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IN THE
COURT OF APPEALS OF INDIANA

DAVID BURKE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0601-CR-7
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jane Magnus-Stinson, Judge
Cause No. 49G06-0503-MR-43337

December 14, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

David Burke appeals his sentence of thirty-five years with five years suspended for voluntary manslaughter, following a guilty plea. Burke raises two issues, which we restate as: (1) whether the trial court properly sentenced Burke; and (2) whether Burke's sentence is inappropriate given his character and the nature of the offense. We affirm, concluding that the trial court properly sentenced Burke and that the sentence is not inappropriate.

Facts and Procedural History

On February 6, 2005, Burke and Eric Taylor attended a barbeque at the residence of Taylor's girlfriend, Nikkitra Flemming. Burke and Taylor remained at Flemming's house after the other guests left. That evening, Dwayne Pryor, Flemming's ex-boyfriend came to the house and got in an argument with Flemming, at one point pushing her up against a wall. At this point, Taylor gave a handgun he had been carrying to Burke and began fighting with Pryor. During the fight, Burke fired four shots at Pryor, who died as a result of the gunshot wounds. Burke then fled the scene and Taylor called 911 to report the shooting.

On March 14, 2005, a police officer saw Burke at a liquor store and recognized him as the person wanted in connection with Pryor's death. Officers arrested Burke and a search of the car Burke had driven to the store revealed the handgun with which Burke had shot Pryor. Burke was charged with murder and carrying a handgun without a license in connection with Pryor's death, and with carrying a handgun without a license and possession of a handgun by a domestic batterer in connection with the March 14 arrest.

On November 16, 2005, Burke entered into a plea agreement under which he agreed to plead guilty to voluntary manslaughter and carrying a handgun without a license in

connection with Pryor's death, and to carrying a handgun without a license and possession of a firearm by a domestic batterer in connection with the March 14 arrest. In return, the State agreed to drop the murder charge, and capped the maximum executed portion of Burke's aggregate sentence at thirty-two and one-half years, with any additional time to be suspended to probation.

On December 9, 2005, the trial court held a guilty plea and sentencing hearing, at which it discussed the aggravating and mitigating circumstances of the case. The trial court found as aggravating circumstances the fact that Burke shot Pryor four times, the fact that Burke continued to possess the handgun he used to kill Pryor after the shooting,[1] and Burke's criminal history, which included felony possession of cocaine, and three misdemeanors: carrying a handgun without a license, resisting arrest, and domestic battery. As mitigating circumstances, the trial court recognized that Burke pled guilty, expressed remorse, had previously completed probation successfully, and had maintained employment. The trial court also found that Burke had acted in "not quite self-defense," and afforded the factor minimal weight. Transcript at 60. The trial court noted that it would not extend mitigating weight to two of Burke's proffered mitigators. First, the trial court stated that it was unable to say that the shooting was a result of circumstances that were unlikely to recur. The trial court also gave no weight to Burke's claim that his incarceration would impose undue hardship on his family, noting that Pryor's death had also imposed undue hardship on Pryor's family.

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[1] Burke does not argue that this factor is an improper aggravator.

The trial court imposed an aggravated sentence of thirty-five years, with five suspended, for voluntary manslaughter, and six years, all executed, for possession of a handgun without a license. Under the cause number stemming from the March 14 arrest, the court sentenced Burke to eight years for possession of a handgun without a license, and one year for possession of a handgun by a domestic batterer.[2] The court ordered that all the sentences run concurrently, for an aggregate sentence of thirty-five years, with five years suspended, and that the length of Burke's probation upon his release be two years. Burke now appeals, challenging only his sentence for voluntary manslaughter.

Discussion and Decision

Burke argues that the trial court improperly balanced the aggravating and mitigating circumstances and that his sentence is inappropriate given his character and the nature of the offense.

I. Balancing of Aggravators and Mitigators

Because of the timing of events in this case, before addressing Burke's sentence, we must discuss the recent change in Indiana's statutory sentencing scheme. In 2004, the United States Supreme Court decided Blakely v. Washington, 542 U.S. 296 (2004), an opinion that called into question the constitutionality of Indiana's current sentencing scheme. Our legislature responded to Blakely by amending our sentencing statutes to replace "presumptive" sentences with "advisory" sentences, effective April 25, 2005. Weaver v.

[2] Although Burke is not appealing the sentences under the second cause number, in his brief, he maintains his ability to challenge the sentences under post-conviction relief if some basis on which the sentences could be challenged is found to exist. Appellant's Brief at 2.

State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), trans. denied. Under the new advisory sentencing scheme, "a court may impose any sentence that is authorized by statute and permissible under the Indiana Constitution 'regardless of the presence or absence of aggravating circumstances or mitigating circumstances.'" Id. (quoting Ind. Code § 35-38-1-7.1(d)). Thus, while under the previous presumptive sentencing scheme, a sentence must be supported by Blakely-appropriate aggravators and mitigators, under the new advisory sentencing scheme, a trial court may impose any sentence within the proper statutory range regardless of the presence or absence of aggravators or mitigators.

There is a split on this court as to whether the advisory sentencing scheme should be applied retroactively. Compare Settle v. State, 709 N.E.2d 34, 35 (Ind. Ct. App. 1999) (sentencing statute in effect at the time of the offense, rather than at the time of conviction or sentencing, controls) with Weaver, 845 N.E.2d at 1070 (concluding that application of advisory sentencing statute violates the prohibition against *ex post facto* laws if defendant was convicted before effective date of the advisory sentencing statutes but was sentenced after) and Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (concluding that change from presumptive sentences to advisory sentences is procedural rather than substantive and therefore application of advisory sentencing scheme is proper when defendant is sentenced after effective date of amendment even though offense was committed before). Our supreme court has not yet resolved this issue.

In this case, Burke committed the crime of voluntary manslaughter before the date the new sentencing statute took effect, but was sentenced after this date. In such situations, the retroactivity of the new sentencing scheme determines which scheme applies. However, the

outcome in this case is the same regardless of which sentencing scheme is applied, and therefore we need not decide the issue of retroactivity herein. We will analyze Burke's argument under both sentencing schemes.

A. Burke's Sentence under the Presumptive Sentencing Scheme

Under the presumptive sentencing scheme, although the trial court has an obligation to consider all mitigating circumstances identified by a defendant, it is within the trial court's sound discretion whether to find mitigating circumstances. Newsome v. State, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003), trans. denied. We will not remand for reconsideration of alleged mitigating factors that have debatable nature, weight, and significance. Id. If the trial court imposes a sentence in excess of the statutory presumptive sentence, it must identify and explain all significant aggravating and mitigating circumstances and explain its balancing of the circumstances. Rose v. State, 810 N.E.2d 361, 365 (Ind. Ct. App. 2004). We will not modify the trial court's sentence unless it is clear that the trial court's decision was clearly "against the logic and effect of the facts and circumstances before the court." Id.

Burke makes various arguments that the trial court improperly found aggravators that had been neither admitted nor proven beyond a reasonable doubt to a jury. However, in his plea agreement, Burke waived his right to have these facts proven.[3] See Strong v. State, 820

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[3] Provision eight of the plea agreement states:
The defendant acknowledges that the defendant has a right, pursuant to the Sixth Amendment to the United States Constitution and Article I, Section 13 of the Indiana Constitution, to have a jury determine, by proof beyond a reasonable doubt, the existence of any fact or aggravating circumstance that would allow the Court to impose a sentence in excess of the statutory presumptive sentence and to have the State of Indiana provide written notification to the defendant of any such fact or aggravating circumstance. The defendant hereby WAIVES such rights and requests that the judge of this Court make the determination

N.E.2d 688, 690 (Ind. Ct. App. 2005), trans. denied ("[A]s noted by the Blakely court, guilty plea defendants may waive their Apprendi rights by either stipulating to the relevant facts supporting the sentence enhancements or consenting to judicial factfinding."). We conclude that the trial court properly found and afforded weight to all of the identified aggravating circumstances.

Burke then argues that the trial court improperly found as an aggravating circumstance the hardship imposed upon Pryor's family, and improperly used this aggravating factor "to ignore [the] clear mitigating circumstance" of the hardship imposed upon Burke's family by his incarceration. Appellant's Br. at 13. Burke is correct that "under normal circumstances the impact upon [the victim's] family is not an aggravating circumstance for purposes of sentencing." Bacher v. State, 686 N.E.2d 791, 801 (Ind. 1997). However, the trial court in this case did not find the impact upon Pryor's family to be an aggravating circumstance, and merely discussed this impact in its explanation of why the trial court afforded no mitigating weight to the impact upon Burke's family. Cf. Gillem v. State, 829 N.E.2d 598, 605 (Ind. Ct. App. 2005), trans. denied (concluding that trial court considered the hardship imposed upon the defendant's family but decided to afford it no weight where trial court had noted that the case "is a tough situation for both families and there are losses to both families").

As in Gillem, it is clear that the trial court did not ignore this proffered mitigator, as it discussed at length the hardship that Burke's incarceration would impose upon his family,

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> of the existence of any aggravating and/or mitigating circumstances and impose sentence, after considering the presentence investigation report and any appropriate evidence and argument presented at the sentencing hearing ([initialed by Burke]).

Appellant's Appendix at 95.

but decided to afford the circumstance no weight. Many defendants have families that are burdened by a defendant's incarceration, 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). Here, while several of Burke's family members testified at the sentencing hearing regarding Burke's interaction with the family, no evidence was introduced that Burke provided financial support for either of his children or any other family member.[4] Also, Burke has failed to demonstrate how the sentence imposed by the trial court imposes any more hardship on his family than would the minimum sentence of twenty years. See Gillem, 829 N.E.2d at 605. We conclude that the nature, weight, and significance of the hardship placed on Burke's family is debatable, and that the trial court did not abuse its discretion in affording no mitigating weight to this circumstance.

Burke also argues that the trial court improperly considered the fact that Burke had originally been charged with murder and discussed its legal and personal opinions as to whether Burke could have prevailed on his theory of self-defense. The trial court discussed self-defense in response to Burke's proffered mitigators that "the situation was induced or facilitated by Mr. Pryor," and that Burke's actions "didn't lead necessarily to a complete or whole self-defense in the sense . . . [b]ut there's no doubt that Mr. Burke was not the aggressor." Tr. at 53-54. The trial court did not, as Burke suggests, use "dismissed charges to create Mr. Burke's sentence." Appellant's Br. at 15. Instead, the trial court discussed self-defense to explain why it was not giving weight to Burke's own proffered mitigators. This

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[4]Although the trial court notes that Burke worked, the record indicates that Burke had not been

discussion was not improper.

Finally, Burke argues that he is entitled to mitigating weight for his guilty plea. "Where the State reaps a substantial benefit from the defendant's act of pleading guilty, the defendant deserves to have a substantial benefit returned." Sensback v. State, 720 N.E.2d 1160, 1164 (Ind. 1999). However, when a defendant has already received a benefit in exchange for the guilty plea, a trial court does not have to give the plea significant weight. Id. at 1165. The trial court in this case found Burke's guilty plea to be a mitigating factor. Also, in exchange for his guilty plea, Burke received a significant benefit as the State dropped the murder charge, and Burke's maximum executed sentence was capped at thirty-two and one-half years. The trial court did not abuse its discretion in finding Burke's guilty plea to be a mitigating factor, but finding its significance outweighed by the aggravating factors.

We conclude that the trial court acted within its discretion in the finding and balancing of aggravating and mitigating circumstances.

B. Burke's Sentence under the Advisory Sentencing Scheme

Under the advisory sentencing scheme, a court may impose any legal sentence "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d). Although our supreme court has not yet interpreted this statute, its plain language seems to indicate that "a sentencing court is under

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employed since December 2004, and currently had no source of income.

no obligation to find, consider, or weigh either aggravating or mitigating circumstances." Fuller v. State, 852 N.E. 22, 26 (Ind. Ct. App. 2006). Therefore, the trial court's identification and balancing of the aggravators and mitigators in this case cannot be error under the new sentencing scheme. Even if the trial court still has an obligation to identify and balance aggravating and mitigating circumstances, as discussed above, the trial court acted within its discretion in identifying and balancing the aggravators and mitigators in this case.

II. Appropriateness of the Sentence

A. Standard of Review

When reviewing a sentence imposed by the trial court, we "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." Ind. Appellate Rule 7(b). Under this rule, we have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005).

B. Burke's Sentence Was Not Inappropriate

Burke argues that his sentence is inappropriate because "[t]he circumstances [of the crime] merited a reduced sentence," and because Burke "is not the worst of the worst or even the typical offender." Appellant's Br. at 10.

As to the nature of the offense, Burke argues that because Flemming's ex-boyfriend started an altercation with Flemming, and then became involved in an altercation with

Burke's friend, Taylor, "[t]his is less than the average circumstance of sudden heat." Id. While the nature of Burke's offense might not be the worst of the worst, he still fired four shots at a man who was involved in a physical altercation with another man. Significantly, Burke committed this crime using a handgun that he was not legally allowed to possess. We conclude that the nature of Burke's offense does not merit a sentence less than that imposed.

Burke also argues that the nature of his character does not merit the sentence imposed, as testimony at the sentencing hearing indicates that Burke is a good father, and that he has maintained employment. He also points out that his prior felony conviction for possession of cocaine and his misdemeanor convictions for carrying a handgun and resisting arrest came in 1999, and his conviction for domestic battery came in 2002. The significance of a criminal history "varies based on the gravity, nature and number of prior offenses as they relate to the current offense." Wooley v. State, 716 N.E.2d 919, 929 n. 4 (Ind. 1999). Again, while Burke's character might not be the worst of the worst, his criminal history includes four convictions, including a gun-related charge and a crime of violence, both of which have some similarity to the instant offense. Also, the sentence imposed by the trial court is only five years above the advisory sentence, and this additional five years was suspended. We cannot say that Burke's sentence is inappropriate based on his character.

Conclusion

We hold that the trial court properly sentenced Burke under both the old and current sentencing schemes. We further hold that Burke's sentence was not inappropriate based on his character and the nature of his offense.

Affirmed.

BARNES, J., concurs.

SULLIVAN, J., concurs in result.