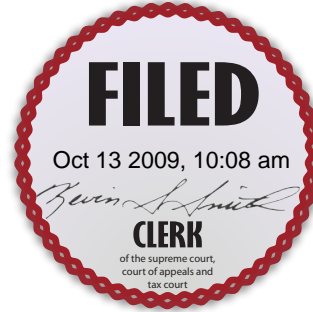


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

**EARL McCOY**  
Law Office of Earl McCoy  
Lafayette, Indiana

**GREGORY F. ZOELLER**  
Attorney General of Indiana

**ZACHARY J. STOCK**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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JAMES ALBERT LOWE,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 79A02-0903-CR-274

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APPEAL FROM THE TIPPECANOE SUPERIOR COURT  
The Honorable Thomas H. Busch, Judge  
Cause No. 79D02-0805-FA-23

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**October 13, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BRADFORD, Judge**

Appellant-Defendant James Lowe appeals following his convictions, pursuant to a guilty plea, for Class B felony Dealing in Methamphetamine<sup>1</sup> and Class C felony Burglary,<sup>2</sup> for which he received an aggregate sentence of ten years in the Department of Correction. Upon appeal, Lowe challenges his sentence.<sup>3</sup> We affirm.

### **FACTS AND PROCEDURAL HISTORY**

The following facts served as the factual basis for Lowe's guilty plea at the December 17, 2008 hearing. On May 11, 2008, Lowe and Heather Eylens entered a vacant duplex owned by David Crandall at 2022-A Bridgewater Circle in Lafayette with the intent to manufacture methamphetamine there. While inside, Lowe and Eylens began the methamphetamine manufacturing process by soaking pills in water.

On May 16 and August 26, 2008, the State charged Lowe with Class A felony dealing in methamphetamine (Count I); Class C felony illegal drug lab (Count II); Class A felony conspiracy to manufacture methamphetamine (Count III); Class A misdemeanor possession of paraphernalia (Count IV); Class C felony burglary (Count V); Class D felony theft (Count VI); and two counts of criminal trespass (Counts VII and VIII). On December 17, 2008, the State amended Count I to a Class B felony. That day, Lowe

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<sup>1</sup> Ind. Code § 35-48-4-1 (2007).

<sup>2</sup> Ind. Code § 35-43-2-1 (2007).

<sup>3</sup> As part of this appeal, Lowe also challenges his one-year sentence for criminal trespass in Cause Number 79D02-0811-FC-105, which the trial court ordered to be served consecutive to his sentence in the instant cause. Lowe's plea agreement addressed both causes, but the trial court entered separate guilty plea and sentencing orders under each cause, and each cause maintained a separate CCS. Lowe filed a notice of appeal under the instant cause number only. The CCS for Cause No. 105 demonstrates that Lowe petitioned for a sentence modification but did not file a notice of appeal from the trial court. We therefore decline to address Lowe's challenges in Cause No. 105. *See Davis v. State*, 771 N.E.2d 647, 648 (Ind. 2002) (observing that right to appeal is forfeited without timely notice of appeal).

entered into a plea agreement in which he agreed to plead guilty to Count I, as amended, and Count V. As part of the plea agreement, Lowe also agreed to plead guilty to Count VIII, Class A misdemeanor criminal trespass, in Cause Number 79D02-0811-FC-105 (“Cause No. 105”). In exchange, the State agreed to dismiss all remaining charges in the instant cause and Cause No. 105. Following the guilty plea hearing, and the January 27, 2009 sentencing hearing, the trial court entered judgment of conviction and sentenced Lowe to concurrent terms of ten years in the Department of Correction on Count I and four years on Count V. The trial court further ordered that this sentence be served consecutive to Lowe’s one-year sentence for criminal trespass in Cause No. 105. In imposing this sentence, the trial court considered as aggravating factors that Lowe had recently violated the conditions of his pretrial release, and that he had received the benefit of reduced charges. The trial court considered as mitigating factors Lowe’s strong family support and good educational, military, and work history. This appeal follows.

### **DISCUSSION AND DECISION**

Upon appeal, Lowe challenges his sentence by claiming that the trial court failed to give adequate consideration to the cited mitigating circumstances. Lowe further challenges the trial court’s alleged failure to consider certain mitigating circumstances and its alleged improper consideration of certain aggravating circumstances.<sup>4</sup>

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<sup>4</sup> While Lowe mentions Indiana Appellate Rule 7(B) and its standard of review, he does not develop a separate argument with respect to the alleged inappropriateness of his sentence. Instead, Lowe confines his argument to challenges to the trial court’s consideration and alleged lack of consideration for certain aggravating and mitigating circumstances. Accordingly, we do not conduct a separate Rule 7(B) analysis of his sentence.

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). “An abuse of discretion occurs if the decision is ‘clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.’” *Id.* (quoting *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006) (internal quotation omitted)). A trial court may abuse its discretion by failing to issue a sentencing statement, by entering a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons, by entering a sentencing statement that omits reasons clearly supported by the record and advanced for consideration, or by giving reasons that are improper as a matter of law. *Id.* at 490-91. Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record. *Id.* Under the current sentencing scheme, a trial court can no longer be said to have abused its discretion by improperly weighing aggravating and mitigating factors. *See id.* at 491.

### **I. Inadequate Consideration**

Lowe first claims that the trial court failed to give adequate consideration to what it found to be the mitigating circumstances of strong family support and good educational, military, and work history. This is essentially an allegation that the trial

court improperly weighed these mitigating circumstances.<sup>5</sup> Under *Anglemyer*, a trial court cannot be said to have abused its discretion by failing to properly weigh or balance sentencing factors. 868 N.E.2d at 491. We find no abuse of discretion.

## II. Omitted Mitigating Factors

Lowe alleges that the trial court failed to consider the following statutory mitigating circumstances: unlikelihood that circumstances would recur; existence of substantial grounds tending to excuse or justify the crime; his lack of a significant criminal history and recent history of leading a law-abiding life; likelihood of affirmative response to short-term imprisonment; that his character and attitudes indicate he is unlikely to commit another crime; and undue hardship of imprisonment to dependents. *See* Ind. Code §§ 35-38-1-7.1(b)(2), (4), (6), (7), (8) and (10) (2007). In arguing at sentencing on Lowe's behalf, however, defense counsel did not focus upon these statutory mitigating circumstances. Instead, defense counsel framed his argument based upon the nature of Lowe's offense and his character. *See* Ind. App. R. 7(B). We cannot say that the trial court abused its discretion with respect to its alleged failure to consider certain statutory mitigating factors which Lowe is essentially raising for the first time on appeal. *See Spears v. State*, 735 N.E.2d 1161, 1167 (Ind. 2000) ("If a defendant does not advance a factor to be mitigating at sentencing, this Court will presume that the factor is not significant and the defendant is precluded from advancing it as a mitigating

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<sup>5</sup> Lowe also alleges error on the grounds that the trial court included only a "perfunctory recitation" of mitigating circumstances. Contrary to Lowe's allegation, the court expanded upon its mitigators in its oral sentencing statement, observing that Lowe had led a "generally positive life" until he began to commit crimes and that he perhaps "kept on [committing crimes] until he was caught despite the best efforts of his family . . . ." Tr. p. 53.

circumstance for the first time on appeal.”). Accordingly, we find no abuse of discretion in the trial court’s failure to consider the above statutory mitigating factors.<sup>6</sup>

### **III. Improper Aggravating Factors**

#### **A. Violation of Pretrial Release**

Lowe also challenges the trial court’s aggravators, the first of which was that he had violated the terms of his pre-trial release. In listing this aggravator, the trial court included all of the statutory language, concluding that Lowe had recently violated the conditions of “probation, parole, pardon, community corrections, or pretrial release.” App. p. 49; *See* Ind. Code § 35-38-1-7.1(a)(6). Lowe suggests that this all-inclusive language “makes it hard to tell” if the factor was properly applied. Appellant’s Br. p. 27. A simple review of the sentencing transcript demonstrates that the trial court clearly based this aggravator upon Lowe’s violation of his pretrial release, which he does not dispute occurred. We find no abuse of discretion on this ground.

As an additional challenge to this aggravator, Lowe argues that it was already factored into the plea agreement provision requiring him to serve consecutive sentences

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<sup>6</sup> To the extent defense counsel raised the “no criminal history/law-abiding life” mitigator by arguing that Lowe lacked criminal history, the trial court considered and rejected this mitigator on the grounds that Lowe violated the terms of his pre-trial release in the instant case by committing criminal trespass in Cause No. 105. Accordingly, we find no abuse of discretion based upon the trial court’s alleged failure to consider this factor.

In addition, to the extent defense counsel raised the “undue hardship” mitigator, which was listed in the PSI, by alluding to Lowe’s regular payment of child support from 2004-2007, defense counsel conceded that Lowe failed to make support payments once he became addicted to methamphetamine. The trial court was within its discretion to reject “undue hardship” as a significant mitigating factor.

Finally, to the extent defense counsel raised the “character and attitudes” mitigator by referencing Lowe’s acceptance of responsibility by pleading guilty, the trial court viewed Lowe’s guilty plea as more of a strategic move than a genuine effort at taking responsibility. The trial court was within its discretion to reject “character and attitudes” as a significant mitigating factor.

in the instant cause and Cause No. 105. Contrary to Lowe's claim, the plea agreement does not suggest that the basis upon which the parties agreed to consecutive sentences was that Lowe's actions in Cause No. 105 violated the terms of his pretrial release in the instant cause. We are therefore unpersuaded that the trial court's consideration of this factor somehow circumvented the plea agreement and constituted an abuse of discretion.

### **B. Receipt of Benefit of Reduced Charges**

Lowe challenges the trial court's consideration of the benefit he received from the plea as an aggravating circumstance. As a part of the plea agreement, the State agreed to dismiss six counts in the instant cause and seven counts in Cause No. 105. The trial court considered the dismissal of these charges, especially in Cause No. 105, to be of significant benefit to Lowe. In its oral sentencing statement the trial court stated that, on account of the benefit to Lowe of these reduced charges, Lowe's guilty plea was not a mitigating factor. In addition, upon issuing its sentencing order, the trial court listed this benefit as an aggravating factor. A trial court is permitted to consider uncharged misconduct when enhancing a sentence, *see Roney v. State*, 872 N.E.2d 192, 200 (Ind. Ct. App. 2007), *trans. denied*, but in circumstances where the State dismisses charges pursuant to a plea agreement, the trial court cannot circumvent the plea agreement by considering those dismissed charges for purposes of enhancing the sentence. *See id.* In addition, a defendant who pleads guilty deserves some mitigating weight be given to the plea. *See McElroy v. State*, 865 N.E.2d 584, 591 (Ind. 2007). We therefore conclude that the trial court abused its discretion both by considering the circumstances involved in the

plea agreement as an aggravating circumstance and by failing to consider the plea itself as a mitigating circumstance.

We nevertheless find it unnecessary to remand for resentencing because we can say with confidence that the trial court would have imposed the same advisory sentences even if it had properly considered this factor to be a mitigating circumstance and not impermissibly used it as an aggravating circumstance. Significantly, in spite of its sentencing order, it appears from the trial court's oral sentencing statement that it considered the reduction in charges largely for purposes of discounting the mitigating weight of Lowe's plea. In any event, the trial court's sentence depended upon another "very serious" aggravating factor, namely Lowe's violation of pretrial release in the instant case. Tr. p. 51. Given this primary aggravator, we are convinced that the trial court would have imposed the same advisory concurrent sentences had it properly considered the fact of and circumstances surrounding Lowe's plea.

The judgment of the trial court is affirmed.

BAILEY, J., and VAIDIK, J., concur.