

## 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

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Jeremy Allen Fennell,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

March 12, 2021

Court of Appeals Case No.  
20A-CR-1727

Appeal from the Vigo Superior  
Court

The Honorable John T. Roach,  
Judge

Trial Court Cause No.  
84D01-2003-F5-0907

**Shepard, Senior Judge.**

## Statement of the Case

- [1] Jeremy Allen Fennell appeals his three-year sentence, imposed after pleading guilty, under a plea agreement, to one count of Level 5 felony failure to register as a sex offender.<sup>1</sup> We affirm.

## Facts and Procedural History

- [2] Because this conviction was the result of a plea agreement, the factual background in the transcript is sparse. We set forth, as have both counsel, some of the facts from the probable cause affidavit, which was filed with the information. *See* Appellant's App. Vol. 2, pp. 10-13. The pre-sentence investigation report was filed with the trial court and Fennell offered no corrections. Tr. Vol. 2, p. 7. The report specifically cited the "Information and Affidavit for Probable Cause and Warrant for Arrest" for the "Official Version" of the present offense. *See* Appellant's App. Conf. Vol. 2, p. 43. As there was no provision excluding the use of the affidavit among the terms of the plea agreement, we use it here. *See* Appellant's App. Vol. 2, pp. 34-35; *see also*, *Bethea v. State*, 983 N.E.2d 1134, 1145 (Ind. 2013) (unless evidence is forbidden by plea agreement, trial court may consider all evidence properly before it).
- [3] After a 2008 conviction for child molesting, Fennell was required to register as a sex offender. On January 27, 2020, Fennell submitted a signed and dated

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<sup>1</sup> Ind. Code § 11-8-8-17 (2018).

change-of-address form to the Vigo County Sex and Violent Offender Registry, informing authorities that he had moved from one address in Terre Haute, Indiana to a new address in Terre Haute. One month later, Fennell's probation officer, Arthur Zurcher, informed law enforcement officers in Indiana that Fennell had missed visitation with his child.

[4] Zurcher explained that Fennell's child was in the custody of the Illinois Department of Child and Family Services. Fennell had informed the Illinois DCFS that he lived at an address in Paris, Illinois. That agency contacted Zurcher, informing him about the missed visitation. Because of the inconsistency in the information about Fennell's address, Sergeant John Burns of the Vigo County Sheriff's Office performed an address verification at Fennell's registered address in Terre Haute.

[5] Sergeant Burns went to the apartment building on February 27, 2020. He noticed that the mailbox associated with Fennell's address was overflowing and appeared not to have been checked in some time. The officer observed that as he rounded the building to locate the specific apartment, he left footprints in the dirt, but there did not appear to be any others. He knocked at the door to the apartment registered as Fennell's, but was unable to get a response. He left his business card, with instructions to call, and returned to his cruiser to leave.

[6] As Sergeant Burns was leaving, and while passing the back of the building, he observed that a light was on inside the apartment registered to Fennell. He decided to make a second attempt to verify whether anyone was inside and to

take pictures. While Burns was knocking on the door and taking pictures, a tenant of another apartment in that building approached him. The neighbor informed him that no one had lived in that apartment for months and gave Burns the contact information for the building's owner, Timothy Altvater.

[7] In a later phone call, Altvater told the officer that he had not rented the apartment in about three months. He also agreed to make an official statement. Later, at the Sheriff's Office, Altvater identified Fennell from the photograph on Fennell's address verification form. He said that he knew Fennell because he had previously rented an apartment to Fennell's parents.

[8] Sergeant Burns concluded that Fennell did not live at the registered address. The State charged Fennell with failure to register as a sex offender on March 6, 2020. He later pleaded guilty to the charge and to probation violations under two other cause numbers. The plea agreement called for those two periods of probation to be terminated as unsuccessful. The only restriction in the new plea agreement related to the trial court's sentencing discretion was a three-year cap on any executed portion of the sentence.

[9] At sentencing, the court considered the pre-sentence investigation report setting forth Fennell's criminal history. That history included the following:

1. On May 9, 2008, Fennell pleaded guilty to child molesting and was sentenced to six years in the DOC with four years suspended to probation, including the requirement that he register as a sex offender;
2. Less than two years later, Fennell violated his probation, was

sentenced to time served, and returned to probation;

3. About one year later, he violated his probation conditions and was sentenced to two years at DOC for the new offense and was ordered to serve three years of his previously suspended sentence;

4. On June 6, 2017, Fennell pleaded guilty to child molesting and was sentenced to six years in the DOC with three years suspended to probation;

5. Less than three years later, Fennell violated his probation by failing to register as a sex offender; and

6. Two months after that conviction, Fennell committed the offense of failure to register by registering with an address where he was not residing.

[10] At the time Fennell committed the offense that is the subject of this appeal, he was on probation for child molesting and failure to register. At the conclusion of the sentencing hearing, the trial court imposed a sentence of three years executed, and the probation under the two other causes was simply terminated as unsuccessful. Fennell now appeals.

## Discussion and Decision

[11] Fennell argues that his sentence is inappropriate in light of the nature of the offense and the character of the offender. He asks us to revise his sentence pursuant to our authority under Indiana Appellate Rule 7(B).

[12] Article 7, sections 4 and 6 of the Indiana Constitution “authorize[] independent appellate review and revision of a sentence imposed by the trial court.”

*Buchanan v. State*, 767 N.E.2d 967, 972 (Ind. 2002). A defendant bears the

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

[13] We independently examine the nature of Fennell’s offense and his character under Rule 7(B) with substantial deference to the trial court’s decision. *See Satterfield v. State*, 33 N.E.3d 344 (Ind. 2015). Such deference to the court’s judgment should prevail 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 (Ind. 2015). “In conducting our review, we do not look to see whether the defendant’s sentence is appropriate or if another sentence might be *more* appropriate; rather, the test is whether the sentence is ‘inappropriate.’” *Barker v. State*, 994 N.E.2d 306, 315 (Ind. Ct. App. 2013), *trans. denied*.

[14] “A defendant’s conscious choice to enter a plea agreement that limits the trial court’s discretion to a sentence less than the statutory maximum, should usually be understood as strong and persuasive evidence of sentence reasonableness and appropriateness.” *Childress*, 848 N.E.2d at 1081 (Ind. 2006) (Dickson, J., concurring).

[15] Concerning the nature of the offense “the advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed.” *Kunberger v. State*, 46 N.E.2d 966, 973 (Ind. Ct. App. 2015). The range for a Level 5 felony of failure to register is a fixed term of between one

and six years with an advisory sentence of three years. Ind. Code § 35-50-2-6(b) (2014).

[16] Generally, the nature of the offense is found in the details and circumstances of the commission of the offense and the defendant's participation. *Croy v. State*, 953 N.E.2d 660 (Ind. Ct. App. 2011). Here, the nature of Fennell's offense is that he failed to register a correct address with the appropriate authorities. Indeed, he intentionally registered a false address in Indiana after giving another address to authorities in Illinois. Although, he argues that his behavior was "akin to a technical violation of the requirements of his registration," and that "he did not commit a new criminal offense or otherwise cause any bodily harm or property damage," he knew, given his history of violations for the same conduct, that he was required to provide an accurate address to the appropriate authorities. Appellant's Br. p. 8. Fennell has not cast the nature of the offense in a positive light such that a downward revision of his sentence from the advisory would be appropriate.

[17] When considering a defendant's character for purposes of Rule 7(B), a defendant's criminal history is one factor. *Garcia v. State*, 47 N.E.3d 1249 (Ind. Ct. App. 2015), *trans. denied*. "A defendant's life and conduct are illustrative of his or her character." *Morris v. State*, 114 N.E.3d 531, 539 (Ind. Ct. App. 2018). The significance of a criminal history varies based on the gravity, nature, and number of prior offenses in relation to the current offense. *Id.*

[18] Here, Fennell's criminal history is such that he has demonstrated an inability to conform his behavior to the law despite numerous contacts. These contacts involve child molesting and failure to register as a sex offender. Fennell has not demonstrated that he would be a good candidate for probation and his criminal history supports the trial court's sentence. Indeed, he received the advisory sentence for the offense, where the maximum sentence for the offense would have been six.

[19] Fennell argues that his good character is demonstrated by his decision to plead guilty. However, Fennell faced a possible sentence three years longer than that provided by the sentencing cap in the plea agreement. Any mitigating weight afforded to a defendant's decision to plead guilty is reduced when the defendant's decision was more pragmatic than a demonstration of acceptance of responsibility. *Davies v. State*, 758 N.E.2d 981 (Ind. Ct. App. 2001). Such is the case here where the level of his offense was elevated due to prior violations for the same offense and he faced consequences related to his violation of probation under two separate cause numbers. The evidence against Fennell related to his offense and the violations was strong. Each of these were addressed by the plea agreement, with the net result being an executed advisory sentence and no further imprisonment for his repeated probation violations.

[20] Further, Fennell told the court that he intended to use his uncle's address should he be released. However, community corrections had been unable to verify the address Fennell gave as his uncle's address, and he testified that he had not obtained his uncle's permission to live there. Additionally, Fennell



stated, for purposes of the pre-sentence report, that he planned to seek employment in Illinois and that he would like to stay at his fiancée's father's address in Paris, Illinois on the weekends. Appellant's App. Conf. Vol. II, p. 44. Fennell also reported that he has a ten-month-old child with his fiancée, but a termination of rights hearing was scheduled. His disingenuousness belies his argument regarding his virtuous traits or persistent good character.

[21] Fennell also argues that his schizophrenia renders his sentence inappropriate. However, he admitted that he deliberately provided an inaccurate address. He told DCS that he lived in Illinois, but he gave authorities here in Indiana a false address in Indiana. Fennell has not demonstrated (1) the severity of his schizophrenia, or (2) the connection between his mental illness and the commission of his offenses. *See Archer v. State*, 689 N.E.2d 678, 685 (Ind. 1997) (Where "defendant appears to have more control over his thought and actions, or where the nexus between defendant's mental illness and the commission of the crime is less clear, the court may determine on the facts of a particular case that the mental illness warrants relatively little or no weight as a mitigating factor.").

[22] The trial court's sentencing discretion was capped by the parties at three years executed for his current offense and his probation was terminated as unsuccessful in two separate cases. He received the maximum allowed under the plea agreement and the full benefit of his bargain. Fennell has not met his burden of establishing that his sentence is inappropriate in light of the nature of the offense and the character of the offender.

## Conclusion

[23] For the foregoing reasons, the trial court's judgment is affirmed.

[24] Affirmed.

Riley, J., and Kirsch, J., concur.