

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Gary Lee Higgins, IV,

Appellant-Defendant,

v.

State of Indiana,

Appellee-Plaintiff.

March 16, 2022

Court of Appeals Case No.
21A-CR-2396

Appeal from the Lake County
Superior Court

The Honorable Natalie Bokota,
Judge

Trial Court Cause No.
45G02-1907-MR-21

Brown, Judge.

[1] Gary Lee Higgins, IV, appeals his sentence for attempted robbery resulting in serious bodily injury as a level 2 felony and asserts that his sentence is inappropriate in light of the nature of the offense and his character. We affirm.

Facts and Procedural History

[2] On or about June 12, 2019, Higgins, who was born in March 2002, used a mobile application to contact J.P., who was sixteen years old, regarding an Xbox gaming console which J.P. was offering for sale.¹ Higgins offered to pay extra if J.P. would deliver the Xbox and two controllers to him at a certain address in Gary, Indiana. Higgins and J.P. arranged for J.P. to make the delivery on the evening of June 12, 2019. At around 5:45 to 6:00 p.m. on June 12, 2019, J.P. arrived at the address, having been driven by his father. Higgins and a friend of his approached the vehicle in which J.P. and his father were waiting, J.P. exited the passenger seat and spoke with Higgins and his friend, Higgins said that he wanted proof the Xbox worked properly, and J.P., Higgins, and Higgins's friend went to a power outlet outside of a residence to plug in the Xbox and see if it powered on correctly. The homeowner at the address briefly came outside and said something, and J.P., Higgins, and Higgins's friend went across the street to a different residence to try another power outlet. At that time, a handgun was brandished and pointed at J.P., and one shot was fired. J.P. was struck by the bullet from the shot. J.P. walked slowly to his father's

¹ These facts are taken from the Stipulated Factual Basis attached to the plea agreement.

vehicle and slumped into the passenger seat. J.P.'s father called 911 and J.P. died in his father's arms. An autopsy revealed that J.P. died as a result of wounds to his arm and torso caused by a single gunshot.

[3] The State charged Higgins under 45G02-1907-MR-21 ("Cause No. 21") with: Count I, murder; Count II, murder in the perpetration of a robbery; Count III, attempted robbery resulting in serious bodily injury as a level 2 felony; and Count IV, attempted armed robbery as a level 3 felony. The State also filed a firearm enhancement.

[4] On July 13, 2021, the parties filed a Stipulated Plea and Agreement. The agreement provided that, in addition to the counts under Cause No. 21, the State had also charged Higgins with carrying a handgun without a license as a level 5 felony under cause number 45G02-1903-F5-134 ("Cause No. 134"); armed robbery as a level 3 felony under cause number 45G02-2001-F3-14 ("Cause No. 14"); and burglary as a level 4 felony under cause number 45G02-2106-F4-111 ("Cause No. 111"). The agreement provided that Higgins would agree to plead guilty to Count III under Cause No. 21, the parties were free to fully argue their respective positions as to the sentence to be imposed by the court, Higgins understood that a level 2 felony carried a possible sentence of ten to thirty years in prison with an advisory sentence of seventeen and one-half years, and the State agreed to dismiss Counts I, II, and IV and the firearm enhancement under Cause No. 21 and the counts under Cause Nos. 134, 14, and 111 in their entirety.

- [5] On July 14, 2021, the court held a hearing at which Higgins pled guilty pursuant to the agreement. Higgins indicated that he carefully read the stipulated factual basis and that the facts were true and accurate. He also indicated that he was out on bond for a handgun charge when he committed the offense.
- [6] On September 29, 2021, the court held a sentencing hearing. The State presented photographs and messages taken from Higgins's social media pages. The exhibits show Higgins posing with guns and Higgins exchanging messages on June 13, 2019, related to selling a gun. The State presented a number of jail incident reports involving Higgins related to fighting with other inmates, assault on staff, and rule violations including screaming, refusing to obey a lawful request, and throwing feces. The court heard testimony from J.P.'s father and mother. The court found that J.P.'s family suffers immensely as a result of the offense and J.P.'s death. It stated Higgins was being investigated for other robberies and "the defense is correct in saying that someone who's youthful can be expected to make youthful, foolish decisions. But at some point, bad decision after bad decision after violent decision after victimization after victimization begins to make that scale tip significantly." Transcript Volume II at 93. The court found the aggravating circumstances included that: the harm suffered by the victim was significant and greater than the elements necessary to prove the offense and the loss has caused his family immense suffering; Higgins had a history of juvenile adjudications including seven adjudications and he was under investigation for three more robberies; he was given the benefit of

probation four times and failed three times; and the nature and circumstances of the crime was significant in that Higgins lured the sixteen-year-old victim to the area of his residence which, considered with all the facts of the case, indicates premeditation. The court also found “the character of the defendant to be dishonest, violent, and manipulative.” Appellant’s Appendix Volume IV at 110. It found the mitigating circumstances included that Higgins expressed sincere remorse for his crime which the court believed to be genuine and that Higgins was only seventeen years old when he committed the offense, which the court gave low weight because he was provided social services, family intervention, and court-regulated programs including probation through the juvenile courts for approximately four years and he failed three opportunities at probation and continued to have repeated contacts with law enforcement culminating with the instant crime where the victim died. The court found “the aggravating factors dramatically outweigh the mitigating factors.” *Id.*

[7] The court sentenced Higgins to thirty years with two years suspended to probation. The sentencing order states Higgins may petition the court to be evaluated for community transition court when he is within one year of his release to probation.

Discussion

[8] The issue is whether Higgins’s sentence is inappropriate in light of the nature of the offense and his character. Ind. Appellate Rule 7(B) provides that we “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, [we find] that the sentence is inappropriate in light of the

nature of the offense and the character of the offender.” Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

[9] Higgins argues the nature of his offense and character do not warrant the maximum penalty. He acknowledges the harm went beyond the elements of the offense to which he pled but asserts the record does not support the conclusion the shooting was premeditated. He argues the factual basis does not state he was the shooter. He also argues his young age and genuine remorse demonstrate his character is not the worst of the worst so as to justify the maximum sentence. He requests that this Court reduce his sentence to twenty years with ten years served in the Department of Correction, five years on community corrections, and five years suspended to probation.

[10] Ind. Code § 35-50-2-4.5 provides that a person who commits a level 2 felony shall be imprisoned for a fixed term of between ten and thirty years with the advisory sentence being seventeen and one-half years. The Indiana Supreme Court has observed the maximum possible sentences are generally most appropriate for the worst offenders. *Buchanan v. State*, 767 N.E.2d 967, 973 (Ind. 2002) (citation omitted). The Court further stated “[t]his is not, however, a guideline to determine whether a worse offender could be imagined,” “[d]espite the nature of any particular offense and offender, it will always be possible to identify or hypothesize a significantly more despicable scenario,” and “[a]lthough maximum sentences are ordinarily appropriate for the worst offenders, we refer generally to the *class* of offenses and offenders that warrant

the maximum punishment. But such class encompasses a considerable variety of offenses and offenders.” *Id.* The trial court sentenced Higgins to thirty years with two years suspended to probation.

[11] Our review of the nature of the offense reveals that Higgins contacted sixteen-year-old J.P. regarding the purchase of an Xbox gaming console and offered to pay extra if J.P. would deliver the console to a certain address, that J.P. agreed and went to the address with his father, and that J.P., Higgins, and Higgins’s friend eventually went across the street to use a power outlet at a residence to plug in the gaming console. A handgun was brandished and pointed at J.P., one shot was fired, and J.P. was struck by the bullet from the shot. J.P. walked slowly to his father’s vehicle and slumped into the passenger seat. J.P.’s father called 911, and J.P. died in his father’s arms. Higgins was the person who communicated with J.P. to arrange the meeting. The stipulated facts indicate that, at a minimum, the attempted robbery was premeditated. There is no indication that J.P. posed any threat to Higgins or his friend. The shooting and J.P.’s death were senseless.

[12] Our review of the character of the offender reveals that Higgins pled guilty pursuant to a plea agreement to attempted robbery resulting in serious bodily injury as a level 2 felony under Count III in Cause No. 21, and in exchange the State dismissed the remaining counts including a murder charge and the firearm enhancement in Cause No. 21 as well as charges for carrying a handgun without a license under Cause No. 134, armed robbery under Cause No. 14,

and burglary under Cause No. 111. Higgins was on bond for carrying a handgun without a license at the time he committed the instant offense.

[13] According to the presentence investigation report (“PSI”), Higgins’s juvenile history includes resisting law enforcement in April 2015, criminal trespass in April 2017, criminal recklessness in July 2017, resisting law enforcement and disorderly conduct in September 2017, and theft and resisting law enforcement in May 2018, and his adult history includes the charges which were dismissed pursuant to the plea agreement under Cause Nos. 134, 14, and 111. The court stated at sentencing that “the record will show . . . five juvenile cases, seven adjudications.” Transcript Volume II at 22-23. The PSI further provides that Higgins received the benefit of probation four times and failed three of those times and that he was sentenced to the Department of Correction as a juvenile in 2018. The court admitted a number of incident reports involving Higgins’s behavior in jail which do not reflect positively on his character. The court’s comments show that it took Higgins’s age into consideration. The court also commented on Higgins’s history, stating “when I look at your total history, it really is rather frightening. It’s disturbing and it’s frightening. Your character, based on what I’ve seen, is violent and is antisocial. And is deceitful.” *Id.* at 94. The PSI indicates that Higgins reported that he has never been gainfully employed. According to the PSI, Higgins considers himself to be a risk-taker but did not think he was taking a risk at the time of this offense.

[14] After due consideration, we conclude that Higgins has not sustained his burden of establishing that his sentence is inappropriate in light of the nature of the

offense resulting in J.P.'s death and his character.

[15] For the foregoing reasons, we affirm Higgins's sentence.

[16] Affirmed.

May, J., and Pyle, J., concur.