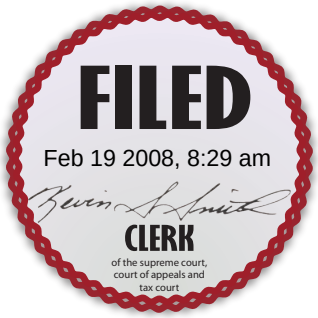

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IN THE
COURT OF APPEALS OF INDIANA

KELVIN SHERMON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0707-CR-338
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
CRIMINAL DIVISION, ROOM 2
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-0604-FC-46

February 19, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Kelvin Shermon (Shermon), appeals his conviction for Theft, a Class D felony, Ind. Code § 35-43-4-2.

We affirm.

ISSUE

Shermon raises one issue on appeal which we restate as follows: Whether the trial court appropriately sentenced him in light of the nature of the offense and his character.

FACTS AND PROCEDURAL HISTORY

At some point in March of 2006, Shermon opened an account at the Mercantile National Bank, located in Lake County, Indiana. Shermon deposited a $20,000 check purportedly issued by Ryder Truck Rental of Canada and made payable to him. Between March 6, 2006 and March 27, 2006, Shermon made several withdrawals from his account for a total amount of $17,000, knowing that the check he had deposited was fraudulent.

On April 17, 2006, the State filed an Information, charging him with Count I, fraud on a financial institution, a Class C felony, I.C. § 35-43-5-8. On March 14, 2007, the State filed an amended Information, adding Count II, theft, a Class D felony, I.C. § 35-43-4-2. That same day, Shermon entered into a plea agreement with the State and agreed to plead guilty to Count II, theft, in exchange for the State's dismissal of Count I, fraud on a financial institution. The parties left sentencing up to the trial court. On June 7, 2007, during the sentencing hearing, the trial court imposed a sentence of two and one-half years in the custody of the Department of Correction.

Shermon now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Shermon argues that the trial court inappropriately sentenced him. Specifically, he contends that the trial court failed to consider one additional mitigator before pronouncing his sentence. "[S]o long as a sentence is within the statutory range, it is subject to review only for an abuse of discretion." *Anglemeyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *reh'g granted on other grounds*, 875 N.E.2d 218 (2007). An abuse of discretion occurs if we find the trial court's decision is clearly against the logic and effect of the facts and circumstance before the court. *Payne v. State*, 854 N.E.2d 7, 13 (Ind. Ct. App. 2006). However, "[i]n order to carry out our function of reviewing the trial court's exercise of discretion in sentencing, we must be told of [its] reasons for imposing the sentence. . . . This necessarily requires a statement of facts, in some detail, which are peculiar to the particular defendant and the crime, as opposed to general impressions or conclusions. Of course[,] such facts must have support in the record." *Anglemeyer*, 868 N.E.2d at 490. Where the trial court has entered a reasonably detailed sentencing statement explaining its reasons for a given sentence that is supported by the record, we may only review the sentence through Appellate Rule 7(B), which provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we] find that the sentence is inappropriate in light of the nature of the offense and the character of the offender." *Id*.

In the present case, Shermon was convicted of theft, a Class D felony, which carries an advisory sentence of one and one-half years, a minimum sentence of six months and a

maximum sentence of three years. I.C. § 35-50-2-7. At the sentencing hearing, the trial court explained its reasons for imposing a sentence of two and one-half years, finding Shermon's criminal history as aggravator and his admission of guilt by way of the plea agreement as a mitigator. The trial court concluded that the aggravator outweighed the mitigator.

Shermon now alleges that the trial court improperly failed to take into account an additional mitigator. Specifically, he maintains that the trial court did not give any weight to the fact that his imprisonment would be a hardship on his three children. As our supreme court clarified in *Anglemeyer*, "[a]n allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." *Anglemeyer*, 868 N.E.2d at 493. Additionally, even "[i]f the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist." *Id*.

Here, the record is devoid of any evidence that Shermon requested the trial court to consider this proposed mitigator, let alone, offered evidence in support of it. Nevertheless, even if he had introduced the mitigator to the trial court, Shermon fails to carry his burden of proof. While we recognize that jail is always a hardship on dependents, Shermon still fails to explain how his sentence is more of a hardship on his family than would be the advisory sentence. *See Vasquez v. State*, 839 N.E.2d 1229, 1234 (Ind. Ct. App. 2005), *trans. denied*.

Additionally, we find the current sentence to be in line with the nature of the offense and Shermon's character. With regard to the nature of the offense, we note that Shermon deposited a fraudulent check in the amount of $20,000 and then made several withdrawals from the account. As pointed out by the State, this was not a one time theft, but rather a deliberate, planned sequence of actions.

With regard to Shermon's character, the record supports that the bank offered him the opportunity of repaying the money prior to pressing charges. Not only did he fail to take advantage of this offer, but even at the sentencing hearing, he continued to dispute the seriousness of the offense, stating that "I was really confused about what was going on because I left that check sit in that bank for a month or so and they told me the check was clear." (Transcript p. 30). He never made a good faith attempt to perform restitution. Furthermore, even though his criminal history is dated with two Class D felonies theft incurred in the mid-nineties, it remains nevertheless important as these are crimes of dishonesty. Accordingly, in light of the evidence before us, we conclude that Shermon's sentence is appropriate in light of his character and nature of the offense.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not inappropriately sentence Shermon.

Affirmed.

KIRSCH, J., and MAY, J., concur.