Hearing Transcript at 12. DeWitt responded, "No. No. If I had it to do again, I wouldn't . . . It wouldn't happen." *Id.*

When questioned about his failure to register as a sex offender, DeWitt expressed remorse stating, “Well I know I didn’t [sic] wrong and I wish, I wished I wouldn’t a done it. You know it . . . ” Id. DeWitt further indicated that he knew failing to register was wrong and that his girlfriend’s advice not to register should have been ignored.

In addition, DeWitt provided testimony acknowledging his extensive criminal history dating back to 1983. Citing DeWitt’s presentence report, the State enumerated his prior convictions, some of which included operating a vehicle while intoxicated, battery, possession of marijuana, public intoxication, child molesting, non-support of dependent children, and failure to register as a sex offender.

The trial court found DeWitt’s criminal history as the sole aggravating circumstance and found no mitigating circumstances. The trial court sentenced DeWitt to an enhanced sentence of two years for the attempted theft conviction and an enhanced sentence of six years for the failure to register as a sex offender conviction. The trial court suspended one of the two years on the attempted theft conviction to probation and suspended four of the six years on the failure to register as a sex offender conviction to probation. In sum, DeWitt was sentenced to three years in the Indiana Department of Correction and five years of probation.

The sole issue for this Court is whether the trial court abused its discretion in sentencing DeWitt. In general, sentencing lies within the discretion of the trial court. Henderson v. State, 769 N.E.2d 172, 179 (Ind. 2002). Thus, we review trial court sentencing decisions only for an abuse of discretion, including a trial court’s decision to

increase the presumptive sentence because of aggravating circumstances. Powell v. State, 769 N.E.2d 1128, 1134 (Ind. 2002), reh’g denied. An abuse of discretion occurs if “the decision is clearly against the logic and effect of the facts and circumstances.” Pierce v. State, 705 N.E.2d 173, 175 (Ind. 1998). A trial court relying upon aggravating and mitigating factors to enhance or reduce a sentence would have to: (1) identify the significant aggravating factors; (2) relate the specific facts and reasons that the court found those aggravators and mitigators; and (3) demonstrate that the court has balanced the aggravators with the mitigators. Veal v. State, 784 N.E.2d 490, 494 (Ind. 2003).<sup>3</sup>

The trial court relied upon DeWitt’s extensive criminal history in imposing enhanced terms for his two convictions. DeWitt does not dispute the trial court’s discretion in finding his criminal history as the sole aggravating factor relied on to enhance his sentence. See Sherwood v. State, 702 N.E.2d 694, 699 (Ind. 1998) (observing that only one valid aggravating factor is necessary to enhance the presumptive sentence), reh’g denied. Rather, DeWitt argues the trial court failed to consider certain mitigating circumstances. DeWitt characterizes his remorse, physical and mental

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<sup>3</sup> Indiana’s sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences. See Ind. Code §§ 35-38-1-7.1, 35-50-2-1.3. Under the amended sentencing scheme, trial courts may impose any sentence within the proper statutory range regardless of the presence or absence of aggravating or mitigating circumstances. Ind. Code § 35-38-1-7.1(d). DeWitt committed his offenses prior to the effective date and was sentenced on October 5, 2005. DeWitt implies that the former sentencing scheme should be applied, but the State argues that the amended statutes should apply. Applying the former sentencing statutes, we conclude that the trial court did not abuse its discretion. Moreover, application of the amended sentencing statutes would not change the result here.

ailments, and guilty plea as significant mitigating circumstances and argues that they warranted a lesser sentence.

“The finding of mitigating factors is not mandatory and rests within the discretion of the trial court.” O’Neill v. State, 719 N.E.2d 1243, 1244 (Ind. 1999). The trial court is not obligated to accept the defendant’s arguments as to what constitutes a mitigating factor. Gross v. State, 769 N.E.2d 1136, 1140 (Ind. 2002). “Nor is the court required to give the same weight to proffered mitigating factors as the defendant does.” Id. Furthermore, a sentencing court is under no obligation to find mitigating factors at all. Echols v. State, 722 N.E.2d 805, 808 (Ind. 2000). However, the trial court may “not ignore facts in the record that would mitigate an offense, and failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them.” Id. 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. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999).

1. Remorse

DeWitt argues that the trial court abused its discretion by failing to consider his remorse as a mitigating factor. The Indiana Supreme Court has held that a trial court’s determination of a defendant’s remorse is similar to a determination of credibility. Pickens v. State, 767 N.E.2d 530, 535 (Ind. 2002). As such, without evidence of some impermissible consideration by the court, we accept its determination of credibility. Id.

Furthermore, because the trial court has the ability to directly observe a defendant and listen to the tenor of his or her voice, it is in the best position to determine whether the remorse is genuine. Corralez v. State, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004). DeWitt does not allege any impermissible considerations. DeWitt did say, when speaking in regard to the attempted theft of the ammonia, that “[i]f I had it to do again, I wouldn’t.” Sentencing Hearing Transcript at 12. DeWitt also said, when asked about his failure to register as a sex offender that “[w]ell I know I didn’t [sic] wrong and I wish, I wished I wouldn’t a done it,” then stated the “first thing” he was going to do once he was released was go register. Id. at 13-14.

Though the record does not indicate that the trial court considered DeWitt’s remorseful statements, the trial court did take other evidence into consideration. Specifically, the trial court considered DeWitt’s lengthy criminal history dating back to 1983, particularly his prior conviction for failure to register as a sex offender, his persistence in continuing to engage in criminal conduct despite the large number of “breaks” he has received, and the apparent blame he placed on Robert Sullivan and his girlfriend for his illegal conduct. Thus, in light of all the evidence, the trial court did not abuse its discretion by failing to consider DeWitt’s alleged remorse to be a mitigating factor. See, e.g., Stout v. State, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005) (holding that the trial court did not err in refusing to find defendant’s alleged remorse to be a mitigating factor), trans. denied.

## 2. Mental and Physical Health

DeWitt alleges he suffers from a variety of physical and mental ailments that the trial court failed to consider. However, other than his own claims, there is nothing on the record that confirms he has been formally diagnosed in the past with any disorder or impairment. Further, a trial court is not required to consider as mitigating circumstances allegations of appellant's substance abuse or mental illness. James v. State, 643 N.E.2d 321, 323 (Ind. 1994).

The trial court did not identify DeWitt's alleged depression, recovering alcoholism, or back injury as significant mitigating factors. At sentencing, DeWitt failed to propose mental illness or his physical ailments as mitigators, nor did he provide any evidence to support a nexus between his depression, recovering alcoholism, or back injury and the commission of the crimes he was convicted for. DeWitt has not shown he was unable to control his behavior due to his alleged mental and physical conditions.

Furthermore, DeWitt's alleged mental and physical ailments did not prevent him from engaging in criminal activity. See Bocko v. State, 769 N.E.2d 658, 668 (Ind. Ct. App. 2002) (holding that the trial court did not abuse its discretion in refusing to find the defendant's medical condition to be a significant mitigating factor because the defendant continued to engage in criminal activity), reh'g denied, trans. denied, implied overruling on other grounds recognized by Paschall v. State, 825 N.E.2d 923 (Ind. Ct. App. 2005). As such, the trial court did not abuse its discretion by failing to consider DeWitt's alleged mental illness or physical ailments as mitigating factors. See, e.g., Leone v. State, 797

N.E.2d 743, 749 (Ind. 2003) (rejecting the defendant's proposed mental illness as a mitigator).

### 3. Guilty Plea

There is no dispute that DeWitt pleaded guilty to attempted theft as a class D felony and failure to register as a sex offender as a class C felony. However, the trial court did not specifically identify DeWitt's guilty plea as a mitigating factor. Indiana courts have recognized that a guilty plea is a significant mitigating circumstance in some instances. Trueblood v. State, 715 N.E.2d 1242, 1257 (Ind. 1999), reh'g denied, cert. denied, 531 U.S. 858, 121 S. Ct. 143 (2000). A defendant who willingly enters a plea of guilty has extended a substantial benefit to the state and deserves to have a substantial benefit extended to him in return. Scheckel v. State, 655 N.E.2d 506, 511 (Ind. 1995). However, a guilty plea is not automatically a significant mitigating factor. Mull v. State, 770 N.E.2d 308, 314 (Ind. 2002) (quoting Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999)). Furthermore, our Supreme Court recently held that a trial court abused its discretion in failing to consider a guilty plea as a mitigating circumstance. Francis v. State, 817 N.E.2d 235, 238 (Ind. 2004).

We agree with DeWitt that the trial court was required to extend a certain amount of mitigating weight to his guilty plea. In exchange for DeWitt's guilty plea, the State agreed to dismiss a charge for battery as a class C misdemeanor. Though we acknowledge that DeWitt received a benefit from this exchange, we do not agree with the State's contention that the benefit was "significant" and, therefore, no mitigating weight

should be afforded to his guilty plea. Appellee's Brief at 6. A class C misdemeanor offense carries a maximum sentence of up to sixty days of incarceration. Ind. Code § 35-50-3-4. In the absence of a guilty plea, DeWitt would have faced only an additional sixty days of incarceration on top of the three years he already received. Thus, we cannot agree that DeWitt's total reduction in incarceration time as a result of the State dismissing the class C misdemeanor charge was significant.

Nonetheless, this Court has the authority to revise a sentence or remand for resentencing if we cannot say with confidence that the trial court would have imposed the same sentence if it considered the proper aggravating and mitigating circumstances. Pickens v. State, 767 N.E.2d 530, 535 (Ind. 2002). In light of the particular circumstances of DeWitt's guilty plea, together with the strong aggravating factor in this case, we can say with confidence that the trial court would have imposed the same sentence even if it had considered the guilty plea as a mitigator. A guilty plea does not rise to the level of significant mitigation where evidence against a defendant is such that the decision to plead guilty is merely a pragmatic one. Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied.

In regard to the attempted theft charge, the State's evidence overwhelmingly supported a conviction. The State also had strong evidence supporting DeWitt's failure to register as a sex offender charge. Given the strength of the evidence against DeWitt on the two charges against him, his decision to plead guilty may have merely been a

pragmatic decision. See Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied

Because DeWitt's decision to plead guilty was likely pragmatic and saved the State few resources, we cannot say that it would have been a significant mitigator. It would have been weighed against DeWitt's extensive criminal history. Therefore, even if the trial court had properly recognized DeWitt's guilty plea as a mitigating factor, we can say with confidence that the trial court would have imposed precisely the same sentence. See, e.g., Kinkead v. State, 791 N.E.2d 243, 247-248 (Ind. Ct. App. 2003) (holding that given the evidence against him, the defendant's decision to plead guilty may have simply been a pragmatic decision), trans. denied.

For the foregoing reasons, we affirm DeWitt's sentence for attempted theft as a class D felony and failure to register as a sex offender as a class C felony.

Affirmed.

NAJAM, J. and ROBB, J. concur