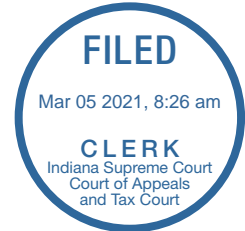

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IN THE
COURT OF APPEALS OF INDIANA

Christopher M. Hubbert,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

March 5, 2021

Court of Appeals Case No.
20A-CR-1617

Appeal from the
Bartholomew Superior Court

The Honorable
James D. Worton, Judge

Trial Court Cause No.
03D01-2001-F2-381

Vaidik, Judge.

Case Summary

- [1] Christopher M. Hubbert appeals his eighteen-year executed sentence for Level 2 felony dealing in methamphetamine, arguing it is inappropriate in light of the nature of the offense and his character. We agree and reverse.

Facts and Procedural History

- [2] In September 2019, Columbus Police Department officers received information from a confidential informant that Hubbert, then forty years old, was dealing methamphetamine. Officers set up three controlled buys through the confidential informant. Two of the buys occurred in September, with Hubbert selling between five and ten grams of methamphetamine to the confidential informant for \$175 and \$200, respectively. The third buy occurred in October in a Bartholomew County public library, where Hubbert sold the confidential informant over ten grams of methamphetamine for \$275.¹
- [3] In January 2020, the State charged Hubbert with three counts of dealing in methamphetamine—one Level 2 felony (for dealing over ten grams of methamphetamine) and two Level 3 felonies (for dealing between five and ten grams of methamphetamine). Thereafter, the State and Hubbert entered into a plea agreement under which Hubbert would plead guilty to the Level 2 felony in exchange for the dismissal of the other two counts and charges filed in another case (No. 03D01-2001-F6-380).² Sentencing was left to the discretion of the trial court.

¹ The exact amount of methamphetamine sold in each buy is not clear from the record. However, the amount sold in the first two buys was between five and ten grams each time. And the total amount of methamphetamine sold over the three buys was “about twenty-six grams.” Tr. Vol. II p. 32. This means the amount sold on the third buy was between ten and sixteen grams.

² That case appears to have stemmed from Hubbert’s January 2020 arrest in this case. After being taken into custody, Hubbert was found in possession of methamphetamine, marijuana, and paraphernalia. He was

[4] The sentencing hearing was held in August 2020. Hubbert claimed he is “not really a dealer” but got into that “situation” due to his “habit.” Tr. Vol. II p. 21. He stated he is visually impaired and believed this allowed others to take “advantage of [him.]” *Id.* Furthermore, he testified that because of his visual impairment and need for assistance, he was confined “in isolation down in the medical unit” of the jail for most of the day, which prevents him from “addressing [his] problem.” *Id.* at 34. He asked the court to assign a portion of his sentence to community corrections or another program where he could receive treatment and get “help with [his] addiction.” *Id.* at 22. The prosecutor acknowledged Hubbert is “blind” but argued that is not a “get out of jail free card” and asked the court to impose a “sentence in the Department of Correction[.]” *Id.* at 37, 39.

[5] The presentence investigation report shows Hubbert has two prior convictions, both in 2017: Level 6 felony unlawful possession of a syringe and Level 6 felony possession of methamphetamine. For the possession of methamphetamine, the court sentenced Hubbert to time served. For the unlawful possession of a syringe, the court sentenced Hubbert to one year in the Bartholomew County Jail, suspended, and one year of probation, with a condition of undergoing substance-abuse treatment. However, that probation was revoked after he “violated by testing positive for illegal substances.” Appellant’s App. Vol. II p.

charged with a Level 6 felony for the methamphetamine and two misdemeanors for the marijuana and paraphernalia.

48. The PSI also indicates that Hubbert’s overall risk-assessment score using the Indiana Risk Assessment System places him in the low risk to reoffend category. The probation department made no recommendation as to the length of Hubbert’s sentence, but it did recommend that “as a condition of any probation” he be placed in community corrections “for the entire term of probation” and complete a “substance use evaluation and follow recommended treatment.” *Id.* at 48.

[6] The trial court identified the following aggravators: (1) Hubbert has a criminal history; (2) he has previously been on probation and had it revoked; (3) he had prior “opportunity for treatment” that was unsuccessful; and (4) he sold methamphetamine in a public library. Tr. Vol. II p. 39. As mitigators, the court found Hubbert pled “guilty to the highest count charged” and is visually impaired, which the court found to be a “significant” mitigator. *Id.* at 40. Finally, the court noted the PSI indicates Hubbert to be at a low risk to reoffend. The trial court sentenced Hubbert to eighteen years, all to be served in the DOC.

[7] Hubbert now appeals.

Discussion and Decision

[8] Hubbert contends his eighteen-year sentence, fully executed, is inappropriate and asks us to reduce it pursuant to Indiana Appellate Rule 7(B), which provides an appellate 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.” “Whether a sentence is inappropriate ultimately turns on the culpability of the defendant, the severity of the crime, the damage done to others, and a myriad of other factors that come to light in a given case.” *Thompson v. State*, 5 N.E.3d 383, 391 (Ind. Ct. App. 2014) (citing *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008)). In assessing whether a sentence is inappropriate, appellate courts may consider whether a portion of the sentence is ordered suspended or is otherwise crafted using any of the variety of sentencing tools available to the trial judge. *Davidson v. State*, 926 N.E.2d 1023, 1025 (Ind. 2010). These tools include probation, home detention, placement in a community-corrections program, and executed time in a DOC facility. *Id.* Because we generally defer to the judgment of trial courts in sentencing matters, defendants must persuade us their sentences are inappropriate. *Schaaf v. State*, 54 N.E.3d 1041, 1044-45 (Ind. Ct. App. 2016).

[9] Hubbert pled guilty to Level 2 felony dealing in methamphetamine. A person who commits a Level 2 felony shall be imprisoned for a fixed term of between ten and thirty years, with the advisory sentence being seventeen-and-a-half years. Ind. Code § 35-50-2-4.5. Hubbert received an above-advisory sentence of eighteen years, fully executed in the DOC.

[10] Regarding the nature of the offense, we are obviously troubled Hubbert conducted a drug deal in a public library, although we note the amount of methamphetamine sold was only a small amount over what was needed to

make this a Level 2 felony. But as to Hubbert’s character, we believe the record supports his contention that his addiction is the underlying source of his criminal behavior. Hubbert had no criminal convictions until he was almost forty years old, when he received two convictions related to possession of illegal substances. It does not appear he served any time in the DOC for these convictions, instead receiving time served and probation. This suggests he is not a “professional drug dealer.” *See McFall v. State*, 71 N.E.3d 383, 390 (Ind. Ct. App. 2017) (defendant’s limited criminal history suggests she is an addict, rather than a “professional drug dealer”). He is considered at a low risk to reoffend according to the Indiana Risk Assessment System. And while the trial court is correct that Hubbert previously had one opportunity to receive substance-abuse treatment while on probation and failed, we do not believe one such failure should preclude future opportunities to reform. In fact, although the probation department did not recommend a sentence length, it did recommend any probation time be served in community corrections and include substance-abuse evaluation and treatment. Finally, Hubbert is visually impaired, which the trial court found to be a “significant” mitigator. And the record indicates his impairment substantially affects his opportunities while incarcerated. *See Moyer v. State*, 796 N.E.2d 309, 314 (Ind. Ct. App. 2003) (reducing sentence of defendant who had serious illness “requir[ing] constant medical attention” the jail could not provide).

[11] For these reasons, Hubbert has convinced us that an eighteen-year executed sentence is inappropriate. Accordingly, we reverse and remand to the trial court

to impose a sentence of eighteen years, with four years executed in the DOC. The remaining years are to be served on probation with substance-abuse counseling and placement in community corrections.

[12] Reversed and remanded.

Brown, J., and Pyle, J., concur.