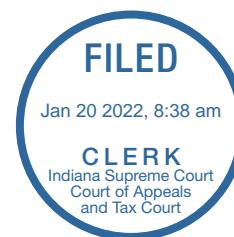


MEMORANDUM DECISION

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.



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IN THE COURT OF APPEALS OF INDIANA

Kristopher Darrah Long,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 20, 2022

Court of Appeals Case No.
21A-CR-1713

Appeal from the Pulaski Superior
Court

The Honorable Crystal A. Kocher,
Judge

Trial Court Cause No.
66D01-2001-F5-3

Altice, Judge.

Case Summary

- [1] Kristopher D. Long pled guilty to Level 6 felony possession of methamphetamine, and the trial court sentenced him to 912 days in the Pulaski County Jail. He argues that the trial court abused its discretion in failing to find certain mitigating factors and that his sentence is inappropriate in light of the nature of the offense and his character.
- [2] We affirm.

Facts & Procedural History

- [3] Long, age forty-three at the time of the instant offense, began using drugs as a teenager, when his parents died a few years apart. Over the years, Long would achieve periods of sobriety and then relapse. During the periods when he was abusing drugs, Long had various arrests, criminal charges, and convictions. He stayed sober from 2004 to 2018, but in 2018 resumed using drugs, including methamphetamine, with his wife.
- [4] In October 2019 he was charged in Cass County under cause number 09D01-1910-F5-59 (the Cass County case) with eight offenses. In December 2019, he entered into a plea agreement, which was filed with the court, pleading guilty to Count 1, Level 5 felony disarming a law enforcement officer; Count 3, Level 5 felony battery resulting in bodily injury to a public safety official; and Count 5, Level 6 felony auto theft. The agreement provided that, for Counts 1 and 3, he would be sentenced to four years each in the Indiana Department of Correction (DOC), with two years served through community corrections if eligible and

approved, and for Count 5, he would be sentenced to one year in the DOC; all counts would run concurrently. The matter was set for a sentencing hearing on January 2, 2020, but Long failed to appear, and the Cass Superior Court issued an arrest warrant.

[5] On January 25, 2020, the Pulaski County Sheriff's Department (PCSD) received a call reporting that Long was staying with friends in Medaryville in Pulaski County. That day, several PCSD law enforcement officers went to the identified residence, arrested Long without incident on the outstanding warrant, and transported him to the Pulaski County Jail. PCSD thereafter obtained a search warrant for the home and seized items from the bedroom where Long was staying.

[6] On January 28, 2020, the State charged Long, in the instant case, with Level 5 felony possession of methamphetamine and Class C misdemeanor possession of paraphernalia. On June 23, 2020, the State amended the charging information to add a third count, Level 6 felony possession of methamphetamine. At a February 12, 2021 status hearing, Long pled guilty without a written agreement to the third count, and sentencing was left to the court's discretion. The trial court accepted Long's plea and set the matter for a sentencing hearing.

[7] The sentencing hearing began on June 25, 2021 and continued on July 22, 2021. Long candidly admitted to struggling with addiction issues most of his life but testified that he remained clean and sober from 2004 to 2018 and was gainfully employed during that time. Long described that in 2018 he started

“doing meth” again with his wife during what he described as a “toxic” marriage. *Transcript* at 93.

[8] Long testified that while waiting for sentencing he had completed a number of programs in jail, including cognitive restructuring/relapse prevention classes through the Betty Ford Hazelden Foundation, Thinking for Good Program, mental health therapy through Floyd County, and Amazing Facts Bible School, and he had enrolled in a Wellness Recovery Action Plan. He also testified that he had been a trustee in the Pulaski County Jail for about ten months, been on a COVID cleaning crew, helped with jail laundry, worked in the kitchen, washed cars for police, and cleaned cells for mentally challenged inmates. As to his various involvements, he explained, “I’m trying to make amends for what I’ve done.” *Id.* at 94.

[9] Long testified that he had not spoken to his wife in three years “because of the drugs” and intended to file for divorce. *Id.* at 93. He requested the court place him on work release, followed by house arrest, and then probation. Long provided the names of specific therapists and group leaders who had given him their personal phone numbers to help him maintain sobriety, and he identified an individual who would be willing to be his sponsor in his goal to remain sober. He testified that, if work release was ordered, he possessed a driver’s license and could get himself to and from work, and he provided the name of an individual and an address where he could stay if house arrest was approved by the court. When asked on cross-examination why he failed to appear in Cass County for sentencing, Long stated that he was using drugs, homeless, and was

“just scared” as he “knew [he] was going to have to do the 18 months’ incarceration.” *Id.* at 96-97.

[10] The defense also called as a witness Long’s former employer, Gary Sibert. Sibert was age seventy, owned a construction company, and had contacted Long’s attorney to volunteer to speak on Long’s behalf. Sibert stated that Long had worked for him directly for at least five to seven years, plus sometimes as a subcontractor, and that – when sober – Long was a “very, very hard worker,” was always on time, and was a good “team player” who worked well with other crew members. *Id.* at 105.

[11] The State argued that Long had a criminal history that included four felonies and six misdemeanors and that he committed the instant offense when out on bond and awaiting sentencing in the Cass County case. Maintaining that the aggravators outweighed any mitigating factors, the State urged that Long ought to receive the maximum sentence. Counsel for Long, on the other hand, urged that Long was a reliable worker and a good person who had addiction issues, highlighting that he stayed clean until his “dysfunctional breakup of his dysfunctional marriage” in 2018. *Id.* at 110. Counsel asked the court to sentence Long to work release. The court took the matter under advisement, specifically stating that there was “a lot of evidence, some exhibits” to consider. *Id.* at 113.

[12] The sentencing hearing resumed on July 22, 2021. The court began by stating that it had considered “everything that was included in the PSI, all the evidence

that was submitted during sentencing as well as recommendations of the probation officer, of your attorney, of the State,” and it added, “I took a long time looking at these things and thinking about them from different angles.” *Id.* at 118.

[13] The court found, and Long confirmed, that he had been incarcerated in the Pulaski County Jail for 545 days (January 25, 2020 to July 22, 2021) which was 1090 days with good time credit. The court then sentenced Long to 912 days, which is the maximum for his Level 6 felony, all executed in the Pulaski County Jail. The court stated that, in reaching its decision, the court considered as aggravating (1) Long’s criminal history and (2) he recently admitted to violating probation in another case. The court found as mitigating that “the crime didn’t threaten or cause serious harm to a person.” *Id.* at 119. The court stated that it was applying the credit time Long earned while in the Pulaski County Jail to the present case, rather than to the Cass County case as Long had requested.¹

[14] In closing, the court took the opportunity to further comment:

I know you’re disappointed, but what I want to say to you, Mr. Long, is I [] took a lot of time going through the readout prevention plan that you have. I read every word that you wrote and I went through all of your certificates, your information, [a]nd I – I’m proud of the progress that you have made. You’ve

¹ Prior to sentencing, Long had filed a Petition for Credit Time Treatment, asking the trial court “to apply [Long]’s jail time credit against his Cass County sentence” and not to the sentence in the instant case. *Appellant’s Appendix Vol. 2* at 46.

got a long way to go. I do think that this is the best way to move you forward through transition, and I do honestly think . . . you have the potential to keep moving forward and . . . as long as you stay on the right track and you get the right treatment and help.

I was very impressed by your employer coming in here and saying the things that he said, because that says to me someone [] is willing to stick their neck out for you and say that [he] sees or has seen at least the potential that you have and who you can be on a permanent basis. And I think you can do that, right? So those are the things that impressed me about you. I think you have this - that potential. But considering all of the things I had to consider, that's going to be the sentence of the Court.

Id. Long now appeals. Additional information will be provided as needed.

Discussion & Decision

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. “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 to be drawn therefrom.” *Id.* 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) (citing *Anglemyer*, 868 N.E.2d at 490-91), *trans. denied*.

[16] The finding of mitigating circumstances is not mandatory but is within the discretion of the trial court. *Page v. State*, 878 N.E.2d 404, 408 (Ind. Ct. App. 2007), *trans. denied*. One way a trial court abuses its discretion is by not recognizing mitigators that are clearly supported by the record and advanced for consideration. *Wert v. State*, 121 N.E.3d 1079, 1084 (Ind. Ct. App. 2019), *trans. denied*. However, a trial court is not obligated to accept the defendant’s contentions as to what constitutes a mitigating circumstance or to give the same weight to a proposed mitigator as the defendant does. *Hunter v. State*, 72 N.E.3d 928, 935 (Ind. Ct. App. 2017), *trans. denied*. Nor is the court required to explain why it did not find a factor to be significantly mitigating. *Page*, 878 N.E.2d at 408.

[17] Long argues that the trial court failed to consider significant mitigating factors, namely, “Long’s good character, pre-sentencing rehabilitation, substance abuse history, [and] remorse.” *Appellant’s Brief* at 10. The record reveals that, contrary to his assertion, the trial court, before imposing the sentence, carefully considered the testimony and evidence presented, which included Long’s history of substance abuse, his participation in and completion of programs intended to increase chances for success at sobriety, his desire to try to make amends for his poor decisions, and his former employer’s positive reviews about Long’s character and work ethic. Indeed, the court took the matter under advisement in order to have time to review all it had been presented with.

When the hearing resumed, the court expressly stated that it had given the testimony and exhibits, as well as argument of counsel, considerable thought and attention. The court commended Long on his efforts and specifically noted that it was impressed by the fact that Long's former employer sought out the opportunity to testify on Long's behalf. The court did not overlook or fail to consider Long's character, his pre-sentence participation in programs, his substance abuse history, or his remorse.

[18] To the extent that Long's argument is that the court did not give proper weight to the mitigators, our Supreme Court has directed "that we cannot review the relative weight assigned to" mitigating and aggravating factors. *See Baumholser*, 62 N.E.3d at 416 (citing *Anglemyer*, 868 N.E.2d at 491). That is, "[b]ecause the trial court no longer has any obligation to 'weigh' aggravating and mitigating factors against each other when imposing a sentence, . . . a trial court cannot now be said to have abused its discretion in failing to 'properly weigh' such factors." *Anglemyer*, 868 N.E.2d at 491.

[19] Long also argues that the court failed to consider his guilty plea as a mitigating factor. Long is correct that our Supreme Court has held that a guilty plea is considered to be a mitigating circumstance. *See Francis v. State*, 817 N.E.2d 235, 237-38 (Ind. 2004). However, "a trial court does not necessarily abuse its discretion when it does not announce that it is considering a defendant's guilty plea as a mitigating factor, because the guilty plea may not be due significant mitigating weight." *Smith v. State*, 908 N.E.2d 1251, 1254 (Ind. Ct. App. 2009). That is, the significance of a guilty plea as a mitigating factor varies from case

to case, and a guilty plea may not be significantly mitigating when the defendant receives a substantial benefit in return for the plea. *Id.* (quotation omitted). Here, Long exchanged his guilty plea to a Level 6 felony for the dismissal of a Level 5 felony and a Class C misdemeanor. This provided a considerable benefit to Long, and we cannot say the trial court abused its discretion in not finding that Long's guilty plea was a substantial mitigating circumstance.

[20] For all these reasons, Long has failed to establish that the trial court abused its discretion with regard to its treatment of Long's proposed mitigators.

Inappropriate Sentence

[21] Long also contends that his sentence is inappropriate. Pursuant to Ind. Appellate Rule 7(B), 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 offenses and the character of the offender. Indiana's flexible sentencing scheme allows trial courts to tailor a sentence to the circumstances presented, and 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 question under App. Rule 7(B) is not whether another sentence is more appropriate; rather, the test is whether the sentence imposed is inappropriate. *Miller v. State*, 105 N.E.3d 194, 196 (Ind. Ct. App. 2018). Long bears the

burden of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

[22] When considering the nature of the offense, the advisory sentence is the starting point to determine the appropriateness of a sentence. *Baumholser*, 62 N.E.3d at 418. Long was convicted of a Level 6 felony, the sentencing range for which is six months to two and one-half years, with the advisory sentence being one year. Ind. Code § 35-50-2-7. The trial court sentenced Long to the maximum of 912 days (two and one-half years), and Long urges that, given the nature of the offense and his character, an appropriate sentence would be the advisory sentence.

[23] When reviewing the nature of the offense we look to the details and circumstances of the offense and the defendant's participation therein. *Madden v. State*, 162 N.E.3d 549, 564 (Ind. Ct. App. 2021). Here, methamphetamine was found in Long's belongings in the room where he was staying. Long highlights that his offense involved no violence and stemmed from his possession of methamphetamine residue – with “no actual weight.” *Appellant's Brief* at 13. The State, on the other hand, emphasizes that Long brought methamphetamine into the home of friends who had given him a place to stay and the opportunity to earn income by doing work on the home. After only a couple of days, Long's behavior caused the friends to suspect that he was on drugs and to contact authorities. While the nature of his offense was not particularly aggravating, we turn to his character.

[24] We conduct our review of a defendant's character by engaging in a broad consideration of his qualities. *Madden*, 162 N.E.3d at 564. In urging us to reduce his sentence, Long emphasizes that, at all times, he "was cooperative and respectful," he used all his time in jail to work on pre-sentencing rehabilitation, and he was a known hard worker and a valued employee. *Appellant's Brief* at 14.

[25] Character is found in what we learn of the offender's life and conduct. *Perry v. State*, 78 N.E.3d 1, 13 (Ind. Ct. App. 2017). It is well settled that a defendant's criminal history is a relevant factor in analyzing character. *Madden*, 162 N.E.3d at 564. Long's criminal history spans over twenty-five years. As a juvenile, he was adjudicated delinquent for having committed what would have been Class D felony theft if committed by an adult. As an adult, Long has four felony convictions, including dealing in marijuana within 1000 feet of a school, intimidation, and possession of methamphetamine, and six misdemeanor convictions, including driving while suspended, resisting law enforcement, and theft. He has had probation revoked on at least four occasions. Long's most recent convictions in the Cass County case include Level 5 felony disarming a law enforcement officer and Level 5 felony battery causing bodily injury to a law enforcement officer. And he committed the current offense while out on bond awaiting sentencing in the Cass County case.

[26] Although Long was sober from 2004 to 2018, we observe that he committed criminal offenses during that time frame, including Class C misdemeanor failure to stop after accident resulting in property damage and Class A

misdemeanor check deception. Other charges were brought and dismissed during that time as well. We agree with the State that “Long’s repeated and consistent disregard for the law does not portray his character in ‘a positive light,’ which is his burden under Rule 7(B).” *Appellee’s Brief* at 16 (citing *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015)). Long has failed to establish that his character warrants revision of his sentence.

[27] In sum, upon considering the nature of the offense and Long’s character, we do not find that his sentence is inappropriate. *See Schaadt v. State*, 30 N.E.3d 1, 4 (Ind. Ct. App. 2015) (finding App. Rule 7(B) sentence revision was not warranted where, although “the nature of [defendant]’s offenses were not particularly aggravating and alone might not support the sentence imposed,” his character was significantly aggravating), *trans. denied*. Although another trial judge might well have decided upon a lower sentence, that is not our standard of review. *See Miller*, 105 N.E.3d at 196 (the question is whether the sentence imposed is inappropriate, not whether another sentence is more appropriate).

[28] Judgment affirmed.

Mathias, J., concur.

Bailey, J., concurring in result without opinion.