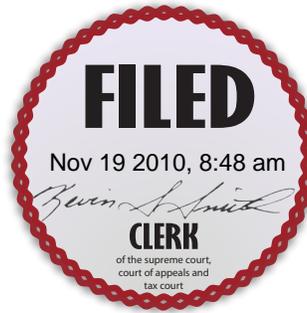


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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BRIAN KEITH THOMPSON,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 48A05-1003-CR-268

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APPEAL FROM THE MADISON CIRCUIT COURT  
The Honorable Rudolph D. Pyle III, Judge  
Cause No. 48C01-911-FB-663

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**November 19, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## **Case Summary**

Following a guilty plea, Brian Keith Thompson appeals his sentence of four years executed, one year on work release, and five years of probation on two felony charges. Finding that Thompson waived his right to appeal the trial court's sentencing decision in his plea agreement, we affirm.

## **Facts and Procedural History**

The facts as admitted by Thompson at his guilty plea hearing establish that, on July 21, 2009, he kicked in the door to his aunt's residence. Once inside, he stole a PlayStation 3 console, a controller, and a game. Thompson did not have the permission of the homeowner to enter the premises or to take possession of these items. When questioned by police, Thompson admitted to having committed these crimes. He stated that he did these things to his aunt as retaliation for something she had done to him earlier in the month.

On November 20, 2009, the State charged Thompson with class B felony burglary and class D felony theft. On February 8, 2010, Thompson pled guilty to both charges pursuant to a written plea agreement, with sentencing left to the trial court's discretion. Paragraph seven of this agreement stated that Thompson agreed to waive certain constitutional rights, including "the right to appeal any discretionary portion of the sentence in this case." Appellant's App. at 28.

On March 8, 2010, the trial court accepted the plea agreement and sentenced Thompson. The trial court found two aggravating factors: (1) Thompson's juvenile and adult criminal history and (2) the fact that he victimized a family member. The court also

found the fact that he pled guilty and accepted responsibility for his action as mitigating. Tr. at 31. The trial court sentenced Thompson to concurrent terms of ten years for the class B felony burglary, with four years executed, one year on work release, and five years suspended to probation, and three years executed for the class D felony theft.

### **Discussion and Decision**

Thompson now appeals, alleging that the trial court erred by failing to deem the possible hardship that incarceration would cause on his disabled fiancée and minor child a mitigating factor and by considering his criminal history to be an aggravating factor. The State argues that Thompson expressly waived the right to appeal his sentence in his plea agreement. The State further argues that, even if he did not waive this right, the trial court did not abuse its discretion when it sentenced Thompson.

It is well established that an accused may waive the right to appellate review of a sentence as part of a written plea agreement so long as the record indicates that the plea was entered into knowingly and voluntarily. *Creech v. State*, 887 N.E.2d 73, 75 (Ind. 2008) (citing *United States v. Williams*, 184 F.3d 666, 668 (7th Cir. 1999)).<sup>1</sup>

Here, Thompson signed a written plea agreement that left sentencing to the trial court's discretion and that provided: "The defendant understands . . . that if this agreement is accepted by the Court, the defendant will give up the following rights: . . . (g) the right to appeal any discretionary portion of the sentence in this case." Appellant's

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<sup>1</sup> Thompson does not argue, nor does the record indicate, that his plea was coerced or that he did not know he was waiving this right. Thus, we address only whether, in his written agreement, he waived his right to appeal the trial court's sentencing decision.

App. at 28. Accordingly, we find that Thompson waived his right to appeal the trial court's sentencing decision in this case.

Waiver notwithstanding, we conclude that the trial court acted within its discretion in sentencing Thompson. “[S]entencing is principally a discretionary function in which the trial court’s judgment should receive considerable deference.” *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). Any sentence that is within the statutory range is subject to review only for abuse of discretion. *Anglemeier v. State*, 868 N.E.2d 482, 490 (Ind. 2007). Abuse of discretion is also the standard when reviewing the reasons given, or those omitted reasons arguably supported by the record, in support of the sentence imposed. *Id.* at 490-91.

“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). Generally, 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). “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).

Regarding undue hardship on Thompson’s son and fiancée, we note that many persons convicted of crimes have one or more dependents and, “absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship.” *Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999). Thompson has failed to establish that evidence of alleged hardship is both significant and clearly

supported by the record. Thus, we cannot say that the trial court abused its discretion when it rejected this proposed mitigator.

As for the finding that his criminal history was aggravating, we point out that even if a defendant's criminal history is minimal or remote, a trial court may still consider this as an aggravating factor. *Corbett v. State*, 764 N.E.2d 622, 631 (Ind. 2002). At the time Thompson committed these crimes, he was thirty years old. As a minor, Thompson had three juvenile adjudications for check deception and a true finding for criminal conversion. His adult record contains a conviction for class A misdemeanor possession of marijuana and two convictions for class A misdemeanor driving while suspended. Under these circumstances, we cannot say that the trial court abused its discretion by considering Thompson's criminal history as an aggravating circumstance.<sup>2</sup>

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.

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<sup>2</sup> In his brief, Thompson opines that his sentence is inappropriate under Indiana Appellate Rule 7(B) in light of the nature of the offense and his character, yet he fails to develop a cogent argument on this point. Even if he had done so, we would find that the sentence imposed was appropriate under the facts presented.