MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jason L. Sowers,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

May 28, 2021

Court of Appeals Case No. 20A-CR-2091

Appeal from the Clinton Circuit Court

The Honorable Bradley Mohler, Judge

Trial Court Cause No. 12C01-1808-F4-1080

Vaidik, Judge.

Case Summary

[1] Jason L. Sowers was convicted of four felonies relating to drug dealing and possession. At sentencing, Sowers testified, but the trial court did not ask him if he wanted to make a statement before the sentence was pronounced, known as the right of allocution and required by statute. Sowers appeals, challenging this omission and asserting his eighteen-year sentence is inappropriate. In making the allocution claim, Sowers acknowledges he did not speak up when the trial court failed to ask him about making a statement; however, he contends the trial court's omission constituted fundamental error. We disagree and affirm, finding the trial court did not commit fundamental error and Sowers's sentence is not inappropriate.

Facts and Procedural History

[2] On July 21 and 25, 2018, the Frankfort Police Department used a confidential informant to purchase methamphetamine from Sowers in two controlled buys. The July 21 buy involved 1.7 grams, and the July 25 buy involved 3.29 grams. On August 1, officers conducted a traffic stop of Sowers's car. After searching the car, officers found 1.37 grams of cocaine and .23 grams of methamphetamine.

[3] The State charged Sowers with two counts of Level 4 felony dealing in methamphetamine (for the July buys), Level 6 felony possession of methamphetamine (for the August traffic stop), Level 6 felony possession of

cocaine (for the August traffic stop), and Level 6 felony maintaining a common nuisance (for using his car to conduct the July buys). The State also alleged Sowers is a habitual offender based on him having three prior unrelated felony convictions. Following a jury trial in October 2020, Sowers was found guilty of all counts except one count of Level 4 felony dealing in methamphetamine. The jury also found him to be a habitual offender.

[4] At the sentencing hearing, Sowers testified he was diagnosed with "schizoaffective disorder and [bipolar] depression" in 2008. Tr. Vol. II p. 235. At the end of Sowers's testimony, his defense counsel asked, "[P]rior to the Court pronouncing sentence, is there anything that I haven't asked you about that you think is important for the Court to know in deciding . . . how to handle this matter?" *Id.* at 241. Sowers replied, "Uhm, no, I think you've done a good job and they know my record and they know my mental disabilities[.]" *Id.* The trial court found three aggravators: (1) Sowers's criminal history—seven felony convictions, "including theft, three possession of marijuana, operating while intoxicated, resisting law enforcement, and possession of cocaine," and six misdemeanors; (2) Sowers violated probation seven times; and (3) while out on bond in this case, Sowers was arrested and charged with two Level 5 felonies, a Level 6 felony, and two misdemeanors. *Id.* at 246.[1] The court found one mitigator: Sowers's "history of mental health." *Id.* at 247. Before announcing

[1] These cases are still pending and are currently set for jury trial in September of this year.

Sowers's sentence, the trial court did not ask him if he wished to make a statement to the court.

[5] The trial court sentenced Sowers to eight years with two years suspended to probation for the Level 4 felony, enhanced by ten years for being a habitual offender. The trial court also sentenced him to 182 days for each of the Level 6 felonies, all to be served concurrently, for an aggregate sentence of eighteen years, with sixteen years executed and two years suspended to probation.

[6] Sowers now appeals.

Discussion and Decision

I. Right of Allocution

Sowers argues the trial court erred by failing to "ask [him] whether he wished to make a personal statement of allocution before the sentence was pronounced." Appellant's Br. p. 10. We agree. The right of allocution is "the opportunity at sentencing for criminal defendants to offer statements in their own behalf before the trial judge pronounces sentence." *Biddinger v. State*, 868 N.E.2d 407, 410 (Ind. 2007). The right of allocution is rooted in the common law. *Id.* Indiana has preserved this right by statute, providing that a defendant may "make a statement personally in the defendant's own behalf **and, before pronouncing sentence, the court shall ask the defendant whether the defendant wishes to**

make such a statement." Ind. Code § 35-38-1-5 (emphasis added). Here, the trial court failed to ask Sowers if he wished to make a statement.[2]

[7] Notwithstanding this error, the State argues Sowers waived appellate review of this issue because he did not raise it during the sentencing hearing. We agree. Our Supreme Court addressed this issue in *Angleton v. State*, 714 N.E.2d 156 (Ind. 1999), *reh'g denied*. There, the defendant, an attorney proceeding pro se, was asked at his first sentencing hearing if he wished to make a statement, and he declined. He later was resentenced, and the trial court did not ask him if he wished to make a statement at the second sentencing hearing. The defendant did not object or speak out about this omission but on appeal argued the trial court violated Section 35-38-1-5. Our Supreme Court held the defendant waived the issue by not objecting, stating "[a] defendant, especially one under these circumstances, may not sit idly at a sentencing hearing, fail to object to a statutory defect in the proceeding, then seek a new sentencing hearing on that basis on appeal." *Id.* at 159.

[8] Here, Sowers did not object or speak out about the trial court's omission and in fact when asked by his attorney if he had anything to say to the court Sowers

[2] The State disputes that the trial court failed to ask Sowers if he wished to make a statement, asserting the trial court did ask Sowers if "prior to the Court pronouncing sentencing, is there anything I haven't asked you about that you think is important for the Court to know in deciding how to . . . handle this matter?" Appellee's Br. p. 10 (quoting Tr. Vol. II p. 241). As noted above, it was Sowers's attorney who asked this question, not the trial court.

stated, "[N]o . . . they know my record and they know my mental disabilities." Therefore, he has waived this issue for appellate review.

[9] However, Sowers attempts to avoid waiver of the issue by asserting "the trial court's failure to satisfy its affirmative duty under Indiana Code section 35-38-1-5 is fundamental error." Appellant's Reply Br. p. 7. "The fundamental error doctrine permits a reviewing court to consider the merits of an improperly raised error if the reviewing court finds that the error was so prejudicial to the rights of the appellant that he could not have had a fair trial." *Sanders v. State*, 764 N.E.2d 705, 710-11 (Ind. Ct. App. 2002), *trans. denied*.

[10] We see no fundamental error here. The purpose of the right of allocution is "to give the trial court the opportunity to consider the facts and circumstances relevant to the sentencing of the defendant in the case before it." *Biddinger*, 868 N.E.2d at 413 (quotation omitted). "When the defendant is given the opportunity to explain his or her views of the facts and circumstances, the purpose of the right of allocution has been accomplished." *Id.* Here, Sowers testified at his sentencing hearing, and at one point was even asked if there was anything else he thought it was "important for the Court to know in deciding" his sentence. Because he was given this opportunity, the trial court's error does not warrant reversal. *See Vicory v. State*, 802 N.E.2d 426, 430 (Ind. 2004) (trial court's refusal to allow defendant to make a statement at his probation-revocation hearing did not warrant reversal because he testified at the hearing).

[11] Sowers cites *Jones v. State*, 79 N.E.3d 911 (Ind. Ct. App. 2017), *trans. not sought*, for the proposition that trial-court errors under Section 35-38-1-5 are "fundamental and mandates reversal." Appellant's Br. p. 9. In *Jones*, a divided panel of this Court held a trial court's "failure to inquire directly of [the defendant] whether he wished to exercise his right of allocution [is] fundamental error." *Id.* at 917. This author dissented, disagreeing with the majority's conclusion the error is fundamental. Since *Jones*, this Court has addressed this issue in *Woods v. State*, 98 N.E.3d 656 (Ind. Ct. App. 2018), *trans. denied*, and *Abd v. State*, 120 N.E.3d 1126 (Ind. Ct. App. 2019), *trans. denied*. In both, this Court held such errors were not fundamental, citing the *Jones* dissent. Sowers has given us no convincing reason to depart from this more recent case law, and we see none.

[12] The trial court did not commit fundamental error by failing to ask Sowers if he wished to exercise his right of allocution.

II. Sentence

[13] Sowers next argues his sentence is inappropriate and asks us to reduce it to twelve years, "with a majority of his sentence to be served on community corrections and probation." Appellant's Br. p. 13. Indiana Appellate Rule 7(B) provides that an appellate 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." "Whether a sentence is inappropriate ultimately turns on the

culpability of the defendant, the severity of the crime, the damage done to others, and a myriad of other factors that come to light in a given case." *Thompson v. State*, 5 N.E.3d 383, 391 (Ind. Ct. App. 2014) (citing *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008)). Because we generally defer to the judgment of trial courts in sentencing matters, defendants must persuade us that their sentences are inappropriate. *Schaaf v. State*, 54 N.E.3d 1041, 1044-45 (Ind. Ct. App. 2016).

[14] Sowers was convicted of a Level 4 felony, three Level 6 felonies, and being a habitual offender. A person who commits a Level 4 felony shall be imprisoned for a fixed term of between two and twelve years, with an advisory sentence of six years. Ind. Code § 35-50-2-5.5. If the person is found to be a habitual offender and convicted of a Level 4 felony, he shall be imprisoned for an additional six to twenty years. Ind. Code § 35-50-2-8(i)(1). A person who commits a Level 6 felony shall be imprisoned for a fixed term of between six months and two-and-a-half years, with an advisory term of one year. Ind. Code § 35-50-2-7. The court sentenced Sowers to eight years, with six years executed and two years suspended to probation, for the Level 4 felony, enhanced by ten years for being a habitual offender. For the Level 6 felonies, the court sentenced Sowers to a term of 182 days for each. The court ordered the sentences to be served concurrently, for a total sentence of eighteen years, with sixteen years executed and two years suspended to probation.

[15] We first note the sentence in this case was far from the maximum Sowers could have received. He was sentenced to below-advisory terms for all the Level 6

felonies, and for the Level 4 felony all the years over the advisory were suspended to probation. For the habitual-offender enhancement, Sowers received ten years, which was ten years below the maximum. And his sentences were ordered to be served concurrently, not consecutively.

[16] But Sowers contends his sentence is inappropriate because his dealing offense is "far less egregious" than typical dealing offenses and because he suffers from mental illness. Appellant's Br. p. 11. We agree Sowers's actions were not particularly egregious. However, his criminal history alone justifies the trial court's sentence. Sowers has a long history of felony convictions dating back to 1997. His criminal history includes seven felonies and six misdemeanors, and he has violated probation seven times. While Sowers does have mental-health issues, which the trial court acknowledged at length throughout the proceedings and included as a mitigator at sentencing, this does not excuse a lifetime of criminal involvement.[3]

[17] For these reasons, Sowers has not convinced us his sentence is inappropriate.

[18] Affirmed.

Bradford, C.J., and Brown, J., concur.

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[3] Sowers also argues because his "criminal history was used to support his habitual offender enhancement, it should not be re-used as a basis to support a further aggravated sentence." Appellant's Br. p. 13. However, Sowers has an extensive criminal history beyond that required for the habitual-offender finding. And in any event, our Supreme Court has found no error where "a trial court uses the same criminal history as an aggravator and as support for a habitual offender finding." *Pedraza v. State*, 887 N.E.2d 77, 80 (Ind. 2008).