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IN THE COURT OF APPEALS OF INDIANA

DARRICK MILLER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A05-0705-CR-261
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No.48D03-0607-FC-336

January 28, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a guilty plea, Darrick Miller appeals his concurrent sentences of eight years executed for robbery, a Class C felony, and attempted robbery, a Class C felony. Miller raises two issues, which we restate as whether the trial court abused its discretion by failing to consider Miller's guilty plea as a significant mitigating circumstance, and whether his sentence is inappropriate given the nature of the offenses and his character. Concluding the trial court abused its discretion and that Miller's sentence is inappropriate, we reverse and remand with instructions that the trial court order sentences of eight years with four years suspended to probation.

Facts and Procedural History

On July 22, 2006, Miller entered a Village Pantry, represented that he had a gun, and demanded that the clerk put money in a bag. After the clerk refused, Miller indicated that he was joking and left the store. Roughly ten minutes later, Miller entered a Ricker's Oil Store and demanded that the clerk put money in a bag. Again, Miller represented that he had a gun. The clerk put money in a bag, and Miller left the store with the money. It was later determined that the item Miller represented as a gun was in fact a cell phone.

On July 26, 2006, the State charged Miller with robbery, a Class C felony, and attempted robbery, a Class C felony. On February 20, 2007, Miller pled guilty to both counts pursuant to a plea agreement under which the State agreed to recommend that the sentences run concurrently. On February 26, 2007, the trial court held a sentencing hearing, at which it found aggravating circumstances of Miller's criminal history and that Miller committed the

criminal offense of driving under the influence while out on bond for the instant offenses. The trial court sentenced Miller to eight years for both robbery and attempted robbery and ordered the sentences to run concurrently. Miller now appeals.

Discussion and Decision

I. Abuse of Discretion

A trial 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). However, a trial court is still required to issue a sentencing statement when sentencing a defendant for a felony. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218. "If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." Id. The trial court may abuse its discretion if it omits "reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law." Id. at 490-91. We will conclude the trial court has abused its discretion 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." Hollin v. State, 877 N.E.2d 462, 464 (Ind. 2007) (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)).

Miller argues the trial court abused its discretion by failing to find his guilty plea to be a significant mitigating circumstance. We agree.

Trial courts should be "inherently aware of the fact that a guilty plea is a mitigating circumstance." Francis v. State, 817 N.E.2d 235, 237 n.2 (Ind. 2004). "[A] defendant who pleads guilty deserves to have mitigating weight extended to the guilty plea in return." Even when a defendant does not specifically argue that his guilty plea should be considered in mitigation, the defendant may subsequently argue on appeal that the trial court abused its discretion in failing to find the plea as a mitigating factor. Anglemyer v. State, 875 N.E.2d 218, 220 (Ind. 2007) (opinion on reh'g).

We recognize that a guilty plea is not always a significant mitigating circumstance. See Primmer v. State, 857 N.E.2d 11, 16 (Ind. Ct. App. 2006), trans. denied. A plea's significance is reduced if it is made on the eve of trial, if the circumstances indicate the defendant is not taking responsibility for his actions, or if substantial admissible evidence exists against the defendant. Id. Also, the plea may not be significant "when the defendant receives a substantial benefit in return for the plea." Anglemyer, 875 N.E.2d at 221 (citing Sensback v. State, 720 N.E.2d. 1160, 1165 (Ind. 1999)). However, because of the inherent mitigating nature of a guilty plea, we have recognized that a trial court "generally should make some acknowledgment of a guilty plea when sentencing a defendant." Hope v. State, 834 N.E.2d 713, 718 (Ind. Ct. App. 2005).

Here, Miller received absolutely no benefit pursuant to his guilty plea. In the plea, the State merely agreed to recommend that the sentences run concurrently. See Appellant's Appendix at 9. Although a trial court is bound by the terms of a plea agreement it accepts, Ind. Code § 35-35-3-3(e), the trial court is not bound by a mere recommendation, see

Robinett v. State, 798 N.E.2d 537, 540 n.2 (Ind. Ct. App. 2003), trans. denied. More importantly, the record indicates that the State failed to make such a recommendation at the sentencing hearing. Our review of the record also convinces us that Miller was indeed accepting responsibility for his actions. Although there may have been substantial evidence against Miller, his plea did save the State significant resources.[1] In sum, Miller extended a significant benefit to the State by pleading guilty. Because the plea agreement did not bind the trial court to order Miller's sentences to run concurrently and because the State in fact made no such recommendation, Miller received no benefit in return. Under these circumstances, the trial court abused its discretion in failing to find Miller's guilty plea to be a significant mitigating circumstance.

We recognize that the trial court did in fact order the sentences to run concurrently. That the trial court used its discretion to order concurrent sentences does not affect the fact that Miller received no benefit pursuant to his guilty plea. Indeed, the trial court's sentencing statement indicates it did not consider Miller's guilty plea in issuing the concurrent eight-year sentences. Further, the trial court's sentencing statement makes no reference to the fact that Miller pled guilty, and its comments at the sentencing hearing likewise make no mention of the plea. Cf. O'Neil v. State, 719 N.E.2d 1243, 1244 (Ind. 1999) (recognizing that where the trial court discussed the defendant's guilty plea at the sentencing hearing, it was apparent that the trial court did not overlook the plea); Primmer,

[1] The State argues that this benefit was reduced because Miller waited five months to plead guilty, and that "for over five months, the State expended resources preparing for trial" Appellee's Brief at 6. The

857 N.E.2d at 16-17 (recognizing that the trial court did not overlook the guilty plea where record indicated the trial court recognized that the defendant pled guilty).

We conclude the trial court abused its discretion in failing to find Miller's guilty plea to be a significant mitigating circumstance. When we conclude the trial court has abused its discretion in this regard, "we have the option to remand to the trial court for a clarification or new sentencing determination, to affirm the sentence if the error is harmless, or to reweigh the proper aggravating and mitigating circumstances independently at the appellate level." Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005). Additionally, we may exercise our authority under Indiana Appellate Rule 7(B) to review the sentence to determine if it is inappropriate given the nature of the offense and the character of the offender. See Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007); Ruiz v. State, 818 N.E.2d 927, 929 (Ind. 2004). As Miller has also argued that his sentence is inappropriate, we elect to pursue this latter course.

II. Appropriateness of Sentence

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). We have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). When determining whether a sentence is inappropriate, we recognize that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime

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State has cited to no evidence indicating that anyone was working on Miller's case or identifying any expense

committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). We must examine both the nature of the offense and the defendant's character. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When conducting this inquiry, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. The burden is on the defendant to demonstrate that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

In regard to the nature of the offenses, we see nothing in the record that distinguishes Miller's crimes from the garden-variety robbery or attempted robbery. Robbery is accomplished when a person "knowingly or intentionally takes property from another person . . . by using or threatening the use of force on any person; or . . . by putting any person in fear." Ind. Code § 35-42-5-1. Miller's acts clearly satisfy the statutory elements, but the State has pointed to nothing in the record, and we likewise find nothing in the record, indicating that Miller's acts were any more egregious than typical robberies or attempted robberies. See Redmon v. State, 734 N.E.2d 1088, 1094 (Ind. Ct. App. 2000).

In regard to the character of the offender, Miller's guilty plea is a strong indication that he accepts responsibility for his actions. The plea is particularly significant in this case, as Miller received no substantial benefit in return. On the other hand, we recognize that Miller committed the offense of driving under the influence while out on bond for the current offenses. We also recognize that Miller has a criminal history consisting of one felony and

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incurred. Further, by pleading guilty, Miller saved the State the expense of conducting a full-blown trial.

three misdemeanors.[2] However, Miller's last conviction was in 1997, and none of his convictions rise to robbery's level of seriousness. See Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006) (recognizing that the weight of a defendant's criminal history "is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability").

After considering the nature of the offense and Miller's character, we conclude that a sentence of eight years executed is inappropriate. Miller's acts do not "'demonstrate a character of such recalcitrance or depravity' that they justify a [maximum sentence]." Hollin, 877 N.E.2d at 465-66 (revising defendant's sentence for burglary to the advisory sentence) (quoting Frye v. State, 837 N.E.2d 1012, 1015 (Ind. 2005)). We are unable to conclude that Miller is one of the worst offenders with respect to robbers. See Reid v. State, 876 N.E.2d 1114, 1116 (Ind. 2007). Instead, we conclude a sentence of eight years, with four years suspended to probation is appropriate. We note that this is also the sentence recommended by the probation officer who completed Miller's pre-sentence investigation report. See Taylor v. State, 840 N.E.2d 324, 342 (Ind. 2006) (finding the recommendation in the pre-sentence report "significant" in remanding for a new sentencing statement).

Conclusion

We conclude the trial court abused its discretion in failing to find Miller's guilty plea

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[2] When discussing his criminal history in his appellate brief, Miller represents only, "Miller had one prior felony from 1997." Appellant's Brief at 8. Although this statement is not technically inaccurate, it

to be a significant mitigating circumstance. We also conclude Miller's sentence is inappropriate and remand with instructions that the trial court enter a sentence of eight years, with four years suspended to probation.

Reversed and remanded.

FRIEDLANDER, J., and MATHIAS, J., concur.

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implies that this felony is the full extent of Miller's criminal history. We urge Miller's counsel to use more candor with this court.