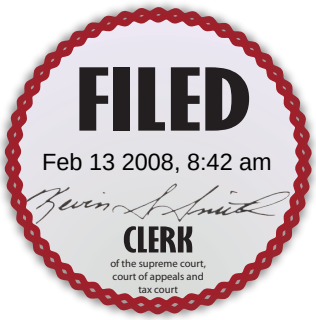

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IN THE
COURT OF APPEALS OF INDIANA

TONY HARRIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0706-CR-511
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jose Salinas, Judge
Cause No. 49G17-0701-FD-018141

FEBRUARY 13, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBERTSON, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Tony Harris ("Harris") appeals from his sentence after pleading guilty to escape, a Class D felony; invasion of privacy, a Class A misdemeanor; and domestic battery, a Class A misdemeanor.

We affirm.

ISSUES

Harris presents us with the following issues for our review:

I. Whether the trial judge abused his discretion when sentencing Harris by issuing a deficient sentencing statement; and

II. Whether the sentence imposed is inappropriate in light of Harris' character and the nature of his offenses.

FACTS AND PROCEDURAL HISTORY

On December 18, 2006, Harris removed a Secure Continuous Remote Alcohol Monitor ("SCRAM") device that he was required to wear as a condition of pre-trial release in a domestic battery action brought against him. Harris traveled to Denver, Colorado, and returned to Indianapolis, Indiana with his wife, Jasmine Harris, the victim in the domestic battery action, on December 24, 2006. Harris was also required to have no contact with Jasmine as a condition of his pre-trial release.

As a result of those actions, Harris was facing a number of charges under several cause numbers. Pursuant to a plea agreement entered into with the State, which combined the several charges, Harris entered guilty pleas to escape, a Class D felony; invasion of privacy, a Class A misdemeanor; and domestic battery, a

Class A misdemeanor. Harris was sentenced to 545 days on the escape charge, 72 days executed and 473 days on probation.[1] On the invasion of privacy charge Harris was sentenced to 365 days on probation, to be served concurrently with the escape charge. On the domestic battery count Harris was sentenced to 365 days, 196 executed and 169 days suspended on home detention to be served consecutively to the escape charge. The remaining charges were dismissed.

In pronouncing sentence the trial court said that he "agonized over the given aggravators and mitigators on each of the several counts," that Harris' contact with his wife had been invited, and that Harris' military record is to be commended; however, the trial court could not overlook Harris' "blatant disrespect or the blatant violation of the court order." Tr. 41-44.

Harris brings this appeal challenging his sentence.

DISCUSSION AND DECISION

STANDARD OF REVIEW

Harris challenges the sentence imposed by the trial court after Harris pled guilty. Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007). Nothing in the amended statutory regime changes this standard. *Id*. So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion. *Id*.

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[1] A person who commits a Class D felony shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1½) years. Ind. Code §35-50-2-7.

I. DEFICIENT SENTENCING STATEMENT

Harris argues that the trial court's sentencing statement was deficient because the trial court did not include a reasonably detailed recitation of its reasons for imposing the sentence. 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. *See Allen v. State*, 865 N.E.2d 686, 689 (Ind. Ct. App. 2007).

We note that Ind. Code §35-50-3-2 governs the sentence to be imposed for Class A misdemeanors. That would apply to two of the convictions at issue here. 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 v. State*, 853 N.E.2d 523, 527 (Ind. Ct. App. 2006). Consequently, the trial judge did not abuse his discretion by failing to articulate aggravating and mitigating circumstances for the misdemeanor convictions.

In the present case, Harris was sentenced on March 15, 2007.[2] Our supreme court's opinions in *Anglemyer* and *Windhorst* were issued in June of 2007. Therefore, the trial court did not have the benefit of our supreme court's guidance in those cases when sentencing Harris. In *Anglemyer* our supreme court determined that sentencing statements retain their importance for purposes of appellate review any time a sentence is imposed for a felony conviction. 868 N.E.2d at 490. Consequently, after the date of the *Anglemyer* opinion, any time a sentence is imposed for a felony conviction a trial court must make a reasonably detailed sentencing statement including an explanation of all significant aggravating and mitigating circumstances, if they have been found by the trial court, and must explain why each circumstance has been determined to be mitigating or aggravating. *See id*. In *Windhorst v. State*, 868 N.E.2d 504 (Ind. 2007), the supreme court chose to rely upon a 7(B) review where the trial judge did not enter a sentencing statement at all upon a felony conviction where the presumptive, now advisory, sentence was imposed. The *Anglemyer* holding regarding sentencing statements for felony convictions was not applied, and the supreme court chose to affirm this court's decision on 7(B) review.

Therefore, following the supreme court's lead, we will not apply the sentencing statement requirement retroactively, and will examine Harris' sentence under our 7(B) review.

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[2] The abstract of judgment was modified on May 1, 2007 in order to correct the amount of Harris' jail time credit.

Before engaging in the Appellate Rule 7(B) review, however, we next address Harris' argument that the trial court failed to consider proffered mitigating evidence. Harris presented as mitigating evidence his voluntary return from Colorado; his taking responsibility for his actions; his family support; and, his wife's desire to put their lives back together. Harris also notes that he is college educated and had served for 18 months in Iraq.

It is within a trial court's discretion to decide both the existence and the weight of a significant mitigating circumstance. *Pennington v. State*, 821 N.E.2d 899, 905 (Ind. Ct. App. 2005). Consequently, a sentencing court abuses its discretion only when there is substantial evidence in the record of mitigating circumstances. *Id.* Although the court must consider evidence of mitigating factors presented by the defendant, it is not required to find that any mitigating circumstances actually exist, nor is it obligated to explain why certain circumstances are not sufficiently mitigating. *Id.* Furthermore, the court is not compelled to credit mitigating factors in the same way as would the defendant. *Id.* On appeal, an allegation that the trial court failed to identify or find a mitigating circumstance requires the defendant to establish that the evidence is both significant and clearly supported by the record. *Id.*

Insofar as Harris' voluntary return is concerned, the trial court heard that Harris' wife had intercepted Harris in Denver. When asked if she thought Harris would have returned on his own, the wife stated that she did not know. This

would dispel to some degree the argued voluntary nature of Harris' return to Indiana.

Harris told the trial court of his remorse for his conduct when he pled guilty. We have held that a defendant who pleads guilty deserves some mitigating weight; however, a guilty plea may not be significantly mitigating when the defendant receives a substantial benefit, such as the dismissal of the invasion of privacy counts, in return. *See McElroy*, 865 N.E.2d 584, 591 (Ind. 2007).

Harris also points to evidence of his wife's, the victim's, wishes. Harris' wife requested that he not be sent to the Department of Correction, but instead that the family be reunited. The sentence included some probation, some home detention, and that he receive a mental health evaluation and treatment, including substance abuse evaluation and treatment. We believe that the evidence supports the trial court's sentence in that it includes much of what the wife requested.

Stated differently, we are of the opinion that the sentencing statement by the trial court, takes into account virtually all of Harris' proffered circumstances. We cannot say that an abuse of discretion has occurred based upon the record presented here on appeal.

II. APPELLATE RULE 7(B) REVIEW

Harris's argument on this issue is founded upon Rule 7(B) of the Indiana Rules of Appellate Procedure. That rule provides that the court on appeal may revise the trial court's sentence if it finds the sentence is inappropriate in light of the nature of the offense and the character of the offender. 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 it sentencing decisions. *Id*. Additionally, Harris bears the burden of persuading the appellate court that his sentence is inappropriate. *Id*.

In determining whether a sentence is inappropriate under Rule 7(B) we are often required to review the trial court's exercise of its sentencing discretion. *Long v. State*, 865 N.E. 2d 1031, 1036 (Ind. Ct. App. 2007). In doing so, we will continue to apply the familiar abuse of discretion standard. *Id.* An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances, or the reasonable, probable, and actual deductions to be drawn therefrom. *Anglemyer*, 868 N.E.2d at 491. This standard, we believe, affords the proper level of deference to the often fact-sensitive sentencing determinations made by trial court judges. *Long*, 865 N.E.2d at 1036.

Regarding the nature of the offense, Harris argues that he voluntarily returned to Indiana and took responsibility for his actions by entered into a plea agreement. He argues that he has family support to help him succeed. Harris points to the fact that the victim, his wife, wanted to reunite the family, did not want Harris to be incarcerated, and was not in fear for her own safety when she flew to intercept Harris and returned with him. However, as the trial court noted,

Harris committed these crimes in violation of court orders issued from a prior charge, orders that were issues as a basis for home detention.

Regarding Harris' character we note that the trial commended Harris for his military service, but then added that his blatant disregard of a court order overrode that factor. While it is true that Harris pled guilty saving the State the time and expense of a trial, Harris also received the benefit of having two charges against him dismissed. The trial court considered Harris' mental health issues and ordered that Harris receive a mental health evaluation and treatment, in addition to substance abuse evaluation and treatment. The trial court observed Harris' wife's wishes by withdrawing the no-contact order, and ordered the majority of Harris' time to be served on probation or on home detention. Last, Harris' criminal history was not lengthy; however, all of the offenses were committed within a short period of time. The offenses reflected a pattern of violation of court orders.

Harris received 72 days executed with 473 years suspended to probation for the escape charge, 365 days suspended to probation for invasion of privacy concurrent with the escape, and 196 days executed, 169 days suspended for domestic battery to be served consecutively. We cannot say that this sentence is inappropriate in light of the nature of the offense and the character of the offender.

CONCLUSION

The trial court properly sentenced Harris. Judgment affirmed.

CRONE, J., and BRADFORD, J., concur.