MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Desmond Johnson,
Appellant-Defendant / Cross-Appellee,

v.

State of Indiana,
Appellee-Plaintiff / Cross-Appellant

October 20, 2021

Court of Appeals Case No. 21A-CR-157

Appeal from the Hendricks Superior Court

The Honorable Mark A. Smith, Judge

Trial Court Cause No. 32D04-1907-F2-24

Crone, Judge.

Case Summary

[1] Desmond Johnson pled guilty via a plea agreement to level 2 felony burglary, and the trial court sentenced him to fifteen years. Johnson now appeals, arguing that the trial court abused its discretion by giving reasons for his sentence that are improper as a matter of law. The State cross-appeals, arguing that Johnson waived his right to appellate review of his sentence. We conclude that Johnson did not waive the right to appellate review of his particular sentencing challenge, but that he has failed to establish an abuse of discretion. Therefore, we affirm.

Facts and Procedural History

[2] On the night of May 21, 2019, eighteen-year-old Johnson, who was armed with a knife, and an accomplice armed with a handgun broke into a family's residence in Brownsburg. The husband was out of town, and his pregnant wife and infant child were asleep upstairs. Johnson and his accomplice stole laptops, a television, a guitar, and video game equipment from the residence. The break-in was recorded on a home security camera, and the footage was used to identify Johnson as one of the burglars.

[3] In July 2019, the State charged Johnson with one count of level 2 felony burglary and one count of level 6 felony theft. In November 2020, Johnson and the State executed a plea agreement, pursuant to which Johnson agreed to plead guilty to the burglary charge and the State agreed to dismiss the theft charge.

Sentencing was left to the trial court's discretion. The plea agreement reads in pertinent part as follows:

> [X] The Defendant hereby knowingly, intelligently, and voluntarily waives his/her right to challenge the sentence on the basis that it is erroneous.
>
> [X] The Defendant waives his/her right to challenge the trial court's finding and balancing of mitigating and aggravating factors and further waives his/her right to have the Court of Appeals review his sentence under Indiana Appellate Rule 7(B).

Appellant's App. Vol. 2 at 113. The trial court accepted the plea and set the matter for sentencing.

[4] At the December 2020 sentencing hearing, Johnson's mother gave a statement and remarked,

> I mean I just know Desmond is very, very sorry, that I do know. I know he wish that he would have never - he's the type of kid that he would go out and try to defend people versus trying to harm people. I never have raised him to be a - the young man that fell short that night […]. I know he wants to do right and make it right by this young people [i.e., the victims] and it touches my heart that deeply that these young people have been affected and I truly as his mom even want to apologize and I'm just sorry and I know he is.

Tr. Vol. 2 at 38-39.

[5] In its oral sentencing statement, the trial court told Johnson's mother,

> [Y]ou didn't do anything wrong. Don't blame yourself. Your son has to grow up. Today he becomes a man.[…] Don't blame yourself. It sounds like you have been a great mother and you try to do the right things. This is Desmond's responsibility. That's why I said today he becomes a man.

Id. at 48. And the court told Johnson,

> You're very fortunate that that your folks and anyone who knows you aren't at a funeral. Because what you did, someone who has any training with a firearm, if they would have come down the stairs at ten to fifteen feet, they could have easily shot you and your accomplice. They would have been well within their rights to do so because of the weapons that were involved. You're lucky to be alive today. I sleep at night with a loaded 45 next to my nightstand. And other people do as well for this very reason. That's why this is serious. The legislature has seen fit in this case to make it a more serious crime because there were weapons involved.

Id. at 49. The court also stated, "I think I'm well within my rights as a sentencing judge to consider the fact that this was a dwelling. This is someone's, this is you know, this is sacred. It's our homes." *Id*. at 50-51.[1]

[6] In its oral sentencing statement and in its written sentencing order, the trial court found as mitigating circumstances that Johnson had no juvenile or criminal history and is likely to respond to probation, and it found as

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[1] Burglary is the breaking and entering of a building or structure of another person, with intent to commit a felony or theft in it. Ind. Code § 35-43-2-1. The base offense is a level 5 felony, but the offense is a level 4 felony if the building or structure is a dwelling and a level 2 felony if it is committed while armed with a deadly weapon. *Id*.

aggravating circumstances that the crime was committed in a residence and the harm caused to the victims was greater than that necessary to prove the offense.[2] Exercising the discretion granted by the agreement, the court imposed a fifteen-year sentence, which is two and a half years less than the advisory sentence for a level 2 felony,[3] with eight years in the Department of Correction, two years on work release, and five years on probation.

[7] Johnson filed a notice of appeal. The State filed a motion to dismiss, arguing that Johnson waived the right to appeal his sentence. This Court's motions panel denied the State's motion. Johnson appealed, and the State cross-appealed.

Discussion and Decision

Section 1 – Johnson did not waive the right to appellate review of his particular sentencing challenge.

[8] On appeal, Johnson argues that "[t]he trial court abused its discretion in sentencing [him] because it considered reasons for imposing its chosen sentence that were improper as a matter of law." Appellant's Br. at 13 (bolding omitted).

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[2] As charged here, level 2 felony burglary is simply a burglary committed while armed with a deadly weapon; no evidence of harm is required. Ind. Code § 35-43-2-1(3)(A).

[3] *See* Ind. Code § 35-50-2-4.5 ("A person who commits a Level 2 felony shall be imprisoned for a fixed term of between ten (10) and thirty (30) years, with the advisory sentence being seventeen and one-half (17 ½) years.").

On cross-appeal, the State renews its argument that Johnson waived the right to appeal his sentence. Under the circumstances presented here, we cannot agree.

[9] The Indiana Supreme Court has held that "a defendant may waive the right to appellate review of his sentence as part of a written plea agreement." *Creech v. State*, 887 N.E.2d 73, 75 (Ind. 2008). The United States Supreme Court has recognized that "'plea bargains are essentially contracts[,]'" and "[a]s with any type of contract, the language of appeal waivers can vary widely, with some waiver clauses leaving many types of claims unwaived." *Garza v. Idaho*, 139 S. Ct. 738, 744 (2019) (quoting *Puckett v. United States*, 556 U.S. 129, 137 (2009)). "We construe contracts against the drafting party, which, in the case of plea agreements, is the State." *Williams v. State*, 51 N.E.3d 1205, 1209 (Ind. Ct. App. 2016) (citation and quotation marks omitted).

[10] To give a sense of how many types of sentencing claims are available on appeal under Indiana law, we first turn to *Anglemyer v. State*, in which our supreme court offered the following summary of how "the imposition of sentence and the review of sentences on appeal should proceed" under Indiana's current statutory sentencing scheme:

> 1. The trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence.[4]

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[4] *See* Ind. Code §§ 35-38-1-1.3 ("After a court has pronounced a sentence for a felony conviction, the court shall issue a statement of the court's reasons for selecting the sentence that it imposes unless the court imposes the advisory sentence for the felony."), 35-38-1-7.1(a)-(c) (providing that court may consider enumerated aggravating and mitigating circumstances "[i]n determining what sentence to impose for a

> 2. The reasons given, and the omission of reasons arguably supported by the record, are reviewable on appeal for abuse of discretion.
>
> 3. The relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse.[5]
>
> 4. Appellate review of the merits of a sentence may be sought on the grounds outlined in Appellate Rule 7(B).[6]

868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218.

[11] With respect to item 2 above, the *Anglemyer* court explained that

> [o]ne way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include 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, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, *or the reasons given are improper as a matter of law*. Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court

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crime" but that those "criteria … do not limit the matters that the court may consider in determining the sentence.").

[5] *See* Ind. Code § 35-38-1-7.1(d) (providing that court may impose "any sentence that is: (1) authorized by statute; and (2) permissible under the Constitution of the State of Indiana; regardless of the presence or absence of aggravating circumstances or mitigating circumstances").

[6] *See* Ind. Appellate Rule 7(B) ("The Court [on appeal] 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.").

> would have imposed the same sentence had it properly considered reasons that enjoy support in the record.

Id. at 490-91 (emphases added). These abuse of discretion claims "are to be analyzed separately" from claims that a sentence is inappropriate under Appellate Rule 7(B), which are referenced in item 4 above. *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008) (citing *Anglemyer*, 868 N.E.2d at 491).

[12] A defendant may also challenge his sentence by filing a motion with the trial court pursuant to Indiana Code Section 35-38-1-15, which states,

> If the convicted person is erroneously sentenced, the mistake does not render the sentence void. The sentence shall be corrected after written notice is given to the convicted person. The convicted person and his counsel must be present when the corrected sentence is ordered. A motion to correct sentence must be in writing and supported by a memorandum of law specifically pointing out the defect in the original sentence.

In *Morris v. State*, in which the defendant agreed to waive his right to appeal his sentence on the basis that it was "erroneous" and then sought to challenge it as "inappropriate" under Appellate Rule 7(B), another panel of this Court observed,

> In legal terms, an "erroneous" sentence is not the same as an "inappropriate" sentence. An "erroneous" sentence, which may be attacked by a motion to correct erroneous sentence under Indiana Code Section 35-38-1-[15], is one that is erroneous "on its face" without reference to proceedings before, during, or after trial. *Davis v. State*, 937 N.E.2d 8, 10-11 (Ind. Ct. App. 2010).

985 N.E.2d 364, 366 (Ind. Ct. App. 2013), *reh'g granted on other grounds*, 2 N.E.3d 7; *see also Beliles v. State*, 663 N.E.2d 1168, 1173 (Ind. Ct. App. 1996) ("The procedures to correct an erroneous sentence under I.C. 35-38-1-15 should be limited to those instances where the sentence is erroneous on its face; that is, to those fundamental sentencing errors where sentences have been entered in violation of express statutory authority or an erroneous interpretation of a statutory penalty provision."). An example of a sentence that is erroneous on its face is a fifty-year sentence for a level 2 felony. *See* Ind. Code § 35-50-2-4.5 (providing that maximum sentence for level 2 felony is thirty years).

[13] In light of the foregoing, it logically follows that an "erroneous" sentence is also not the same as a sentence that resulted from an abuse of discretion, which is the basis of Johnson's argument here. Therefore, we reject the State's argument to the contrary.[7] Johnson does not raise a claim that the trial court abused its discretion in finding or balancing aggravating and mitigating circumstances, which would be barred by his plea agreement; instead, he argues that the "reasons given [for imposing sentence] are improper as a matter of law." *Anglemyer*, 868 N.E.2d at 491. In some cases, the trial court's reasons for imposing sentence might be limited to its finding and balancing of aggravating and mitigating circumstances. In this case, however, the trial court's lengthy

[7] The State cites *Winkleman v. State*, 22 N.E.3d 844 (Ind. Ct. App. 2014), *trans. denied* (2015), for the proposition that "[o]ne way in which a trial court may impose an erroneous sentence is by considering reasons that are improper as a matter of law." Appellee's Br. at 14. Actually, *Winkleman* states that a trial court "may *abuse its discretion* in a number of ways, including … entering a sentencing statement that includes reasons that are improper as a matter of law." 22 N.E.3d at 852 (emphasis added).

sentencing statement ventured beyond that scope, and some of its surplus comments are the focus of Johnson's abuse of discretion claims. Johnson's plea agreement does not bar him from raising those claims. The State could have drafted a waiver provision broad enough to encompass them, but it failed to do so. *See, e.g.*, *Starcher v. State*, 66 N.E.3d 621, 621-22 (Ind. Ct. App. 2016) (finding waiver where plea agreement provided, "[D]efendant knowingly and voluntarily agrees to waive the right to appeal the sentence on the basis that it is erroneous *or for any other reason* so long as the Judge sentences him/her within the terms of this agreement.") (emphasis added), *trans. denied* (2017); *Brown v. State*, 970 N.E.2d 791, 791-93 (Ind. Ct. App. 2012) (finding waiver where plea agreement provided, "The Defendant hereby waives his right to appeal his sentence so long as the Judge sentences him within the terms of the plea agreement."). Accordingly, we address the merits of Johnson's claims.

Section 2 – Johnson has failed to establish an abuse of discretion.

[14] On appeal, the defendant bears the burden of establishing an abuse of sentencing discretion. *Plummer v. State*, 851 N.E.2d 387, 391 (Ind. Ct. App. 2006). Johnson first contends that in mentioning the sanctity of "our homes[,]" Tr. Vol. 2 at 51, and that he keeps a loaded firearm next to his nightstand, the trial court judge expressed an improper "personal philosophical" message about gun ownership and his willingness to shoot intruders. Appellant's Br. at 14 (quoting *Scheckel v. State*, 655 N.E.2d 506, 510 (Ind. 1995)). In *Scheckel*, our supreme court reiterated its stance that a trial judge should not "be allowed to

use the sentencing process as a method of sending a personal philosophical or political message. A trial judge's desire to send a message is not a proper reason to aggravate a sentence." 655 N.E.2d at 510 (quoting *Beno v. State*, 581 N.E.2d 922, 924 (Ind. 1991)). In this case, rather than aggravate Johnson's sentence, the trial court gave him a sentence below the advisory term, and we agree with the State that "the trial court's statements merely provided a detailed explanation of its assessment of the seriousness of Johnson's offense and the risk he placed himself in when he decided to burglarize an occupied home." Appellee's Br. at 19.

[15] Johnson also contends that the trial court judge improperly used the "sentencing hearing as an opportunity to denigrate [Johnson's] manhood and to express his belief that going to prison would be what makes [Johnson] a man." Appellant's Br. at 17. We do not agree with this assessment. In view of the foregoing transcript excerpts, and the fact that Johnson was only a teenager when he committed his crime, we believe that the State is correct in asserting that "the trial court was explaining that Johnson was accountable for his own actions, as he was no longer a child, and his mother should not blame herself for his criminal activity." Appellee's Br. at 20. In sum, we conclude that Johnson has failed to establish an abuse of discretion, and therefore we affirm his sentence.

[16] Affirmed.

Bailey, J., and Pyle, J., concur.