

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Lenord A. Smith,

Appellant-Defendant,

v.

State of Indiana,

Appellee-Plaintiff.

January 18, 2024

Court of Appeals Case No.
23A-CR-491

Appeal from the Marion Superior
Court

The Honorable Marc T.
Rothenberg, Judge

Trial Court Cause No.
49D29-2106-F4-019807

Memorandum Decision by Judge Felix
Judges Crone and Brown concur.

Felix, Judge.

Statement of the Case

[1] Lenord A. Smith was convicted of unlawful possession of a firearm by a serious violent felon and received an eight-year sentence. Other than time served before the sentencing hearing, Smith's entire sentence was suspended, and he was sentenced to four years of probation with two years to be served on home detention. Smith presents two issues on appeal:

1. Whether the trial court imposed an inappropriate sentence; and
2. Whether the trial court abused its discretion when it did not set probation and home detention fees.

[2] We affirm the sentence and remand to the trial court to set fees.

Facts and Procedural History

[3] On June 26, 2021, law enforcement responded to a report of shots fired at the Timber Point apartment complex in Indianapolis, Indiana. In the Timber Point parking lot, law enforcement officers discovered a parked car with its lights on. Officers found Smith sitting in the driver's seat of the car.

[4] Officer David Hutson questioned Smith about the shooting. While questioning Smith, Officer Hutson observed what appeared to be a handgun next to the driver's seat, and he asked Smith if there was a gun in the car. Smith replied affirmatively. Officer Hutson asked Smith to place his hands on the steering wheel, and then retrieved the gun from the vehicle. Smith was compliant with the officers throughout the encounter.

- [5] Officer Hutson ran Smith’s information through the Indiana criminal database and discovered that Smith had a prior felony conviction. Officer Hutson arrested Smith, and the State charged Smith with unlawful possession of a firearm by a serious violent felon, a Level 4 felony.
- [6] During the pendency of the case, Smith posted bond and was placed on electronic monitoring pre-trial release. On March 9, 2022, the State filed a notice of pre-trial release violation alleging multiple instances of Smith failing to comply with the terms of his release. Even though Smith admitted to the violation, he was ordered to remain on electronically monitored pre-trial release. Smith maintained steady employment throughout his pre-trial release.
- [7] On January 3, 2023, the trial court conducted a bench trial and found Smith guilty as charged. The trial court gave Smith a sentence of eight years, or 2,920 days, and suspended the entirety of the sentence except for the 163 days of total credit time from pretrial detention. The sentence included four years of probation with two years to be served on home detention. The trial court ordered that the Probation Department and Community Corrections conduct a financial assessment to determine what probation and home detention fees Smith would owe. Smith now appeals.

Discussion and Decision

1. The Trial Court’s Sentence was not Inappropriate

- [8] Smith argues the trial court’s sentence was inappropriate under the circumstances. Appellate Rule 7(B) permits us to “revise a sentence authorized

by statute if, after due consideration of the trial court’s decision,” we determine “the sentence is inappropriate in light of the nature of the offense and the character of the offender.”

[9] The use of Appellate Rule 7(B) is reserved for “exceptional cases, and its exercise ‘boils down to our collective sense of what is appropriate.’” *Mullins v. State*, 148 N.E.3d 986, 987 (Ind. 2020) (quoting *Faith v. State*, 131 N.E.3d 158, 160 (Ind. 2019)). “‘The principal role of [Appellate Rule 7(B)] review should be to attempt to leaven the outliers.’ *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). The point is ‘not to achieve a perceived correct sentence.’ *Knapp v. State*, 9 N.E.3d 1274, 1292 (Ind. 2014).” *Wilson v. State*, 157 N.E.3d 1163, 1181 (Ind. 2020).

[10] When gauging inappropriateness under Rule 7(B), courts are not to construe the term “sentence” to include only the aggregate length of the sentence. *Davidson v. State*, 926 N.E.2d 1023, 1025 (Ind. 2010). Rather, trial courts have a variety of sentencing tools, such as probation and home detention, and these tools should also be considered in appellate review of sentences. *Id.* Therefore, when applying Rule 7(B), we focus on the length as well as the manner of a sentence. *Cardwell*, 895 N.E.2d at 1224.

[11] The starting point for an appropriate sentence is the advisory sentence. *Childress v. State*, 848 N.E.2d 1073, 1081 (Ind. 2006)(citing *Ruiz v. State*, 818 N.E.2d 927, 929 (Ind. 2004)). The trial court may go beyond this advisory sentence if it

determines that, under the circumstances, the advisory sentence would be inappropriate. *See Anglemeyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007).

[12] Here, Smith was found guilty of a Level 4 felony. “A person who commits a Level 4 felony shall be imprisoned for a fixed term of between two (2) and twelve (12) years, with the advisory sentence being six (6) years.” Ind. Code. § 35-50-2-5.5. The trial court sentenced Smith to a total of eight years. Smith argues this sentence is inappropriate in light of the nature of the offense and Smith’s character. Smith’s argument conveniently leaves out the fact that most of the sentence was suspended. After incorporating the credit from his pretrial confinement, the remainder of the eight-year sentence was suspended, and Smith was sentenced to four years on probation with two years to be served on home detention.

[13] Smith argues the sentence was inappropriate because he “was not causing trouble” at the time of the arrest and he had shown good character since his prior felony conviction. Appellant’s Br. at 12. In review of the offense, the statute criminalizes the possession of a handgun by a felon. There are no elements in the offense that require the Defendant to be acting poorly or in violation of any other law. Smith’s argument that he was not “causing trouble” is of no moment.

[14] Even if Smith’s argument that the nature of the offense should result in a reduction of his sentence, a review of Smith’s character upends that conclusion. Smith’s criminal history includes a felony conviction for robbery, a felony

conviction for robbery resulting in bodily injury, two misdemeanor convictions for carrying a handgun without a license, and a conviction for driving without an operator's license in possession. Additionally, Smith violated the terms of his probation stemming from his robbery conviction, and he violated the terms of his pre-trial release in this matter. At sentencing, the trial court found Smith's criminal history and violations to be aggravating factors.

[15] The trial court also determined that Smith's attempts to better himself since his robbery conviction, his ability to maintain steady employment during pre-trial release, the fact that law enforcement determined he was not involved in the shooting they were investigating, and the hardship incarceration would cause to his family were mitigating factors. In balancing these factors, the trial court determined that ordering Smith to serve his sentence at the Department of Correction was not warranted. However, a total sentence above the advisory was warranted. After a review of the nature of the offense and the character of the offender, we do not conclude that this case is one of those exceptional cases where a sentence needs to be leavened. Therefore, we hold the trial court's sentence was not inappropriate "in light of the nature of the offense and the character of the offender." Ind. App. R. 7(B).

2. The Trial Court Must Determine Smith's Probation and Home Detention Fees

[16] Smith argues that the trial court abused its discretion in failing to set probation and home detention fees during sentencing. We review sentencing decisions for abuse of discretion, *Owen v. State*, 210 N.E. 3d 256, 269 (Ind. 2023) (quoting

Anglemeyer, 868 N.E.2d at 490), *reh'g denied* (Aug. 17, 2023), and sentencing decisions include the trial court's decision to impose costs and fees, *Coleman v. State*, 61 N.E.3d 390, 392 (Ind. Ct. App. 2016). "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.'" *Owen*, 210 N.E. 3d at 269 (quoting *Anglemeyer*, 868 N.E.2d at 490).

[17] When an individual is sentenced to probation as result of a felony conviction, "the court shall order the person to pay to the probation department the user's fee." I.C. § 35-38-2-1(b). Additionally, a home detention order must include "a requirement that the offender pay a home detention fee set by the court in addition to the probation user's fee." I.C. § 35-38-2.5-6(7).

[18] Smith argues that the trial court abused its discretion when it delegated the task of setting fees to the Probation Department and Community Corrections. The State agrees with this argument. Because Indiana Code requires the trial court to set probation and home detention fees, *see* I.C. §§ 35-38-2-1(b), 35-38-2.5-6(7), remand is appropriate for the trial court to set these fees, *Amick v. State*, 126 N.E.3d 909, 911–12 (Ind. Ct. App. 2019) (remanding to the trial court to clarify its intent regarding home detention fees); *Polk v. State*, 88 N.E.3d 226, 231 (Ind Ct. App. 2017) (remanding to the trial court to set probation fees).

Conclusion

[19] We hold Smith's sentence was not inappropriate under the circumstances and the trial court abused its discretion in failing to set fees.

[20] Affirmed and remanded with instruction to set fees for probation and home detention.

Crone, J., and Brown, J., concur.