MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Marcus Dawayne McNeil,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 23, 2021

Court of Appeals Case No. 20A-CR-1581

Appeal from the Tippecanoe Superior Court

The Honorable Steven Meyer, Judge

Trial Court Cause No. 79D02-1907-F3-29

Tavitas, Judge.

Case Summary

[1] Nearly a decade after Marcus Dawayne McNeil was convicted of a similar crime, he now appeals his fourteen-year aggregate sentence, entered pursuant to a guilty plea, for two counts of dealing in cocaine, Level 3 felonies. We decline to find that his less-than-maximum sentence is inappropriate in light of the nature of his offenses and his character. We affirm.

Issue

[2] The lone issue on appeal is whether McNeil's fourteen-year aggregate sentence is inappropriate pursuant to Indiana Appellate Rule 7(B).

Facts

[3] During the relevant period, McNeil was on probation for his 2011 conviction for dealing in cocaine, a Class A felony, in Cause 79D02-1008-FA-22 ("FA-22").[1] On May 7, 2019, and again on June 4, 2019, McNeil sold over one gram of cocaine to a police confidential informant ("CI"). The May 7, 2019 transaction occurred within 500 feet of Oakland Elementary School and Columbian Park in Lafayette, Indiana; and the June 4, 2019 transaction occurred near Oakland High School. Both transactions occurred when children under the age of eighteen could reasonably be expected to be present.

[1] In FA-22, McNeil was sentenced to twenty years in the Department of Correction, with ten years suspended to probation (five years of supervised probation and five years of unsupervised probation).

[4] On June 6, 2019, the CI introduced Lafayette Police Detective M.A. Barthelemy to McNeil, and McNeil sold one gram of cocaine to Detective Barthelemy. On June 7, 2019, June 11, 2019, and June 17, 2019, McNeil sold cocaine to the detective at McNeil's residence; in each of these transactions, McNeil sold the detective at least three grams of cocaine.

[5] On July 15, 2019, the State charged McNeil with various offenses, including Count I, dealing in cocaine, a Level 3 felony; and Count III, dealing in cocaine, a Level 3 felony.[2] On July 24, 2019, the State filed a petition to revoke McNeil's probation in Cause FA-22.

[6] During McNeil's guilty plea hearing on May 11, 2020, McNeil and the State tendered a plea agreement to the trial court. The plea agreement provided that McNeil would plead guilty to Counts I and III, two counts of dealing in cocaine, as Level 3 felonies, and would admit to violating his probation in Cause FA-22. In exchange for McNeil's guilty plea, the State agreed to dismiss the remaining charges and agreed that McNeil's sentences on Counts I and III would be served concurrently to one another, but consecutively to McNeil's sentence on the probation revocation in Cause FA-22. After being advised of

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[2] The remaining charges were as follows: Count II, possession of cocaine, a Level 5 felony; Count IV, possession of cocaine, a Level 5 felony; Count V, dealing in cocaine, a Level 4 felony; Count VI, possession of cocaine, a Level 6 felony; Count VII, dealing in cocaine, a Level 4 felony; Count VIII, possession of cocaine, a Level 6 felony; Count IX, dealing in cocaine, a Level 4 felony; Count X, possession of cocaine, a Level 6 felony; Count XI, dealing in cocaine, a Level 4 felony; Count XII, possession of cocaine, a Level 6 felony; Count XIII, dealing in cocaine, a Level 3 felony; Count XIV, dealing in cocaine, a Level 3 felony; Count XV, dealing in cocaine, a Level 3 felony; Count XVI, dealing in cocaine, a Level 3 felony; and Count XVII, dealing in cocaine, a Level 3 felony.

his rights, McNeil pleaded guilty and admitted he violated his probation in Cause FA-22 when he committed the instant offenses. At the State's request, the trial court ordered McNeil to submit to a drug screen.[3] McNeil's sample was presumptively positive. The State moved for revocation of McNeil's bond, which was granted. McNeil's sample was later confirmed positive for cocaine.

[7] On June 16, 2020, the trial court conducted McNeil's sentencing hearing. McNeil testified that he: (1) is a committed father, who has consistently provided for his children, without being court-ordered to do so; (2) has previously attempted drug treatment but has relapsed due to an acute addiction; (3) has successfully participated in substance abuse programming in the Department of Correction and community corrections, *see* McNeil's App. Vol. II pp. 70, 71; (4) has maintained employment; and (5) has counseled at-risk youth against drug use.

[8] At the close of the evidence, the trial court identified the following mitigating factors: (1) McNeil pleaded guilty and accepted responsibility; (2) he expressed remorse; (3) he has a substance dependency, albeit diminished by his failure to take advantage of prior opportunities[4] to address the issue; (4) he has strong

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[3] The trial court took a recess to allow the probation department to conduct McNeil's drug screen and reconvened after the drug screen was completed.

[4] McNeil's participation in substance abuse programming in the Department of Correction and community corrections includes his participation in the DOC Therapeutic Community program for eight months during his incarceration in FA-22. Therapeutic Community programs are part of "Purposeful Incarceration[,]" which is a program instituted by the Department of Correction and our trial courts:

family support; (5) he participated in the Inside Reaching Out program, which counsels youth against drug use, albeit diminished by his contemporaneous drug dealing; (6) potential hardship to McNeil's three children could result from his long-term incarceration; and (7) McNeil has a good work history. The trial court also identified the following aggravating factors: (1) the overall circumstances and seriousness of the crimes, including the quantity of cocaine sold and the multiple drug dealing transactions throughout Lafayette; (2) McNeil's prior criminal history, including a prior conviction for dealing cocaine; (3) McNeil's failed probation history, including two petitions to revoke probation which were found to be true; and (4) McNeil violated a condition of his bond by being arrested for a new offense and his failed drug test during his guilty plea hearing.

[9] The trial court found that the aggravating factors outweighed the mitigating factors and imposed concurrent fourteen-year sentences to be served as follows: ten years, executed, of which the last two years would be served in community corrections, followed by four years suspended to supervised probation. The

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> In 2009 the Indiana Department of Correction [ ] began a cooperative project with Indiana Court Systems called Purposeful Incarceration (P.I.). The Department works in collaboration with Judges who can sentence chemically addicted offenders and document that they will "consider a sentence modification" should the offender successfully complete an IDOC Therapeutic [C]ommunity. This supports the Department of Correction and the Judiciary to get addicted offenders the treatment that they need and work collaboratively to support their successful re-entry into society.

Purposeful Incarceration, Indiana Department of Correction, http://www.in.gov/idoc/2798.htm (last visited February 12, 2021). McNeil successfully completed the program, and his sentence was shortened by six months.

trial court ordered McNeil's sentence on the instant offenses to be served consecutively to any sentence imposed regarding the probation revocation in FA-22. McNeil now appeals.[5]

Analysis

[10] McNeil argues that his sentence is inappropriate in light of the nature of his offenses and his character. He maintains that "[his] actions were no worse than those involved in any other case of this kind"; "nothing about the nature of these offenses [ ] demands an aggravated sentence"; and his "too severe" sentence fails to account for positive aspects of his character. McNeil's Br. p. 15, 16.

[11] The Indiana Constitution authorizes independent appellate review and revision of a trial court's sentencing decision. *See* Ind. Const. art. 7, §§ 4, 6; *Jackson v. State*, 145 N.E.3d 783, 784 (Ind. 2020). Our Supreme Court has implemented this authority through Indiana Appellate Rule 7(B), which allows this Court to revise a sentence when it is "inappropriate in light of the nature of the offense and the character of the offender." Our review of a sentence under Appellate Rule 7(B) is not an act of second guessing the trial court's sentence; rather, "[o]ur posture on appeal is [ ] deferential" to the trial court. *Bowman v. State*, 51 N.E.3d 1174, 1181 (Ind. 2016) (citing *Rice v. State*, 6 N.E.3d 940, 946 (Ind. 2014)). We exercise our authority under Appellate Rule 7(B) only in

[5] This Court granted McNeil's petition for leave to bring a belated appeal on July 29, 2020.

"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)).

[12] "'The principal role of appellate review is to attempt to leaven the outliers.'" *McCain v. State*, 148 N.E.3d 977, 985 (Ind. 2020) (quoting *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008)). The point is "not to achieve a perceived correct sentence." *Id*. "Whether a sentence should be deemed inappropriate 'turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case.'" *Id*. (quoting *Cardwell*, 895 N.E.2d at 1224). Deference to the trial court's sentence "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, 122 (Ind. 2015).

[13] When determining whether a sentence is inappropriate, the advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed. *Fuller v. State*, 9 N.E.3d 653, 657 (Ind. 2014). McNeil pleaded guilty to two Level 3 felonies. The sentencing range for a Level 3 felony is three to sixteen years, with an advisory sentence of nine years. Ind. Code § 35-50-2-5(b). McNeil, thus, faced a maximum sentence of sixteen

years.[6] Here, the trial court imposed two fourteen-year sentences, ordered to be served concurrently, for an aggregate sentence of fourteen years with ten years executed, of which the last two years would be served in community corrections, followed by four years suspended to supervised probation.

[14] Our analysis of the "nature of the offense" requires us to look at the nature, extent, and depravity of the offense. *Sorenson v. State*, 133 N.E.3d 717, 729 (Ind. Ct. App. 2019), *trans. denied*. Regarding the nature of the offenses, the record reveals that, twice, while McNeil was on probation in Cause FA-22 and free on bond for the instant offenses, McNeil sold over one gram of cocaine to a police CI. These initial transactions occurred within 500 feet of a park, an elementary school, and a high school and were conducted when persons under eighteen years of age were reasonably expected to be present. In four subsequent transactions, McNeil sold cocaine to Detective Barthelemy. In all, McNeil sold thirteen grams of cocaine to the CI and Detective Barthelemy.

[15] Our analysis of the character of the offender involves a "broad consideration of a defendant's qualities," *Adams v. State*, 120 N.E.3d 1058, 1065 (Ind. Ct. App. 2019), including the defendant's age, criminal history, background, and remorse. *James v. State*, 868 N.E.2d 543, 548-59 (Ind. Ct. App. 2007). "The significance of a criminal history in assessing a defendant's character and an appropriate sentence varies based on the gravity, nature, proximity, and number

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[6] The plea agreement mandated concurrent sentences.

of prior offenses in relation to the current offense." *Sandleben v. State*, 29 N.E.3d 126, 137 (Ind. Ct. App. 2015) (citing *Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006)), *trans. denied*. "Even a minor criminal history is a poor reflection of a defendant's character." *Prince v. State*, 148 N.E.3d 1171, 1174 (Ind. Ct. App. 2020) (citing *Moss v. State*, 13 N.E.3d 440, 448 (Ind. Ct. App. 2014), *trans. denied*).

[16] At the time of the sentencing hearing, thirty-seven-year-old McNeil had amassed a significant adult[7] criminal history, including two prior felony convictions for dealing in cocaine, Class A felonies (2011) in Cause FA-22. McNeil was also convicted of the following eleven misdemeanor offenses: possession of cannabis (2003); driving while suspended (2008, five times; 2009; 2018; 2019); resisting law enforcement (2009), and reckless driving (2019).

[17] As the trial court acknowledged in imposing a less-than-maximum sentence, McNeil is a committed father, who has consistently provided for his children, without being court-ordered to do so. McNeil has also attempted drug treatment, participated in self-improvement programming, maintained employment, and counseled at-risk youth against drug use. As commendable as these aspects of McNeil's character may be, they are significantly outweighed by the following facts, which reflect unfavorably upon McNeil's character: (1) the repetitive nature of McNeil's offenses; (2) McNeil's simultaneous substance

[7] McNeil does not have a juvenile criminal history.

abuse and ongoing drug-dealing; (3) his conviction for an identical cocaine-dealing felony a decade earlier; (4) his failure to take advantage of ample opportunities to address his cocaine addiction; (5) his continuing drug use[8] and arrest for a new criminal offense while on bond; (6) his failed drug test during his guilty plea hearing; (7) the revocation of McNeil's probation on two previous occasions in FA-22; and (8) his failure to appear for court proceedings on three occasions.

[18] McNeil is undeterred from criminal activity even after serving prison time on prior drug dealing convictions and despite receiving leniency from multiple courts. His commission of the instant offenses while he was on probation, his continued drug abuse, his new arrest while he was free on bond, and his positive drug test at the hearing on his guilty plea reflect his contempt for the rule of law. We simply cannot say that McNeil's fourteen-year aggregate sentence is inappropriate in light of the nature of his offenses or his character.

Conclusion

[19] McNeil's sentence is not inappropriate in light of the nature of his offenses or his character. We affirm.

[20] Affirmed.

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[8] The pre-sentence investigation report provides that McNeil used ecstasy and cocaine while he was free on bond.

Bailey, J., and Robb, J., concur.