IN THE SUPREME COURT OF INDIANA
APPELLATE CASE NO. 43A05-0510-CR-590

ALEXANDER ANGLEMYER,	)	**Kosciusko Superior Court**
Appellant (Defendant below),	)	
	)	
vs.	)	**Cause No. 43D01-0505-FB-76**
	)	
STATE OF INDIANA,	)	**Honorable Duane G. Huffer,**
Appellee (Plaintiff below).	)	**Judge**

PETITION TO TRANSFER

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QUESTIONS PRESENTED ON TRANSFER

In the wake of the 2005 amendments to Indiana's sentencing statutes, must trial courts continue the venerable requirement of a sentencing statement, including the articulation and weighing of aggravating and mitigating circumstances?

Does a defendant who pleads guilty pursuant to a plea agreement that affords the trial court considerable sentencing discretion retain the right to challenge the exercise of that discretion in appealing his sentence?

Is a sixteen-year sentence for B felony robbery and C felony battery procedurally defective or inappropriate when the trial court fails to find significant mitigating circumstances clearly supported by the record and aggravates the sentence based on a criminal history consisting of only two misdemeanors?

BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER

Nineteen-year-old Alex Anglemyer has not lived an easy life. His father died when Alex was just five years old. Throughout his childhood Alex was placed on a variety of different drugs and received inpatient treatment for behavioral disorders, including Bipolar Mood Disorder and Intermittent Explosive Disorder. App. 15, 17, 70-72, 82.

By May of 2005, Anglemyer was homeless and jobless when he beat and robbed a pizza delivery person. Tr. 15; App. 15. He was charged with robbery, a Class B felony, and battery, a Class C felony. App. 5. Less than three months after his initial hearing and after just one appearance in court for a pre-trial conference, Anglemyer entered into a plea agreement to both charges. App. 3-4, 8-10. The plea required the sentences on each count to be served consecutively but capped the executed term at sixteen years. App. 8.

At sentencing, Anglemyer's counsel argued that his age and mental illness were mitigating circumstances. Tr. 14-15. In addition, Anglemyer personally told the court of his "great remorse" for the offense, personally apologizing to the victim by telling him he was "very, very sorry" for what he had done. Tr. 16. Anglemyer's criminal history consisted only of a misdemeanor conviction for criminal conversion and a misdemeanor conviction for visiting a common nuisance. App. 14. Nevertheless, the trial court found as aggravating circumstances "the prior juvenile and criminal history of the Defendant" and "the seriousness of the offense herein committed," while finding Anglemyer's age as the sole mitigating circumstance. App. 4. It imposed the maximum possible sentence

under the plea agreement: sixteen years (ten years for robbery and six for battery) executed at the Department of Correction. App. 4, Tr. 18.

On appeal, Anglemyer challenged the trial court's failure to find his significant mental illness, remorse, and homelessness as mitigating circumstances, the trial court's finding of the seriousness of the offense as an aggravating circumstance, and the appropriateness of the sentence under Appellate Rule 7(B). The court of appeals affirmed in a published decision on April 20, 2006. Pursuant to the 2005 amendments to Indiana's sentencing statute, the court held that trial courts are "no longer required to justify any deviation from the presumptive sentence" and any "error in the trial court's identification or weighing of [aggravating or mitigating circumstances] is not an issue that now can be raised on appeal." Slip op. at 7. Second, it found that Anglemyer had "waived his appropriateness claim" under Rule 7(B) by agreeing to a sentence "capped" at sixteen years. Slip op. at 9-10.

ARGUMENT

I. Trial courts must continue the decades-old practice of finding aggravating and mitigating circumstances and making sentencing statements.

Since the adoption of the modern criminal code in 1977, Indiana's appellate courts have emphasized the importance of trial courts articulating aggravating and mitigating circumstances as an integral part of a sentencing hearing. The iterations of the pre-2005 statute have always set a "fixed" or "presumptive" term and required "if the court finds aggravating circumstances or mitigating circumstances, a statement of the court's reasons for selecting the sentence that it imposes," Ind. Code §§ 35-38-1-3(3) (2003), and provided that trial courts "may" consider delineated aggravating or mitigating circumstances, Id. § 35-38-1-7.1(b)&(c).

Despite seemingly discretionary language, this Court has long interpreted these statutes to require "when a judge increases or decreases the basic sentence, suspends the sentence, or imposes consecutive terms of imprisonment, the record should disclose what factors were considered by the judge to be mitigating or aggravating circumstances." Gardner v. State, 270 Ind. 627, 633, 388 N.E.2d 513, 517 (1979). More recent cases focus on three requirements for sentencing statements: "a judge must identify all significant aggravating and mitigating factors, explain why such factors were found, and balance the factors in arriving at the sentence." Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006). The important purpose behind these requirements "is to guard 'against arbitrary sentences and provide an adequate basis for appellate review.'" Id. (quoting Morgan v. State, 675 N.E.2d 1067, 1074 (Ind. 1996)).

Hundreds of challenges have been grounded on sentencing errors over the years, and many have proved successful. On the mitigating side, for example, this Court has explained that "a defendant who pleads guilty deserves to have mitigating weight extended to the guilty plea in return." Francis v. State, 817 N.E.2d 235, 238 (Ind. 2004) (revising fifty-year sentence for child molesting to thirty years). A lack of criminal history or longstanding mental illness—when ignored or not credited by trial courts—have similarly led to appellate reversals. See, e.g., Dowdell v. State, 720 N.E.2d 1146, 1154 (Ind. 1999) (lack of criminal history); Archer v. State, 689 N.E.2d 678, 685 (Ind. 1997) (mental illness). As to aggravators, this Court has explained that the "presumptive sentence already assumes the underlying elements and that it is therefore improper to enhance a sentence based on an act for which the defendant is already presumed to be punished." West v. State, 755 N.E.2d 173, 186 (Ind. 2001). Other examples of improper

aggravating circumstances include a defendant's criminal history if comprised of only unrelated misdemeanor convictions, Wooley v. State, 716 N.E.2d 919, 929 (Ind. 1999), and victim impact unless it is of such a destructive nature not normally associated with the offense, Bacher v. State, 686 N.E.2d 791, 801 (Ind. 1997).

The court of appeals' sweeping interpretation of the 2005 amendments—eliminating any need for sentencing statements or the articulation of aggravating and mitigating circumstances—would seemingly overrule all of these cases and principles. This interpretation cannot be squared with principles of statutory interpretation when reading the statute as a whole, Sections 4 and 6 of Article VII of the Indiana Constitution, or this Court's supervisory power over sentencing procedures in trial courts.

A. Statutory Construction

The court of appeals' view that the 2005 amendments eliminated the requirement of sentencing statements and explicit findings of aggravating or mitigating circumstances is inconsistent with the language of those amendments. Statutes pertaining to the same subject should be harmonized to produce a logical result. Santignon v. State, 749 N.E.2d 1134, 1137 (Ind. 2001). Similarly, "[t]he legislature is presumed to have intended the language used in the statute to be applied logically and not to bring about an unjust or absurd result." Sales v. State, 723 N.E.2d 416, 420 (Ind. 2000). Finally, if there is any ambiguity in a penal statute, the amendments must be construed strictly against the State. State v. Downey, 770 N.E.2d 794, 797 (Ind. 2002).

The court of appeals noted an apparent conflict between two statutory provisions, but it made no attempt to harmonize those provisions. Instead, the court of appeals grounded its decision largely in the amended language that permits trial courts to impose

any sentence that is statutorily and constitutionally permissible "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Slip op. at 6 (quoting Ind. Code § 35-38-1-7.1(d)). It noted a "conflict" between this provision and the long-standing provision that trial courts must include "a statement of the court's reasons for selecting the sentence that is imposes" if it finds aggravating or mitigating circumstances. Slip op. at 6 (quoting Ind. Code § 35-38-1-3(3)). Nevertheless, the court concluded that the amended statute renders "any error in such a sentencing statement moot." Slip op. at 6.

These statutes can be harmonized, however, by requiring a sentencing statement under section 1-3(3), which does not conflict with section 7.1(d) because that provision specifically requires the sentence to be permissible under statutory and constitutional law. Section 1-3(3) requires a sentencing statement, as does Article VII of the Indiana Constitution, as explained in Part B below. It would be illogical, if not absurd, for the legislature to have retained a lengthy list of aggravating and mitigating circumstances within the statute if it did not intend for trial courts to rely on them in fashioning a sentence. Finally, if there is any doubt about the proper interpretation of these penal amendments, they must be resolved in favor of the Defendant—and defendants benefit considerably from the requirement of a sentencing statement and articulation of aggravating and mitigating circumstances.

This view of the statutory language is further bolstered by the "main objective" in construing a statute: "to determine, give effect to, and implement the intent of the legislature." In re K.G., 808 N.E.2d 631, 637 (Ind. 2004). There is little doubt that these amendments were intended to do nothing more than eliminate the requirement of jury

trials for aggravating circumstances in the wake of Blakely v. Washington, 542 U.S. 296 (2004) and Smylie v. State, 823 N.E.2d 679 (Ind. 2005). Slip op. at 4-6; see also Michael Limrick, Senate Bill 96: How General Assembly Returned Problem of Uniform Sentencing to Indiana's Appellate Courts, Res Gestae, Jan./Feb. 2006 at 18. As the amendment's chief sponsor, Senator Long explained, "Indiana sentencing procedures [could] be changed to avoid the need for any Blakely juries without also working major changes in the substantive pre-Blakely sentencing law." Limrick, supra, at 22. Senator Long, and presumably the scores of other legislators who quickly and unanimously passed the legislation, realized that this Court was "committed to uniform sentencing" and they could be "confident that, under the amendment [Long] proposed, appellate review would continue to prevent wide discrepancies in sentences from one court to another." Id. at 23. The 2005 amendments rectified the Blakely concerns, but there is no suggestion that they were intended to do anything more, much less any evidence of intent to fundamentally alter the time-tested statutes and procedures as the court of appeals held in this case.

B. Indiana Constitution

The 2005 amendments also included the requirement that sentences must be "*permissible under the Constitution of the State of Indiana*; regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-37-1-7.1(d)(2) (emphasis added). The court of appeals' opinion barely mentions this language and does not attempt to square its holding with the decades of precedent interpreting the Indiana Constitution.

Article VII, Sections 4 and 6 of the Indiana Constitution were proposed in the 1960s and took effect as constitutional amendments approved by the voters in 1970. See Walker v. State, 747 N.E.2d 536, 537 (Ind. 2001). Specific language was added to provide the power to review and revise sentences—a power that was previously not included. "The Commission's comments demonstrate that the intent of the Amendment was to expand the role of appellate sentence review, not restrict it." King v. State, 769 N.E.2d 239, 241 (Ind. Ct. App. 2002) (Najam, J., concurring). The purpose was not only to provide for sentence review but for that review to mimic the substantive, nearly de novo review that was occurring in England. See, e.g., Walker, 747 N.E.2d at 537-38.

The laudable goal of the power to review and revise sentences was well stated in Serino v. State, 798 N.E.2d 852, 854 (Ind. 2003): "[A] respectable legal system attempts to impose similar sentences on perpetrators committing the same acts who have the same backgrounds." Sentencing principles have been developed and applied over the years to address disparities.[1] For example, defendants who plead guilty in England may not only challenge their sentence on appeal, "the Court of Appeal has formulated the principle that . . . an offender's remorse, expressed in his plea of guilty, may properly be recognized as a mitigating factor." Thomas, supra, at 201. This Court has appropriately taken a similar view, recognizing that an early guilty plea saves the victims from going through a full-blown trial and conserves limited prosecutorial and judicial resources; therefore, it is a mitigating circumstance entitled to significant weight. Francis, 817 N.E.2d at 238. Other principles have become ingrained in appellate review, such as maximum sentences

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[1] At the time of the 1970 Amendment, the English system included "a complex and coherent body of sentencing principles and policy," which had been developed to realize the goal of eradicating disparities in the sentences imposed by trial courts. D.A. Thomas,

should generally be reserved for the worst offenses and worst offenders, see, e.g., Buchanan v. State, 699 N.E.2d 655, 657 (Ind. 1998). The goal of consistency in sentencing and the application of these principles will be difficult, if not impossible, without a sentencing statement from trial courts.

This Court has sometimes addressed separately the appropriateness of a sentence under Rule 7(B) from a claim that the trial court's sentencing order failed to include significant mitigating circumstances or included improper aggravating ones. See, e.g., Noojin v. State, 730 N.E.2d 672, 678-79 (Ind. 2000) (applying predecessor rule). Nevertheless, the appellate review and revise power is intimately tied to what occurs in the trial court The constitutional power places the "central focus on the role of the trial judge, while reserving for the appellate court the chance to review the matter in a climate more distant from local clamor." Serino, 798 N.E.2d at 856-57.[2] Put another way, appellate sentence review requires a re-examination of all valid aggravating and mitigating circumstances in light of the nature of the offense and character of the offender. See Carter v. State, 711 N.E.2d 835, 841 (Ind. 1999) (applying predecessor rule).

In sum, the constitutional review and revise power can only be exercised when trial courts make reasoned sentencing statements that articulate aggravating and mitigating circumstances. In the absence of such statements, no deference may be afforded to trial courts, and it will be exceedingly difficult, if not impossible, for

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Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience, 20 Ala. L. Rev. 193, 194, 197 (1968).

[2] As this Court has observed in another context, the lack of findings by the trial court puts "the appellate court in the precarious position of evaluating the abuse of discretion when discretion was perhaps never exercised." Brown v. State, 703 N.E.2d 1010, 1020 (Ind. 1998).

appellate advocates to craft sentencing arguments and for this Court and the court of appeals to engage in meaningful appellate sentence review.

C. Supervisory Power

In addition to the statutory construction and constitutional arguments discussed above, continuing to require trial courts to articulate and weigh aggravating and mitigating circumstances as part of a well-reasoned sentencing statement would be a prudent use of this Court's supervisory power over trial courts. Article VII, Section 4 grants this Court "supervision of the exercise of jurisdiction by the other courts of the State," which has been applied in a variety of contexts in recent years. See, e.g., Williams v. State, 690 N.E.2d 162, 169-70 (Ind. 1997) (courtroom security procedures); Winegeart v. State, 665 N.E.2d 893, 902 (Ind. 1996) (reasonable doubt instruction).

Here, the court of appeals urged trial courts to continue making sentencing statements for the laudable reason that "a detailed sentencing statement provides us with a great deal of insight regarding the nature of the offense and the character of the offense from the trial court who crafted a particular sentence." Slip op. at 8. This should not merely be a suggestion. If sentencing statements are optional, some trial judges will make them and others will not; disparity in sentences will result. Such disparity in trial courts will make appellate review "difficult to say the least." Slip op. at 8 (quoting Limrick, supra, at 24).

Moreover, in the absence of this Court's intervention, further havoc might be wreaked upon long-standing sentencing procedures in Indiana's trial courts. A short step from the court of appeals' holding that trial courts need not find aggravating or mitigating circumstances at sentencing is the abolition of any requirement of an opportunity for

defendants (or the State) to submit and argue aggravating or mitigating circumstances. An objection to defendant's desire to put on evidence of mental illness or to make an argument about victim impact may well be sustained; the evidence is arguably not relevant if trial courts may make sentencing decisions without any regard to aggravating and mitigating circumstances.

Finally, there will surely be many more appeals when defendants are disgruntled with a cursory sentencing hearing or the imposition of a lengthy prison term with little, or no, explanation from the trial judge. One objective of appellate sentence review is to

> negate the defendant's perception of the sentencing judge as one who possesses unbridled power over his future. . . . The attitude of the defendant in this regard is not unimportant as a defendant who has an opportunity to air his grievances concerning his punishment is more likely to approach rehabilitation with a positive attitude than one who is convinced that one person wronged him in passing judgment . . . .

J. Eric Smithburn, Sentencing in Indiana: Appellate Court Review of the Trial Court's Discretion, 12 Val. U. L. Rev. 221, 223-24 (1978). Hundreds of defendants have appealed their sentences in recent years even though trial courts generally explain their reasons in great detail; one can only imagine how many more will appeal their sentences in the coming years if trial courts say nothing in imposing a maximum or near-maximum sentence.

Transfer is appropriate to affirm that the 2005 amendments did not alter the fundamental requirements of sentencing, which are consistent with the statutory scheme as a whole and vital to effective appellate review and the goal of consistency in sentencing that has distinguished Indiana for decades. Ind. Appellate Rule 57(H)(4)&(6). Requiring trial courts to continue doing what they have done for the past three decades is

the only way—and a very easy way—to guard "against arbitrary sentences and provide an adequate basis for appellate review." Morgan, 675 N.E.2d at 1074.

II. A defendant who pleads guilty pursuant to a plea agreement that affords the trial court sentencing discretion retains the right to challenge the exercise of that discretion in appealing his sentence.

Relying exclusively on its own precedent, the court of appeals incorrectly held that Anglemyer had waived his constitutional right to challenge his sentence as inappropriate under Article VII, Section 6, and Appellate Rule 7(B). Slip op. at 9-10. This Court heard argument last September and granted transfer in two cases that will resolve the extent to which defendants who plead guilty may challenge their sentences on appeal. See Childress v. State, 61A01-0409-CR-391; Carroll v. State, 61A04-CR-483. Anglemyer's arguments echo those advanced in the Brief of *Amicus Curiae* Marion County Public Defender Agency filed in those cases.

This Court has never imposed the types of limitations on sentencing appeals after a guilty plea embraced by the court of appeals in this and other cases. As Justice Rucker suggested in his question to counsel for Carroll and Childress early in oral argument, these cases may be resolved by simply applying this Court's holding in Tumulty v. State, 666 N.E.2d 394, 396 (Ind. 1996), which permits a sentencing challenge in any case "where the [trial] court has exercised sentencing discretion." Here, the plea agreement required only that the trial court to impose consecutive sentences, which still left considerable discretion to the trial court, which could have imposed a sentence as short as eight years (six years for the B felony robbery and two years for the C felony battery) *suspended*, or a sentence as long as the sixteen years executed set as a cap in the plea agreement and imposed by the trial court.

The combined effect of the court of appeals' sweeping interpretation of the 2005 amendments and its restrictive view of Appellate Rule 7(B) in guilty plea cases leaves defendants like Anglemyer with no appellate recourse whatsoever. The plethora of practical concerns raised in the MCPDA brief are even more pronounced, as defendants, especially those before a judge known to be tough at sentencing, have no incentive to take a guilty plea that would preclude them from challenging their sentence on any basis on appeal. If the court of appeals' decision stands, competent defense counsel would need to advise clients that the trial court is under no obligation to consider any mitigating circumstances, even those weighty ones this Court has long recognized, such as entering a guilty plea, the lack of a criminal history, or a longstanding mental illness. Moreover, the trial court could impose the maximum possible sentence under the plea agreement without any mention, let alone a reasoned finding, of aggravating circumstances. Indeed, a trial court may decide to impose a lengthy sentence based on erroneous information or a misunderstanding of law, and a defendant would seemingly be powerless to do anything to challenge this on appeal.

The end result would surely be many more—thousands more—trials in those cases in which defendants have everything to gain (a right to appeal their sentence, not to mention a chance of acquittal) and nothing to lose by going to trial. The better option—and the one consistent with precedent, policy, practical concerns, and the purpose of the Indiana Constitution—is to continue to allow defendants who plead guilty pursuant to a plea agreement that affords any sentencing discretion to the trial court the right to challenge the exercise of that discretion on appeal.

III. The sixteen-year sentence in this case is both procedurally defective and inappropriate.

The numerous problems with the anything-goes-at-sentencing approach of the court of appeals in this case are highlighted by the particular facts of this case. The trial court failed to find either Anglemyer's early guilty plea or his long-standing mental illness as mitigating circumstances. See Francis, 817 N.E.2d at 238; Archer, 689 N.E.2d at 685; App. 8-10, 17, 70-72, 82. Moreover, it improperly aggravated his sentence based on nothing more than elements of the offense, which was not of a destructive nature beyond what is inherent in the offense, Bacher, 686 N.E.2d at 801; App. 84, Tr. 17-18, and based on a criminal history consisting of just two misdemeanor convictions of a different nature from these charges, Wooley, 716 N.E.2d at 929; App. 13-14.

In addition to these procedural defects, the sixteen-year sentence is inappropriate in light of the nature of the offense and Anglemyer's character. See Ind. Appellate Rule 7(B). Sixteen years is close to the maximum possible sentence, which should be reserved for worst offenses and worst offenders. Buchanan, 699 N.E.2d at 657.[3] The nature of the offenses is no worse than the typical robbery or battery, which is accounted for in the sentencing range. More importantly, Anglemyer's character points to a mitigated sentence. Anglemyer was nineteen years old and homeless at the time of the offense; he had long been struggling with mental illness and his criminal history consisted of merely

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[3] Convictions for both B felony robbery (taking property by force and resulting in bodily injury) and C felony battery (touching a person in a rude, angry, or insolent manner that resulted in bodily injury) involving the same victim raise double jeopardy concerns. See generally Guyton v. State, 771 N.E.2d 1141 (Ind. 2001). This Court has held, however, that "Defendants who plead guilty to achieve favorable outcomes give up a plethora of substantive claims and procedural rights, such as challenges to convictions that would otherwise constitute double jeopardy." Lee v. State, 816 N.E.2d 35, 40 (Ind. 2004). Nevertheless, had this case gone to trial, Anglemyer would seemingly have faced a

two misdemeanor convictions. App. 14. He demonstrated great remorse for his actions and entered a guilty plea within three months of his initial hearing. Tr. 16, App. 3-4, 8-10. An appropriate sentence—below the advisory term to account for the mitigating circumstances yet above the minimum sentence—is an aggregate term of ten years. Cf. Biehl v. State, 738 N.E.2d 337 (Ind. Ct. App. 2000), trans. denied (reducing a presumptive sentence to the minimum sentence in light of defendant's lack of criminal history and long-standing mental illness).

CONCLUSION

For the foregoing reasons, Alex Anglemyer respectfully requests this Court grant transfer and reduce his sentence to ten years.

VERIFICATION

I verify that this petition for transfer contains no more than 4,200 words.

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Joel M. Schumm
Pro bono Counsel for the Appellant

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maximum possible sentence of twenty years—the maximum for a B felony—because

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Petition to Transfer were duly served by personal delivery upon the Attorney General of Indiana and Deputy Attorney General Justin F. Roebel, 219 Statehouse, Indianapolis, Indiana, this 16th day of May, 2006.

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double jeopardy would preclude a conviction for battery on the same facts.