MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Dustin Eugene Race,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 28, 2022

Court of Appeals Case No. 21A-CR-2334

Appeal from the Ripley Circuit Court

The Honorable Ryan J. King, Judge

Trial Court Cause No. 69C01-2106-F5-5

Tavitas, Judge.

Case Summary

[1] After Dustin Race was released from jail pending charges relating to a domestic violence incident pertaining to his girlfriend, Felicia Ward, he immediately violated a no-contact order that was in effect to protect Ward. An intoxicated Race picked up Ward and drove headfirst into a bridge abutment at eighty miles per hour, killing Ward. Race was charged with, and pleaded guilty to, reckless homicide, a Level 5 felony. Finding a wealth of aggravating factors and no mitigating factors, the trial court sentenced Race to the maximum six-year sentence, all executed. Race contends that the trial court abused its discretion in failing to recognize several mitigating factors and that his sentence is inappropriate in light of the nature of the offense and his character. We disagree. Accordingly, we affirm the decision of the trial court.

Issues

[2] Race raises two issues for review:

I. Whether the trial court abused its discretion when it rejected Race's proposed mitigating factors.

II. Whether Race's sentence is inappropriate in light of the nature of the offense and his character.

Facts[1]

[3] On June 15, 2020, Race was arrested for his involvement in a domestic violence incident against Ward, resulting in multiple felony charges.[2] On June 16, 2020, a no-contact order was issued to Race with respect to Ward; the order was served on Race in jail the next day. On July 21, 2020, fewer than twenty-four hours after Race was released on bond, officers from the Ripley County Sheriff's Office responded to a scene of a single vehicle accident. Police observed an open bottle of whiskey on the lap of the driver—Race—as well as other open bottles of whiskey in the vehicle. Both Race and Ward, who was a passenger in the vehicle, were "unconscious and in serious condition." Appellant's App. Vol. II p. 32. Police determined that Race's driver's license was suspended at the time of the accident. A witness near the scene—who had originally called 911—indicated that he observed Race travelling at a high rate of speed and pulled over his vehicle to avoid a head-on collision. A local resident explained to police that she heard the crash and came outside to discover that Race's vehicle struck a concrete bridge abutment. Police observed

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[1] The factual basis established at the guilty plea hearing was sparse, essentially consisting of a rote recitation of the elements of the crime. The facts sections in the briefing before this court appear to rely heavily on the probable cause affidavit, which was not submitted as an exhibit, and, therefore, was not part of the evidentiary record. That probable cause affidavit was, however, attached to the pre-sentence investigation report, which the trial court considered for sentencing purposes. Moreover, Race had an opportunity to review the pre-sentence investigation report and raise any issues he may have had with that report prior to sentencing.

[2] The details of the incident do not appear in the record, and the charges were still pending at the time of Race's sentencing in the instant matter. The State charged Race with: Count I, confinement, a Level 6 felony; Count II, strangulation, a Level 6 felony; Count III, intimidation, a Level 6 felony; Count IV, domestic battery, a Level 6 felony; and Count V, failure to appear, a Level 6 felony.

that the speedometer inside Race's car was stuck on eighty miles per hour. Ward died several hours later as a result of a subdural hematoma. Records indicated that Race's blood alcohol content ("BAC") was .222.

[4] On June 7, 2021,[3] the State charged Race with Count I, reckless homicide, a Level 5 felony; and Count II, invasion of privacy, a Class A misdemeanor.[4] On June 23, 2021, Race pleaded guilty to reckless homicide, and the trial court held a sentencing hearing on September 21, 2021. Race's mother testified on the subject of Race's substance abuse, and the following colloquy ensued:

> A. [ ] He's admitted a lot more since he's come clean and he started readin[g] that stuff [ ] he knows he made a tremendous mistake and it's killing him.
>
> Q. Has he expressed remorse?
>
> A. Oh, yeah. The love of his life is gone.
>
> Q. And the love of his life is—
>
> A. [Ward]
>
> Q. [Ward]?

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[3] The long period between the crime and the filing of charges is apparently attributable to Race's failure to appear, a felony for which he was charged under the cause number associated with the domestic battery incident that occurred prior to the instant case.

[4] The State amended the charging informations on June 17, 2021, to correct a minor scrivener's error. Appellant's App. Vol. II p. 14.

A. Yes.

Q. And, um, has he expressed remorse—

A. Yes.

Q. –about the fact that his actions resulted in her death?
(Defendant crying)

A. Yeah. (Witness crying).

Q. Do you have anything else you'd like to add?

A. No, I just know that he's really sorry for what happened. I hate it that it got to this. I tried over the years to help him, but, like I said, unless you're ready to, you're ready for it, you're gonna [sic] keep being in denial and he's pretty well, he has come right out and told me, "Mom, I'm an addict. I need help." [ ] I know it could change his life, but I also know he's gotta [sic] pay for what he's done too.

Tr. Vol. II pp. 39-40. Race's mother also testified that Race had a nine-year-old son. The trial court questioned Race's mother and established that Race's relationship with Ward was only a couple of years in duration and that Race's mother had only met Ward a couple of times.

[5] During his allocution, Race stated: "I can't take back and I'm not, I take guilt for what happened. I mean I live with it ever[y] single day." *Id*. at 74. Race further stated: "I barely remember some of the stuff from that day. I just, it's

actually like I hit my head or whatever happened. I don't remember anything, I just remember hearing her and that was it." *Id*.

[6] During the trial court's sentencing statement in open court, the trial court recognized: (1) Race's license was suspended at the time of the accident; (2) the car was accelerating when it struck the bridge; (3) there were multiple whiskey bottles in the car; (4) Race's BAC was .222; (5) Race was out on bond less than twenty-four hours before he killed Ward, and the bond was for a domestic violence incident where Ward was alleged to be the victim; and (6) Race was in violation of a no-contact order. The trial court formally found no mitigating factors and the following aggravating factors:

> a. The facts and circumstances of the offense. At the time of the offense, the Defendant was Driving While Suspended; Defendant was "out of control" and was heard "accelerating" shortly before the crash; Defendant had a bottle of Kessler in his lap and other bottles of whiskey in the car; and the speedometer stuck at 80 MPH and the Tachometer stuck at 4000 RPM indicating where these devices were at the point of impact. Defendant had a blood alcohol content of .222 per serum blood.
>
> b. At the time of the offense Defendant was in violation of a No Contact Order. (State's Exhibit #1). Defendant was prohibited from being near the victim, but instead he killed her.
>
> c. At the time of the offense, the Defendant violated conditions of bond. One of those conditions was for the Defendant to not use alcohol. He flagrantly disregarded that condition.
>
> d. The Defendant has a criminal history and another pending case.

Appellant's App. Vol. II p. 50. The trial court sentenced Race to the maximum six-year sentence, all to be executed in the Department of Correction. Race now appeals.

Analysis

I. Proposed Mitigating Factors

[7] Race argues that the trial court abused its discretion when it failed to find as mitigating factors: (1) Race's guilty plea; (2) Race's remorse; (3) the offense is unlikely to recur; and (4) incarceration would impose an undue hardship on Race's son. "[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) (citing *Smallwood v. State*, 773 N.E.2d 259, 263 (Ind. 2002)), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007); *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)).

[8] A trial court may abuse its 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), *cert. denied*.

[9] "This Court presumes that a court that conducts a sentencing hearing renders its decision solely on the basis of relevant and probative evidence." *Schuler*, 132 N.E.3d at 905. "When an abuse of discretion occurs, this Court 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.'" *Ackerman*, 51 N.E.3d at 194 (quoting *Anglemyer*, 868 N.E.2d at 491).

[10] The trial court "'is not obligated to accept the defendant's contentions as to what constitutes a mitigating circumstance or to give the proffered mitigating circumstances the same weight the defendant does.'" *Weisheit v. State*, 26 N.E.3d 3, 9 (Ind. 2015) (quoting *Wilkes v. State*, 917 N.E.2d 675, 690 (Ind. 2009), *cert. denied*), *cert. denied*. "An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." *Anglemyer*, 868 N.E.2d at 493 (citing *Carter v. State*, 711 N.E.2d 835, 838 (Ind. 1999)).

A. Guilty Plea

[11] Race first argues that the fact that he pleaded guilty should have been a mitigating factor. "'[A] guilty plea may not be significantly mitigating when it does not demonstrate the defendant's acceptance of responsibility or when the defendant receives a substantial benefit in return for the plea.'" *McCoy v. State*, 96 N.E.3d 95, 99 (Ind. Ct. App. 2018) (quoting *Anglemyer*, 868 N.E.2d at 221). We note that here, Race benefitted from the plea because the State dismissed the Class A misdemeanor charge.[5] The trial court also explicitly detailed, as a part of its sentencing order, why it rejected the guilty plea as a mitigating factor:

> Defendant's guilty plea is not a mitigating factor because it was the result of a plea agreement and charge bargain, wherein he received the substantial benefit of dismissed charges. Also, the Operating While Intoxicated Resulting in Death, Level 4 Felony, (as set forth in the Probable Cause) was not filed. This case was filed on June 7th, 2021, and the Defendant pleaded guilty by agreement just 17 days later in recognition of all of these benefits.

Appellant's App. Vol. II p. 50. The trial court's evaluation of Race's guilty plea is not an abuse of discretion.

B. Remorse

[12] Race argues that he expressed remorse and that the trial court should have credited that remorse as a mitigating factor. We have recently explained that:

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[5] There are suggestions in the record that charges under a different cause number were dismissed as part of the plea as well, though the plea agreement itself does not reflect that.

> [A] defendant's "reference to statements articulating [their] remorse is insufficient to establish an abuse of discretion." *Corralez v. State*, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004). "The trial court, which has the ability to directly observe the defendant and listen to the tenor of his or her voice, is in the best position to determine whether the remorse is genuine." *Id*. "[W]ithout evidence of some impermissible consideration by the trial court, we accept its determination." *Hape v. State*, 903 N.E.2d 977, 1002-03 (Ind. Ct. App. 2009) (citing *Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002)).

Snyder v. State, 176 N.E.3d 995, 998 (Ind. Ct. App. 2021).

[13] Race does not allege that the trial court engaged in any impermissible considerations. His statements that the car wreck was an "accident" and that he does not "remember anything" are not expressions of remorse of *one's actions*, which is the remorse we consider mitigating. Tr. Vol. II p. 74. Rather, these are expressions of remorse about the *consequences* of one's actions. The trial court is best situated to evaluate whether a defendant's expressed remorse is indeed genuine, and here, the trial court simply did not credit Race's statements. We see no reason to quarrel with the trial court's evaluation.

C. Likelihood of Circumstances to Recur

[14] Race's arguments on this point are unclear. Below, his attorney characterized Race's criminal history as minor and remote in time: "Your Honor, I pointed out some case law and criminal history is not significant, and not likely to reoccur." Tr. Vol. II p. 70. The sum total of Race's argument on this point in his brief is as follows:

> Race's crime is not the result of circumstances likely to recur and/or he is likely to respond affirmatively to probation or short term imprisonment. Race's criminal history is minimal consisting of only misdemeanors, all of which are significantly remote in time. He has successfully completed prior probations. Race has a history of alcohol addiction, but has never had the opportunity to engage in inpatient treatment. It took this offense for him to realize the severity of his addiction and that he needs help. He acknowledged this to his Mother and obtained a "Daily Devotions" book via AA to begin working on this addiction. Tr. Vol. II, P. 39-40. There is no evidence to suggest that he would not respond positively to short term imprisonment follow by probation. A presumptive sentence or partially suspended sentence would give him the opportunity to engage in purposeful incarceration to gain the tools to ensure this never occurred again and gain the tools to remain sober.

Appellant's Br. p. 11.

[15] This argument suffers from several defects. First, on its face, it is not an argument that the trial court has abused its discretion in failing to accept Race's proposed mitigator. The argument is, therefore, waived for lacking cogency. *See* Ind. App. R. 46(A)(8)(a). Second, insofar as it asks us to consider the weight assigned to Race's sobriety, or lack thereof, this argument is a request that we reweigh evidence, which we will not do. And third, even if we were to accept all of its premises as true, they do not yield a conclusion that this crime is as a result of circumstances unlikely to reoccur, especially when the pre-sentence investigation report indicates that Race presents a moderate risk to re-offend. The trial court was best positioned to determine that circumstances,

such as Race's history of alcohol abuse and flouting of authority, were, indeed, likely to recur.

[16] The parties sporadically allude to another, starker way in which Race's second mitigating factor might be understood. Given that Race's actions resulted in Ward's death, she cannot by definition be a victim of any of his future potential crimes. To the extent that this dubious argument is made, it fundamentally misunderstands the relevant statutory mitigator. Certainly, Race is able to repeat his behavior with respect to a different victim. The question is not whether the *crime* against this victim is likely to recur, but whether the circumstances begetting that crime might recur. Race has not met his burden to demonstrate that the trial court's rejection of this proposed mitigating factor was clearly against the logic and effects of the facts and circumstances before it.

D. Undue Hardship

[17] Finally, Race argues that the trial court abused its discretion by failing to recognize that incarceration would work an undue hardship upon Race's son. The record is wholly devoid of evidence to support such a mitigator, let alone establishing that the trial court abused its discretion in failing to recognize that mitigator. The only evidence adduced at the sentencing hearing with respect to Race's son is that his son is nine years old. Any time a parent is incarcerated, the circumstances are likely to work a hardship on any dependents. The statute, however, calls for evidence that such a hardship was *undue*. *See Benefield v. State*, 904 N.E.2d 239, 247 (Ind. Ct. App. 2009) (citing *Roney v. State*, 872 N.E.2d 192, 204-05 (Ind. Ct. App. 2007), *abrogated on other grounds, trans.*

denied) ("'[m]any persons convicted of crimes have dependents, and absent special circumstances showing that the hardship to them is 'undue,' a sentencing court does not abuse its discretion by not finding this to be a mitigating factor."), *trans. denied*. Race offers neither evidence nor argument to support such a finding.[6] The trial court did not err in rejecting Race's proposed mitigator.

II. Appellate Rule 7(B) Analysis

[18] 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

[6] To the extent that he argues that incarceration will work an undue burden upon him, given that he may need medical treatment for his injuries in the future, our reasoning is the same. There is nothing in the record to suggest that incarceration will prevent Race from getting the necessary medical treatment.

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)).

[19] "'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). Though we must consider both the nature of the offense and the character of the offender, an appellant need not prove that each prong independently renders a sentence inappropriate. *See, e.g., State v. Stidham*, 157 N.E.3d 1185, 1195 (Ind. 2020) (granting a sentence reduction based solely on an analysis of aspects of the defendant's character); *Connor v. State*, 58 N.E.3d 215, 219 (Ind. Ct. App. 2016); *see also Davis v. State*, 173 N.E.3d 700, 707-09 (Tavitas, J., concurring in result).

[20] 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). In the case at

bar, Race was charged with reckless homicide, a Level 5 felony. Indiana Code Section 35-50-2-6 provides that a person convicted of a Level 5 felony will be sentenced to a term of between one and six years, with the advisory sentence being three years. The trial court sentenced Race to the maximum six-year term.

[21] 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*. "Race acknowledge [sic] that he acted recklessly and that his actions resulted in the death of Ms. Ward. Despite the trial court's comments, this was not an intentional act on Race's part. He loved Ms. Ward and did not want to harm her." Appellant's Br. p. 14. Race contends that "[t]here is nothing so egregious in the facts of this case to warrant the maximum sentence." *Id.* at 15. We disagree. Race consumed enough whiskey to reach a .222 BAC. He then accelerated his car to approximately eighty miles per hour and drove head-on into a bridge abutment with his girlfriend in the passenger seat. She died as a result. Furthermore, Race committed the offense after he violated the conditions of bond within hours of his release by drinking alcohol,[7] immediately violated the no contact order by having contact with Ward and did not have an active driver's license when he got into his car.

[7] Race conceded below that alcohol consumption was a violation of his terms of release. Tr. Vol. II p. 66.

[22] 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). We have already addressed the issue of Race's remorse—or lack thereof—*supra* and need not repeat ourselves here. We note that Race was thirty-eight years old at the time of this offense and had been given both the encouragement and the opportunity to correct his behaviors, especially his substance abuse.

[23] Moreover, when considering the criminal history, we note that "[t]he 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*).

[24] Here, Race's criminal history is comprised of multiple convictions for violent acts and abuse of alcohol, including: a misdemeanor battery resulting in bodily injury charge, which resulted in an unsatisfactory discharge from probation; a conviction for alcohol consumption as a minor; a misdemeanor domestic battery conviction; a misdemeanor possession of marijuana charge; and a series of felony charges—including confinement, strangulation, and intimidation—

stemming from the incident that precipitated Race's incarceration immediately prior to the instant case. Ward was alleged to be the victim in that matter as well. Those latter charges remained pending at the time of Race's sentencing for the instant offense.

[25] On balance, we cannot say that the trial court's imposition of the maximum sentence in this case was inappropriate. Accordingly, we affirm.

Conclusion

[26] The trial court did not abuse its discretion when imposing its sentence in this case. Nor was that sentence inappropriate. We affirm.

[27] Affirmed.

Bradford, C.J., and Crone, J., concur.