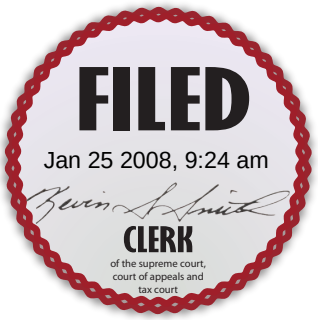

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IN THE
COURT OF APPEALS OF INDIANA

DARRICK W. O'BRIEN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 62A01-0705-CR-216
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PERRY CIRCUIT COURT
The Honorable Lucy Goffinet, Judge
Cause No. 62C01-0608-MR-788

January 25, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Darrick O'Brien appeals his conviction and sentence for murder.[1] O'Brien raises four issues, which we revise and restate as:

I. Whether there was a sufficient factual basis to support O'Brien's guilty plea;

II. Whether the trial judge should have recused herself;

III. Whether the trial court abused its discretion in sentencing O'Brien; and

IV. Whether O'Brien's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.[2]

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[1] Ind. Code § 35-42-1-1 (Supp. 2006) (subsequently amended by Pub. L. No. 1-2007, § 230 (eff. Mar. 30, 2007)).

[2] O'Brien included a copy of the presentence investigation report on white paper in his supplemental appendix. We remind O'Brien that Ind. Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Ind. Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Ind. Administrative Rule 9(G)(1)(b)(viii) states that "[a]ll pre-sentence reports pursuant to Ind. Code § 35-38-1-13" are "excluded from public access" and "confidential." The inclusion of the presentence investigation report printed on white paper in his supplemental appendix is inconsistent with Trial Rule 5(G), which states, in pertinent part:

> Every document filed in a case shall separately identify information excluded from public access pursuant to Admin. R. 9(G)(1) as follows:
>
> (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked "Not for Public Access" or "Confidential."
>
> (2) When only a portion of a document contains information excluded from public access pursuant to Administrative Rule 9(G)(1), said information shall be omitted [or redacted] from the filed document and set forth on a separate accompanying document on light green paper conspicuously marked "Not For Public Access" or "Confidential" and clearly designating [or identifying] the caption and number of the case and the document and location within the document to which the redacted material pertains.

The relevant facts follow. On the evening of August 15, 2006, O'Brien and Kyle Kiplinger, O'Brien's coworker, came into contact with Bobbi Jo Braunecker in Cannelton, Indiana, at Kathy Driskel's house. O'Brien, Kiplinger, and Braunecker left Driskel's house in Kiplinger's vehicle. The three drove around and eventually ended up on River Road in Perry County, which runs behind the flood wall and past Maxine's Marina, and Kiplinger parked the vehicle. Either O'Brien or Kiplinger or both of them wanted to have sex with Braunecker, and Braunecker resisted. Kiplinger started fighting with Braunecker, and they were rolling around on the ground outside of Kiplinger's vehicle. Kiplinger began choking Braunecker and asked O'Brien to help him. O'Brien began kicking Braunecker with his steel toed boots. Braunecker eventually became limp to where she could no longer walk. O'Brien and Kiplinger carried Braunecker several hundred feet through some woods until they reached the edge of the river and pushed Braunecker's limp body into the river with the intention to kill her.

O'Brien and Kiplinger returned to O'Brien's house. O'Brien took off his clothing and gave it to Kiplinger, and Kiplinger disposed of O'Brien's clothing in a dumpster. Some time later, Braunecker's body was discovered floating in the Ohio River. An autopsy revealed that Braunecker suffered multiple traumatic injuries including multiple closed head and facial blunt force injuries, injuries consistent with asphyxia via manual

strangulation, and an acute rib fracture. The pathologist indicated that either the strangulation or the blunt force trauma could have killed Braunecker.

The State charged O'Brien with murder. O'Brien pleaded guilty, and the State agreed not to file the sentence enhancement of life without parole. At the sentencing hearing, the trial court judge informed O'Brien that she was the Chief Deputy Prosecutor at the time that a past unrelated charge was filed against O'Brien. The trial court informed O'Brien that she did not remember the case and would not be influenced by the fact that she was a prosecutor in that case, but offered to withdraw as the trial court judge. O'Brien indicated that he did not want her to withdraw from the case and waived any possible conflict.

The trial court found O'Brien's extensive criminal history as an aggravator. The trial court found the following mitigating factors: O'Brien's imprisonment would result in undue hardship to O'Brien's daughter; O'Brien accepted responsibility by pleading guilty; O'Brien cooperated with local law enforcement; O'Brien's mental illness, alcoholism, drug addiction, troubled childhood, learning disability, and lack of education. The trial court found that the aggravating factor substantially outweighed any mitigating factors. The trial court sentenced O'Brien to sixty-five years in the Indiana Department of Correction.

I.

The first issue is whether there was a sufficient factual basis to support O'Brien's guilty plea. O'Brien argues that the facts contained in the charging information and

testimony at the guilty plea hearing do not establish the elements of murder. The State argues that O'Brien has waived any direct appeal of his conviction by pleading guilty.

The State cites Tumulty v. State, 666 N.E.2d 394 (Ind. 1996). In Tumulty, the Indiana Supreme Court stated "[w]e have long recognized that a defendant may forgo a trial and plead guilty. Without question, '[a]n accused has the right to elect as to whether he will stand trial or plead guilty.' With that election, of course, a defendant gives up certain rights." Tumulty, 666 N.E.2d at 395 (citations omitted). "One consequence of pleading guilty is restriction of the ability to challenge the conviction on direct appeal." Id. at 396. The proper procedure for challenging the factual basis behind O'Brien's guilty plea is a request for post-conviction relief under Ind. Post-Conviction Rule 1. See, e.g., id.

In his reply brief, O'Brien argues that the facts and circumstances of this case justify an exception to the prohibition on challenging a guilty plea on direct appeal. Specifically, O'Brien argues that "[p]recluding O'Brien from directly appealing the insufficient factual basis for the trial judge's acceptance of O'Brien's plea under the circumstances presented in this case circumvents the requirements contained in I.C. § 35-35-1-3,[3] and effectively permits the trial judge to accept a plea from an individual

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[3] Ind. Code § 35-35-1-3 (2004) governs the voluntariness and factual basis of a guilty plea and provides:

> (a) The court shall not accept a plea of guilty or guilty but mentally ill at the time of the crime without first determining that the plea is voluntary. The court shall determine whether any promises, force, or threats were used to obtain the plea.

incapable of fully understanding the proceedings with no factual basis for the plea." Appellant's Reply Brief at 3. Given the Indiana Supreme Court's decision in Tumulty, we decline to create such an exception in the absence of such direction from the Indiana Supreme Court.

II.

The next issue is whether the trial court judge should have recused herself. O'Brien appears to concede that he waived any conflict when he indicated that he did not want the trial court judge to withdraw from the case after she informed him of her potential conflict due to the fact that she was the Chief Deputy Prosecutor at the time that a past unrelated charge was filed against O'Brien. Rather, O'Brien argues, without citation to the record, that "his conviction should be vacated" because the trial court judge "unintentionally failed to recognize or disclose to O'Brien that she was a prosecuting attorney of record in his underlying murder case prior to her judicial term as Perry Circuit Court Judge, which began on January 1, 2007." Appellant's Brief at 23-24.

The State argues that this issue is unavailable for appellate review based on Tumulty. We agree. As previously stated, "[o]ne consequence of pleading guilty is

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(b) The court shall not enter judgment upon a plea of guilty or guilty but mentally ill at the time of the crime unless it is satisfied from its examination of the defendant or the evidence presented that there is a factual basis for the plea.

(c) A plea of guilty or guilty but mentally ill at the time of the crime shall not be deemed to be involuntary under subsection (a) solely because it is the product of an agreement between the prosecution and the defense.

restriction of the ability to challenge the conviction on direct appeal." Tumulty, 666 N.E.2d at 396. The proper procedure for challenging the trial court judge's failure to recuse herself is a request for post-conviction relief under Ind. Post-Conviction Rule 1.[4] See, e.g., id.

III.

The next issue is whether the trial court abused its discretion in sentencing O'Brien. We note that O'Brien's offense was committed after the April 25, 2005, revisions of the sentencing scheme. In clarifying these revisions, the Indiana Supreme Court has held that "the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). We review the sentence for an abuse of discretion. Id. An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Id.

A trial court abuses its discretion if it: (1) fails "to enter a sentencing statement at all;" (2) enters "a sentencing statement that explains reasons for imposing a sentence – including a finding of aggravating and mitigating factors if any – but the record does not support the reasons;" (3) enters a sentencing statement that "omits reasons that are clearly

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[4] O'Brien relies on Lee v. State, 735 N.E.2d 1169 (Ind. 2000), and Brim v. State, 471 N.E.2d 672 (Ind. 1984), to argue that the Indiana Supreme Court routinely decides judicial disqualification issues on direct appeal and reliance on Tumulty is misplaced. We find Lee and Brim distinguishable because neither involved a guilty plea. See Lee, 735 N.E.2d at 1171 (noting that a jury convicted defendant); Brim, 471 N.E.2d at 673 (noting that the trial court convicted the defendant).

supported by the record and advanced for consideration;" or (4) considers reasons that "are improper as a matter of law." Id. at 490-491. If the trial court has abused its discretion, we will remand for resentencing "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." Id. at 491. However, under the new statutory scheme, the relative weight or value assignable to reasons properly found, or those which should have been found, is not subject to review for abuse of discretion. Id.

A. Aggravator

O'Brien argues that the trial court failed to adequately explain why his prior criminal history was an aggravating circumstance and that his criminal history "primarily relates to substance abuse convictions or other non-violent crimes related to theft and similar offenses." Appellant's Brief at 21. We frequently hold that a single aggravating circumstance may be sufficient to support the imposition of an enhanced sentence. Deane v. State, 759 N.E.2d 201, 205 (Ind. 2001); see also Battles v. State, 688 N.E.2d 1230, 1235 (Ind. 1997) (holding that "a criminal history suffices by itself to support an enhanced sentence"). The Indiana Supreme Court has held that this "does not mean that any single aggravator will suffice in all situations." Deane, 759 N.E.2d at 205. For example, a "non-violent misdemeanor ten years in the past . . . would hardly warrant adding ten or twenty years to the standard sentence." Id. 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), reh'g denied.

The trial court addressed O'Brien's criminal history as follows:

> The Court finds the following statutory aggravating factors to exist: Mr. O'Brien has an extensive criminal history. This criminal history includes crimes against a person.
>
> * * * * *
>
> In the past, [O'Brien] has shown that he is not likely to respond affirmatively to probation or short, short-term imprison. In fact, he violated his probation and continues to commit crimes after being released from probation. [O'Brien]'s prior record further shows that there is a likelihood he would commit other crimes in the future.

Transcript at 155-156.

O'Brien essentially argues that the trial court failed to give the aggravator proper weight. Pursuant to Anglemyer, the balancing of the aggravators and mitigators is not subject to our review for abuse of discretion. Consequently, we cannot review O'Brien's argument. See, e.g., Anglemyer, 868 N.E.2d at 491.

B. Mitigators

O'Brien also argues that the trial court failed to identify the following mitigating circumstances: "O'Brien's mental illness; O'Brien's marginal IQ; O'Brien's childhood and his family's facilitating O'Brien's drug use as early as age twelve (12); O'Brien's substance abuse relating to genetic predisposition for alcoholism; O'Brien's lack of opportunity for mental health treatment and substance abuse treatment resulting from

attempted self-medication; and O'Brien's lack of brain development related to impulse control, judgment, gratification and appreciation of consequences." Appellant's Brief at 19.

The trial court addressed proposed mitigators as follows:

> [O'Brien]'s mental disease, defect or intoxication substantially impaired his ability to appreciate the criminality of his conduct or to conform to law. [O'Brien] may well suffer from a mental disease and he may have been under the influence of alcohol at the time of the murder, but the evidence does not show that the mental disease of that, does not show that the mental disease of that his voluntary use of alcohol, uh, or intoxicating substances substantially impaired his ability to appreciate the criminal activity he, he himself was involved in. [O'Brien] claims that he suffers from a mental disease or defect; however, both expert witnesses have testified [O'Brien] knew what he was doing at the time of the murder. Dr. Holsworth testified that [O'Brien] has a detent, has a tendency to negate his own criminal activity or participation. There are no grounds that would justify or excuse this crime. In the past, [O'Brien] has shown that he is not likely to respond affirmatively to probation or short, short-term imprison. In fact, he violated his probation and continues to commit crimes after being released from probation. [O'Brien]'s prior record further shows that there is a likelihood he would commit other crimes in the future. Both experts agree that his failure to receive treatment would make it likely that he would re-offend.
>
> * * * * *
>
> Any mental illness, alcoholism, drug addiction, troubled childhood, ADHD, learning disability and educational achievements, clearly show that [O'Brien] is a very troubled young man, but these facts do not explain nor do they justify his taking of another person's life. As such, I do give weight to these mitigating factors. After considering the aggravating and mitigating factors and the nature and the, of the circumstances of this case, I find that the aggravating factor clearly and substantially out weigh any mitigating factors raised by the defense and found by the Court.

Transcript at 155-157.

O'Brien essentially argues that the trial court failed to give the mitigators proper weight. Pursuant to Anglemyer, the balancing of the aggravators and mitigators is not subject to our review for abuse of discretion. Consequently, we cannot review O'Brien's argument. See, e.g., Anglemyer, 868 N.E.2d at 491.

O'Brien also appears to argue that the trial court abused its discretion by considering a reason that was improper as a matter of law. Specifically, O'Brien argues that the trial court abused its discretion by stating that O'Brien "has accepted responsibility by pleading guilty here today; however, he has received a benefit from the State of Indiana by entering a plea in which the State has agreed not to file the life without parole enhancement." Transcript at 156. O'Brien relies on Ind. Code § 35-50-2-3 (Supp. 2005), which governs sentencing for murder and provides:

> (a) A person who commits murder shall be imprisoned for a fixed term of between forty-five (45) and sixty-five (65) years, with the advisory sentence being fifty-five (55) years. In addition, the person may be fined not more than ten thousand dollars ($10,000).
>
> (b) Notwithstanding subsection (a), a person who was:
>
> (1) at least eighteen (18) years of age at the time the murder was committed may be sentenced to:
>
> (A) death; or
> (B) life imprisonment without parole; and
>
> (2) at least sixteen (16) years of age but less than eighteen (18) years of age at the time the murder was committed may be sentenced to life imprisonment without parole;
>
> under section 9 of this chapter unless a court determines under IC 35-36-9 that the person is a mentally retarded individual.

Ind. Code § 35-36-9-2 (2004) provides that a "mentally retarded individual" means an "individual who, before becoming twenty-two (22) years of age, manifests: (1) significantly subaverage intellectual functioning; and (2) substantial impairment of adaptive behavior; that is documented in a court ordered evaluative report." While O'Brien presented evidence of his mental condition and argued that his "mental illness" was a mitigating factor, he did not argue that he was a "mentally retarded individual" under Ind. Code § 35-36-9-2. Transcript at 150. Further, O'Brien did not file a petition alleging that he was a mentally retarded individual pursuant to Ind. Code § 35-36-9-3 (2004).[5] Thus, O'Brien has waived this argument on appeal. See C.T.S. v. State, 781 N.E.2d 1193, 1204 (Ind. Ct. App. 2003) (holding that failure to raise issue before trial court results in waiver of that issue), trans. denied.

IV.

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[5] Ind. Code § 35-36-9-3 provides:

(a) The defendant may file a petition alleging that the defendant is a mentally retarded individual.

(b) The petition must be filed not later than twenty (20) days before the omnibus date.

(c) Whenever the defendant files a petition under this section, the court shall order an evaluation of the defendant for the purpose of providing evidence of the following:

(1) Whether the defendant has a significantly subaverage level of intellectual functioning.
(2) Whether the defendant's adaptive behavior is substantially impaired.
(3) Whether the conditions described in subdivisions (1) and (2) existed

The next issue is whether O'Brien's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Our review of the nature of the offense reveals that either Kiplinger or O'Brien or both wanted to have sex with Braunecker, and Braunecker resisted. Kiplinger started fighting with Braunecker, and they were rolling around on the ground outside of Kiplinger's vehicle. Kiplinger began choking Braunecker and asked O'Brien to help him. O'Brien began kicking Braunecker with his steel toed boots. Braunecker eventually became limp to where she could no longer walk. Braunecker suffered multiple traumatic injuries including multiple closed head and facial blunt force injuries, injuries consistent with asphyxia via manual strangulation, and an acute rib fracture.

O'Brien and Kiplinger carried Braunecker several hundred feet through some woods until they reached the edge of the river and pushed Braunecker's limp body into the river with the intention to kill her. O'Brien and Kiplinger returned to O'Brien's

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before the defendant became twenty-two (22) years of age.

house. O'Brien took off his clothing and gave it to Kiplinger, and Kiplinger disposed of O'Brien's clothing in a dumpster.

Our review of the character of the offender reveals that O'Brien pleaded guilty to murder. In exchange, the State agreed not to file the sentence enhancement of life without parole. The trial court noted that O'Brien cooperated with law enforcement, but that he "has a tendency to negate his own personal responsibility in this murder." Transcript at 156. A psychological evaluation conducted by Dr. Thomas Holsworth indicated that O'Brien's IQ was 82, which placed him in the twelfth percentile. Dr. Holsworth indicated that O'Brien's IQ is "marginal" and "at best below average." Id. Dr. Holsworth also indicated that O'Brien suffers from a recurrent depressive mood disorder and a "[g]eneralized [a]nxiety [d]isorder." Id. at 78. O'Brien is also "probably [b]ipolar." Id. Dr. Holsworth also indicated that "[n]one of his disorders would explain away what he did." Id. at 166. O'Brien reported "long-term, extensive use of both alcohol and drugs," "using marijuana, cocaine, methamphetamine, LSD, Ketamine, Oxycontin, and whatever pills he could obtain." Appellant's Supplemental Appendix at 222.

O'Brien's criminal history reveals that as a juvenile, in April 2000, O'Brien was referred to juvenile probation for burglary, theft, criminal mischief, and minor consuming, and O'Brien was adjudicated a delinquent.[6] In October 2000, O'Brien was

[6] O'Brien was born on January 28, 1983.

adjudicated delinquent after admitting to stealing a truck. As an adult, O'Brien was charged with resisting law enforcement as a class D felony, criminal recklessness resulting in serious bodily injury as a class C felony, and battery resulting in serious bodily injury as a class C felony. O'Brien pleaded guilty to resisting law enforcement as a class D felony and the remaining two charges were dismissed pursuant to the plea agreement. O'Brien's sentence was suspended to probation, and O'Brien violated his probation by using marijuana. In February 2003, O'Brien pleaded guilty to possession of marijuana as a class A misdemeanor and minor consuming alcohol as a class C misdemeanor.

Finally, O'Brien's participation in the extended struggle that ended Braunecker's life reflects a character that warrants the sentence imposed.

After due consideration of the trial court's decision, we cannot say that the sentence is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Williams v. State, 782 N.E.2d 1039, 1052 (Ind. Ct. App. 2003) (holding that the defendant's sixty-five-year sentence for murder was not inappropriate in light of the nature of the offense and the character of the offender), trans. denied.

For the foregoing reasons, we affirm O'Brien's sentence for murder.

Affirmed.

BARNES, J. and VAIDIK, J. concur