## 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

Dillon Clem,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff.*

May 20, 2022

Court of Appeals Case No. 22A-CR-124

Appeal from the Posey Circuit Court

The Honorable Craig S. Goedde, Judge

Trial Court Cause No. 65C01-2107-F5-389

**Bradford, Chief Judge.**

# Case Summary

[1] Dillon Clem was convicted of Class C felony child molesting in 2011 and was convicted of Class D felony failure to register as a sex offender in 2017. He has since been convicted of Level 5 felony failure to register as a sex offender on three separate occasions. This appeal stems from the most recent of these convictions, following which the trial court sentenced Clem to a three-year term in the Department of Correction ("DOC"). Clem challenges his sentence, arguing that it is inappropriate. For its part, the State contends that Clem has waived appellate review of his sentence. We affirm.

# Facts and Procedural History

[2] In 2011, Clem was convicted of Class C felony child molesting. He was convicted of Class D felony failure to register as a sex offender in 2014. He was also convicted of Level 5 felony failure to register as a sex offender in 2016 and 2018.

[3] On July 8, 2021, the State charged Clem with Level 5 felony failure to register as a sex offender. The State also alleged that Clem was a habitual offender. On November 9, 2021, Clem entered into a guilty plea by the terms of which he agreed to plead guilty to the charge of Level 5 felony failure to register as a sex offender. Pursuant to the terms of the plea agreement, the parties agreed that Clem's sentence would be: "Three (3) years total to be served as follows: Two (2) years executed at the [DOC] and One (1) year with the Court to determine

placement and parties to argue for appropriate placement." Appellant's App. Vol. II p. 14. In agreeing to this sentence, Clem signed the following acknowledgment: "I understand and agree that the sentence recommend and/or imposed herein is the appropriate sentence to be served pursuant to this agreement, and I hereby waive any future request to modify the sentence under I.C. 35-38-1-17." Appellant's App. Vol. II p. 15. In exchange for Clem's guilty plea, the State agreed to dismiss the habitual offender enhancement and an unrelated criminal case. The trial court accepted Clem's guilty plea and entered a judgment of conviction on the Level 5 felony charge.

[4] The trial court conducted a sentencing hearing on December 29, 2021. Following conclusion of the hearing, the trial court sentenced Clem as follows: "Count 1 – Two (2) years executed in the [DOC] as agreed upon by the parties, and an additional One (1) year executed at the [DOC] for a total aggregate sentence of Three (3) years executed in the [DOC]." Appellant's App. Vol. II p. 27. The trial court's order further stated that "[t]he Defendant is advised of his right to appeal the part of the sentence imposed by the Court (one (1) year) but not the part of the sentence agreed upon by the parties (two (2) years) in this cause." Appellant's App. Vol. II p. 28 (emphasis omitted).

# Discussion and Decision

[5] Clem contends that his three-year sentence, all of which the trial court ordered executed in the DOC, is inappropriate. Indiana Appellate Rule 7(B) provides that "[t]he 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).

[6] Clem pled guilty to Level 5 felony failure to register as a sex offender. "A person who commits a Level 5 felony … shall be imprisoned for a fixed term of between one (1) and six (6) years, with the advisory sentence being three (3) years." Ind. Code § 35-50-2-6(b). In pleading guilty, Clem and the State agreed that Clem would be sentenced to a three-year sentence. As such, the parties' agreed that Clem would receive the advisory sentence for Clem's offense. The parties' agreement indicated that two years of Clem's sentence would be executed in the DOC and Clem's placement for the third year would be left to the discretion of the trial court.

[7] In challenging the appropriateness of his sentence, Clem asserts that the trial court "overlooked [his] mitigating factors and sentenced him to the advisory sentence of three (3) years on his Level 5 Felony rather than departing downward and ordering [him] to serve the final one (1) year on probation."

Appellant's Br. p. 12. For its part, the State contends that Clem waived his right to appellate review of his sentence.

[8] Generally, when an individual enters into an "open plea" or an agreement that provides for a sentencing cap or range, the trial court must still exercise discretion in determining the sentence it will impose and a defendant may still challenge said sentence on appeal. *See Hole v. State*, 851 N.E.2d 302, 304 (Ind. 2006) ("That is not to say however that every sentence that is the product of a plea agreement is subject to Rule 7(B) review. Only if the trial court is exercising discretion in imposing a sentence may a defendant then contest on appeal the merits of the discretion on the grounds that the sentence is inappropriate in light of the nature of the offense and the character of the offender."). "By contrast where a plea agreement calls for a specific term of years, if the trial court accepts the parties' agreement, it has no discretion to impose anything other than the precise sentence upon which they agreed." *Id.* (internal quotation omitted). In *Hole*, the trial court sentenced the defendant to a ten-year sentence, which was the precise length of sentence agreed to by the parties. *Id.* In affirming Hole's sentence, the Indiana Supreme Court held that "[e]xcept for the location where his sentence is to be served, which Hole does not challenge, his sentence is not available for Rule 7(B) review." *Id.*

[9] In *Creech v. State*, 887 N.E.2d 73 (Ind. 2008), the Indiana Supreme Court further held that a defendant can waive his right to appeal his sentence following a guilty plea even if the trial court erroneously informs him that he can appeal his sentence. In that case, the defendant did "not claim that the language of the

plea agreement was unclear or that he misunderstood the terms of the agreement at the time he signed it, but rather claims that his otherwise knowing and voluntary plea lost its knowing and voluntary status because the judge told him at the end of the sentencing hearing that he could appeal." *Id.* at 76. The Supreme Court affirmed Creech's sentence, concluding that because "[b]y the time the trial court erroneously advised Creech of the possibility of appeal, Creech had already pled guilty and received the benefit of his bargain. Being told at the close of the hearing that he could appeal presumably had no effect on that transaction." *Id.* at 77.

[10] As we have previously noted, "[a] plea agreement is a contract, binding upon both parties when accepted by the trial court." *Brewer v. State*, 830 N.E.2d 115, 118 (Ind. Ct. App. 2005). Clem entered into a binding plea agreement, in which he and the State agreed that his sentence would be: "Three (3) years total to be served as follows: Two (2) years executed at the [DOC] and One (1) year with the Court to determine placement and parties to argue for appropriate placement." Appellant's App. Vol. II p. 14. Additionally, Clem signed the following acknowledgment: "I understand and agree that the sentence recommend and/or imposed herein is the appropriate sentence to be served pursuant to this agreement[.]" Appellant's App. Vol. II p. 15. Clem does not claim on appeal that this acknowledgement was not made knowingly or voluntarily. Importantly, despite the fact that the plea agreement left placement for the third year of Clem's sentence to the discretion of the trial court, the plea agreement was clear that Clem's sentence would be three years and the

acknowledgment did not reserve the right for Clem to appeal the trial court's decision as to placement. It also specifically indicated that Clem "underst[oo]d and agree[d]" that the sentence "imposed herein is the appropriate sentence to be served pursuant to this agreement." Appellant's App. Vol. II p. 15. Clem knew, or at least should have known, that it was possible that the trial court would order that he serve all three years in the DOC when he signed the above acknowledgement that the sentence imposed by the trial court was an appropriate sentence. We therefore conclude that Clem knowingly and voluntarily waived the right to challenge the appropriateness of his sentence on appeal.

[11] Further, while we acknowledge that the trial court's sentencing order indicates that Clem had the right to appeal "the part of the sentence imposed by the Court (one (1) year)," Appellant's App. Vol. II p. 28, we conclude that the trial court's statement was erroneous given that Clem waived the right to challenge the appropriateness of his three-year sentence. Clem entered into the plea agreement over a month before the trial court entered the sentencing order. Thus, Clem had already pled guilty and received the benefit of his bargain before the trial court erroneously informed him that he could appeal a portion of his sentence. As such, like the Indiana Supreme Court in *Creech*, we

conclude that being told at the close of the sentencing hearing that he could appeal a portion of his sentence presumably had no effect on that transaction.[1]

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

Najam, J., and Bailey, J., concur.

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[1] The State alternatively contends that Clem's sentence is not inappropriate. However, given that we conclude that Clem waived appellate review of his sentence, we need not address the question of whether his three-year sentence is inappropriate.