MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Steven M. Terrell,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

July 23, 2021

Court of Appeals Case No. 21A-CR-374

Appeal from the Lawrence Superior Court

The Honorable John M. Plummer, III, Judge

Trial Court Cause No. 47D01-1908-F4-1530

Bailey, Judge.

Case Summary

[1] Steven Terrell ("Terrell") appeals the sentence imposed upon his plea of guilty to Child Molesting, as a Level 4 felony.[1] We affirm.

Issues

[2] Terrell presents two issues for review:

I. Whether the trial court abused its sentencing discretion by failing to recognize his lack of a criminal history as a mitigating circumstance; and

II. Whether the advisory sentence, with one year suspended to probation, is inappropriate.

Facts and Procedural History

[3] On August 8, 2019, the State charged Terrell with fondling his eight-year-old daughter, S.T. On November 18, 2020, Terrell pled guilty to the charged offense. On February 3, 2021, Terrell was sentenced to six years imprisonment, with one year suspended to probation. He now appeals.

[1] Ind. Code § 35-42-4-3(b).

Discussion and Decision

Abuse of Discretion

[4] A trial court commits an abuse of discretion if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable inferences to be drawn therefrom. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g* 875 N.E.2d 218 (Ind. 2007). There are four ways that a trial court can abuse its discretion at sentencing: (1) failing to enter a sentencing statement altogether; (2) entering a sentencing statement explaining reasons for imposing the sentence when those reasons are not supported by the record; (3) failing to include reasons supported by the record and put forth for consideration when entering a sentencing statement; and (4) considering reasons inappropriate as a matter of law. *Id.* at 490-91. If the trial court abused its discretion in one or more of those ways and we are unable to "say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record," then we will remand for resentencing. *Id*. at 491.

[5] Here, the third category is implicated. The presentence investigation report reveals a lack of criminal convictions or other arrests.[2] Terrell testified at the sentencing hearing that he "had never been incarcerated before" and his counsel argued in closing that Terrell had "almost zero criminal history."

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[2] Terrell was once charged with driving with a suspended license but that charge was dismissed.

(Sentencing Tr. at 28, 33.) Terrell argues that the trial court ignored the proffered and clearly supported mitigating factor when imposing the advisory sentence.

[6] "A trial court's consideration of factors may be evidenced in either the written order or in an oral sentencing statement." *Anderson v. State*, 989 N.E.2d 823, 826 (Ind. Ct. App. 2013), *trans. denied*. "In reviewing a sentencing decision in a non-capital case, we are not limited to the written sentencing statement but may consider the trial court's comments in the transcript of the sentencing proceedings." *Corbett v. State*, 764 N.E.2d 622, 631 (Ind. 2002).

[7] Here, the trial court articulated its reasoning in open court. The trial court found violation of a position of trust to be a "significant" aggravator. (Sentencing Tr. at 35.) With respect to mitigators, the trial court specifically recognized Terrell's acceptance of responsibility by pleading guilty and his cooperation with law enforcement. Based on the trial court's statements, we agree with Terrell that it did not recognize his lack of criminal history.

[8] A lack of a criminal history is a significant mitigating factor, to which the trial court assigns weight in its balancing process. *McElroy v. State*, 865 N.E.2d 584, 592 (Ind. 2007). But when a trial court abuses its discretion in sentencing, we have "several options." *Windhorst v. State*, 868 N.E.2d 504, 507 (Ind. 2007). We may remand to the trial court for "clarification or a new sentencing determination" or "we may exercise our authority to review and revise the sentence" by addressing whether it is inappropriate under Indiana Appellate

Rule 7(B). *Id.* Based on judicial economy concerns, we will not remand the case back to the trial court unless the sentence is inappropriate. *See id.* (affirming Court of Appeals decision to review Windhorst's sentence based on Indiana Appellate Rule 7(B) instead of remanding to the trial court for entry of a sentencing statement).

Inappropriateness

[9] Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a sentence imposed by a trial court. *See, e.g., Sanders v. State*, 71 N.E.3d 839, 843 (Ind. Ct. App. 2017), *trans. denied*. This appellate authority is implemented through Indiana Appellate Rule 7(B). *Id.* Under 7(B), the appellant must demonstrate that his sentence is inappropriate in light of the nature of his offense and his character. *Id.* (citing Ind. Appellate Rule 7(B)). In these instances, deference to the trial courts "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).

[10] The Indiana Supreme Court has explained that the principal role of appellate review is an attempt to leaven the outliers, "not to achieve a perceived 'correct' result in each case." *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). The question is not whether another sentence is more appropriate, but whether the

sentence imposed is inappropriate. *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008).

[11] A defendant convicted of a Level 4 felony is subject to a sentencing range of two to twelve years; six years is the advisory sentence. I.C. § 35-50-2-5.5. Terrell contends that his advisory sentence, with one year suspended to probation, is inappropriate in light of the nature of the offense and his character. Because the advisory sentence is the starting point chosen by the Legislature, the defendant "bears a particularly heavy burden in persuading us that his sentence is inappropriate when the trial court imposes the advisory sentence." *Fernbach v. State*, 954 N.E.2d 1080, 1089 (Ind. Ct. App, 2011), *trans. denied*.

[12] First, we look to the nature of the offense. Terrell admitted that, having the care and custody of his eight-year-old daughter, he fondled her with intent to gratify sexual desires.

[13] Next, we consider what we know of the defendant's character. Terrell does not have a history of prior convictions. He was cooperative with law enforcement and pled guilty to the sole charge against him, without the benefit of a plea deal. He testified that he had been a child victim of sexual abuse spanning several years.

[14] Terrell asserts that his offense was not particularly egregious in comparison to other child molesting offenses. However, we are mindful that Terrell received an advisory sentence and the punitive consequences were further reduced when

one year was suspended to probation. In sum, we are unpersuaded that Terrell has met his heavy burden to show that this sentence is inappropriate.

Conclusion

[15] Although the trial court did not specifically recognize the absence of a criminal history to be a mitigating factor in sentencing Terrell, we elect not to remand for clarification or resentencing. We have independently reviewed Terrell's sentence for inappropriateness and concluded that the sentence is not inappropriate.

[16] Affirmed.

May, J., and Robb, J., concur.