

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Joseph Allen Petry,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 15, 2022

Court of Appeals Case No.
21A-CR-2397

Appeal from the Spencer Circuit
Court

The Honorable Jon A. Dartt, Judge

Trial Court Case No.
74C01-2002-MR-58

Shepard, Senior Judge.

- [1] Joseph Petry appeals the sentence he received upon his convictions for voluntary manslaughter and pointing a firearm at another. We affirm.

Facts and Procedural History

- [2] Nineteen-year-old Joseph Petry's Snapchat of a female's legs in the seat of his car was viewed by his recent ex-girlfriend, seventeen-year-old Kylee Miller. Miller was upset by the Snapchat, and she and Petry messaged back and forth before she went to Petry's home to speak to him. Petry told police he retrieved his handgun from his vehicle prior to Miller's arrival because some of Miller's messages were threatening. He took the handgun into his residence, loaded a magazine, and chambered a round into the gun. When Miller arrived, the two talked on the porch, but an argument erupted that quickly turned physical.
- [3] Meanwhile, eighteen-year-old Zane Lee and his seventeen-year-old girlfriend Lillian Houchin were sitting in a vehicle nearby. Houchin is a friend of Miller's and was aware that Miller was upset about Petry's Snapchat. Lee and Houchin saw the confrontation between Petry and Miller and approached the two to intervene when they observed Petry putting Miller in a headlock. As Petry wrestled with Lee, he retrieved the gun from the pocket of his sweatshirt and fired two shots into the air. Miller, Houchin, and Lee all backed away from the porch of Petry's home. Petry aimed his gun at Lee and fired, hitting Lee. Petry then pointed the gun at Miller and Houchin but did not shoot. He put the gun back in his vehicle and called 911.
- [4] After being shot, Lee ran toward his home, and Houchin and Miller followed. They found Lee face down in his front yard. Houchin rolled him over and ran

to get Lee's mother. Lee's mother, Houchin, and neighbors all tried to render life-saving aid to Lee, but their attempts were unsuccessful.

[5] The State charged Petry with murder, voluntary manslaughter as a Level 2 felony, and pointing a firearm at another as a Level 6 felony. In a plea agreement with the State, Petry pleaded guilty to voluntary manslaughter and pointing a firearm at another. The length of his sentence on each count was left to the court's discretion, though he was to be sentenced to executed time only. The court sentenced Petry to twenty-four years for voluntary manslaughter and one year on his firearm conviction, to be served consecutively. This appeal followed.

Issues

[6] Petry presents two issues for our review, which we restate as:

- I. Whether the trial court abused its discretion in sentencing Petry; and
- II. Whether Petry's sentence is inappropriate in light of the nature of his offenses and his character.

Discussion and Decision

I. Sentencing Discretion

[7] Petry first contends the trial court erred by considering improper aggravating circumstances and failing to consider valid mitigating circumstances. A court may impose any sentence authorized by statute regardless of the presence or absence of aggravating or mitigating circumstances. Ind. Code § 35-38-1-7.1(d)

(2019). Beyond that, sentencing decisions rest within the court's sound discretion. *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (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 drawn therefrom. *Id.*

[8] Petry challenges the court's finding that his commission of voluntary manslaughter in the presence or within the hearing of individuals under the age of eighteen is an aggravating factor. *See* Ind. Code § 35-38-1-7.1(a)(4). However, this aggravator is supported not only by the fact that Miller and Houchin were under the age of eighteen and were eyewitnesses to Lee's shooting and death but also by the fact that this occurred in a family housing project where it would always be likely that other children heard the shots and/or saw the result. *See Cloum v. State*, 779 N.E.2d 84 (Ind. Ct. App. 2002) (citing *Crawley v. State*, 677 N.E.2d 520, 522 (Ind.1997)) (shooting may be considered to have been in presence of children where they are able to hear gunshot and see or discover shooting victim shortly thereafter).

[9] The court also found that the unique nature and circumstances of the crime apart from the elements of the offense constitute an aggravating circumstance. Citing *Thompson v. State*, 793 N.E.2d 1046 (Ind. Ct. App. 2003), Petry asserts that the emotional and psychological effects of a crime are inappropriate aggravating factors unless the impact, harm, or trauma is greater than that usually associated with the crime.

[10] Given the circumstances present here, we believe that Judge Dartt properly applied this aggravator. Lee’s girlfriend and Miller watched as Lee was shot and then attempted to run to his nearby home. At Petry’s sentencing hearing, Houchin described Lee’s face when he was shot as “[p]ure terror.” Tr. Vol. 2, p. 40. She also testified to running after Lee, finding him face down in his front yard, rolling his body over, and attempting to hold the bullet hole closed while neighbors came to assist and give him CPR. Moreover, Lee’s mother testified that she heard the gun shots and opened the door of her home to see her son “running down the sidewalk trying to get home” with a “look of complete horror – fear – confusion.” *Id.* at 51-52. She recounted that just before Lee made it to the door of their home, he began to stagger before collapsing face first on the grass. She recalled Lee “gasping for air” as one individual attempted to hold the bullet hole closed and his eyes rolling to the back of his head as she watched him die in their yard while neighbors tried to save his life. *Id.* at 52. The impact and trauma, particularly to Lee’s mother, in this instance is sufficient to support this aggravator.

[11] As to mitigating factors, the finding of mitigators is not mandatory but is within the discretion of the trial court. *Page v. State*, 878 N.E.2d 404 (Ind. Ct. App. 2007), *trans. denied* (2008). Further, the court is not obligated to accept the defendant’s arguments as to what constitutes a mitigating factor, and an allegation on appeal that the 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. *Id.*

[12] Here, Petry raises up several factors that he alleges are mitigating but are not identified as such by the trial court. Although Petry cites six factors, several amount to the same argument and can be grouped together, leaving two for us to address. First, he contends that the crime was the result of circumstances unlikely to recur and that he is likely to respond to a short term of imprisonment based on his character/attitude, lack of criminal history, and classification as low risk to reoffend. While the court did find Petry's lack of history of delinquent and criminal activity as a mitigating circumstance, it is well within the court's discretion to reject Petry's argument and decline to find as a significant mitigating circumstance that he would not commit the same offense if he found himself in another altercation.

[13] The second mitigating category advanced by Petry is that the victims induced the offenses and therefore substantial grounds existed to excuse or justify the crimes. Although Petry allegedly felt threatened by Miller's messages, he did not remain in his home when she arrived and armed himself with a concealed loaded gun. Moreover, Houchin testified that the conversation between Petry and Miller became aggressive when Petry "started getting in [Miller]'s face." Tr. Vol. 2, p. 39. Miller put her hands up, possibly pushing Petry, and Petry then proceeded to put her in a headlock. At that point, Houchin and Lee intervened. *Id.* at 42-43. The court did not err by not identifying this as a mitigating circumstance.

II. Inappropriate Sentence

[14] Finally, Petry claims his sentence is inappropriate given the nature of his offenses and his character. Indiana Appellate Rule 7(B) provides that we may revise a sentence authorized by statute if, after due consideration of the trial court's decision, we determine that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Thompson v. State*, 5 N.E.3d 383 (Ind. Ct. App. 2014). However, "we must and should exercise deference to a trial court's sentencing decision, both because Rule 7(B) requires us to give 'due consideration' to that decision and because we understand and recognize the unique perspective a trial court brings to its sentencing decisions." *Stewart v. State*, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The defendant bears the burden of persuading the appellate court that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006).

[15] To assess whether the sentence is inappropriate, we look first to the statutory range for the offenses. The advisory sentence for a Level 2 felony is seventeen and one-half years, with a minimum of ten and a maximum of thirty. Ind. Code § 35-50-2-4.5 (2014). The advisory sentence for a Level 6 felony is one year, ranging from six months to two and one-half years. Ind. Code § 35-50-2-7 (2019). The court sentenced Petry to twenty-four years on the Level 2 and to the advisory one year on the Level 6 felony, to be served consecutively.

[16] As to the nature of the offenses, Petry shot and killed an unarmed eighteen-year-old boy when the boy intervened to help a girl who was involved in a physical altercation with Petry. Petry also pointed his gun at two seventeen-

year-old girls, all of which took place in a family housing project where numerous people were endangered by his actions.

[17] As to the character of the offender, Petry has no delinquent or criminal history. In addition, after shooting Lee, Petry called 911, waited for the police to arrive, and was cooperative.

[18] In sentencing Petry, the court found committing the offense in the presence or hearing of individuals less than eighteen years of age and the unique nature and circumstances of the crime to be aggravating factors. The court also found several mitigators, including Petry's lack of delinquent or criminal history; his call and submission to authorities; the conservation of court time and resources and the reprieve for all the victims from enduring a trial by his guilty plea; and his remorse. Petry's intermediate sentence for voluntary manslaughter is within the acceptable range, given that he did not have to plead to or be tried for murder. Moreover, the deference shown to a trial court's sentencing should prevail unless overcome by compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) and the defendant's character (such as substantial virtuous traits or persistent examples of good character). *Stephenson v. State*, 29 N.E.3d 111 (Ind. 2015). Petry has not met this burden.

Conclusion

[19] We conclude that the court did not abuse its discretion as to aggravators and mitigators and that Petry's sentence is not inappropriate.

[20] Affirmed.

Robb, J., and Vaidik, J., concur.