MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Calvin R. Quertermous,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 9, 2022

Court of Appeals Case No. 22A-CR-764

Appeal from the Posey Circuit Court

The Honorable Craig S. Goedde, Judge

Trial Court Cause No. 65C01-2107-F6-433

Bradford, Chief Judge.

Case Summary

[1] Following a traffic stop, Calvin Quertermous was charged with and convicted of Level 6 felony operating a vehicle while intoxicated ("OWI") and was found to have committed various traffic infractions. Quertermous raises numerous contentions on appeal, which we restate as whether (1) the trial court abused its discretion by allowing the State to amend the charging information; (2) the trial court abused its discretion in admitting certain evidence; (3) the trial court abused its discretion in sentencing Quertermous; (4) Quertermous's sentence is inappropriate; and (5) the trial court abused its discretion by ordering that Quertermous's bond be used to pay Quertermous's costs, fees, and fines. We affirm.

Facts and Procedural History

[2] On July 24, 2021, Posey County Sheriff's Deputy Bryan Hicks and Detective Kyle Reidford were driving in Posey County when they observed a red pickup truck with a badly-damaged license plate. Due to the condition of the license plate, Deputy Hicks activated his emergency lights and siren and attempted to initiate a traffic stop. The driver, who was subsequently identified as Quertermous, initially refused to pull over and continued driving for roughly 2100 feet. Once Quertermous stopped, he exited the vehicle without prompting from either Deputy Hicks or Detective Reidford.

[3] Deputy Hicks approached Quertermous and placed him in handcuffs. Detective Reidford approached the passenger side of the vehicle, spoke to the passenger, and instructed him to remain in the vehicle. As Deputy Hicks was speaking with Quertermous, Detective Reidford observed that Quertermous's eyes were red and glassy, his speech was slurred, and he had a hard time keeping his balance. Quertermous agreed to participate in three field-sobriety tests. Quertermous failed two of the tests and was unable to complete the third. After being informed of Indiana's Implied Consent law, Quertermous refused to submit to a certified test.

[4] On July 26, 2021, the State charged Quertermous with Count I – Level 6 felony OWI, Count II – Level 6 felony resisting law enforcement, Count III – Class A infraction driving while suspended, Count IV – Class C infraction open alcoholic beverage container during operation of a motor vehicle, Count V – Class C infraction improper display of a license plate, Count VI – Class C infraction driving left of center, Count VII – Class C infraction operating with expired plates, Count VIII – Class A infraction operating a motor vehicle without financial responsibility, and Count IX – Class C infraction driving without a valid driver's license. On February 9, 2022, the State amended the charging information for Count II. The State also alleged that Quertermous was a habitual offender.

[5] A jury trial was held on February 24, 2022, with the two felony counts presented to the jury.[1] At the conclusion of trial, the jury found Quertermous guilty of OWI as a Class C misdemeanor and not guilty of Level 6 felony resisting law enforcement. Quertermous subsequently admitted that he had a prior driving-related offense, which elevated his conviction from a Class C misdemeanor to a Level 6 felony. The trial court took the infractions under advisement and the State dismissed the allegation that Quertermous was a habitual offender.

[6] Quertermous was subsequently erroneously released from jail when his brother was allowed to post a bond for his release, despite the trial court's order that Quertermous be "remanded to the custody of the Sheriff and ordered held *without bond* pending sentencing." Appellant's App. Vol. II p. 42 (emphasis added). The error was quickly discovered, a warrant for Quertermous's arrest was issued, and, within hours of being released, Quertermous turned himself in. When he did, Quertermous's blood alcohol concentration was 0.223 milliliters of alcohol per 100 milliliters of blood.

[7] On March 23, 2022, the trial court found Quertermous guilty of Counts III, IV, V, VII, and IX and not guilty of Counts VI and VIII. The trial court waived the fines associated with the traffic infractions. With regard to the conviction for

[1] The infractions were not tried before the jury.

Level 6 felony OWI, the trial court sentenced Quertermous to two and one-half years of incarceration.

Discussion and Decision

[8] Quertermous raises numerous contentions on appeal, which we restate as whether (1) the trial court abused its discretion by allowing the State to amend the charging information; (2) the trial court abused its discretion in admitting certain evidence; (3) the trial court abused its discretion in sentencing Quertermous; (4) Quertermous's sentence is inappropriate; and (5) the trial court abused its discretion by ordering that Quertermous's bond be used to pay Quertermous's costs, fees, and fines.

I. Amendments to Charging Information

[9] "We review a trial court's decision on whether to permit an amendment to a charging information for an abuse of discretion." *Hobbs v. State*, 160 N.E.3d 543, 551 (Ind. Ct. App. 2020), *trans. denied*. Quertermous contends that the trial court abused its discretion by allowing the State to amend the charging information two weeks prior to trial. We need not decide whether the trial court abused its discretion in this regard, however, because the issue is moot.

> An issue is deemed moot when it is no longer 'live' or when the parties lack a legally cognizable interest in the outcome of its resolution. Accordingly, where the principal questions at issue cease to be of real controversy between the parties, the errors assigned become moot questions and this court will not retain jurisdiction to decide them. Stated differently, when we are

> unable to provide effective relief upon an issue, the issue is deemed moot, and we will not reverse the trial court's determination where absolutely no change in the status quo will result.

Jones v. State, 847 N.E.2d 190, 200 (Ind. Ct. App. 2006) (internal citations and quotations omitted).

[10] In arguing that the trial court abused its discretion, Quertermous asserts that the trial court should not have allowed the State to amend Count II or to add the habitual allegation. Quertermous was found not guilty of Count II following trial and the State dismissed the habitual allegation prior to consideration of whether Quertermous was a habitual offender. We agree with the State that given that Quertermous was found not guilty of Count II and was not found to be a habitual offender, "[t]here is no remedy that this Court [can] provide to Quertermous and reversing the trial court's decision to permit the State to amend the charging information would have absolutely no effect on Quertermous's conviction or sentence." Appellee's Br. p. 16. As such, the question of whether the trial court abused its discretion in allowing the amendments is no longer "live" as a reversal of the trial court's decision would result in absolutely no change in the status quo. Because we are unable to provide any effective relief on the issue, the issue is moot. *See Jones*, 847 N.E.2d at 200.

II. Admission of Evidence

[11] "A trial court exercises broad discretion in ruling on the admissibility of evidence, and an appellate court should disturb its rulings only where it is shown that the court abused its discretion." *Camm v. State*, 908 N.E.2d 215, 225 (Ind. 2009). "A trial court abuses its discretion when its ruling is either clearly against the logic and effect of the facts and circumstances before the court, or when the court misinterprets the law." *Williams v. State*, 43 N.E.3d 578, 581 (Ind. 2015). Quertermous contends that the trial court abused its discretion by admitting his booking photograph into evidence and by allowing the State to refer to Officer Hicks by name.

A. Booking Photograph

[12] Quertermous objected below to the admission of the booking photograph on the grounds of lack of foundation and lack of personal knowledge by the authenticating witness. On appeal, however, Quertermous argues that the trial court abused its discretion in admitting the booking photograph because "[t]here was no substantial evidentiary value to the booking photograph other than to imply criminal history."[2] Appellant's Br. p. 22. "It is well-settled law in Indiana that a defendant may not argue one ground for objection at trial and then raise new grounds on appeal." *Gill v. State*, 730 N.E.2d 709, 711 (Ind.

[2] While Quertermous filed a motion in limine prior to trial, the motion was denied and Quertermous did not renew the motion or object to the admission of the booking photograph at trial on the grounds of error argued on appeal.

2000). Doing so results in waiver and any subsequent review must be done "through the lens of fundamental error." *Hitch v. State*, 51 N.E.3d 216, 219 (Ind. 2016).

[13] The fundamental error exception "is extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *Halliburton v. State*, 1 N.E.3d 670, 678 (Ind. 2013) (internal quotation omitted). Quertermous, however, did not raise the issue of fundamental error in his appellate brief and has therefore waived the issue for appellate review. *See Curtis v. State*, 948 N.E.2d 1143, 1148 (Ind. 2011) ("Because Curtis failed to allege fundamental error in his principal appellate brief, the issue is waived.").

B. Reference to Deputy Hicks by Name

[14] Quertermous asserts that the trial court abused its discretion by allowing the State to refer to Deputy Hicks by name because

> Deputy Bryan Hicks was shot in the line of duty in connection with a separate, unrelated matter. Community support for Deputy Hicks has been overwhelming. As such, the inclusion of evidence naming Deputy Hicks was prejudicial in that the jury's support for Deputy Hicks due to his injuries and significant recovery time caused the jury to overestimate the value of Deputy Hicks's actions based upon their passion and sympathy.
>
> Deputy Hicks's identification by name served no probative value to the furtherance of the remaining evidence available to the State and served only to prejudice [Quertermous] at trial.

Appellant's Br. p. 21. Quertermous, however, did not object to any reference to Deputy Hicks's name at trial.[3] The Indiana Supreme Court "has consistently held that in order to preserve error in the overruling of a pre-trial motion in limine, the appealing party also must have objected to the admission of the evidence at the time it was offered." *Clausen v. State*, 622 N.E.2d 925, 927 (Ind. 1993). "Failure to object at trial to the admission of the evidence results in waiver of the error." *Id*. Because Quertermous failed to object to any of the references to Deputy Hicks by name at trial, he has waived his contention that the trial court abused its discretion in this regard. Further, as was the case with the admission of the booking photograph, Quertermous did not raise the issue of fundamental error in his appellate brief and has therefore waived the issue for appellate review. *See Curtis*, 948 N.E.2d at 1148.

III. Sentencing Issues

A. Abuse of Discretion

[15] Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *modified on other grounds on reh'g*, 875 N.E.2d 218 (Ind. 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

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[3] Quertermous filed a motion in limine prior to trial, seeking to bar any mention of Deputy Hicks's name at trial. The trial court granted the motion in part and ordered the State to refrain from mentioning Deputy Hicks's hospitalization or that he received his injury in the line of duty. Quertermous did not renew his motion or object to any reference to Deputy Hicks's name at trial.

reasonable, probable, and actual deductions to be drawn therefrom." *Id.* (quotation omitted).

> We review for an abuse of discretion the court's finding of aggravators and mitigators to justify a sentence, but we cannot review the relative weight assigned to those factors. When reviewing the aggravating and mitigating circumstances identified by the trial court in its sentencing statement, we will remand only if 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.

Baumholser v. State, 62 N.E.3d 411, 416 (Ind. Ct. App. 2016) (internal citation and quotation omitted).

> A single aggravating circumstance may be sufficient to enhance a sentence. When a trial court improperly applies an aggravator but other valid aggravating circumstances exist, a sentence enhancement may still be upheld. The question we must decide is whether we are confident the trial court would have imposed the same sentence even if it had not found the improper aggravator.

Id. at 417 (internal quotation omitted).

[16] Indiana Code section 35-50-2-7(b) provides that a person who commits a Level 6 felony "shall be imprisoned for a fixed term of between six (6) months and two and one-half (2½) years, with the advisory sentence being one (1) year." Thus, in sentencing Quertermous to two and one-half years, the trial court imposed the maximum sentence permitted by statute. Quertermous

acknowledges that the sentence imposed by the trial court was within the range permitted by statute. He argues that the trial court abused its discretion by considering two improper aggravators.

[17] First, Quertermous argues that because his OWI conviction was elevated from a Class C misdemeanor to a Level 6 felony by virtue of a prior OWI conviction, the trial court erred in finding a past OWI conviction to be an aggravating circumstance. In support, Quertermous cites to *Davis v. State*, 851 N.E.2d 1264, 1267 (Ind. Ct. App. 2006), in which we reiterated that "a fact that comprises a material element of the offense may not also constitute an aggravating circumstance to support an enhanced sentence." However, review of the record reveals that the trial court did not specifically find the prior OWI conviction that was used as the qualifying conviction to elevate Quertermous's conviction from a Class C misdemeanor to a Level 6 felony to be an aggravating circumstance but, rather, found Quertermous's complete criminal history to be an aggravating circumstance.

[18] Indiana Code section 35-38-1-7.1(a)(2) provides that a trial court may consider the fact that a person has "a history of criminal or delinquent behavior" to be an aggravating circumstance. In finding Quertermous's criminal history to be an aggravating circumstance, the trial court stated,

> Sir, obviously your criminal history is a huge, uh, deterrent to your sentence, uh, and certainly warrants an aggravated sentence.… [A]ll your prior convictions, uh, that includes all the other arrests and convictions, Sir, especially for the OWI's, uh, that were outlined in there, I also counted six, I think that was

> the number that the [S]tate came up with. With regards to prior incidences you've had, clearly alcohol is a substantial factor in your life, Sir. Uh, in fact the first thing that you did when you got out, and I'm gonna come back and talk about you getting out in a minute, uh, was to go out and, you know, basically hit yourself a bender because you weren't gonna go back to jail sober. I mean those were your words and you didn't deny them.… So that clearly is … an aggravating factor in this matter, Sir.

Tr. Vol. II p. 166. The trial court's statement makes it clear that it considered Quertermous's complete criminal history, including Quertermous's numerous prior alcohol-related arrests and convictions, when sentencing Quertermous. Excluding the prior conviction that was used as the basis for enhancing the level of his crime from a Class C misdemeanor to a Level 6 felony, Quertermous's criminal history includes five other OWI-type convictions, one OWI charge with the disposition unknown,[4] and yet another case where the OWI charge was dismissed. These convictions and arrests are in addition to Quertermous's prior convictions for reckless driving, auto theft, check deception, battery, criminal recklessness committed with a deadly weapon, and sexual exploitation of a child. We cannot say that the trial court abused its discretion in finding Quertermous's criminal history to be an aggravating circumstance.

[4] This OWI charge stems from an arrest in Kentucky.

[19] Quertermous also argues that the trial court erred in finding his behavior while briefly out on bail to be an aggravating circumstance. In discussing Quertermous's behavior, the trial court stated

> in fact, *if it was an aggravating factor*, Sir, I'd find it as an aggravating factor. Uh, because again, the character and attitude of what you did when you got out of jail, even for the short time that you were out of jail, was to run right back to what got ya in trouble in the first place.

Tr. Vol. II p. 167 (emphasis added). Contrary to Quertermous's claim, the trial court did not find Quertermous's behavior while out on bail to be an aggravating circumstance, but rather merely stated that it would if it could.[5]

[20] Furthermore, even if the trial court had improperly considered Quertermous's behavior while out on bail to be an aggravating circumstance, the Indiana Supreme Court has held that "[a] single aggravating circumstance may be sufficient to enhance a sentence." *Hackett v. State*, 716 N.E.2d 1273, 1278 (Ind. 1999). "When a trial court improperly applies an aggravator but other valid aggravating circumstances exist, a sentence enhancement may still be upheld." *Id*. We are confident that, given Quertermous's significant criminal history, the

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[5] While Quertermous's behavior while out on bail arguably does not fall within the statutorily-defined aggravating circumstances, Indiana Code section 35-38-1-7.1(c) states that the statutorily-listed criteria are not exclusive and do "not limit the matters that the court may consider in determining the sentence." *See also Hildebrandt v. State*, 770 N.E.2d 355, 363 (Ind. Ct. App. 2002) (providing that the trial court is not only limited to considering the statutory factors and circumstances listed in Indiana Code section 35-38-1-7.1 when imposing a sentence). We agree with the State that Quertermous's actions during his brief release from incarceration were a relevant factor that the court could consider as it demonstrated Quertermous's character and his likely future behavior.

trial court would have imposed the same sentence regardless of whether it considered Quertermous's behavior while briefly out on bail to be an aggravating circumstance.

B. Appropriateness

[21] Indiana Appellate Rule 7(B) provides that "The Court 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." In analyzing such claims, we "concentrate less on comparing the facts of [the case at issue] to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character." *Paul v. State*, 888 N.E.2d 818, 825 (Ind. Ct. App. 2008) (internal quotation omitted). The defendant bears the burden of persuading us that his sentence is inappropriate. *Sanchez v. State*, 891 N.E.2d 174, 176 (Ind. Ct. App. 2008).

[22] Again, Quertermous was convicted of Level 6 felony OWI and was sentenced to a maximum two-and-one-half-year sentence. In arguing that his sentence is inappropriate, Quertermous argues that "[t]here was no evidence presented that [his] offense is any more egregious than the 'typical' version of the offense of [OWI] having had a prior conviction that would justify a sentence above the advisory." Appellant's Br. p. 25. As the State points out, however, at the time of his arrest, not only was Quertermous intoxicated, he also committed a number of "additional offenses that made his operation of a vehicle unsafe for

himself, his passenger, and other drivers on the road." Appellee's Br. pp. 33–34.

[23] As for his character, Quertermous's criminal history includes at least thirteen prior convictions with misdemeanor convictions for operating a vehicle without a license or registration, driving under the influence, check deception, operating while intoxicated endangering a person, and auto theft, as well as convictions for battery and sexual exploitation of a child[6] and felony convictions for driving under the influence, operating a vehicle while intoxicated with a prior conviction, and criminal recklessness committed with a deadly weapon. Quertermous was found to be a "high" risk to reoffend. Appellant's App. Vol. II p. 48.

[24] It is also apparent from the record that Quertermous has serious and long-running substance-abuse issues. Quertermous admitted to having an alcohol problem, stating that he drinks "every chance he can get." Appellant's App. Vol. II p. 49. During his brief release from incarceration, Quertermous knew he would be going back to jail and indicated that "he was not going in sober." Appellant's App. Vol. II p. 49. Quertermous also reported that prior attempts at treatment for his substance-abuse issues have been unsuccessful. Further, while Quertermous acknowledged that "what [he] did was wrong" and "apologize[d] for [his] mistake," Tr. vol. II p. 158, the trial court found that he

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[6] The battery and sexual exploitation convictions are from Illinois, and we are unable to ascertain from the record the level of crime that these convictions reflected.

was "two steps short" of taking full responsibility for his actions. Tr. Vol. II p. 168. Quertermous has failed to convince us that his two-and-one-half-year sentence is inappropriate in light of either the nature of his offense or his character.

IV. Application of Bond to Costs and Fees

[25] Both the amount of bail and the manner of executing bail are within the discretion of the trial court. *Winn v. State*, 973 N.E.2d 653, 656 (Ind. Ct. App. 2012). "Indiana Code section 35-33-8-3.2(a)(2) authorizes the trial court to retain all or a part of the cash or securities of the defendant's bond toward the payment of fines, costs, and fees." *Kimbrough v. State*, 911 N.E.2d 621, 638 n.7 (Ind. Ct. App. 2009). A defendant is made aware that his bond may be retained as Indiana Code section 35-33-8-3.2(a)(2) requires the defendant to execute "an agreement that allows the court to retain all or a part of the cash or securities to pay fines, costs, fees, and restitution that the court may order the defendant to pay if the defendant is convicted" prior to release. There is no allegation that Quertermous did not execute the required agreement alerting him of the possibility that his bond could be retained by the court to pay costs, fees, and fines.

[26] In arguing that the trial court abused its discretion by ordering that his bond be applied to attorney's costs, fees, and fines, Quertermous asserts that

> [His] bond was posted and accepted by the Posey County Jail, and [he] was released despite the jury's finding of guilt and the trial court's remand. [He] surrendered himself when he learned

> of the error. The error here was on the part of the Posey County Jail. [His] brother's money should never have been accepted. [His] bond money should be returned to the holder of the bond receipt as it was posted and accepted in error.

Appellant's Br. p. 27. We disagree. Quertermous knew, or at least should have known, that his bond might be retained. We cannot say that the trial court abused its discretion by ordering that Quertermous's bond be retained and applied to costs, fees, and fines.

[27] The judgment of the trial court is affirmed.

Pyle, J., and Tavitas, J., concur.