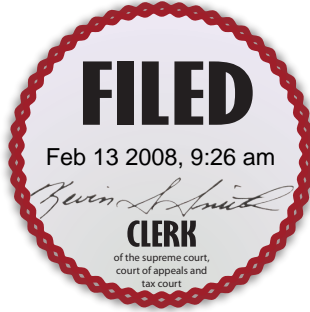


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

AMY M. CARMONY,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 15A04-0706-CR-345

APPEAL FROM THE DEARBORN SUPERIOR COURT
The Honorable G. Michael Witte, Judge
Cause No. 15D01-0606-FC-011

February 13, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Amy Carmony (“Carmony”) pleaded guilty in Dearborn Superior Court to three counts of Class C felony forgery and was sentenced to three concurrent terms of seven years with two years suspended to probation. Carmony appeals arguing that her sentence was inappropriate in light of the nature of the offense and the character of the offender, and the trial court erred when it ordered her to pay restitution without holding an indigency hearing.

We affirm.

Facts and Procedural History

On April 8, 2006, Carmony cashed a forged check in the amount of \$1200.06 at Credit Til Payday and a second forged check in the same amount at Quick Cash. Five days later, Carmony cashed a third forged check in the amount of \$1742.77 at Credit Til Payday. Carmony took the money to Argosy Casino and gambled for nine days until the money was gone.

Carmony was charged with three counts of Class C felony forgery. On November 1, 2006, Carmony pleaded guilty but mentally ill and the plea agreement provided that her sentences for each count would be served concurrently. At the sentencing hearing, the trial court concluded that the aggravating circumstance of Carmony’s criminal history outweighed the mitigating circumstance of her mental illness. The court ordered Carmony to serve three concurrent terms of seven years with two years suspended. The court also ordered Carmony to pay restitution to Credit Til Payday in the amount of \$2982.83 and to Quick Cash in the of amount \$1200.06. Carmony now appeals. Additional facts will be provided as necessary.

I. Carmony's Sentence

Carmony argues that trial court abused its discretion when it failed to consider her guilty plea and remorse as mitigating circumstances and that her aggregate seven-year sentence is inappropriate in light of the nature of the offense and the character of the offender. “[S]entencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion.” Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007). “An abuse of discretion occurs if the decision is ‘clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.’” Id. (citation omitted). Moreover,

[t]he finding of mitigating factors is within the discretion of the trial court. A trial court is not obligated to weigh or credit the mitigating factors in the manner a defendant suggests they should be weighed or credited. “The allegation that the trial court failed to find a mitigating circumstance requires [the defendant] to establish that the mitigating evidence is both significant and clearly supported by the record.”

McKinney v. State, 873 N.E.2d 630, 645 (Ind. Ct. App. 2007), trans. denied.

First, we address Carmony's argument concerning her guilty plea. “Our courts have long held that a defendant who pleads guilty deserves to have some mitigating weight extended to the guilty plea in return.” Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005). A guilty plea, however, is not necessarily a significant mitigating factor. Id.

The trial court failed to consider Carmony's guilty plea as a mitigating circumstance. Carmony was charged with three counts of Class C felony forgery, which subjected her to a sentence of up to twenty-four years. The plea agreement provided that Carmony would be sentenced to concurrent terms, limiting her sentence to a maximum

aggregate sentence of eight years. Moreover, during the forgery investigation, Carmony admitted to an investigating officer that she forged the checks at issue. Appellant's App. pp. 10-11. Carmony's decision to plead guilty was therefore likely a pragmatic one. Moreover, she received a substantial reduction to her sentence by pleading guilty. Accordingly, we conclude that the trial court's error in failing to consider her guilty plea as a mitigating circumstance was harmless. See Banks v. State, 841 N.E.2d 654, 658-59 (Ind. Ct. App. 2006), trans. denied. (Trial court's failure to identify defendant's guilty plea as a mitigating circumstance was harmless error where record indicated that plea was entitled to little or no weight.).

With regard to Carmony's claim that the trial court overlooked her alleged show of remorse, our court has determined that the trial court is in the best position to judge the sincerity of a defendant's remorseful statements. Stout v. State, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005), trans. denied. Carmony asserted that she was remorseful for committing forgery, but at the same time, attempted to make herself less accountable by blaming her gambling addiction and failing to take personal responsibility. Under these circumstances, the trial court acted within its discretion in declining to identify Carmony's alleged show of remorse as a mitigating circumstance.

Finally, Carmony asserts that her aggregate seven-year sentence with two years suspended is inappropriate in light of the nature of the offense and the character of the offender.¹ Carmony argues that her sentence is inappropriate because her offenses "were

¹ In addition to arguing that her sentence is inappropriate, Carmony argues that the trial court "abused its sentencing discretion when it refused to send Ms. Carmony to an inpatient treatment program for gambling addiction[.]" Br. of Appellant at 14. The trial court considered Carmony's request to be sent to

[not] particularly egregious,” she suffers from mental illness² and a gambling addiction, and she acknowledged her responsibility for the offenses by pleading guilty.

Pursuant to Indiana Appellate Rule 7(B), our court “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.” The burden is on the defendant to persuade us that her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

In a span of five days, Carmony committed three Class C felony forgeries and fraudulently obtained over \$4100. She then took that money and went directly to the Argosy Casino where she gambled and lost all of the money. Carmony admitted that she realized she had a gambling addiction in the late 1990s, and despite the financial ability to do so, has not sought intensive treatment. Carmony has a prior 2002 conviction for forgery, a 2005 theft conviction, five convictions of criminal possession of a forged instrument in 2006 in Kentucky, and several pending charges in Kentucky for theft and forgery offenses.³ Carmony’s recent, but extensive, criminal history reveals her inability to lead a law-abiding life. While we acknowledge her guilty plea and mentally illness, those circumstances do not lead us to the conclusion that Carmony’s aggregate sentence

a treatment program, but rejected it due to her pending criminal charges in Kentucky. Carmony cannot establish that the trial court abused its discretion when it refused her request.

² In her brief, Carmony asserts that the trial court abused its discretion by failing to assign significant mitigating weight to her guilty plea. However, the weight afforded to mitigating and aggravating circumstances is no longer a claim available on appellate review. Kremptez v. State, 872 N.E.2d 605, 613 (Ind. 2007).

³ Carmony argues that the trial court abused its discretion in considering her arrest record and pending charges. However, when evaluating the character of the offender, a trial court may consider the offenders arrest record in addition to actual convictions. Johnson v. State, 837 N.E.2d 209, 218 (Ind. Ct. App. 2005), trans. denied.

of seven years with two years suspended is inappropriate in light of the nature of the offense and the character of the offender.

II. Restitution

Carmony also argues that the trial court erred when it ordered her to pay restitution without holding an indigency hearing. As a condition of probation, the trial court may order a defendant to make restitution to the victim of the crime for damage or injury that was sustained by the victim. Ind. Code § 35-38-2-2.3(a)(5) (2004 & Supp. 2007). “When restitution or reparation is a condition of probation, the court shall fix the amount, which may not exceed an amount the person can or will be able to pay, and shall fix the manner of performance.” Id.

Although this statute does not specify the manner in which a trial court must inquire into the defendant’s ability to pay, the trial court must make such an inquiry. The reason for requiring this inquiry is to ensure that a defendant is not imprisoned based on his or her inability to pay restitution. When making this inquiry, the trial court should consider factors such as the defendant’s current financial status, health, and employment history.

Laker v. State, 869 N.E.2d 1216, 1220-21 (Ind. Ct. App. 2007) (citations omitted).

At the sentencing hearing, Carmony testified, “I really want to work and pay back [] the people that I’ve stolen from[.]” Tr. p. 78. Moreover, Carmony did not object when the trial court entered the restitution order. For these reasons, we conclude that Carmony has waived her claim that the restitution order is invalid.⁴ See Green v. State, 811 N.E.2d 874, 877 (Ind. Ct. App. 2004).

⁴ We also note that Carmony has a bachelor’s degree in economics. She was most recently employed as a sales representative for a pharmaceutical company earning \$80,000 to \$100,000 per year. Tr. p. 35.

Conclusion

Carmony's aggregate seven-year sentence with two years suspended is not inappropriate in light of the nature of the offense and the character of the offender. Furthermore, the trial court did not err when it ordered Carmony to pay restitution as a condition of her probation.

Affirmed.

FRIEDLANDER, J., and ROBB, J., concur.