

IN THE
SUPREME COURT OF INDIANA

(Court of Appeals Cause No. 43A05-0510-CR-590)

ALEXANDER ANGLEMYER,)	Appeal from the Kosciusko Superior
)	Court,
Appellant, (Defendant Below),)	
)	
vs.)	No. 43D01-0505-FB-76
)	
STATE OF INDIANA,)	
)	The Hon. Duane G. Huffer,
Appellee, (Plaintiff Below).)	Judge.

APPELLEE'S RESPONSE IN OPPOSITION TO TRANSFER

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APPELLEE'S RESPONSE IN OPPOSITION TO TRANSFER

I. The Court of Appeals correctly found that that under Indiana's post-*Blakely/Smylie* sentencing scheme any error in identifying aggravators and mitigators is harmless and moot. Under the new sentencing scheme, sentencing factors no longer have any bearing on the validity of sentences that fall within statutory ranges and therefore review of a trial court's identification of these factors is immaterial. This result is reasonable because appellate courts will still have an opportunity to review sentences pursuant to Indiana Appellate Rule 7(b).

II. For the reasons the State has already argued to this Court in two pending cases, the Court of Appeals properly found that Defendant had waived his right to an appropriateness challenge by entering into a plea agreement which set a sentencing cap. Defendant's assent to the plea agreement was an implicit acknowledgement that a sentence within that limited range was appropriate.

III. Finally, for the reasons already discussed in the Brief of the Appellee, the trial court did not abuse its discretion in identifying sentencing factors and Defendant's sentence is

appropriate.

BACKGROUND AND PRIOR TREATMENT OF THE ISSUES

On May 16, 2005, the State charged Defendant Alexander Anglemeyer with robbery and battery based on acts occurring on May 14, 2005 (App. 3, 5). Pursuant to a plea agreement, Defendant pled guilty as charged (App. 4, 8-10). Under the plea agreement, the parties agreed that Defendant's sentences "will not exceed sixteen (16) years executed" and "shall run consecutive" to each other (App. 8). In exchange for the plea, the State agreed to dismiss a separate cause and not reinstate prosecution in another cause (App. 8).

To establish a factual basis for robbery, Defendant acknowledged that he did "knowingly or intentionally take property from another person by using force on that other person which resulted in bodily injury to said person" (Tr. 8). For the battery conviction, Defendant acknowledged that he did "knowingly or intentionally touch Grover England in a rude, insolent or angry manner resulting in bodily injury to Grover England" (Tr. 8).

The court imposed consecutive sentences of ten years for robbery and six years for battery (Tr. 18). To support that sentence, the court found as aggravating Defendant's criminal history and the seriousness of the crimes (App. 84; Tr. 18-19). The court identified Defendant's age to be a mitigating circumstance (App. 84; Tr. 18).

On appeal, Defendant challenged that his sentence was inappropriate and should be revised pursuant to Indiana Appellate rule 7(b) (Brief of Appellant at 8-11). As part of his appropriateness claim, Defendant challenged that the trial court improperly identified aggravating and mitigating circumstances (Brief of Appellant 9-11).

The Court of Appeals found that under the new sentencing scheme any error in identifying aggravating and mitigating sentencing facts was harmless and moot. *Anglemeyer v.*

State, 845 N.E.2d 1087, 1090-91 (Ind. Ct. App. 2006). In reaching this conclusion, the Court found that trial courts now have the discretion to impose any sentence within the sentencing range, regardless of the presence of aggravating or mitigating circumstances:

... the General Assembly ... amended our sentencing system by removing the fixed presumptive terms and replacing them with “advisory sentences.” The General Assembly left the lower and upper limits for each class of offense intact and effectively created statutory sentencing ranges. *See* I.C. §§ 35-50-2-3 to 7. In addition to establishing advisory sentences, the General Assembly no longer required trial courts to consider certain mandatory circumstances when determining what sentence to impose. *See* I.C. § 35-38-1-7.1. Instead, Indiana Code Section 35-38-1-7.1 now only includes non-exhaustive lists of aggravating and mitigating circumstances that trial courts “may” consider. Further, under the revised statute, trial courts may impose any sentence that is statutorily and constitutionally permissible “regardless of the presence or absence of aggravating circumstances or mitigating circumstances.” I.C. § 35-38-1-7.1(d).

Id. at 1090. The Court noted that the sentencing scheme still requires trial courts to make “a statement of the court’s reasons for selecting the sentence that it imposes’ if a trial court finds aggravating or mitigating circumstances. *Id.* (citing I.C. § 35-38-1-3(3)). The Court found this requirement creates “a conflict” with the portion of the new sentencing scheme which “eliminates the requirement that sentencing decisions be based on the presence of aggravating and mitigating circumstances.” *Id.* The Court noted that any error in the sentencing statement would now be moot and harmless because presumptive sentences no longer exist, courts no longer need to justify a deviation from a presumptive sentence, and courts have the authority to impose any sentence within the range. *Id.*

Despite this finding, the Court of Appeals encouraged trial courts to continue adhering to the statutory sentencing requirement for sentencing statements in order to assist appellate courts in their review pursuant to Indiana Appellate Rule 7(b). *Id.* The Court recognized that under the new sentencing scheme, Appellate Rule 7(b) becomes the principal vehicle for sentence review:

. . . the extensive discretion afforded to trial courts under the new sentencing system will make even more imperative our review of sentences pursuant to Indiana Appellate Rule 7(B). In undertaking this review, oftentimes a detailed sentencing statement provides us with a great deal of insight regarding the nature of the offense and the character of the offender from the trial court judge who crafted a particular sentence. For this reason, we urge trial courts to continue issuing detailed sentencing statements pursuant to the direction of Indiana Code Section 35-38-1-3(3), as they facilitate our review of the appropriateness of sentences.

Id.

The Court of Appeals then found that Defendant had waived any review under Rule 7(b) because he entered into a plea agreement which limited his maximum possible sentence. *Id.* at 1092. The Court found that “because Anglemyer agreed to an executed sentence ‘capped’ at sixteen years, he inherently agreed that such a sentence is appropriate.” *Id.* The Court of Appeals further noted that this issue is presently under review by this Court. *Id.* Defendant now seeks transfer.

ARGUMENT

I.

Court of Appeals Correctly Found that Any Error in Identifying Aggravators and Mitigators was Harmless and Moot

The Court of Appeals correctly found that that under Indiana’s post-*Blakely/Smylie* sentencing scheme any error in identifying aggravators and mitigators is harmless and moot. Under the new scheme, sentencing factors have no bearing on the validity of sentences that fall within statutory ranges. *See* Ind. Code §§ 35-38-1-7.1; 35-50-2-3 to 7. Trial courts may impose any sentence that is statutorily and constitutionally permissible ‘regardless of the presence or absence of aggravating circumstances or mitigating circumstances.’” *Anglemyer*, 845 N.E.2d at 1090 (quoting I.C. § 35-38-1-7.1(d)). As the Court of Appeals found, “on remand for the

correction of an erroneous sentence, a trial court could correct an error by imposing precisely the same sentence while not finding any aggravating and mitigating circumstances.” *Id.* at 1091.

There is no need, as Defendant suggests, to allow continued appellate review of a trial court’s identification of sentencing factors in order to effectuate the statutory sentencing statement requirement. *See* I.C. § 35-38-1-3(3). While the Court of Appeals characterized the implementation of the new sentencing scheme and retention of the sentencing statement requirement as a “conflict,” there was no actual conflict which would require the Court to harmonize these provisions. As the Court of Appeals noted, the retention of the sentencing statement requirement is very helpful to the appellate review of sentences even though any specific instances of error would be harmless and moot. *Anglemyer*, 845 N.E.2d at 1091.

Furthermore, Indiana appellate courts will still have the opportunity to exercise their constitutional authority to review sentences and fulfill their duty to supervise trial courts by reviewing sentences pursuant to Indiana Appellate Rule 7(b). The Indiana Constitution gives this Court the express authority to “review and revise the sentence imposed.” *Weeks v. State*, 697 N.E.2d 28, 29 (Ind. 1998) (citing *Archer v. State*, 689 N.E.2d 678, 683 (Ind. 1997)); IND. CONST. art. VII, § 4. Similarly, the constitution gives the Court of Appeals the power to “review and revise” sentences “to the extent provided by rule[s]” of specified by this Court. IND. CONST. art. VII, § 6. -

Indiana Appellate Rule 7(B) provides that appellate courts “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Using this authority, appellate courts can still review a trial court’s sentencing decision and determine whether the court failed to consider or incorrectly considered relevant

sentencing factors. *See Williams v. State*, 782 N.E.2d 1039, 1051 (Ind. Ct. App. 2003) (noting that the “character of the offender” portion of the standard refers to the general sentencing considerations and the relevant aggravating and mitigating circumstances). Therefore, appellate courts will still be able to consider whether a trial court properly considered mitigating circumstances such as age or a guilty plea and aggravating circumstance such as criminal history. *Id.*

Even so, appellate courts should still give “due consideration” to the trial court’s sentencing decision. *See Frye v. State*, 837 N.E.2d 1012, 1015-16 (Ind. 2005) (Dickson, J., dissenting) (citing *Serino v. State*, 798 N.E.2d 852, 856 (Ind. 2003)). As Justice Dickson observed, “[t]rial judges, not appellate judges, are in a far superior position to make sound sentencing decisions that are appropriate to the offender and the offense.” *Id.* The Court of Appeals’ opinion correctly recognizes that the new sentencing scheme leaves significant authority and discretion to trial courts to impose sentences which can not be directly reviewed, but a trial court’s sentence can still be set a side by an appellate court when it is deemed inappropriate.

II.

Defendant has Waived any Appropriateness Challenge

The Court of Appeals properly found that Defendant has waived his right to an appropriateness challenge by entering into a plea agreement which set a sentencing cap. In support of this argument, the State relies on the Brief of the Appellee, the Court of Appeals’ correct decision, and the arguments that the State has already presented to this Court in the presently pending cases *Carroll v. State*, Cause Number 61S04-0510-CR-485, and *Childress v. State*, Cause Number 61S01-0510-CR-484.

III.

The Trial Court Did Not Abuse Its Discretion in Identifying Sentencing Factors

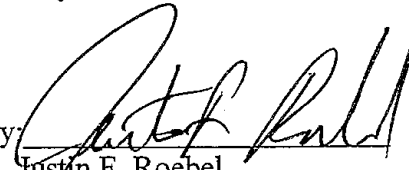
Finally, for the reasons already discussed in the Brief of the Appellee, the trial court did not abuse its discretion in identifying sentencing factors and Defendant's sentence is appropriate

Conclusion

For the foregoing reasons, the State respectfully requests that this Court deny Appellant's Petition for Transfer.

Respectfully submitted,

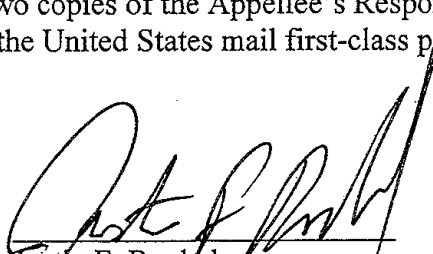
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Certificate of Service

I do solemnly affirm under the penalties for perjury that on June 5, 2006, I served upon the opposing counsel in the above-entitled cause two copies of the Appellee's Response in Opposition to Transfer by depositing the same in the United States mail first-class postage prepaid, addressed as follows:

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