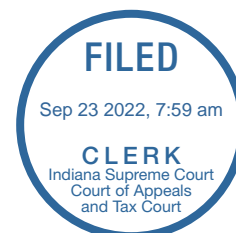


## MEMORANDUM DECISION

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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### ATTORNEY FOR APPELLANT

Christopher J. Evans  
Dollard Evans Whalin LLP  
Noblesville, Indiana

### ATTORNEYS FOR APPELLEE

Theodore E. Rokita  
Attorney General of Indiana

Steven J. Hosler  
Deputy Attorney General  
Indianapolis, Indiana

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## IN THE COURT OF APPEALS OF INDIANA

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Jay T. Cast,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

September 23, 2022

Court of Appeals Case No.  
22A-CR-278

Appeal from the Hamilton  
Superior Court

The Honorable Jonathan M.  
Brown, Judge

Trial Court Cause No.  
29D02-2012-F4-7802

**Tavitas, Judge.**

## Case Summary

[1] Jay T. Cast was convicted of causing death while operating a vehicle while intoxicated, a Level 4 felony, and causing serious bodily injury while operating a vehicle while intoxicated, a Level 5 felony, and sentenced to an aggregate term of sixteen years. Cast appeals and claims that the trial court abused its discretion in its finding of mitigating and aggravating circumstances and that the sixteen-year sentence imposed by the trial court was inappropriate in light of the nature of the offense and the character of the offender. Because we conclude that both of these claims are without merit, we affirm.

## Issues

- I. Whether the trial court abused its discretion in its findings of aggravating and mitigating circumstances.
- II. Whether Cast's sentence is inappropriate in light of the nature of Cast's offenses and his character.

## Facts

[2] Between 11:20 a.m. and 5:50 p.m. on December 9, 2020, Cast purchased twenty-three beers at the Atlanta Pub in Arcadia, Indiana. Of these twenty-three beers, Cast drank twenty-two. Although Cast was severely intoxicated, he got into his pickup truck and drove, eventually ending up on State Road 19.

[3] Shortly before 6:00 p.m. that same day, Wendy Warner was driving her SUV northbound on State Road 19. Wendy's husband, Thomas, was in the front passenger seat, and their daughter, Abby, was in the back seats with Tessa

Hartwick, Hanna Beechler, Becca Beechler, and Gabe Roosa. As Cast drove his truck southbound on the same highway, he veered off the road onto the shoulder, overcorrected, and crossed the center line into the northbound lanes. Wendy tried to avoid Cast's vehicle, but she was unable to do so. Cast struck the passenger side of the Warners' SUV, which "literally peeled back the whole side of the car like a can opener." Appellant's App. Vol. II p. 118.

[4] The force of the impact pushed Thomas's seat into a fully reclined position, which pinned Tessa into her seat behind Thomas. Thomas was moaning in pain, and Tessa was initially unconscious. Wendy could not open the driver's side door, so she climbed over Thomas to exit the vehicle. When Tessa regained consciousness, she began to scream in pain and fear. The other passengers were stuck in the vehicle until first responders removed Thomas and Tessa. As Thomas was removed from the vehicle, he asked whether his daughter Abby was okay.

[5] Thomas was taken to the hospital, where he was diagnosed with a shattered pelvis, broken ribs, a broken collar bone, liver damage, and internal bleeding. Thomas eventually succumbed to his injuries. Tessa was also taken to the hospital, where she was diagnosed with broken ribs, a shattered pelvis, and lacerations to her liver. Tessa survived. The remaining passengers of the Warners' vehicle suffered minor injuries.

[6] When police arrived at the scene of the crash to investigate, they noticed that Cast smelled of alcohol. The police also observed alcoholic beverages in Cast's

truck. Cast exhibited signs of intoxication, including slurred speech, bloodshot and glassy eyes, poor dexterity, and unsteady balance. A portable breath test confirmed that Cast had been drinking, and he was taken to the hospital for a consensual blood draw. Testing of Cast's blood indicated that he had an alcohol concentration equivalent ("ACE") of .306 grams of ethanol per 100 milliliters of blood. The tests also revealed the presence of THC<sup>1</sup> in Cast's blood.

- [7] The State ultimately charged Cast with eleven counts: Count I, causing death when operating a vehicle while intoxicated, a Level 4 felony; Count II, causing death when operating a vehicle with an ACE of .08 or greater, a Level 4 felony; Count III, causing death when operating a vehicle with a Schedule I or II controlled substance in the blood, a Level 4 felony; Count IV, causing serious bodily injury while operating a vehicle while intoxicated, a Level 5 felony; Count V, causing serious bodily injury when operating a vehicle with an ACE of .08 or greater, a Level 5 felony; Count VI, causing serious bodily injury when operating a vehicle with a Schedule I or II controlled substance in the blood, a Level 5 felony; Count VII, operating a vehicle while intoxicated endangering a person, a Class A misdemeanor; Count VIII, operating a vehicle with an ACE of .15 or greater, a Class A misdemeanor; Count IX, operating a vehicle with a Schedule I or II controlled substance in the blood, a Class C misdemeanor;

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<sup>1</sup> THC is the common abbreviation of tetrahydrocannabinol, which is the main active chemical in marijuana. *Radick v. State*, 863 N.E.2d 356, 359 (Ind. Ct. App. 2007). See also <https://www.drugabuse.gov/drug-topics/marijuana> (explaining that marijuana contains "[a] mind-altering chemical delta-9-tetrahydrocannabinol (THC) and other related compounds") (last visited April 18, 2022).

Count X, possession of cocaine, a Level 6 felony; and Count XI, possession of a controlled substance, a Class A misdemeanor.

- [8] On November 4, 2021, Cast entered into a plea agreement in which he agreed to plead guilty to Count I and Count IV. In exchange, the State agreed to dismiss the remaining counts. Sentencing was to be determined by the trial court. The trial court accepted the plea agreement on January 13, 2022, and sentenced Cast to eleven years in the Department of Correction (“DOC”) for Count I and a consecutive term of five years for Count IV, with two years to be served on community corrections. The trial court also suspended Cast’s driver’s license for a total of thirteen years and ordered Cast to pay restitution in the amount of \$182,883.68 to Wendy. Cast now appeals.

## **Discussion and Decision**

- [9] Cast claims that the trial court abused its discretion in its determination of aggravating and mitigating factors. He also claims that the sentence imposed by the trial court is inappropriate under Appellate Rule 7(B). We address each contention in turn.

### ***I. Trial Court Did Not Abuse its Sentencing Discretion***

- [10] “[S]ubject to the review and revise power [under Indiana Appellate Rule 7(B)], sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion.” *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218; *accord Phipps v. State*, 90 N.E.3d 1190, 1197 (Ind. 2018). “An abuse [of discretion] occurs only

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.” *Schuler v. State*, 132 N.E.3d 903, 904 (Ind. 2019) (citing *Rice v. State*, 6 N.E.3d 940, 943 (Ind. 2014)).

[11] A trial court can abuse its sentencing discretion in a number of ways, including: (1) failing to enter a sentencing statement at all; (2) entering a sentencing statement in which the aggravating and mitigating factors are not supported by the record; (3) entering a sentencing statement that does not include reasons that are clearly supported by the record and advanced for consideration; or (4) entering a sentencing statement in which the reasons provided in the statement are improper as a matter of law. *Ackerman v. State*, 51 N.E.3d 171, 193 (Ind. 2016) (quoting *Anglemyer*, 868 N.E.2d at 490-91). Even if a trial court abuses its sentencing discretion, we will remand for resentencing only if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record. *Id.* at 194 (citing *Anglemyer*, 868 N.E.2d at 491).

#### *A. Aggravating Factors*

[12] Cast claims that the trial court abused its discretion by considering as an aggravating factor that “the harm, injury, loss, or damage suffered by the victim of an offense was (A) significant; and (B) greater than the elements necessary to prove the commission of the offense.” Ind. Code § 35-38-1-7.1(a)(1); Tr. Vol. II p. 89. Cast argues that the only harm, injury, loss, or damage mentioned by the

trial court during sentencing was the loss suffered by Thomas’s family, who were in the car when he was fatally injured.

[13] Cast notes that our Supreme Court has long held that “where ‘[t]here is nothing in the record to indicate that the impact on the families and victims in [a] case was different than the impact on families and victims which usually occur in such crimes,’ this separate aggravator is improper.” *McElroy v. State*, 865 N.E.2d 584, 590 (Ind. 2007) (quoting *Mitchem v. State*, 685 N.E.2d 671, 680 (Ind. 1997)). Our Supreme Court has also held:

We appreciate the terrible loss of a loved one. But because such impact on family members accompanies almost every murder, we believe it is encompassed within the range of impact which the presumptive<sup>[2]</sup> sentence is designed to punish. Although the impact on others may qualify as an aggravator in certain cases, the defendant’s actions must have had an impact on . . . other persons of a destructive nature that is not normally associated with the commission of the offense in question and this impact must be foreseeable to the defendant.

*Smith v. State*, 770 N.E.2d 818, 821-22 (Ind. 2002) (citation and internal quotations omitted).

[14] In the case at bar, the trial court did not simply focus on the fact that Thomas died<sup>3</sup> or the impact that his death had on his family. Instead, the trial court

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<sup>2</sup> *Smith* was decided under the old presumptive sentencing scheme. For purposes of our discussion, we assume *arguendo* that its reasoning still applies under the current advisory sentencing scheme.

<sup>3</sup> This is an element the crime for which Cast was convicted—causing death when driving while intoxicated—and therefore cannot generally be considered as an aggravating factor. See *Gomillia v. State*, 13

noted the specific circumstances of the accident that resulted in Thomas’s death and Tessa’s severe injuries, including that: Thomas appeared to be in terrible pain and was barely able to speak; Thomas’s daughter watched as her father lay dying in front of her; Tessa was pinned in the car behind Thomas and appeared to be dead; Gabe Roosa, one of the other passengers, took Tessa’s pulse to see if she was alive; Thomas’s last words were, “Is Abby okay?”; and Abby heard these words. Tr. Vol. II p. 89.

[15] The trial court did not merely consider the impact of Thomas’s death on his family as aggravating. It considered the horrific nature and circumstances of the crime, which is a valid statutory aggravating factor. See *McElroy v. State*, 865 N.E.2d 584, 590 (Ind. 2007) (holding that trial court did not find victim impact to be a separate aggravator; instead, its discussion of the impact that defendant’s behavior had on the victims and their families was part of the court’s explanation of why the offense was particularly heinous, which was proper to consider as part of the nature and circumstances of the offense).

### *B. Mitigating Factors*

[16] Cast also claims that the trial court abused its discretion by failing to consider certain mitigating factors. A trial court is not obligated to accept the defendant’s contentions as to what constitutes a mitigating circumstance or to

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N.E.3d 846, 852-53 (Ind. 2014) (“Where a trial court’s reason for imposing a sentence greater than the advisory sentence includes material elements of the offense, absent something unique about the circumstances that would justify deviating from the advisory sentence, that reason is ‘improper as a matter of law.’”) (quoting *Anglemyer*, 868 N.E.2d at 491).



give the proffered mitigating circumstances the same weight the defendant does. *Brown v. State*, 160 N.E.3d 205, 219-20 (Ind. Ct. App. 2020) (citing *Weisheit v. State*, 26 N.E.3d 3, 9 (Ind. 2015)).

[17] Cast first claims that the trial court should have considered as mitigating the fact that he pleaded guilty. Contrary to Cast's claims, the trial court did specifically consider Cast's guilty plea during sentencing, stating, "I understand that . . . you have admitted your guilt. And although admitting your guilt is not a statutory mitigator, it is at least something the Court needs to consider when it's looking at your sentence." Tr. Vol. II p. 90. To the extent that Cast claims that the trial court did not afford this mitigating factor sufficient weight, this is no longer an argument available on appeal under our advisory sentencing scheme. *See Anglemeyer*, 868 N.E.2d at 491 ("Because the trial court no longer has any obligation to 'weigh' aggravating and mitigating factors against each other when imposing a sentence . . . , a trial court cannot now be said to have abused its discretion in failing to 'properly weigh' such factors.").

[18] Moreover, Cast received a substantial benefit by pleading guilty, as the State dismissed nine of the eleven counts against him in exchange for his guilty plea. Thus, the trial court cannot be said to have abused its discretion by failing to consider Cast's guilty plea as a significant mitigating factor. *See Anglemeyer*, 875 N.E.2d at 221 (holding that trial court did not abuse its discretion by failing to consider defendant's guilty plea as a significant mitigator where the evidence against him was overwhelming and his decision was likely pragmatic and where defendant received a substantial benefit from the plea agreement).

[19] The next mitigator that Cast claims the trial court improperly overlooked is Cast's lack of criminal history. A lack of criminal history is a statutory mitigating factor that a trial court may consider. *See* I.C. § 35-38-1-7.1(b)(6) (listing as a mitigating factor a trial court may consider that "[t]he person has no history of delinquency or criminal activity, or the person has led a law-abiding life for a substantial period before commission of the crime"). Here, however, there was evidence that Cast did not lead a law-abiding life despite his lack of prior convictions. Specifically, Cast used marijuana on a weekly basis. He had also been charged with possession of marijuana and public intoxication, though these charges were dismissed after his completion of a diversion program. Moreover, Cast admittedly continued to use marijuana after he was charged in the present case. Accordingly, we cannot say that the trial court abused its discretion by failing to consider Cast's lack of criminal history as a significant mitigator.

[20] Cast further argues that the trial court erred by failing to consider that he was "likely to respond affirmatively to probation or short term imprisonment." I.C. § 35-38-1-7.1(b)(7). Cast notes that his IRAS score indicates that he is at a low risk to reoffend, that he has no criminal history, and that he self-enrolled in treatment. As noted above, however, Cast did not lead a fully law-abiding life. And Cast only sought treatment for his alcoholism after the fatal collision with the Warners' vehicle. The fact that the trial court did not specifically address this alleged mitigator is not dispositive. *See Zavala*, 138 N.E.3d at 299. Moreover, the trial court did note that it had reviewed the statements attached

to the presentence investigation report and also noted that Cast had taken “rehabilitative classes.” Tr. Vol. II p. 86. The trial court simply did not find any of this to be significantly mitigating, and we cannot say that the trial court abused its discretion in so doing.

[21] Lastly, Cast argues that the trial court should have considered as mitigating that he was willing to pay restitution to the victims. The fact that a defendant desires to make restitution need not be considered as a significant mitigator. *Creekmore v. State*, 853 N.E.2d 523, 530 (Ind. Ct. App. 2006), *clarified on denial of reh’g*, 858 N.E.2d 230. Accordingly, we cannot say that the trial court abused its discretion by failing to consider Cast’s willingness to pay restitution as a significant mitigating factor.

## ***II. Cast’s Sentence is Not Inappropriate***

[22] Cast also claims that his aggregate sentence of sixteen years is inappropriate. 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

“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) (per curiam) (quoting *Faith v. State*, 131 N.E.3d 158, 160 (Ind. 2019)).

[23] “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). 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).

[24] In the case at bar, Cast was convicted of a Level 4 felony and a Level 5 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. “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. The trial court sentenced Cast to eleven years on the Level 4 felony, which is five years above the advisory sentence but one year shy of the maximum. The trial court sentenced Cast to five years on the Level 5 felony, which is two years greater than the advisory sentence, but one year shy of the maximum. We also note the trial court ordered that the last two years of this sentence be served in community corrections.<sup>4</sup> See *Mise v. State*, 142 N.E.3d 1079, 1088-89 (Ind. Ct. App. 2020) (“When considering the appropriateness of a sentence, we consider ‘all aspects of the penal consequences imposed by the trial judge in sentencing[.]’”) (quoting *Davidson v. State*, 926 N.E.2d 1023, 1025 (Ind. 2010)), *trans. denied*.

[25] 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*. The nature of Cast’s offenses is particularly horrific. Over a period of hours, Cast drank what can only be described as an enormous amount of beer. His ACE was .306, which is almost four times the legal limit of .08. But this did not deter Cast from getting behind the wheel of his pickup truck. Cast also had THC in his system. When Cast struck the Warners’ SUV, he peeled the side off of the vehicle, causing severe injuries to two of the passengers. Thomas lay dying, moaning and in obvious pain, in

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<sup>4</sup> In its brief, the State claims that two years of Cast’s five-year sentence were suspended to community corrections. The trial court’s sentencing order, however, clarifies that Cast is to serve his sentence as a direct placement in community corrections, not as part of a suspended sentence. See Appellant’s App. Vol. II p. 216.

front of his young daughter, who heard her father's last words. The nature of Tessa's injuries was also horrific and included broken ribs, a shattered pelvis and a lacerated liver. Cast has not referred us to any compelling evidence portraying the nature of his offenses in a positive light, such as restraint or regard.

[26] 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 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*).

[27] Here, Cast had no prior convictions or juvenile adjudications. As noted above, however, Cast did not lead a law-abiding life. Cast was charged in 2009 with possession of marijuana and public intoxication. He also admitted to using marijuana on a weekly basis at the time he committed the present offenses. Indeed, Cast admitted that he used marijuana even after he committed the present offenses, while he was on pre-trial release. Despite admitting to

alcoholism, Cast took no steps to address his addiction until after his drinking caused death and serious bodily injury. None of this reflects well on Cast's character. *See Marley v. State*, 17 N.E.3d 335, 341 (Ind. Ct. App. 2014) (concluding that defendant's substance abuse problem did not weigh in favor of a lesser sentence because defendant never sought treatment until after his arrest for the offense for which he was being sentenced), *trans. denied*.

[28] Cast did plead guilty and claimed remorse, but the evidence against him was overwhelming, and he received a substantial benefit by pleading guilty. A guilty plea does not automatically signify a positive character trait, especially in cases where, as here, the defendant has received a significant benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one. *See Caraway v. State*, 977 N.E.2d 469, 473 (Ind. Ct. App. 2012) (holding that defendant's guilty plea did not reflect positively on his character where his decision to plead guilty was likely pragmatic given the weight of the evidence against him and the benefit he received from the State's dismissal of one of the charges); *Lavoie v. State*, 903 N.E.2d 135, 143 (Ind. Ct. App. 2009) (holding that defendant's guilty plea did not reflect well on his character where his decision to plead guilty was pragmatic in light of the overwhelming evidence against him). Furthermore, the trial court was in the best position to gauge the sincerity and depth of Cast's remorse.

[29] Cast also notes that he had a history of steady employment and had a job ready for him if he was released. We have long held, however, that most people are gainfully employed, and this does not weigh in favor of a lesser sentence. *See*

*Hale v. State*, 128 N.E.3d 456, 465 (Ind. Ct. App. 2019) (noting that employment is not necessarily a mitigating factor) (citing *Holmes v. State*, 86 N.E.3d 394, 399 (Ind. Ct. App. 2017), *trans. denied*).

[30] We cannot say that Cast's sentence is inappropriate. Cast's aggravated sentence corresponds to the magnitude of his offenses. We conclude, therefore, that Cast's aggregate sixteen-year sentence, with two years thereof to be served in community corrections, is not inappropriate in light of the nature of his offenses or his character.

### **Conclusion**

[31] The trial court did not abuse its discretion in the finding of mitigating and aggravating factors, nor is Cast's sixteen-year aggregate sentence inappropriate in light of the nature of the offenses and the character of the offender. Accordingly, we affirm the judgment of the trial court.

[32] Affirmed.

Riley, J., and May, J., concur.