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**IN THE
COURT OF APPEALS OF INDIANA**

DANIEL NEUENSCHWANDER,)

Appellant-Defendant,)

vs.)

STATE OF INDIANA,)

Appellee-Plaintiff.)

No. 01A02-0604-CR-350

APPEAL FROM THE ADAMS CIRCUIT COURT
The Honorable Frederick Schurger, Judge
Cause No. 01C01-0410-FB-016

October 17, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Daniel Neuenschwander appeals from the sentence imposed by the trial court following his conviction for Burglary,¹ a class B felony. Specifically, Neuenschwander contends that the trial court erred in assigning too much weight to his prior criminal history, failing to find undue hardship to his dependents as a mitigating circumstance, and imposing a sentence that is inappropriate in light of the nature of the offense and his character. Finding no error, we affirm the judgment of the trial court.

FACTS

Jeffrey McAfee and his family traveled out of state to attend a wedding on March 21, 2003. Neuenschwander's parents, who lived next door to the McAfee residence, also attended the wedding. Neuenschwander, who was then eighteen years old and did not attend the wedding, is related to the McAfees and had been inside their home hundreds of times.

On March 23, 2003, the McAfees arrived home to discover that their residence had been broken into and that some knives, over a dozen guns, and some cash had been taken. Tipped off by Neuenschwander's estranged wife, the police learned that Neuenschwander and two accomplices had committed the burglary of the McAfee residence. Neuenschwander knew that the McAfee family had a large gun collection and believed that he would be able to make money by stealing and selling the weapons.

On October 27, 2004, the State charged Neuenschwander with class B felony burglary. On January 18 and 19, 2006, a jury trial was held, after which the jury found

¹ Ind. Code § 35-43-2-1.

Neuenschwander guilty as charged. Following a hearing, on February 13, 2005, the trial court found Neuenschwander's prior criminal history to be a significant aggravating factor and found no mitigating circumstances. The trial court imposed a sentence of fifteen years with five years suspended, for a total executed sentence of ten years. Neuenschwander now appeals.

DISCUSSION AND DECISION

As we consider Neuenschwander's argument that the trial court erred in finding and weighing aggravators and mitigators, we observe that sentencing determinations are within the sound discretion of the trial court, and we will only reverse for an abuse of discretion. Krumm v. State, 793 N.E.2d 1170, 1186 (Ind. Ct. App. 2003).² 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. Id.

In a sentencing statement, a trial court must identify all significant aggravating and mitigating factors, explain why such factors were found, and balance the factors in arriving at the sentence. Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006). A trial court is not obligated to weigh a mitigating factor as heavily as the defendant requests. Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002). A single aggravating factor may

² On April 25, 2005, the General Assembly amended Indiana's felony sentencing statutes, which now provide that the person convicted is to be sentenced to a term within a range of years, with an "advisory sentence" somewhere between the minimum and maximum terms. See Ind. Code §§ 35-50-2-3 to -7. Because the instant offense occurred in 2003, we will review Neuenschwander's sentence under the former version of the relevant sentencing statute. See Ind. Code § 35-50-2-5.

support the imposition of an enhanced sentence. Payton v. State, 818 N.E.2d 493, 496 (Ind. Ct. App. 2004), trans. denied.

Neuenschwander first argues that the trial court assigned too much weight to his prior criminal history. Neuenschwander was adjudicated a delinquent multiple times before he reached the age of eighteen for “driving and drug offenses” Appellant’s Br. p. 9. Neuenschwander was committed to the Indiana Boys’ School and had been released from the facility for only three months at the time he committed the instant offense. Furthermore, subsequent to committing the instant offense but prior to being sentenced herein, Neuenschwander pleaded guilty to class A misdemeanor check deception. Although Neuenschwander does not have a lengthy history of felonies, violent or otherwise, it is apparent that, taken in its totality, his criminal history is substantial and recent enough to constitute a significant aggravating factor. Thus, we cannot conclude that the trial court abused its discretion in assigning substantial weight to Neuenschwander’s prior criminal history.

Next, Neuenschwander contends that the trial court erred in refusing to find as a mitigating circumstance that Neuenschwander’s incarceration would be an undue hardship on his dependents. At the time of sentencing, Neuenschwander had a two-and-one-half-year-old daughter with his estranged wife. He owed \$81 per week in child support and saw the little girl every couple of months. Neuenschwander’s mother has had to help him out with child support in the past, advancing him \$650 in January 2006 for that purpose. Additionally, Neuenschwander had a five-month-old daughter with his fiancée, Mandy Gomarez, who was pregnant with the couple’s second child at the time of

sentencing. Neuenschwander, Mandy, and their infant daughter lived with Mandy's mother. Neuenschwander was unemployed at the time of sentencing.

The trial court acknowledged that Neuenschwander's incarceration would be a hardship on his dependents but declined to find that the hardship would be undue. Initially, we note that the State's emphasis on Neuenschwander's sparse employment history is inappropriate. See Weaver v. State, 845 N.E.2d 1066, 1074 (Ind. Ct. App. 2006) (holding that "[w]e decline to adopt the State's apparent premise that a child suffers 'hardship' by virtue of a parent's incarceration only when that parent was steadily employed before being incarcerated"). Additionally, we note that there is scant support in the record for the State's bald assertion that "it is clear that Defendant has supported himself and dependants [sic] solely with crime," appellee's br. p. 5, especially when his juvenile adjudications were for drug and driving offenses and none of his children were born at the time he committed the instant offense. Indeed, he had neither married his now-estranged wife nor begun a relationship with Mandy at the time of the burglary. We caution the State against making such inflammatory statements with no support from the record.³

We also observe, however, that the trial court is not required to consider undue hardship to a defendant's dependents as a mitigating circumstance, especially when the defendant fails to establish that incarceration for a particular term will cause more

³ Similarly, we caution the State against making moral judgments such as the one obvious from the following statement regarding his character: "that [Neuenschwander] impregnated his fiancé [sic] while awaiting sentencing on a class B felony shows that he lacks a basic understanding of responsibility." Appellee's Br. p. 6.

hardship than incarceration for a shorter term. Id.; see also Abel v. State, 773 N.E.2d 276, 280 (Ind. 2002). Here, Neuenschwander offered no such evidence. Thus, we cannot conclude that the trial court abused its broad discretion in finding that, while Neuenschwander's incarceration would be a hardship to his dependents, it would not be undue.

Finally, Neuenschwander argues that the sentence imposed by the trial court is inappropriate in light of the nature of the offense and his character. See Ind. Appellate Rule 7(B). As to the nature of the offense, Neuenschwander burglarized his neighbor, to whom he is related, caused property damage, and stole and resold handguns and rifles worth over \$8,000. As to Neuenschwander's character, as noted above, he has amassed a not insignificant criminal record at a very young age. Neither probation nor a period of time spent in the Indiana Boys' School have managed to turn him away from a life of crime. Indeed, as noted above, he had only been released from the Boys' School for three months at the time he committed the instant offense. Under these circumstances, we cannot say that the ten-year executed sentence imposed by the trial court is inappropriate in light of the nature of the offense and Neuenschwander's character.

The judgment of the trial court is affirmed.

VAIDIK, J., and CRONE, J., concur.