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IN THE
COURT OF APPEALS OF INDIANA

DAVID BROWN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0609-CR-785
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49G02-0509-MR-163553

April 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

David Brown appeals from the trial court's order that he serve consecutive sentences for the murder of his son H. and the attempted murder of his daughter A., offenses to which he had pleaded guilty.

We affirm.

ISSUES

1. Whether the imposition of consecutive sentences must be reversed because the trial court abused its discretion in its consideration of mitigating and aggravating circumstances.

2. Whether the imposition of consecutive sentences is inappropriate in light of the nature of the offenses and Brown's character.

FACTS

On September 22, 2005, the State charged Brown with the murder of H. and with the attempted murder of A. On October 17, 2005, Brown filed a motion and request for psychiatric examination and notice of insanity defense. The trial court appointed Dr. Don Olive and Dr. George Parker to examine Brown. Dr. Olive, a neuropsychologist, filed his report with the trial court on December 22, 2005. Dr. Olive opined that Brown was "competent" to stand trial and had, at the time of the offenses, suffered no "mental disease or mental defect that militated against his capacity to appreciate the wrongfulness of his conduct." (App. 57).

Dr. Parker, a psychiatrist, filed his report with the trial court on January 30, 2006. Dr. Parker's report included the fact that A. had informed the police that on the afternoon of September 19, 2005, Brown told H. and A. "he wanted to talk to both of them in the

kitchen." (App. 71). A. reported that Brown's "speech was slurred and he was upset," and that she "saw him drinking alcohol shortly before the incident." (App. 70, 72). According to A., Brown had "said, 'I love you,'" and then she saw him pull the trigger and shoot her brother in the head. (App. 70). A. further told the police that after Brown shot her brother, "he said to her I love you and shot her in the back," and he then "fired another shot and missed." *Id.* Dr. Parker's report included the fact that A. "had been shot in the back" and that H. had suffered more than one shot to the head. (App. 71). Dr. Parker also found Brown competent to stand trial and that Brown "did not have a mental disease or defect at the time" of the alleged offenses and that Brown "did appreciate the wrongfulness of his behavior at the time" of the alleged offenses. (App. 73).

On June 30, 2006, Brown moved to suppress his statement to a medic in the ambulance on September 19th. According to the probable cause affidavit, Brown had "told the medic . . . I shot my son." (App. 23). The trial court noted that the medic was "not a law enforcement officer" and that Brown had "volunteered" the statement but never ruled on the motion. (Tr. 40, 41).

On July 7, 2006, Brown tendered to the trial court a written plea agreement. The agreement provided that Brown would plead guilty to both counts as charged; that the trial court "may enter a finding of Guilty but Mentally Ill as to both charges provided that" Brown provided an adequate factual basis to support such a finding; the State would recommend "a cap" of fifty-five years on the murder charge and thirty years on the attempted murder charge, with "determination of concurrent vs. consecutive sentencing . . . left" to the trial court's discretion. (App. 124, 125). That same day, July 7th, Brown

testified to the trial court as follows. On the afternoon of September 19, 2005, Brown was in the family home with his son, H., and his daughter, A. Brown retrieved a .38 caliber pistol "from the top of the refrigerator," and from a distance of "approximately four or five feet" shot his son H. in the head. (Tr. 53). A. ran, and "as she was running from the house," with her "back to [him]," Brown shot at A., his daughter. *Id.* Brown "intend[ed] to kill them." (Tr. 54).

The trial court accepted Brown's guilty pleas. However, the trial court agreed to defer its determination of whether Brown was guilty but mentally ill, and further agreed that it would allow Brown to submit an additional psychiatric evaluation for consideration at sentencing.

The trial court held the sentencing hearing on August 16, 2006. Brown submitted the evaluation by Dr. Larry Davis, psychiatrist. Dr. Davis opined that Brown "had diminished judgment and self control at the time of the shootings" and that "Brown was mentally ill . . . on September 19, 2005." The trial court stated that it had read Dr. Davis' report as well as having reviewed those from Dr. Olive and Dr. Parker. The State indicated that it did not "contest the basis for a finding of guilty but mentally ill in this case." (Tr. 82). The trial court then entered judgment of conviction as guilty but mentally ill on both counts.

Brown acknowledged that the contents of the presentence investigation report (PSI) were accurate. A written statement from A. described how she continued to visualize "like a video camera" that played "over and over" the scenes of H. "being shot," her last sight of "him lying there dead in front of the stove," and her "being shot while

running" away from her father. (PSI p. 6). It further reported that H.'s "last words" to Brown were, "'Dad, don't do it.'" *Id.* Brown testified that he was "sorry" and "wish[ed] [he] could change" what had happened. (Tr. 108).

The trial court found as mitigating circumstances that Brown had "accepted responsibility for his own actions" by pleading guilty, "his mental health issues," and his remorse. (Tr. 122, 123). It found Brown's criminal history – specifically, his "D felony conviction for Criminal Recklessness . . . in 1981," and convictions for "Operating While Intoxicated in '86"; "Public Intoxication, Firearms Act" and "Disorderly Conduct in '87"; and "Operating While Under the Influence . . . also in '87" – to be an aggravating circumstance. (Tr. 124). It further found the fact that Brown "violated a position of trust" to be an aggravating fact. The trial court explained,

> Most children believe that when they get home they're safe. And certainly in this situation, I see no reason to believe that his children didn't believe that [they] were safe when they walked into the[ir] own home on that dreadful day and he violated that position and he took . . . [H.]'s life and shot his daughter in the back. And . . . that aggravator, in and of itself, outweighs any mitigating circumstance in this case.

(Tr. 124). The trial court then sentenced Brown to the advisory term for each count: fifty-five years on the murder count and thirty years on the attempted murder count. It ordered that the sentences be served consecutively.

DECISION

1. Consideration of Mitigating and Aggravating Circumstances

Brown first argues that the trial court abused its discretion when it imposed consecutive sentences "because the aggravating circumstances in this case do not

outweigh the substantial mitigating circumstances." Brown's Br. at 8. His argument must fail.

The legislature has prescribed standard, or advisory, sentences for each crime, allowing the sentencing court limited discretion to enhance the sentence to reflect aggravating circumstances or to reduce it to reflect mitigating circumstances. *Lander v. State*, 762 N.E.2d 1208, 1215 (Ind. 2002). The legislature also permits sentences to be imposed consecutively if aggravating circumstances warrant. *Id.* When the trial court imposes consecutive sentences where not required by statute, we examine the record to insure that the court explained its reasons for selecting the sentence. *Id.* Before the trial court can impose a consecutive sentence, the trial court must articulate, explain, and evaluate the aggravating circumstances that support the sentence. *Id.* The trial court's assessment of the proper weight of mitigating and aggravating circumstances is entitled to great deference on appeal and will be set aside only upon a showing of a manifest abuse of discretion. *Patterson v. State*, 846 N.E.2d 723, 727 (Ind. Ct. App. 2006).

Brown asserts that his "guilty plea alone deserved heavy mitigating weight." Brown's Br. at 9. However, a guilty plea can be construed to be a pragmatic and/or strategic decision made by the defendant. Nevertheless, the mitigating effect of a plea should be noted by the sentencing court, *see, e.g., Banks v. State*, 841 N.E.2d 654, 658 (Ind. Ct. App. 2006). The trial court here did so when it expressly found Brown's having "accepted responsibility for his own actions" by entering the guilty plea to be a mitigating circumstance. (Tr. 122). Further, the trial court is in the best position to determine the weight to be assigned to a given mitigating circumstance. Based upon the evidence

before it, we do not find it an abuse of discretion that Brown's guilty plea was simply found to be a mitigating circumstance and not expressly a "substantial" one.

Brown also claims that his "mental illness . . . deserved substantial mitigating weight" and "should have [been] given greater weight." Brown's Br. at 10, 12.[1] As noted above, the trial court did find that Brown's "mental health issues" were a mitigating circumstance. (Tr. 122). In *Covington v. State*, 842 N.E.2d 345, 349 (Ind. 2006), Indiana's Supreme Court observed that definitions of mental illness have "continued to expand to the point that a recent study declared that about half of Americans become mentally ill and half do not." This fact "suggests the need for a high level of discernment when assessing" the weight to be given "a claim that mental illness warrants mitigating weight." *Id.* The reports from all three experts indicated that Brown exhibited symptoms of some mental disorders, while disagreeing as to the specific diagnosis and severity thereof. Therefore, as in *Covington*, we are not persuaded that the trial court "erred in assigning some, but not determinate, weight" to Brown's mental condition. *Id.*

Brown also argues that his remorse "was a significant mitigating circumstance" that was not assigned adequate weight by the trial court. Brown's Br. at 12. The weight assigned to a mitigator is at the trial court's "discretion, and the judge is under no obligation to assign the same weight to a mitigating circumstance as the defendant"

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[1] Brown argues that "imposition of the enhanced sentence under" the factual circumstances of his mental illness "was not reasonable." Brown's Br. at 11. However, the trial court did not impose an enhanced sentence but rather imposed the advisory sentences -- fifty-five years for murder and thirty years for attempted murder.

would suggest. *Covington*, 842 N.E.2d at 348. As in *Covington*, "it is proper" under the circumstances of the instant offenses "for the defendant to show remorse, and the court did find this as a mitigator." *Id.* However, the defendant's expression of remorse "does not necessarily compel a conclusion that [the defendant]'s regret outweighs" the heinous nature of the offenses committed against his children. *Id.* at 348-49.

Brown further asserts that his guilty plea, mental health issues, and remorse should not have been found to be outweighed by "aggravating circumstances" that were "relatively weak." Brown's Br. at 12-13. He argues that his criminal history was "relatively minor" and "temporal[ly] remote." *Id.* at 13. However, significance of a criminal history for sentencing purposes "varies based on the gravity, nature and number of prior offenses as they relate to the current offense." *Bryant v. State*, 841 N.E.2d 1154, 1156-57 (Ind. 2006) (quoting *Wooley v. State*, 716 N.E.2d 919, 929 n. 4 (Ind. 1999)) (emphasis added). Brown's criminal history reflects multiple alcohol-related arrests and convictions, and the evidence indicated that Brown was intoxicated when he committed these offenses. Further, one previous arrest and conviction involved a firearm, and Brown used a firearm to shoot each of his two children. Finally, his criminal history includes a conviction for criminal recklessness, an offense involving danger to others. Because Brown's criminal history did bear a "relationship to the current offense[s]," *id.* at 1157, the trial court did not err in finding it to be an aggravating circumstance.

Finally, Brown argues that the trial court's finding that his violation of a position of trust as an aggravating circumstance should have been given "little aggravating weight" because the trial court also recognized his mental health issues as a mitigating

circumstance and found him to be guilty but mentally ill. Brown's Br. at 13. None of the experts' reports of possible mental health issues affecting Brown in any way indicated that he misapprehended his relationship with his children or his responsibility to care for them. Therefore, because there was no evidence that Brown's mental health issues affected his ability to understand his relationship with and responsibility for his children, we find that the fact that he violated his position of trust when he shot them is an appropriate aggravating circumstance.

The trial court found the existence of two significant aggravating circumstances -- which are supported by the evidence. It is within the trial court's discretion to impose consecutive sentences. *Bryant*, 841 N.E.2d at 1158. A single aggravating circumstance may support the imposition of consecutive sentences. *Mathews v. State*, 849 N.E.2d 578, 589 (Ind. 2006). Having found two valid aggravating circumstances, the trial court did not abuse its discretion when it imposed consecutive sentences under the circumstances here. *See Covington*, 841 N.E.2d at 1158.

2. Inappropriate Sentence

Brown also argues that we "must . . . reverse" his sentence pursuant to our authority under the Indiana Constitution because "imposition of an enhanced sentence was inappropriate under Ind. Appellate Rule 7(B)." Brown's Br. at 15, 16. We cannot agree.

We note that in effect Brown is arguing that his sentence for shooting both children should be no greater than if he had only shot one. Further, we note once again that the trial court did not impose an enhanced sentence on either conviction. However,

we consider whether imposition of consecutive sentences is "inappropriate in light of the nature of the offense and the character of the offender." Ind. App. R. 7(B).

In their own home, Brown asked his children to accompany him into the kitchen to talk, and they obeyed. Brown proceeded to obtain a handgun and shoot his son in the head from a distance of approximately four feet. His daughter saw him shoot her brother, saw her brother fall to the floor, and was herself shot in the back by Brown as she ran away from her father. Brown shot his son in the head twice after his son "said, 'Dad, don't do it.'" (PSI p. 6). Brown shot his daughter once and fired a second shot at her as she was running away. Based upon the nature of the offenses and the character of the offender, we do not find it inappropriate to impose a sentence that punishes Brown for commission of both crimes: the murder of his son and the attempted murder of his daughter.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.