

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.



ATTORNEY FOR APPELLANT

Michael G. Moore
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General

Steven J. Hosler
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Candace K. Hobbs,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

November 16, 2022
Court of Appeals Case No.
22A-CR-96

Appeal from the
Vermillion Circuit Court

The Honorable
Jill D. Wesch, Judge

Trial Court Cause No.
83C01-2102-F2-1

Vaidik, Judge.

Case Summary

- [1] Candace K. Hobbs appeals her sentence for Level 4 felony possession of methamphetamine. Because Hobbs’s plea agreement included a waiver of the right to appeal her sentence, we dismiss.

Facts and Procedural History

- [2] The State charged Hobbs with Level 2 felony dealing in methamphetamine, Level 4 felony possession of methamphetamine, Class B misdemeanor possession of marijuana, and Class C misdemeanor possession of paraphernalia. The trial court found Hobbs to be indigent and appointed an attorney to represent her. The parties entered into a written plea agreement under which Hobbs would plead guilty to Level 4 felony possession of methamphetamine and the State would dismiss the other charges. Hobbs agreed to “pay \$1,000.00 to the Drug Interdiction Fee Fund and reimburse Vermillion County for costs of appointed counsel,” but all other terms of her sentence were left to the discretion of the trial court. Appellant’s App. Vol. II p. 41. The agreement also included the following sentence-appeal waiver (which Hobbs initialed): “[T]he Defendant acknowledges that he/she is waving [sic] his/her right to appeal any sentence imposed by the Court that is within the range of penalties set forth in this plea agreement.” *Id.* at 42. The trial court held a change-of-plea hearing and accepted the parties’ agreement.

[3] The court then held a sentencing hearing, imposed the advisory sentence of six years in the Department of Correction, and recommended Hobbs for participation in the Recovery While Incarcerated program. (In its written sentencing order, the court stated that it would consider modifying Hobbs’s sentence if she successfully completes substance-abuse treatment while in the DOC.) The court also ordered Hobbs to pay a \$1,000 drug-interdiction fee, \$185 for court costs, \$100 for the cost of appointed counsel, and a \$1 fine. At the end of the sentencing hearing, the court told Hobbs—contrary to her written plea agreement—that she had the right to appeal her sentence:

I will also tell you that you do have the right to appeal the sentence with – that’s within the plea agreement, but it was still left open to the Court as to how that would be served. If you know that you wish to appeal that today, the Court can appoint an appellate counsel to represent you, and that is certainly your right to do.

Sentencing Tr. p. 9. Hobbs said she wanted to appeal, and the court appointed counsel for that purpose.

[4] Hobbs now appeals.

Discussion and Decision

[5] Hobbs contends the advisory sentence of six years is inappropriate and asks us to reduce it pursuant to Appellate Rule 7(B). She also argues the trial court erred by ordering her to pay fees and court costs without first determining her ability to pay, since there is a risk she will be re-incarcerated if she fails to pay.

The State responds to those arguments on the merits but first asks us to dismiss Hobbs’s appeal, citing the sentence-appeal waiver in her plea agreement. Hobbs did not address the waiver in her brief and did not file a reply brief to respond to the State’s argument. We agree with the State that the appeal should be dismissed. *See Creech v. State*, 887 N.E.2d 73, 75 (Ind. 2008) (holding that “a defendant may waive the right to appellate review of his sentence as part of a written plea agreement”).

[6] The State acknowledges that, at the sentencing hearing, the trial court told Hobbs she had the right to appeal her sentence. However, as the State also points out, our Supreme Court has held that when a trial court gives such a mistaken advisement at the sentencing hearing (as opposed to the guilty-plea hearing), it doesn’t affect the enforceability of the sentence-appeal waiver. *Id.* at 77. By the time the trial court gives the advisement, the defendant has already pled guilty “and received the benefit of his bargain.” *Id.*; *see also Ricci v. State*, 894 N.E.2d 1089, 1093 (Ind. Ct. App. 2008) (“[I]t is clear that under *Creech*, a trial court’s incorrect advisement at the conclusion of a defendant’s sentencing hearing has no effect on an otherwise knowing, voluntary, and intelligent waiver of the right to appeal his sentence[.]”), *trans. denied*.

[7] While we dismiss the appeal, we note that Hobbs’s ability to pay the fees and costs can be revisited after she completes her term of incarceration. *See Whedon v. State*, 765 N.E.2d 1276, 1279 (Ind. 2002) (noting that “a defendant’s financial resources are more appropriately determined not at the time of initial sentencing but at the conclusion of incarceration, thus allowing consideration of

whether the defendant may have accumulated assets through inheritance or otherwise”); *Kimbrough v. State*, 911 N.E.2d 621, 638 (Ind. Ct. App. 2009) (“Hence, because the trial court did not order Kimbrough to pay [the public-defender fee] immediately, it was not necessary for the trial court to hold a hearing to determine his current ability to pay.”).

[8] Dismissed.

Bradford, C.J., and Pyle, J., concur.