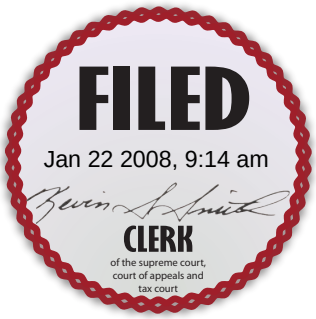

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IN THE
COURT OF APPEALS OF INDIANA

MILTON SMITH, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 89A01-0706-CR-266
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WAYNE SUPERIOR COURT
The Honorable P. Thomas Snow, Judge
Cause No. 89D01-0607-FC-27

January 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Milton Smith, Jr., appeals his four-year sentence for one count of Class C felony robbery. We affirm.

Issues

The issues before us are:

I. whether the prosecutor committed misconduct by discussing prior plea negotiations and offers during the sentencing hearing; and

II. whether Smith's sentence is inappropriate.

Facts

On July 17, 2006, Smith went to the Amish Cheese Shop in Cambridge City. When the cashier opened a cash register, Smith reached into the register, causing the cashier to back up, and grabbed $306.00 in cash. Smith was apprehended shortly thereafter.

The State charged Smith with one count of Class C felony robbery. On April 11, 2007, Smith appeared in court to plead guilty as charged, with a cap on sentencing of four years. At this hearing, the State indicated that in connection with previous plea negotiations the victim "had expressed satisfaction" with a total sentence for Smith of three years. Tr. p. 9. At the sentencing hearing held on May 10, 2007, defense counsel requested a sentence of three years "because the State had initially offered a recommendation of three years on the case." Id. at 43. The prosecutor responded, "The original offer made July 27, 2006, was five years on a robbery." Id. at 45.

Also at the sentencing hearing, Smith and his wife testified as to his allegedly poor mental health. The trial court acknowledged this testimony in its oral sentencing statement, but believed any possible mitigators in the case were counterbalanced by Smith's criminal history, which consists of a juvenile delinquency adjudication, three felony convictions and two parole revocations from Texas, and one felony conviction in Indiana. The trial court imposed a sentence of four years, and Smith now appeals.

Analysis

I. Statements Regarding Plea Negotiations

Smith first contends the prosecutor committed misconduct in this case by referring to plea offers that had been made before he accepted the final plea offer. In the present case, Smith made no objection to the prosecutor's reference to plea negotiations, at either the guilty plea or sentencing hearings. Thus, Smith must establish not only that it was misconduct for the prosecutor to make such comments, but that it was fundamentally erroneous to do so. See Seide v. State, 784 N.E.2d 974, 977 (Ind. Ct. App. 2003). Fundamental error is a substantial blatant violation of basic principles rendering a proceeding unfair to the defendant and depriving the defendant of fundamental due process. Id. (quoting Carter v. State, 738 N.E.2d 665, 677 (Ind. 2000)).

There is both a statute and an evidentiary rule governing the admission of plea negotiations. The statute provides, "A plea agreement, or a verbal or written communication concerning the plea agreement, may not be admitted into evidence at the trial of the case, should the plea agreement not culminate in approval by the court." Ind. Code § 35-35-3-4. The evidentiary rule states:

> Evidence of a plea of guilty or admission of the charge which was later withdrawn, or a plea of nolo contendere, or of an offer so to plead to the crime charged or any other crime, or of statements made in connection with any of the foregoing withdrawn pleas or offers, is not admissible in any civil or criminal action, case or proceeding against the person who made the plea or offer.
>
> However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussion has been introduced and the statement ought in fairness to be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

Ind. Evidence Rule 410.

With respect to the statute, its aim "is to promote free and open discussions leading up to any plea agreement reached between the defense and the prosecution." Mundt v. State, 612 N.E.2d 566, 568 (Ind. Ct. App. 1993), trans. denied. Once a bargain between a defendant and the State has been struck and the plea negotiations ended, the protections of the statute are rendered inapplicable. See id. Excluding testimony regarding plea negotiations after a plea agreement has been reached would not serve the purposes of encouraging guilty pleas. See id.

Evidence Rule 410 appears largely to be a codification of pre-existing common law regarding the admissibility of plea negotiations. Specifically, before adoption of the rule in 1994 this court held that any communication related to plea negotiations is inadmissible in evidence unless a defendant afterward has entered a guilty plea that the defendant has not withdrawn. Hensley v. State, 573 N.E.2d 913, 916 (Ind. Ct. App.

1991), trans. denied. We derived this holding from an American Bar Association recommended standard relating to guilty pleas, which stated:

> Unless the defendant subsequently enters a plea of guilty or nolo contenders which is not withdrawn, the fact that the defendant or his counsel and the prosecuting attorney engaged in plea discussions or made a plea agreement should not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.

Hineman v. State, 155 Ind. App. 293, 302, 292 N.E.2d 618, 623 (1973). We additionally note that the Evidence Rules, except those regarding privileges, do not apply in sentencing hearings. Evid. R. 101(c)(2).

Given that both Indiana Code Section 35-35-3-4 and Evidence Rule 410 only apply in cases where no final guilty plea has been made, we cannot say it was misconduct, let alone fundamental error, for the prosecutor to make two brief references to prior plea negotiations, once at the guilty plea hearing and once at the sentencing hearing. Moreover, at the sentencing hearing it was Smith's attorney, not the prosecutor, who first mentioned that there had been at one time an offer to plead guilty with a maximum three-year sentence. The prosecutor only then mentioned the fact that the original offer in the case had provided for a five-year sentence. Smith has not demonstrated reversible error on this point.

II. Appropriateness of Sentence

Smith next challenges the appropriateness of his sentence under Indiana Appellate Rule 7(B) in light of the nature of the offense and his character.[1] 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. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. "Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id.

In particular, Smith asserts that evidence he presented regarding his mental health should dictate a sentence less than the four-year advisory sentence for a Class C felony that he received. Our supreme court has held that there is a "need for a high level of discernment when assessing a claim that mental illness warrants mitigating weight." Covington v. State, 842 N.E.2d 345, 349 (Ind. 2006). This is because a recent study declared that nearly half of all Americans will be mentally ill at some point in their lives, as mental illness is defined in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders. Id. Factors to consider in weighing a mental health issue include the extent of the inability to control behavior, the overall limit on function, the duration of the illness, and the nexus between the illness and the crime. Id.

Smith testified that he suffered from bipolar disorder, which causes him to have mood swings when he is not on his medication. His wife also testified that he is

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[1] Smith does not assert that the trial court abused its discretion in sentencing him.

"nervous" and "anxious" when is not on his medication. Tr. p. 38. Smith had run out of his medication at the time of this crime, because he had left Texas in violation of his parole there and did not have a doctor in Indiana who could prescribe more medication. He testified that when he committed the crime, "I just . . . I really didn't understand, didn't really know what was going on, you know." Id. at 24.

Smith presented no expert testimony regarding the extent of his mental illness. Additionally, by his own testimony his illness did not place significant limitations upon his ability to function or control his behavior, as long as he took his medication. However, Smith stopped taking his medication because of his decision to leave Texas in violation of his parole there, leaving him without a doctor who could prescribe more medication for him. We conclude that the evidence of Smith's mental illness, which he should have been able to regulate, is not entitled to overwhelming mitigating weight. Certainly, it is not so mitigating that it outweighs Smith's extensive history of committing crimes and violating parole. Smith's advisory four-year sentence is not inappropriate.

Conclusion

Fundamental error did not occur when the prosecutor mentioned plea negotiations during the guilty plea and sentencing hearings. Additionally, Smith's four-year sentence is not inappropriate. We affirm.

Affirmed.

SHARPNACK, J., and VAIDIK, J., concur.