

Case Summary

In appealing the three-year total sentence he received for his convictions of possession of marijuana¹ and driving while suspended,² Clifford Warner challenges the weighing of aggravating and mitigating factors. In addition, he raises “manifestly unreasonable” concerns, which we will address in terms of Indiana Appellate Rule 7(B). We affirm.

Facts and Procedural History

On February 11, 2005, around 11:00 p.m., Officer Brandon Reynolds of the Rushville Police Department was on routine patrol when he saw Warner driving without wearing a seatbelt. Officer Reynolds initiated a stop, which prompted Warner to pull over to the right side of the road and throw a small bag out the passenger side window. Upon approaching the vehicle, Officer Reynolds requested the driver’s license of Warner, the only person in the vehicle. Warner admitted that his driver’s license was suspended and then provided a state identification card instead. Tr. at 142. Officer Reynolds took Warner’s identification card, retrieved the bag that had been thrown out the window, went to his patrol car, and called dispatch to run a check on Warner. *Id.* at 143. Upon confirming that Warner’s license was suspended with a prior conviction, and suspecting that the discarded bag contained marijuana, Officer Reynolds called for backup and arrested Warner. A subsequent search of Warner at the police station revealed Zig Zag rolling papers inside his wallet. Analysis of the bag’s contents confirmed Officer Reynolds’ suspicion; the green leafy substance was 1.25

¹ Ind. Code § 35-48-4-11.

² Ind. Code § 9-24-19-2.

grams of marijuana.

On February 14, 2005, the State filed charges of operating a vehicle while license suspended or revoked, a class A misdemeanor, and possession of marijuana after having been previously convicted of marijuana possession, a class D felony. After numerous continuances were sought and granted, the parties filed a plea agreement. On May 24, 2006, the court ordered a pre-sentence investigation to be conducted. However, within the next month, Warner filed a motion to vacate guilty plea, which the court granted. On October 17, 2006, a trial was held *in absentia*, and a jury found Warner guilty on both counts. Thereafter, the pre-sentence investigation report³ was updated, and a sentencing hearing was held.

On November 9, 2006, the court issued a sentencing order in which it listed one mitigating circumstance (“It will be a hardship on [Warner’s] family for [him] to be incarcerated in light of his son’s medical condition”), set out one aggravating circumstance (“[Warner’s] criminal record is extensive even considering just the criminal record since 1998”), and found that the “aggravating circumstances outweigh the mitigating circumstances.” App. at 56. The court committed Warner to jail for one year for the misdemeanor conviction, and to the Indiana Department of Correction for three years for the felony conviction, “to be served concurrently.” *Id.*⁴

³ Warner’s counsel did not include the pre-sentence report in the materials on appeal. However, the State did provide it, and followed the requirements of Indiana Trial Rule 5(G)(1), requiring that document be separately identified and “tendered on light green paper or have a light green coversheet attached to the document, marked ‘Not for Public Access’ or ‘Confidential.’”

⁴ On November 29, 2006, the court issued an amended order that simply clarified court costs. App. at 59.

Discussion and Decision

Warner contends that his incarceration will impose a substantial hardship on both his young son, who suffers from a costly medical condition, and his wife. Warner downplays his criminal history, noting it does not include violence or physical injury. In addition, he argues that his offense is not one of the “very worst.” Appellant’s Br. at 14. Finally, Warner maintains that a drug abuse treatment program would be a more appropriate alternative for him than incarceration.

In general, sentencing lies within the discretion of the trial court. *Henderson v. State*, 769 N.E.2d 172, 179 (Ind. 2002). As such, we review sentencing decisions only for an abuse of discretion, “including a trial court’s decision to increase or decrease the presumptive sentence because of aggravating or mitigating circumstances.” *Id.*⁵ Furthermore, “[w]hen enhancing a sentence, a trial court must: (1) identify significant aggravating and mitigating circumstances; (2) state the specific reasons why each circumstance is aggravating or mitigating; and (3) evaluate and balance the mitigating against the aggravating circumstances to determine if the mitigating offset the aggravating circumstances.” *Vazquez v. State*, 839 N.E.2d 1229, 1232 (Ind. Ct. App. 2005) (citing *Bailey v. State*, 763 N.E.2d 998, 1004 (Ind. 2002)), *trans. denied*. A single aggravating circumstance is adequate to justify an enhanced sentence. *Moon v. State*, 823 N.E.2d 710, 717 (Ind. Ct. App. 2005), *trans. denied*.

At the sentencing hearing, the court explained its reasoning as follows.

⁵ Because he committed the offenses before the April 25, 2005 effective date of the recent amendments to Indiana’s criminal sentencing statutes, Warner was sentenced under the presumptive sentencing scheme. See *Jacobs v. State*, 835 N.E.2d 485, 491 n.7 (Ind. 2005) (“courts must sentence defendants under the statute in effect at the time the defendant committed the offense”). For a discussion regarding sentencing *after* the amendments took effect, see *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind.

Well I believe first of all and we may have clarified that this, uh, the offense of this charge did occur in, uh, February of '05 so we're dealing with the, as far as I'm concerned I guess we're dealing with the presumptive issues. Uh, the Court finds that the following aggravating circumstance, uh, being the criminal record of [Warner]. Uh, the Court's not going to consider the juvenile, uh, record that was in the pre-sentence or even, uh, there was a charge of Robbery and Battery back in 1981 that was so long ago that, uh, the Court isn't inclined to, um, consider that. However, in the last, uh, since '98 the Court notes that this will be the fourth Possession of Marijuana, the third "D" Felony, uh, for marijuana. There was also a 1998, um, "D" Felony for Receiving Stolen Property. Since 2003 [Warner] has had one, two, three, four, five, this would be the sixth Driving While Suspended. I'm not sure, uh, the exact date. One of the Driving While Suspendeds was in Fayette County almost the same time as this one so I'm not sure quite where that falls but. The Court does consider the family circumstances of Mr. um, Mr. Warner to be a mitigating circumstance. His child's medical condition and the burden that this is going to place on the family. However, in, in balancing everything, uh, the record is just too compelling, um. The Court believes that the, the aggravating circumstance of, of his record, the same charges that he's basically, uh, seems to be dealing with on a regular basis, uh, far outweighs the mitigating circumstance[.]

Tr. at 218.

“Generally, the weight assigned to a mitigator is at the trial judge’s discretion[.]” *Covington v. State*, 842 N.E.2d 345, 348 (Ind. 2006). Here, the court clearly acknowledged family hardship as a mitigator. The court was within its discretion in assigning that mitigator significant though not overwhelming weight – regardless of Warner’s opinion otherwise. *See Gillem v. State*, 829 N.E.2d 598, 604-05 (Ind. Ct. App. 2005) (“The trial court is not obliged to agree with the defendant as to the weight or value to be given proffered mitigating circumstances.”), *trans. denied*.

Our supreme court has emphasized that “the extent, if any, that a sentence should be enhanced [based upon prior convictions] turns on the weight of an individual’s criminal

2007), and *McDonald v. State*, 868 N.E.2d 1111 (Ind. 2007).

history.” *Duncan v. State*, 857 N.E.2d 955, 959 (Ind. 2006). “This weight is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant’s culpability.” *Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006).

As catalogued in the sentencing statement *supra*, Warner’s prior criminal convictions are numerous, substantial, and very similar to his current illegal activities. Specifically, within the past ten years, not including the present offenses, Warner has been convicted of three marijuana possession charges (at least two of which were D felonies), one charge of receiving stolen property (also a D felony), and at least five instances of driving while suspended.

We are sympathetic to the plight of Warner’s family while he is incarcerated. However, given the gravity, nature, and number of prior offenses, as well as the similarity to the convictions at issue here, we cannot say that the court abused its discretion when, in balancing the aggravating versus mitigating circumstance, it concluded that the former outweighed the latter. In reaching our conclusion, we easily distinguish *Westmoreland v. State*, 787 N.E.2d 1005 (Ind. Ct. App. 2003), on which Warner relies. Seventeen-year-old Westmoreland pled guilty to one count of criminal deviate conduct and received a twenty-year maximum sentence. In reversing and ordering a ten-year presumptive sentence, we noted that the pre-sentence report contained numerous pertinent errors; Westmoreland’s criminal history consisted of only unrelated misdemeanors; *and* the court did not properly attach weight to the fact that the defendant had recently married, become a father, and gained employment to provide for his new family. *See id.* at 1009-11. Forty-two-year-old Warner

could hardly blame the folly of youth, did not plead guilty, was not the victim of an erroneous pre-sentence report, and could not profess his current crimes were an aberration.

As for the Indiana Appellate Rule 7(B) challenge, we note that before January 1, 2003, that rule provided: “The Court shall not revise a sentence authorized by statute unless the sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.” Today, Appellate Rule 7(B) provides: “The Court may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” “Regarding the nature of the offense, the presumptive sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed.” *Weiss v. State*, 848 N.E.2d 1070, 1072 (Ind. 2006) (footnote omitted). The presumptive sentence for a class D felony was eighteen months, with not more than eighteen months added for aggravating circumstances. *See* Ind. Code § 35-50-2-7. Upon being pulled over for not wearing a seatbelt, Warner attempted to dispose of a bag of marijuana and then admitted to driving while suspended. This incident represents Warner’s fourth marijuana conviction and sixth driving while suspended conviction in the past ten years. Given the nature of the circumstances of the crimes and Warner’s character, as indicated by his repeated disregard for the law, we cannot say that enhanced, but concurrent, sentences were

inappropriate.⁶ Accordingly, we will not revise the three-year total sentence that Warner is to serve for his convictions of class D felony marijuana possession and class A misdemeanor driving while suspended.

Affirmed.

BAKER, C. J., and FRIEDLANDER, concur.

⁶ Warner cites *Jordan v. State*, 787 N.E.2d 993 (Ind. Ct. App. 2003), for the proposition that a sentencing reversal could in part be warranted when a court does not consider drug abuse treatment programs as an alternative to incarceration. Appellant's Br. at 14. What we actually found in *Jordan* was that the "trial court erred in considering Jordan's drug habit as an aggravating circumstance without considering alternative drug abuse treatment programs." 787 N.E.2d at 996. *Jordan*, which was an appeal from a guilty plea, is actually more like *Westmoreland*, and we find it equally inapposite to and distinguishable from Warner's situation. See *Jordan*, 787 N.E.2d at 997 ("Taking into consideration Jordan's youth; his extensive drug habit; the non-violent nature of his prior [all juvenile] and present offense[s]; and Jordan's request for drug treatment in lieu of retribution, the maximum sentence imposed by the trial court was inappropriate. Here, the nature of the offense supports an enhanced sentence, but the character of the offender does not.").