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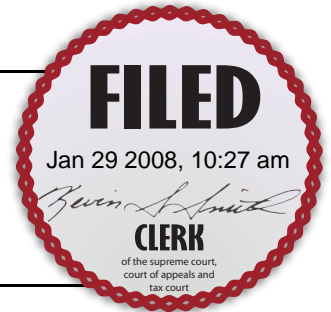
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**IN THE
COURT OF APPEALS OF INDIANA**

MICHAEL T. FOLEY,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 79A05-0709-CR-509

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0602-FA-02

JANUARY 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Defendant-Appellant Michael T. Foley (“Foley”) appeals from his sentence after pleading guilty to possession of methamphetamine, a Class C felony, and to escape, a Class D felony.

We affirm.

Foley does not contest the one-year sentence imposed on the escape conviction, but challenges the trial court’s use of discretion in sentencing for the possession of methamphetamine conviction. Foley also contends that the sentence imposed is inappropriate in light of the nature of the offense and the character of the offender, and asks this court to exercise its authority to revise his sentence.

On February 17, 2006, the State charged Foley with Class A felony possession of methamphetamine, Class A misdemeanor possession of paraphernalia, and Class C felony possession of methamphetamine. On August 24, 2006, Foley entered into a plea agreement which provided that Foley plead guilty to Class C felony possession of methamphetamine in exchange for the dismissal of the remaining counts. Sentencing was to be left to the trial court’s discretion. A plea hearing was held on that date and the trial court ordered Foley moved into the Pre-Trial Release Program at Community Corrections in order to complete an intensive outpatient counseling program. Sentencing was set off until January 19, 2007.

Foley failed to return to the Community Corrections Work Release Program on December 13, 2006. On December 14, 2006, the State filed one count of Class D felony escape against Foley for his failure to return.

Foley and the State reached a supplemental plea agreement incorporating the escape charge. The supplemental plea agreement provided that Foley would plead guilty to the escape charge and receive a one-year sentence for that conviction to be served consecutively to whatever sentence the trial court imposed for the Class C felony possession of methamphetamine conviction.

A combined guilty plea and sentencing hearing was conducted on May 11, 2007. The trial court sentenced Foley to seven years for the conviction for possession of methamphetamine and to one year for the escape conviction. The trial court ordered the sentences to run consecutively, and that six years would be served at the Department of Correction followed by two years served in the Tippecanoe County Community Corrections.

Foley now appeals the sentence imposed by the trial court. First, Foley argues that the trial court abused its discretion by sentencing him to seven years for the Class C felony conviction, and appears to argue that the trial court omitted from consideration at sentencing evidence of Foley's age and that he accepted responsibility for his actions both at the scene of the arrest and by pleading guilty. Second, Foley argues that the sentence is inappropriate in light of the nature of the offense and the character of the offender.

The sentencing range for a Class C felony is a fixed term of between two and eight years, with the advisory sentence being four years. Ind. Code §35-50-2-6. Foley's sentence for possession of methamphetamine was seven years. Consequently, since

Foley's sentence is within the statutory range, it is subject to review only for abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007).

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only 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 before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.* Additionally, an abuse of discretion occurs if the record does not support the reasons given for imposing sentence, or the sentencing statement 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.

First, Foley argues that the trial judge abused his discretion by enhancing Foley's sentence for possession of methamphetamine by considering as an aggravating factor Foley's failure to return to the pre-trial program. He argues that Foley has already been penalized for absconding from the pre-trial program by pleading guilty to escape and receiving a one-year sentence for that crime.

However, a fair interpretation of the trial court's sentencing statement is that the trial court properly sentenced Foley for the escape conviction, as that sentence was agreed to and spelled out in the supplemental plea agreement. What the trial court did do was consider as an aggravating circumstance that Foley was given the opportunity to avoid prison through the Community Corrections Work-Release Program and Foley committed yet another crime, by escaping, when given that opportunity. Consequently, the trial court's consideration of that factor in that way was not improper.

Assuming *arguendo* that the trial court did err in considering that factor, Foley recognizes that other aggravating factors do exist. As a juvenile, Foley was found to have committed the offense of minor consumption. Foley was placed on an informal adjustment, but violated the terms of his probation by further substance abuse. As an adult, Foley's criminal record consists of Class C misdemeanor contributing to the delinquency of a minor in 1999, Class C misdemeanor consumption in 2000, two counts of Class D felony theft in 2001, Class A misdemeanor battery in 2002, felony possession of a controlled substance in Illinois in 2003, Class 4 felony possession of a controlled substance in Illinois in 2004, Class D felony auto theft in 2004, and felony possession of a controlled substance in Illinois in 2005. Foley has violated probation on two occasions as an adult. Based upon Foley's criminal history alone, the trial court did not abuse its discretion in imposing sentence.

Foley also appears to advance the argument that the trial court omitted from his consideration Foley's youth, he was twenty-five years old at the time of sentencing, and that Foley accepted responsibility for his actions at the time of his arrest and by pleading guilty.

An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Anglemyer*, 868 N.E.2d at 493.

Age is neither a statutory nor a per se mitigating factor. *See Sensback v. State*, 720 N.E.2d 1160, 1164 (Ind.1999). At age eighteen, a defendant is beyond the age at which the law commands special treatment by virtue of youth. *Id.* In addition, Foley had

committed numerous offenses as an adult by the time he reached the age of twenty-five. Therefore, Foley has failed to establish that his proposed mitigating circumstance is both significant and clearly supported by the record.

A defendant who pleads guilty deserves some mitigating weight be given to the plea in return. *McElroy v. State*, 865 N.E.2d 584, 591 (Ind. 2007). However, a guilty plea may not be significantly mitigating when the defendant receives a substantial benefit in return. *Id.* Here, Foley received a substantial benefit in exchange for his plea. The Class A felony charge against him was dismissed. Therefore, we cannot say that Foley has met his burden of establishing that this mitigating evidence is both significant and clearly supported by the record.

Foley asks this court to find his sentence to be inappropriate under Ind. Appellate Rule 7(B) in light of Foley's character and the nature of the offense. He asks this court to use its authority to revise his sentence.

Although Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we still must give due consideration to that decision. *See Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). This court recognizes and understands the unique perspective a trial court brings to its sentencing decisions. *Id.* Besides, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate.

Regarding the nature of the offense, Foley argues that there was a serious evidentiary dispute about whether Foley possessed more than three grams of methamphetamine, the difference between commission of a Class C felony and a Class D

felony. However, Foley pled guilty, informing the trial court that he was not disputing the weight of the methamphetamine he was alleged to have possessed. Furthermore, he agreed that the information in the charging information was correct. We note that a defendant may not challenge the factual basis supporting his guilty plea on direct appeal. *See Tumulty v. State*, 666 N.E.2d 394, 395-96 (Ind. 1996).

The probable cause affidavit reflects that Foley committed the crime next to an elementary school. He could have been convicted of Class A felony possession of methamphetamine and faced a potential sentence of twenty to fifty years. This offense is similar to the others offenses outlined in detail above that Foley has committed.

With regard to Foley's character, he has committed eight felonies since 2001, and committed a Class A misdemeanor battery. Foley has failed at prior opportunities for substance abuse treatment and has violated probation when given that opportunity. Foley admits in his pre-sentence report that his only period of sobriety from heroin have been during his incarceration. He resumed the use of methamphetamine at a time when he was not incarcerated.

Foley has failed to establish that his sentence is inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

NAJAM, J., and BAILEY, J., concur.