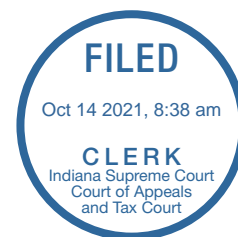


MEMORANDUM DECISION

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

Donald E.C. Leicht
Peru, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Caroline G. Templeton
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Demetrice Lay,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 14, 2021

Court of Appeals Case No.
21A-CR-775

Appeal from the Howard Superior
Court

The Honorable William C.
Menges, Jr., Judge

Trial Court Cause No.
34D01-2006-F4-1868

Altice, Judge.

Case Summary

- [1] Demetrice Lay pled guilty to Carrying a Handgun Without a License, as a Level 5 Felony, and received an executed sentence of six years in prison. On appeal, Lay contends that imposition of the maximum sentence¹ is inappropriate in light of the nature of the offense and his character.
- [2] We affirm.

Facts & Procedural History

- [3] On June 29, 2020, Lay was driving a vehicle in Kokomo, Indiana, that had been reported stolen in Arkansas. Officer Marek Hullinger of the Kokomo Police Department determined the status of the vehicle after encountering it at an intersection and running a license plate check. Shortly thereafter, he located the vehicle parked in a Walmart parking lot and approached. Lay exited the vehicle and informed Officer Hullinger that he had borrowed it from a cousin in Arkansas. Officer Hullinger placed Lay under arrest and was advised by dispatch that Lay had an active warrant for his arrest out of another state.
- [4] After other officers arrived on the scene, Officer Hullinger searched the vehicle. He found, under the driver's seat, a loaded CZ52 7.62 caliber handgun, which had a round in the chamber. Officer Hullinger also recovered from the middle console a small plastic bag containing nine pills, which he believed to be

¹ The sentencing range for a Level 5 felony is between one and six years, with an advisory sentence of three years. Ind. Code. § 35-50-2-6(b).

Oxycodone Hydrochloride 30 mg tablets. Lay indicated that the pills were his and that he took them for pain. Finally, Officer Hullinger found a small glass jar containing a plant-like residue in the glove box and an empty plastic bag on the floorboard.

[5] The following day, the State charged Lay with Level 4 felony unlawful possession of a firearm by a serious violent felon (Count 1), Level 6 felony auto theft (Count 2), and Class A misdemeanor possession of a Schedule II controlled substance (Count 3). In October 2020, the State amended the charging information to add Count 4, carrying a handgun without a license, elevated to a Level 5 felony for having a prior felony conviction in the last fifteen years.

[6] In November 2020, Lay and the State entered into a written plea agreement pursuant to which Lay would plead guilty to Count 4, the State would dismiss the remaining counts, and Lay's executed sentence would be capped at three years. The trial court rejected the plea agreement on December 4, 2020. In doing so, the court observed:

Given the defendant's prior criminal history including the fact this would be his third firearms violation in three different states, his history of violence, the break that he is receiving by reducing the charge from a Level 4 felony to a Level 5 felony is extremely lenient and to make it further lenient by capping any executed time at three years, I think is unreasonable.

Transcript at 3. Thereafter, on March 25, 2021, the State filed an amended information in which it amended Count 3 to allege Level 6 felony possession of a Schedule II controlled substance.

[7] On March 26, 2021, the day of Lay’s scheduled jury trial, he and the State entered into another plea agreement. Like the prior agreement, Lay would plead guilty to Count 4, and the State would dismiss the remaining charges. This agreement, however, left sentencing to the trial court’s discretion. The trial court accepted the plea and set the matter for sentencing.

[8] At the sentencing hearing on April 19, 2021, Lay acknowledged that he had “a pretty extensive felony criminal history” spanning multiple states. *Id.* at 18. However, he asked that any executed time be served through community corrections because he had recently become a parent, which had given him motivation to reform his behavior. The trial court imposed a six-year sentence to be served in the Indiana Department of Correction, explaining:

I think the defendant’s prior criminal history is a significant aggravating factor particularly when we look at the fact that this is his third conviction for possession of a firearm within fourteen years involving three separate states. I think he is receiving a substantial break by pleading to Count 4 instead of Count 1. The fact that he has a newborn child is a mitigating factor, but I don’t think that is entitled to much weight given the criminal activity that he was involved in at or near the time of conception of his child.

Id. at 20. Lay now appeals.

Discussion & Decision

[9] Lay argues that the sentence imposed by the trial court is inappropriate. We may revise a sentence authorized by statute if, after due consideration of the trial court's decision, we find the sentence inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). Indiana's flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented and the trial court's judgment "should receive considerable deference." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). The principal role of appellate review is to attempt to "leaven the outliers." *Id.* at 1225. Whether we regard a sentence as inappropriate turns on "our sense of culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." *Id.* at 1224. Deference to the trial court "prevail[s] 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, 122 (Ind. 2015). The burden is on the defendant to persuade us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

[10] Regarding the nature of his offense, Lay asserts that his possession of a handgun was "as benign as one could 'hypothesize.'" *Appellant's Brief* at 6. We certainly do not agree, and we reject the implicit invitation to turn a blind eye to the underlying facts of his offense. *See Bethea v. State*, 938 N.E.2d 1134, 1145

(Ind. 2013) (holding that sentencing enhancements may be based on the underlying charges that were dismissed pursuant to a plea agreement or from which a lesser included plea is taken and that “it is not necessary for a trial court to turn a blind eye to the facts of the incident that brought the defendant before them”). Here, Lay possessed a loaded handgun, within easy reach, while he was driving a stolen vehicle that he had driven from Arkansas. Lay also possessed, within the vehicle, Oxycodone Hydrochloride pills and possibly other drugs/paraphernalia. He did this all while having an active arrest warrant out of Mississippi for absconding from probation in Tennessee. In sum, the manner in which Lay committed the instant offense was clearly aggravating. And, as the trial court observed, Lay, who was unquestionably a serious violent felon, received a substantial benefit by pleading to Count 4 as a Level 5 felony instead of Count 1 as a Level 4 felony.

[11] Lay’s character similarly counsels against revision of his sentence. His prior criminal history – for which he omits any discussion on appeal² – is extensive. His adult criminal history began in 2000, in Arkansas, when he was seventeen years old, and resulted in a conviction for aggravated robbery with a sentence of seven years in prison. While the robbery case was pending, he committed residential burglary in Arkansas in 2001 and was sentenced to five years in prison. Thereafter, still in Arkansas, Lay committed felony possession of a

² Lay’s appellate counsel simply directs us to (incorrect) pages in the appendix that set out his criminal history. This is improper, lacks candor, and does not constitute adequate appellate argument. Counsel is directed to more fully brief issues in future appeals to avoid the appearance of slapped-together briefing.

firearm in 2006, violated bond a year later, and was eventually sentenced in 2010 to sixty months in prison. Lay was also arrested in Tennessee in 2010 for aggravated burglary and in 2012 for disorderly conduct, but neither cause proceeded to trial. In 2016, Lay was convicted in Mississippi of felony possession of a firearm and sentenced to four years in prison suspended to five years of supervised probation. His probation was eventually transferred to Tennessee and, thereafter, Lay absconded from probation and a warrant was issued for his arrest in 2019. The warrant remained active at the time Lay committed the instant offense in Indiana. Thus, Lay's felony activity spans multiple states, he has been undeterred by incarceration or probation, and he has been convicted of carrying a handgun as a felon in Arkansas, Mississippi, and now Indiana.

[12] Lay has wholly failed in his burden of establishing that the six-year, maximum sentence is inappropriate here in light of the nature of the offense and his character. Accordingly, we reject his invitation to reduce the sentence imposed by the trial court.

[13] Judgment affirmed.

Bradford, C.J. and Robb, J., concur.