

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Cody Hitchcock,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

June 28, 2022

Court of Appeals Case No.
21A-CR-2663

Appeal from the Howard Superior
Court

The Honorable Hans Pate, Judge

Trial Court Cause No.
34D04-1911-F3-3470

May, Judge.

- [1] Cody Hitchcock appeals his nine-year sentence for Level 3 felony aggravated battery.¹ He argues his sentence is inappropriate given the nature of his offense and his character. We affirm.

Facts and Procedural History

- [2] On September 12, 2019, Hitchcock and his friend, Sam Crull, were driving to Taco Bell and noticed a man, later identified as Rusty Prince, lying on the ground outside the Hi-Mark restaurant and lounge. Prince was passed out, and Hitchcock approached him and attempted to wake him up by impersonating law enforcement to elicit a response. Upon waking, an altercation ensued among Prince, Hitchcock, and Crull. At some point, while Prince was on the ground, Hitchcock kicked Prince in the head while wearing steel-toed boots, and Prince sustained injuries as a result. Hitchcock went home, but he turned himself in to law enforcement the next day when he learned the police were looking for him. Prince does not remember the incident but recalls waking up the next day in an Intensive Care Unit on a respirator.
- [3] The State charged Hitchcock with Level 3 felony aggravated battery and Level 6 felony impersonation of a public servant.² On September 30, 2021, Hitchcock pled guilty to Level 3 felony aggravated battery pursuant to a plea agreement

¹ Ind. Code § 35-42-2-1.5(1) (2014).

² Ind. Code § 35-44.1-2-6(a)-(b)(1) (2016).

that capped his sentence at nine years and his executed sentence at six years. The agreement also provided the State would dismiss the Level 6 felony charge for impersonation of a public servant. On November 4, 2021, the trial court held a sentencing hearing and found the following aggravating factors: Hitchcock kicked Prince while he was on the ground; he did not seek the proper help when he initially found Prince unresponsive; he witnessed Crull hit Prince and did not do anything to stop it; Prince's injuries were significant;³ and Hitchcock lacked remorse. The mitigating factors included Hitchcock's guilty plea that saved the cost of a jury trial, the hardship to Hitchcock's family, his employment history, and his struggles with depression and anxiety. The trial court found the aggravating factors outweighed the mitigating factors and imposed a nine-year sentence. The court ordered Hitchcock to serve six years executed – two years in the Department of Correction, one year on work release, and three years on home detention – and suspended three years to supervised probation.⁴

³ Prince sustained a fractured orbital bone and partial loss of vision in his right eye after Hitchcock kicked Prince in the head.

⁴ At Hitchcock's sentencing hearing, the trial court indicated Hitchcock's sentence included: "Two years at the Indiana Department of Corrections, followed by one-year of work release, followed by three years of in-home detention, remainder *unsupervised* probation." (Tr. Vol. 2 at 45 (emphasis added).) However, the Appealed Order indicates the sentence includes: "Three (3) years suspended, to be served supervised probation." The Abstract of Judgment also indicates "THREE (3) YEARS SUSPENDED, TO BE SERVED ON SUPERVISED PROBATION." (App. Vol. 2 at 95) (capitalization in original).) Finally, the plea agreement called for Hitchcock's probation to be "supervised." (*Id.* at 71.) Because the three written documents are consistent, we presume the transcript contains a typo – replacing "on supervised" with "unsupervised" – and we refer to Hitchcock's probation as supervised.

Discussion and Decision

- [4] Hitchcock asserts his sentence is inappropriate given the nature of his offense and his character.⁵ Pursuant to Indiana Appellate Rule 7(B), we may revise a sentence if, after due consideration of the trial court’s decision, we find the sentence is inappropriate in light of the nature of the offense and the character of the offender. Hitchcock “bears the burden of persuading this court that his . . . sentence is inappropriate.” *See Connor v. State*, 58 N.E.3d 215, 218 (Ind. Ct. App. 2016) (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).
- [5] When considering the nature of the offense, the “advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed.” *Connor*, 58 N.E.3d at 220. The sentencing range for Level 3 felony aggravated battery is between three and sixteen years, with an advisory sentence of nine years. Ind. Code § 35-50-2-5(b). Hitchcock’s guilty plea capped his sentence at nine years. The trial court imposed the maximum sentence pursuant to the plea,⁶ which equaled the advisory term of nine years,

⁵ Hitchcock’s inappropriate sentence analysis also referenced the abuse of discretion standard and mentioned five alleged mitigators the trial court “did not consider[.]” (Appellant’s Br. at 16.) However, “inappropriate sentence claims and abuse of discretion claims are to be analyzed separately.” *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008). As Hitchcock’s argument did not provide explanation to support finding error in the trial court’s lack of consideration, we presume he did not intend to raise an abuse of discretion argument. *See* Indiana Appellate Rule 46(A)(8)(a)-(c) (Appellant’s brief “shall have an argument heading” for each argument, and “[t]he argument must include for each issue a concise statement of the applicable standard of review.”). We presume instead that Hitchcock mentioned these alleged mitigators as other evidence in the record that would support his sentence being inappropriate, and we consider them in that context.

⁶ The State argued Hitchcock “can only challenge his placement” because he agreed to a nine-year maximum sentence. (Appellee’s Br. at 10.) In support, the State cited *King v. State*, 894 N.E.2d 265, 267 (Ind Ct. App.

and the court ordered Hitchcock to serve six years executed and three years on supervised probation.

[6] Prince sustained a fractured orbital bone and partial loss of vision in his right eye after Hitchcock kicked Prince in the head, and Prince needed four months off from work to recover from his injuries. As noted by the trial court, Hitchcock kicked Prince when he was on the ground, and Prince suffered greatly when he permanently lost vision in his right eye, which caused him to miss work. Although it is unclear from the record who started the altercation,⁷ the fact remains that Prince was lying on the ground when Hitchcock kicked him in the head with steel-toed boots, which resulted in Prince being hospitalized for three days. We cannot say a nine-year sentence is inappropriate for this offense.

2008). However, *King* contains no such holding. Instead, King was challenging as inappropriate the trial court's order that he serve his sentence incarcerated, and we reiterated that an Appellate Rule 7(B) analysis could be used to challenge a placement as inappropriate, even though it is "difficult" for appellants to prevail on such an argument. *Id.* at 267-68. Moreover, in support of this idea, the State cites a concurring opinion from Justice Dickson in *Childress v. State*, 848 N.E.2d 1073, 1081 (Ind. 2006), but the State ignores the fact that the majority opinion in *Childress* held:

[T]o say that a defendant [who agrees to a sentencing range] has acquiesced in his or her sentence or has implicitly agreed that the sentence is appropriate undermines in our view the scope of authority set forth in Article VII, Section 4 of the Indiana Constitution. We thus disapprove of language in [cases that have held such defendants cannot challenge their sentences as inappropriate].

Id. at 1080.

⁷ Hitchcock insists Prince provoked the incident and his response was induced by Prince's hostility. During the sentencing hearing, Prince stated he felt remorse for his behavior on the night of the incident. (Tr. Vol. II at 12.) Prince was told the bartender described him as a mean drunk, and he conceded to that being a fair assessment of his intoxicated temperament. The trial court asserted, "You can't blame the victim," because he was drunk, and the court subsequently dismissed Hitchcock's claim of provocation because of the extent of his offense and the injury caused to Prince. (Tr. Vol. II at 44.)

[7] When considering the character of the offender, one relevant fact to assess is the defendant's criminal history. *Johnson v. State*, 986 N.E.2d 852, 857 (Ind. Ct. App. 2013). The significance of criminal history varies based on the gravity, nature, and number of prior offenses in relation to the current offense. *Id.* While Hitchcock is 26 years old and does not have an adult criminal history,⁸ he has a history of juvenile delinquency, and two of his four juvenile offenses were for battery. Moreover, Hitchcock did not seek help when he found Prince passed out and he did not stop his friend from hitting Prince, both of which reflect negatively on Hitchcock's character. Hitchcock has not demonstrated his character makes his sentence inappropriate, especially given his prior juvenile battery offenses and the gravity of his current offense. *See, e.g., Erickson v. State*, 72 N.E.3d 965, 975-76 (Ind. Ct. App. 2017) (fourteen-year sentence not inappropriate for Level 3 felony dealing in a Schedule IV controlled substance), *trans. denied*.

⁸ Howard County Probation Department completed a pre-sentence investigation report and determined that Hitchcock was a low risk to reoffend. The probation department believed incarceration was an inappropriate punishment for the crime because Hitchcock felt remorse and sought counseling after his altercation with Prince. The probation officer recommended Hitchcock be placed on home detention for two years and the remaining seven years be suspended to supervised probation. Hitchcock argues that, although the trial court referenced the pre-sentence investigation report when referring to his counseling, the court should have also considered all other facts and recommendations contained within the report. (Appellant's Br. at 17-18.) Hitchcock cites Indiana Code section 35-38-1-8, which requires a trial court to consider a pre-sentencing report: "[A] defendant convicted of a felony may not be sentenced before a written presentence report is prepared by a probation officer and considered by the sentencing court." (*Id.* at 17.) However, "[w]eighing of presentence investigation report (PSI) is part of broad discretion granted to trial courts in sentencing." *Malone v. State*, 660 N.E.2d 619, 632 (Ind. Ct. App. 1996). The trial court's comments about Hitchcock's counseling listed within the report reveals the court did consider the pre-sentencing report and used its broad discretion when rejecting the probation officer's suggestions for sentencing.

Conclusion

[8] Hitchcock failed to demonstrate the trial court imposed an inappropriate sentence based on the nature of the offense and his character. We accordingly affirm the trial court's decision.

[9] Affirmed.

Riley, J., and Tavitas, J., concur.