



## STATEMENT OF THE CASE

Defendant-Appellant Sewell Jerome Evans (“Evans”) appeals from his sentencing after pleading guilty to Class A misdemeanor domestic battery, Class D felony criminal confinement, Class D felony intimidation, and Class D felony resisting law enforcement.

We affirm.

## ISSUE

The sole issue presented for our review in this appeal is whether the trial judge abused his discretion when sentencing Evans.

## FACTS AND PROCEDURAL HISTORY

Evans had several charges pending against him under two different cause numbers. On April 26, 2007, pursuant to agreements reached with the State, Evans pled guilty to all of the charges pending against him. In one plea agreement, Evans pled guilty to Class A misdemeanor domestic battery, Class D felony criminal confinement, and Class D felony intimidation in exchange for a cap of two years on his sentence. In the second plea agreement, Evans pled guilty to Class D felony resisting law enforcement in exchange for a cap of two years on his sentence. Both agreements provided that the amount and placement of the executed portion of the sentences would be argued by the parties at the sentencing hearing.

The trial court set the sentencing hearing for June 25, 2007, and ordered a pre-sentence investigation. On June 25, 2007, after hearing testimony and noting corrections in the pre-sentence investigation report, the trial court found as aggravating circumstances that Evans had violated the conditions of his probation, that Evans had a

history of criminal or delinquent activity, and that Evans had violated his bond when released for the January 18, 2004 offenses. The trial court found as a mitigating circumstance that Evans had pled guilty. The trial court then found that the aggravating circumstances outweighed the mitigating circumstances. The trial court sentenced Evans to one year for the domestic battery conviction and to two years each for the confinement and intimidation convictions, all to be served concurrently, with all but one year suspended. The trial court sentenced Evans to two years for his resisting law enforcement conviction, with one year suspended. The trial court ordered Evans to serve the executed portion of the sentences in the two causes to be served consecutively, for an aggregate executed sentence of two years.

Evans now appeals stating that his sentence is inappropriate in light of the nature of the offense and character of the offender, but actually arguing that the trial judge abused his discretion.

## DISCUSSION AND DECISION

### STANDARD OF REVIEW

Evans' crimes were committed prior to the effective date of the amendments to Indiana's sentencing statutes. Application of the new sentencing statutes to crimes committed before the effective date of the amendments violates the prohibition against *ex post facto* laws. *See Creekmore v. State*, 853 N.E.2d 523, 528-29 (Ind. Ct. App. 2006). Therefore, we apply the prior version of the sentencing statutes to Evans' situation.

Sentencing decisions are generally left to the trial court's sound discretion and are reviewed only for an abuse of discretion. *Powell v. State*, 751 N.E.2d 311, 314 (Ind. Ct.

App. 2001). We will not modify the sentence imposed by the trial court unless a clear abuse of discretion has occurred. *See Rose v. State*, 810 N.E.2d 361, 365 (Ind. Ct. App. 2004). An abuse of discretion in identifying or not identifying aggravators and mitigators has occurred if the trial court's decision is against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007). 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.

#### ABUSE OF DISCRETION

First, we note that one of Evans' convictions, domestic battery, is a Class A misdemeanor. Ind. Code §35-50-3-2 governs the sentence to be imposed for Class A misdemeanors. The statute provides that a person who commits a Class A misdemeanor shall be imprisoned for a fixed term of not more than one (1) year. Ind. Code §35-50-3-2. Therefore, because the statute does not provide a presumptive or advisory sentence, but rather a maximum allowable sentence, a trial court is not required to articulate and balance aggravating and mitigating circumstances before imposing sentence on a misdemeanor conviction. *See Creekmore*, 853 N.E.2d at 527. Consequently, the trial judge did not abuse his discretion by failing to articulate aggravating and mitigating circumstances for the misdemeanor conviction.

A defendant is entitled to challenge, on direct appeal, the merits of a trial court's sentencing decision where the trial court has exercised sentencing discretion. *Allen v. State*, 865 N.E.2d 686, 689 (Ind. Ct. App. 2007). Evans' plea agreement can be described as a "capped" plea. An "open plea" is one in which the sentence to be imposed is left to the discretion of the court. *Id.* A "range" or "capped" plea is akin to the open plea by virtue of the discretion in sentencing afforded to the trial court. *Id.* A "fixed plea," however, is one that specifies the exact number of years to be imposed for sentencing. *Id.* Therefore, the trial court did exercise discretion in pronouncing the sentence in this capped plea.

Evans' argument is that the trial court failed to properly evaluate and balance the aggravating and mitigating circumstances. Evans claims that the mitigators he advanced below were not properly considered by the trial court.

When a defendant offers evidence of mitigators, the trial court has the discretion to determine whether the factors are mitigating. *Burgess v. State*, 854 N.E.2d 35, 38 (Ind. Ct. App. 2006). The trial court is not required to explain why it does not find the proffered factors to be mitigating. *Id.*

Here, Evans argues that the trial court failed to properly consider mitigating evidence of Evans' ability to maintain employment, his work ethic at the time of his arrest, his prior violation of probation being the result of financial obligations, Evans' desire to participate in community corrections, and the pre-sentence investigation and criminal history not substantiating convictions.

Evans complains that the trial court overlooked his record of participation in in-home detention and the sobriety. There is no evidence in the record to establish that Evans previously had been placed on in-home detention. Evans received one year of probation for prior domestic battery, resisting law enforcement, and public intoxication convictions. He was on probation for those offenses when he committed the instant domestic battery, criminal confinement, and intimidation offenses. He violated his probation by committing the new offenses. Therefore, the trial court could properly consider the violation of probation by committing new offenses. Evans' argument that his probation violation was based upon his inability to satisfy the financial obligation component is not well-taken .

Further, Evans was placed on the sobriety monitoring system as a condition of his pre-trial release in the instant matters. The monitoring requirement was discontinued by the trial court on April 9, 2007. Therefore, we find that the trial court did not err by not giving this proposed mitigator much, if any, weight.

The evidence of Evans' employment history was contained in Evan's pre-sentence investigation report. Evans stated that prior to his most recent employment, which had a listed hire date as "February-April of 2007", he was only employed for six months in 2006, that he had work experience in sheet metal, and that he had previously worked some roofing jobs. Therefore, Evans' has failed to satisfy his burden of establishing that the evidence of his ability to maintain employment is both significant as well as supported by the record.

As for the trial court's consideration of aggravating circumstances, Evans does not challenge the trial court's finding that Evans violated his bond for the January 18, 2004 offenses. In addition, the trial court's finding that Evans violated the terms of his probation is discussed above. Evans was on probation for other offenses, when he committed the January 18, 2004 offenses. Even though Evans argued that he previously had violated his probation for financial reasons, the record supports the trial court's finding based upon the commission of the new offenses. Last, Evans seems to argue that his prior criminal history was not significant and that the trial court considered unsubstantiated charges listed in the pre-sentence investigation report as aggravating circumstances. Evans' criminal history reveals that he was convicted in 1991 of resisting law enforcement, battery resulting in bodily injury, and disorderly conduct. Although remote, they are similar to some of the instant offenses. Evans was convicted of public intoxication in 1993, 1995, and 1997. Evans was convicted of check deception in 2000. Consequently, the trial court's finding that Evans has a history of criminal or delinquent behavior is supported by the record. The trial court did not err.

The trial judge did not abuse his discretion when sentencing Evans.

#### CONCLUSION

The trial judge did not abuse his discretion when sentencing Evans. Evans has failed to establish the trial court relied upon improper aggravating factors to enhance the sentence. Further, Evans has failed to establish that proffered mitigating factors were both significant and supported by the record.

Affirmed.

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