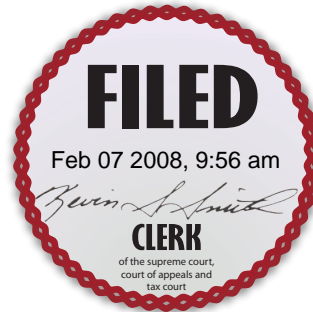


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

KEVIN THARP,)

Appellant-Defendant,)

vs.)

No. 48A02-0703-CR-233

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-0109-CF-401

February 7, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

In this belated appeal, Appellant-Defendant Kevin Tharp challenges the fourteen-year sentence imposed by the trial court following his guilty plea and conviction for Class B felony Confinement.¹ Specifically, Tharp contests the trial court's weighing of aggravators and mitigators and claims that his sentence was inappropriate in light of his character and the nature of his offense. We affirm.

FACTS

The factual basis to which Tharp pled guilty establishes that on approximately July 3, 2001, Tharp, while armed at various times with a gun or knife, knowingly confined C.M. without C.M.'s consent. Specifically, Tharp and a certain Randall Byrd drove C.M. into the country in southern Madison County, where they presumably removed him from the vehicle, and one or both of them bound C.M. with duct tape. Tharp subsequently picked C.M. up and placed him back into Byrd's vehicle. Byrd and Tharp then drove to 2804 Brentwood Drive, Anderson, where they assaulted C.M. by striking him and cutting him with a knife carried by Tharp.

On September 11, 2001, the juvenile court waived its jurisdiction over Tharp, who was seventeen years old at the time he committed the above acts. On September 13, 2001, the State charged Tharp with three counts of criminal confinement as Class B felonies and with Class B felony aggravated battery. On January 28, 2002, Tharp entered into a plea agreement whereby he would plead guilty to one count of criminal confinement (Count I), and the State would dismiss the three remaining counts. At a

¹ Ind. Code § 35-42-3-3(1) (2001).

February 25, 2002 sentencing hearing, the trial court sentenced Tharp to fourteen years, with ten years executed and four years suspended to probation.

Tharp filed a petition for permission to file a belated notice of appeal on October 26, 2006, which the trial court granted. This appeal follows.²

DISCUSSION AND DECISION

Tharp first challenges his sentence by arguing that the trial court did not give due mitigating weight to the fact of his guilty plea. The State responds that, based upon the reconstructed record, the trial court did consider the guilty plea. The State further argues that Tharp's guilty plea was not entitled to significant mitigating weight because he received a substantial benefit from the plea, namely the State's dropping the three additional charges against him.

As a preliminary matter, we note that because the conviction and sentence at issue were based upon the statutory scheme involving presumptive sentences prior to the 2005 sentencing amendments creating advisory sentences, we apply the sentencing laws applicable to that presumptive sentencing scheme. We specifically observe that the rule in *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), stating that the relative weight of aggravators and mitigators is not reviewable for abuse of discretion, does not apply here.

The trial court articulated the following aggravating factors in its February 25, 2002 sentencing order: (1) Tharp's history of delinquent behavior; (2) Tharp's being on probation at the time of the offense; and (3) Tharp's participation in an aggravated battery

² The appellate process in the instant case was delayed for purposes of reconstructing the February 25, 2002 sentencing hearing record because it was unavailable due to a corrupt and damaged CD. On August 27, 2007, the trial court and trial counsel reconstructed the record, which the trial court certified pursuant to Indiana Appellate Rule 31(C).

which was a part of the facts of the case. The trial court also articulated the following mitigating factors: (1) Tharp's age; (2) Tharp's learning disability; (3) Tharp's status as a victim of abuse and neglect as a child; and (4) the influence of co-defendant Randall Byrd. The sentencing transcript indicates that the trial court also considered as a mitigator Tharp's guilty plea and acceptance of responsibility and that it ultimately determined that the mitigators were outweighed by the aggravators. We examine both the written and oral sentencing statements to discern the findings of the trial court. *McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007).

Sentencing determinations, including whether to adjust the presumptive sentence, are within the discretion of the trial court. *Ruiz v. State*, 818 N.E.2d 927, 928 (Ind. 2004). Based upon the law applicable to Tharp at the time of his sentence, if a trial court relied on aggravating or mitigating circumstances to modify the presumptive sentence, it was required to do the following: (1) identify all significant aggravating and mitigating circumstances; (2) explain why each circumstance is aggravating or mitigating; and (3) articulate the evaluation and balancing of the circumstances. *Id.*

When a defendant offered evidence of mitigators, the trial court had the discretion to determine whether the factors were mitigating, and the trial court was not required to explain why it did not find the proffered factors to be mitigating. *Stout v. State*, 834 N.E.2d 707, 710 (Ind. Ct. App. 2005), *trans. denied*. The trial court was not required to give the same weight as the defendant did to mitigating evidence. *Fugate v. State*, 608 N.E.2d 1370, 1374 (Ind. 1993). A single aggravating circumstance was sufficient to justify an enhanced sentence. *McNew v. State*, 822 N.E.2d 1078, 1082 (Ind. Ct. App.

2005). An allegation that the trial court failed to identify or find a mitigating factor required the defendant to establish that the mitigating evidence was both significant and clearly supported by the record. *Matshazi v. State*, 804 N.E.2d 1232, 1239 (Ind. Ct. App. 2004), *trans. denied*. Further, a trial court was not required to include within the record a statement that it considered all proffered mitigating circumstances, only those that it considered significant. *Id.*

With respect to Tharp's challenge based upon the mitigator of the guilty plea, we observe that although a trial court should be inherently aware that a guilty plea is a mitigating factor, such plea is not necessarily a significant mitigating factor. *See Scott v. State*, 840 N.E.2d 376, 383 (Ind. Ct. App. 2006), *trans. denied*. Here, in pleading guilty, there is no question that Tharp saved the State the resources necessary for a trial. Nevertheless, given the number of potential witnesses against Tharp, including the victim, together with Tharp's alleged admissions, it appears that the State had a strong case against him. Further, the State dropped three charges pursuant to the plea agreement, including Class B felony aggravated battery.³ Given the strong evidence against Tharp and the advantage to him of facing a single conviction only, it appears Tharp's guilty plea was as much a pragmatic decision as an effort at taking responsibility. We find no abuse of discretion on this point.

Tharp additionally challenges the aggravating weight placed by the trial court upon his juvenile history by arguing that his juvenile history was minor and unrelated to

³ Because there is some question as to the viability of multiple criminal confinement convictions for the one continuous confinement apparently alleged here, we rely largely on the State's dropping the aggravated battery charge in finding Tharp received a substantial benefit from the plea. *See Bartlett v. State*, 711 N.E.2d 497, 500 (Ind. 1999).

the instant offense. It is true, as Tharp points out, that the significance of criminal history varies based upon the gravity, nature, and number of prior offenses as they relate to the current offense. *See Morgan v. State*, 829 N.E.2d 12, 15 (Ind. 2005). Here, however, in Tharp's young life, he already had true findings for resisting arrest and dealing in a look-alike substance, he was on probation at the time of the instant offense, and he was found in contempt of court due to his refusal to testify in the instant case. This criminal history demonstrates Tharp's persistent disregard for the law, even while facing the instant charges. We therefore find no merit to Tharp's contention that his history is somehow sufficiently minor or unrelated to the instant offense such that the court's consideration of it as a significant aggravating circumstance is an abuse of discretion.

As to Tharp's age, which he argues merited significant mitigating weight, we observe that the trial court did give it weight, naming it as the primary mitigator. Further, as this court has observed, young age "is neither a statutory nor a per se mitigating factor." *Sensback v. State*, 720 N.E.2d 1160, 1164 (Ind. 1999). "There are cunning children and there are naïve adults." *Id.* Given Tharp's juvenile history, we are unpersuaded that his age is indicative of an extraordinary level of naïveté or innocence. Having reviewed those factors which Tharp points to as erroneously weighed, having concluded that the trial court was justified in attributing less weight to Tharp's age and guilty plea and greater weight to his juvenile history, and given the law that even one aggravator may enhance a sentence, we find no abuse of discretion in the trial court's enhancing Tharp's ten-year presumptive sentence by four years.

Tharp further argues his sentence is inappropriate by pointing to his young age, his allegedly minimal juvenile history, his learning disability, his history of child abuse, and the influence of his co-defendant, Byrd. We observe that a defendant may challenge the appropriateness of his sentence in any case where the trial court exercises discretion in sentencing him. *Childress v. State*, 848 N.E.2d 1073, 1079-80 (Ind. 2006). We may revise a sentence authorized by statute if it is inappropriate in light of the nature of the offense and the character of the offender. *Id.* (citing Ind. Appellate Rule 7B). With respect to the nature of his offense, Tharp, while armed with a weapon, participated in the team confinement of another person by transporting that person, who was bound with duct tape, to multiple sites over an extended period of time. Nothing about the calculating and lengthy nature of this offense suggests a fourteen-year sentence is inappropriate.

With respect to Tharp's character, while he may have been somewhat influenced by Byrd during the instant crime, and he may have a learning disability and have suffered abuse as a child, these factors do not discount our negative view of his character given his ongoing disregard for the law up to and including his contempt conviction and his participation in this particularly brutal crime. We are therefore unconvinced that Tharp's character somehow merits a lesser sentence.

Having concluded that the trial court did not abuse its discretion with respect to its consideration and weighing of aggravators and mitigators, and having further concluded that Tharp's sentence was not inappropriate, we affirm the trial court's imposition of a

fourteen-year sentence, with four years suspended, for Tharp's conviction for Class B felony confinement.

The judgment of the trial court is affirmed.

BAKER, C.J., and DARDEN, J., concur.