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**IN THE
COURT OF APPEALS OF INDIANA**

BRYAN O'NEAL,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 48A02-0602-CR-74

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis Carroll, Judge
Cause No. 48D01-0207-FA-00359

October 3, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Bryan O’Neal (“O’Neal”) appeals his maximum eight-year sentence for conspiracy to commit dealing in marijuana over ten pounds, a Class C felony. Because we find that the trial court did not abuse its discretion in enhancing O’Neal’s sentence, we affirm.

Facts and Procedural History

During 2002, Jonathan Harris (“Harris”), a Nevada resident, and O’Neal began a smuggling operation that brought marijuana from Mexico into the United States for distribution in Indiana. Harris and O’Neal agreed that O’Neal would supply the marijuana to be distributed in Indiana by Harris. Several shipments involving hundreds of pounds of marijuana were made. The State charged O’Neal with Count I, conspiracy to commit dealing in marijuana over ten pounds, a Class C felony.¹ The charging information alleged that O’Neal “did cause to be delivered on numerous occasions in 2002 marijuana in the amounts ranging from 200 to 500 pounds on each trip[.]” Appellant’s App. p. 2. The State also charged O’Neal with Count II, conspiracy to commit dealing in cocaine as a Class A felony.² O’Neal entered into a plea agreement with the State, by which O’Neal agreed to plead guilty to Count I and the State agreed to dismiss Count II. The parties agreed to leave sentencing to the discretion of the trial court.

The trial court then held a sentencing hearing and issued a sentencing order. In its order, the trial court identified two aggravating circumstances. First, the trial court

¹ Ind. Code § 35-48-4-10(b)(2); Ind. Code § 35-41-5-2.

² Ind. Code § 35-48-4-1(b)(1); I.C. § 35-41-5-2.

assigned moderate aggravating weight to O’Neal’s criminal history, which the court said included “several arrests with a few convictions.” *Id.* at 8. Second, the trial court cited as an aggravator the fact that O’Neal “was a key player in delivering large quantities of marijuana to Anderson[, Indiana,] on multiple occasions.” *Id.* During the sentencing hearing, the trial court stated that this was “the State’s strongest aggravator,” Tr. p. 180, as the case involved “a significant conspiracy involving numbers of people over a period of time,” *id.* at 181. As such, the trial court assigned this aggravator significant weight. The trial court also identified O’Neal’s guilty plea as a mitigating circumstance but assigned it “minimal weight,” having found that O’Neal’s decision to plead guilty was a pragmatic one. *Id.* Describing O’Neal’s crime as “highly aggravated” and “profoundly aggravated,” *id.*, the trial court sentenced O’Neal to an executed term of eight years, the maximum sentence for a Class C felony. With permission from the trial court, O’Neal brings this belated appeal.

Discussion and Decision

On appeal, O’Neal challenges the trial court’s finding of aggravating circumstances. In general, sentencing lies within the discretion of the trial court. *Vazquez v. State*, 839 N.E.2d 1229, 1232 (Ind. Ct. App. 2005), *trans. denied*. As such, we review sentencing decisions only for an abuse of discretion, including a trial court’s decision to increase the presumptive sentence because of aggravating circumstances. *Id.* An abuse of discretion occurs if the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court. *Field v. State*, 843 N.E.2d 1008, 1010 (Ind. Ct. App. 2006), *trans. denied*.

O'Neal first contends that the trial court abused its discretion in finding his criminal history to be an aggravating circumstance of "moderate weight." Specifically, he notes that his only previous conviction was a misdemeanor conviction for driving under the influence in Florida and argues that the gravity and nature of this offense as it relates to the current offense is insufficient "to justify even minimal aggravation[.]" Appellant's App. p. 7. We cannot agree. First, O'Neal's DUI conviction relates to his current offense in that both are related to substance abuse. And while it is true that a single misdemeanor conviction is generally not a significant aggravator, the trial court expressly acknowledged this, stating: "It's just not the kind of record that justifies a finding that that particular aggravator should have significant weight." Tr. p. 180. Additionally, as the State notes, O'Neal admitted at the plea hearing to using marijuana, violating a restraining order, and kicking his girlfriend's car. *See id.* at 125, 130. The trial court did not abuse its discretion in assigning O'Neal's criminal history "moderate" aggravating weight.

O'Neal also argues that the trial court abused its discretion in finding as an aggravating factor "the fact that [O'Neal] was a key player in delivering large quantities of marijuana to Anderson[, Indiana,] on multiple occasions." Appellant's App. p. 8. Again, we cannot agree.

Initially, we note that O'Neal is correct that the amount of marijuana involved in the conspiracy cannot be an aggravating circumstance because it is a material element of the offense. Indiana's appellate courts have consistently held that it is error for the trial court to use the amount of drugs involved in an incident as an aggravating circumstance

when the amount of drugs is a material element of the offense charged. *Merlington v. State*, 814 N.E.2d 269, 272-73 (Ind. 2004) (possession of 224 grams of methamphetamine not a valid aggravator in prosecution for possession of methamphetamine in excess of three grams with intent to deliver); *Donnegan v. State*, 809 N.E.2d 966, 978 (Ind. Ct. App. 2004) (possession of nearly fifty grams of cocaine not a valid aggravator in prosecution for possession of three or more grams of cocaine with intent to deliver), *trans. denied*; *Smith v. State*, 780 N.E.2d 1214, 1219 (Ind. Ct. App. 2003) (possession of eighty-five grams of cocaine not a valid aggravator in prosecution for dealing in cocaine three grams or more), *trans. denied*.

However, the amount of marijuana involved is only part of the aggravator cited by the trial court. Not only did the trial court find that the amount of marijuana involved was substantial, it also found that this was “a significant conspiracy involving numbers of people over a period of time.” Tr. p. 181. Indeed, by pleading guilty, O’Neal admitted the truth of the allegation in the charging information that he caused marijuana to be delivered “on numerous occasions” in 2002. Appellant’s App. p. 2. A trial court may appropriately consider the particularized circumstances of a criminal act as an aggravating factor. *Townsend v. State*, 498 N.E.2d 1198, 1201 (Ind. 1986); *Smith*, 780 N.E.2d at 1219. Therefore, the trial court did not abuse its discretion in assigning significant aggravating weight to the fact that O’Neal was involved in a broad-ranging, ongoing conspiracy to deal marijuana.

When it balanced the two aggravators—one of significant weight and one of moderate weight—with the single mitigator of minimal weight, the trial court concluded

that an enhanced sentence of eight years, the maximum sentence for a Class C felony, is appropriate. This conclusion does not constitute an abuse of discretion.

Affirmed.

BAKER, J., and CRONE, J., concur.