MEMORANDUM DECISION ON REHEARING

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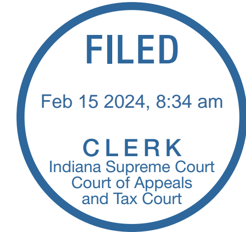

IN THE

Court of Appeals of Indiana

Steven R. Kennedy,

Appellant-Defendant

v.

State of Indiana,

Appellee-Plaintiff

February 15, 2024

Court of Appeals Case No.
23A-CR-565

Appeal from the Tippecanoe Superior Court

The Honorable Randy J. Williams, Judge

Trial Court Cause No.
79D01-2103-F4-10

Memorandum Decision by Judge Tavitas
Judges Pyle and Foley concur.

Tavitas, Judge.

Case Summary

[1] Steven Kennedy pleaded guilty to unlawful possession of a firearm by a serious violent felon ("SVF"), a Level 4 felony, and operating a vehicle while intoxicated endangering a person, a Class A misdemeanor, and admitted to being an habitual offender. The trial court sentenced Kennedy to an aggregate term of sixteen years. Kennedy appealed his sentence, and we determined that Kennedy's appeal was untimely and, accordingly, dismissed.

[2] Kennedy has filed a Petition for Rehearing. In his Petition, Kennedy observes that, after we dismissed his appeal, the following events have occurred: (1) he filed a motion for permission to file a belated notice of appeal; (2) the trial court granted this motion; and (3) he filed an amended notice of appeal. Kennedy asks that we, therefore, reconsider our decision to dismiss his appeal and address his claim on the merits. In the interest of judicial economy, we agree and grant rehearing to address Kennedy's claim on the merits. We, however, reject Kennedy's sole argument on appeal that his sentence is inappropriate in light of the nature of his offense and his character. Accordingly, we grant rehearing but affirm Kennedy's sentence.

Issues

[3] We address the following two issues on rehearing:

I. Whether we should reconsider our dismissal of Kennedy's appeal now that he has received permission to file a belated notice of appeal.

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

Facts

[4] The facts of this case were set forth in our original opinion as follows:

> In the early morning hours of January 4, 2021, Kennedy was driving his vehicle on I-65 in Tippecanoe County with Andrea Diggs in the passenger seat. Tippecanoe County Sheriff's Deputy Conner Lefever observed Kennedy change lanes without signaling and clocked Kennedy's vehicle at 95 mph in a 65 mph zone. Deputy Lefever stopped Kennedy's car and approached the vehicle to speak with Kennedy. Kennedy admitted that his license was suspended, and Deputy Lefever smelled the odor of marijuana emanating from the vehicle. When Kennedy opened the glove compartment to retrieve his insurance card, Deputy Lefever saw a handgun in the compartment. Deputy Lefever confirmed that neither Kennedy nor his passenger Diggs had a permit to carry the handgun. Deputy Lefever also confirmed that Kennedy's license was suspended. Deputy Lefever searched the car and found an open bottle of cognac in the passenger side of the front seat. Kennedy admitted that he had smoked marijuana and drank cognac earlier in the night.
>
> Kennedy submitted to a portable breath test, which indicated that Kennedy had an alcohol concentration equivalent ("ACE") of .097. A subsequent blood test revealed that Kennedy had an ACE of .113 and also had THC and MDMA in his blood. When Kennedy was searched at the jail, the police found a bag of marijuana on his person.

On March 19, 2021, the State charged Kennedy with nine counts: Count I: possession of a firearm by a[] SVF, a Level 4 felony; Count II: operating a vehicle while intoxicated endangering a person, a Class A misdemeanor; Count III: operating a vehicle with an ACE of .08 or greater but less than .15, a Class A misdemeanor; Count IV: carrying a handgun without a license, a Class A misdemeanor; Count V: possession of marijuana, a Class B misdemeanor; Count VI: driving while suspended, a Class A misdemeanor; Count VII: unlawful possession of a firearm by a domestic batterer, a Class A misdemeanor; Count VIII: carrying a handgun without a license with a prior felony conviction, a Level 5 felony; and Count IX: possession of marijuana with a prior drug offense, a Class A misdemeanor. The State also alleged that Kennedy was an habitual offender.

Kennedy subsequently entered into a plea agreement with the State in which he agreed to plead guilty to Count I: Possession of a Firearm by a Serious Violent Felon, a Level 4 Felony, and Count II: Operating While Intoxicated, a Class A Misdemeanor, and admitted to being an habitual offender. In exchange, the State agreed to dismiss all other charges. Sentencing was left to the discretion of the trial court. The trial court accepted the guilty plea on October 29, 2021.

At a sentencing hearing held on November 20, 2022, the trial court sentenced Kennedy to nine years on Count I, which the trial court enhanced by six years for the habitual offender finding, and a consecutive term of one year on Count II, for an aggregate sentence of sixteen years. The trial court also ordered that the final three years of the sentence be served on community corrections.

On December 1, 2022, Kennedy, filed a pro se motion to appeal his sentencing order, in which he requested that the trial court appoint counsel to represent him on appeal. The trial court did not rule on this motion until March 10, 2023, when it entered an

> order stating the Kennedy timely filed his "motion to appeal," and appointed Kennedy pauper counsel. Kennedy's appellate counsel then filed a notice of appeal on March 14, 2023.

Kennedy v. State, 23A-CR-565, slip op. pp. 2-4 (Ind. Ct. App. Dec. 21, 2023) (mem.) (footnote omitted).

[5] The State cross-appealed and argued that Kennedy's notice of appeal was untimely because it was not filed within thirty days of the trial court's final appealable order. *See* Ind. Appellate Rule 9(A)(1). Because Kennedy had not availed himself of the provisions of Post-Conviction Rule 2 for belated appeals, the State argued that we should dismiss Kennedy's appeal. We agreed, concluding: "Kennedy did not timely file a notice of appeal. He, therefore, forfeited his right to appeal, subject to the provisions of Post-Conviction Rule 2 for belated appeals, of which Kennedy has not yet availed himself." *Kennedy*, slip op. pp. 6-7.

[6] On January 2, 2024, Kennedy filed a motion for a belated appeal with the trial court, which the trial court granted two days later. Next, on January 10, Kennedy filed a Petition for Rehearing and a Petition to Reconsider our earlier dismissal of his appeal.[1] Kennedy then filed an amended notice of appeal on January 16.

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[1] The State has not filed a response to Kennedy's Petition for Rehearing.

Discussion and Decision

I. Belated Appeal

[7] Our original decision to dismiss Kennedy's appeal was based on two facts: (1) Kennedy did not timely file his initial notice of appeal; and (2) Kennedy had not yet availed himself of the procedures set forth in Post-Conviction Rule 2 for belated appeals. Kennedy has since remedied both deficiencies. He filed a motion for permission to file a belated notice of appeal, which the trial court granted; and he filed an amended notice of appeal noting that he had received permission to file a belated notice of appeal.

[8] Under these facts, we have two options. First, we could require Kennedy to file a new notice of appeal under a new case number and start his appeal afresh. Second, we could consider the merits of Kennedy's appeal on rehearing since he has cured the deficiencies of his original notice of appeal. For the sake of judicial economy, we choose the latter and grant Kennedy's petition for rehearing. That said, we conclude that Kennedy's appellate argument is unavailing.

II. Kennedy's Sentence is Not Inappropriate

[9] Kennedy argues that his sixteen-year sentence is inappropriate. We disagree.

[10] 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."[2] 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 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)).

[11] "'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

[2] 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 (Ind. Ct. App. 2021) (Tavitas, J., concurring in result).

character (such as substantial virtuous traits or persistent examples of good character)." *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015). 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).

[12] Here, Kennedy was convicted of possession of a firearm by a SVF, a Level 4 felony, and operating while intoxicated, a Class A Misdemeanor. He also admitted to being an habitual offender. The sentencing range for a Level 4 felony is between two and twelve years, with an advisory sentence of six years. Ind. Code § 35-50-2-5.5. A person convicted of a Class A misdemeanor may be sentenced to no more than one year of imprisonment. Ind. Code § 35-50-3-2. A trial court "shall sentence a person found to be a habitual offender to an additional fixed term that is between . . . six (6) years and twenty (20) years, for a person convicted of murder or a Level 1 through Level 4 felony." Ind. Code § 35-50-2-8(i)(1) (2017).[3]

[13] The trial court imposed a sentence of nine years on Kennedy's Level 4 felony conviction, which is three years more than the advisory but also three years below the maximum. For the habitual offender finding, the trial court enhanced Kennedy's nine-year sentence by six years—the minimum enhancement the trial court was allowed to impose. The trial court also

[3] We refer to the habitual offender statute that was in effect at the time Kennedy committed his offenses.

sentenced Kennedy to a consecutive term of one year for the Class A misdemeanor conviction. Thus, Kennedy faced a maximum sentence of thirty-three years but received a sentence of less than half of that. It is with this in mind that we consider the appropriateness of Kennedy's sentence.

A. Nature of the Offense

[14] Our analysis of the "nature of the offense" requires us to look at the nature, extent, heinousness, and brutality of the offense. *See Brown v. State*, 10 N.E.3d 1, 5 (Ind. 2014). Kennedy claims that there is little about his offenses that set them apart from the typical offenses of possession of a firearm by a SVF or operating while intoxicated. We note, however, that Kennedy was driving his vehicle at ninety-five miles per hour and had marijuana and an open container of alcohol in his car. After he was pulled over, Kennedy attempted to hide his handgun by putting it in his passenger's purse. Nothing about the nature of Kennedy's offenses warrants revising his sentence.

B. Character of the Offender.

[15] Our analysis of the character of the offender involves a broad consideration of a defendant's qualities, including the defendant's age, criminal history, background, past rehabilitative efforts, and remorse. *See Harris v. State*, 165 N.E.3d 91, 100 (Ind. 2021); *McCain*, 148 N.E.3d at 985. The significance of a criminal history in assessing a defendant's character and an appropriate sentence vary based on the gravity, nature, proximity, and number of prior offenses in relation to the current offense. *Prince v. State*, 148 N.E.3d 1171, 1174

(Ind. Ct. App. 2020). "Even a minor criminal history is a poor reflection of a defendant's character." *Id.*

[16] Kennedy claims that he was living an average American life and supporting his four children. Although Kennedy was supporting his family, little else about his character is average. Kennedy has an extensive criminal history consisting of twelve misdemeanors and five felony convictions. Kennedy was also on probation at the time he committed the instant offenses. Also revealing is that Kennedy failed to appear at his originally-scheduled sentencing hearing and was not apprehended until six months later. After he was apprehended, he was charged with additional crimes. Kennedy's poor character, as reflected by his continued criminal behavior, does not support a downward revision of his sentence.

Conclusion

[17] Because the trial court granted Kennedy's motion for permission to file a belated notice of appeal, we grant rehearing to address Kennedy's appellate claim on its merits. We conclude, however, that Kennedy's sixteen-year sentence is not inappropriate in light of the serious nature of Kennedy's offenses and his poor character as demonstrated by his long history of criminal behavior. Accordingly, we grant rehearing but affirm the judgment of the trial court.

[18] Affirmed.

Pyle, J., and Foley, J., concur.

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