Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

FILED
Oct 28 2010, 8:38 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

PHILIP R. SKODINSKI
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ARTURO RODRIGUEZ II
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ANTOINE R. BIRD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-1003-CR-170
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable William G. Albright, Judge
Cause No. 71D01-0401-MR-3

October 28, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Antoine R. Bird (Bird), appeals his sentence for robbery, a Class B felony, Ind. Code § 35-42-5-1, and felony murder, I.C. § 35-42-1-1(2).

We affirm.

ISSUES

Bird raises one issue on appeal, which we restate as the following two:

(1) Whether the trial court abused its discretion when the court failed to provide a sufficient sentencing statement; and

(2) Whether the trial court abused its discretion when the court failed to find additional mitigating factors.

FACTS AND PROCEDURAL HISTORY

On January 21, 2004, Bird and two other men planned and agreed to rob the occupants of a house in St. Joseph County, Indiana. Bird and his accomplices entered the house carrying guns and held the victims at gunpoint. They made the victims lie down and robbed them of their cash. At some point, all three men discharged multiple gunshots. One of the victims died from six gunshot wounds. The other two sustained wounds, but managed to survive.

On January 23, 2004, the State filed an Information charging Bird with Count I, robbery, a Class B felony, I.C. § 35-42-5-1; Count II, murder, I.C. § 35-42-1-1(1); Count III, attempted murder, a Class A felony, I.C. §§ 35-41-5-1; 35-42-1-1(1); Count IV, attempted murder, a Class A felony, I.C. §§ 35-41-5-1; 35-42-1-1(1); and Count V, felony murder, I.C.

§35-42-1-1(2). On April 17, 2006, Bird entered into a plea agreement with the State whereby he agreed to plead guilty to Counts I and V, and the State agreed to dismiss Counts II, III, and IV. At the May 31, 2006 sentencing hearing, the trial court found Bird's criminal record as an aggravator and Bird's guilty plea as a mitigator. The trial court sentenced Bird to the presumptive sentence of ten years on Count I and to the presumptive sentence of fifty-five years on Count V, with sentences to run concurrently and to be executed at the Department of Correction. On May 5, 2008, Bird filed a petition for permission to file a belated appeal, which was granted on February 12, 2010.

Bird now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Bird committed his offense in January 2004, prior to the April 25, 2005 revision to the sentencing statutes. The Indiana supreme court has held that we apply the sentencing scheme in effect at the time of the defendant's offense. *See Robertson v. State*, 871 N.E.2d 280, 286 (Ind. 2007). Under the pre-April 25, 2005 sentencing scheme, sentencing determinations, including whether to adjust the presumptive sentence, are within the discretion of the trial court. *Ruiz v. State*, 818 N.E.2d 927, 928 (Ind. 2004). If a trial court relies on aggravating or mitigating circumstances to modify the presumptive sentence, it must: (1) identify all significant aggravating and mitigating circumstances; (2) explain why each circumstance is aggravating or mitigating; and (3) articulate the evaluation and balancing of the circumstances. *Id.*

When a defendant offers evidence of mitigating factors, the trial court has the discretion to determine whether the factors are mitigating, and the trial court is not required to explain why it does not find the proffered factors to be mitigating. *Stout v. State*, 834 N.E .2d 707, 710 (Ind. Ct. App. 2005), *trans. denied*. The trial court is not required to give the same weight as the defendant does to mitigating evidence. *See Fugate v. State*, 608 N.E.2d 1370, 1374 (Ind. 1993). A single aggravating circumstance is sufficient to justify an enhanced sentence. *McNew v. State*, 822 N.E.2d 1078, 1082 (Ind. Ct. App. 2005). 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*. Further, a trial court is not required to include within the record a statement that it considered all proffered mitigating circumstances, but rather only those that it considered significant. *Id*.

Here, the trial court imposed a ten year sentence for robbery, a Class B felony, and a fifty-five year sentence for felony murder. At the time Bird committed his offense, the presumptive penalty for a Class B felony was ten years, to which ten years could be added for aggravating circumstances or four years subtracted for mitigating circumstances. *See* I.C. § 35-50-2-5. Further, the presumptive sentence for felony murder was fifty-five years, to which ten years could be added for aggravating circumstances or ten years subtracted for mitigating circumstances. *See* I.C. § 35-50-2-3.

I. *Reasoning for Presumptive Sentence*

Bird first argues that the trial court abused its discretion by failing to state a basis for imposing the presumptive sentence. In support of his argument, Bird cites to *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, where our supreme court held that the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence. However, we specifically note that *Anglemyer* does not apply here because the robbery took place before the 2005 amendments. *See Robertson*, 871 N.E.2d at 286. Under the sentencing scheme in effect in 2004, the trial court was not required to state a basis for imposing the presumptive sentence for a conviction. *Berry v. State*, 819 N.E.2d 443, 452 (Ind. Ct. App. 2004). The trial court was required to disclose its reasoning only when imposing an enhanced sentence. *Id*. Even then, the trial court was not required to explain why it did not find any mitigating circumstances. *Id*.

Here, the trial court was not required to explain its decision because the trial court did not deviate from the presumptive sentence. Nonetheless, even though the trial court was not required to explain, during the sentencing hearing, the trial court provided a clear sentencing statement justifying the sentences. Specifically, the trial court found Bird's criminal history record as an aggravator and Bird's guilty plea as a mitigator. As such, we find that the trial court did not abuse its discretion.

II. *Mitigating Factors*

Bird further argues that the trial court abused its discretion by failing to find mitigating circumstances. Although a court must consider all evidence of mitigating factors

presented by a defendant, a finding of mitigating circumstances is within the trial court's discretion. *Harris v. State*, 659 N.E.2d 522, 528 (Ind. 1995). A trial court is not obliged to explain why it has not chosen to find mitigating circumstances. *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). The trial court's assessment of the proper weight of mitigating and aggravating circumstances and the appropriateness of the sentence as a whole is entitled to great deference on appeal and will be set aside only upon showing of a manifest abuse of discretion. *Donnegan v. State*, 809 N.E.2d 966, 978 (Ind. Ct. App. 2004).

Here, Bird has failed to show that the mitigating evidence is both significant and clearly supported by the record. Bird raised several "potential" mitigating factors, specifically, Bird's "age, acceptance of responsibility, being raised without a father figure, involvement in his son's life, that he was not a shooter, and a shooting was not a part of the plan." (Appellant's Br. p. 4). However, Bird did not provide any explanations as to why these mitigating factors are significant and whether they are clearly supported by the record.

As such, we find that the trial court did not abuse its discretion when it did not find any additional mitigating circumstances.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion because the trial court provided a sufficient sentencing statement and the trial court was not required to find any additional mitigators.

Affirmed.

KIRSCH, J., and BAILEY, J., concur.