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.

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IN THE COURT OF APPEALS OF INDIANA

David Ditmore,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 9, 2021

Court of Appeals Case No. 21A-CR-283

Appeal from the Howard Superior Court

The Honorable Hans S. Pate, Judge

Trial Court Cause No. 34D04-2003-F6-885
34D04-2008-F6-2625

Tavitas, Judge.

Case Summary

[1] David Ditmore appeals his sentence imposed for his convictions of escape, a Level 6 felony, and failure to return to a lawful detention center, a Level 6 felony. After Ditmore twice absconded from a work release program, Ditmore's previously-suspended sentence was ordered to be served in the Department of Correction ("DOC"). Ditmore's momentary brushes with freedom, however, also resulted in two new felony charges for escape and failure to return to a lawful detention center. Ditmore pleaded guilty to both charges, and the trial court sentenced Ditmore to an aggregate sentence of four years (two executed and two suspended) to be served consecutive to one another, and consecutive to the sentence previously ordered. The trial court found that Ditmore was not entitled to credit time on the new charges, because that time had already been awarded on the prior offense. Ditmore now contends that the trial court abused its discretion in so finding and, also, that his sentence is inappropriate in light of the nature of the offenses and his character. His arguments, however, lack cogency and are waived. Waiver aside, the trial court did not abuse its discretion, and Ditmore's sentence is not inappropriate. Thus, we affirm.

Issues

Ditmore raises two issues, which we restate here as:

I. Whether the trial court abused its discretion by not awarding Ditmore credit time.

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

Facts

[2] David Ditmore was serving a sentence in a work release program for felony residential entry under cause number 34D01-1911-F5-3631 ("F5-3631"). On March 23, 2020, the Howard County Sheriff's office was dispatched after a report that Ditmore escaped the work release center. Officers were directed to a residence on Forest Drive, and Ditmore was located inside the residence and arrested.

[3] The arrest resulted in noncompliance under F5-3631 and a petition to revoke was filed, but the State also charged Ditmore with failure to return to lawful detention, a Level 6 felony, under cause number 34D04-2003-F6-885 ("F6-885"). Ditmore was in jail from the date of his arrest on March 24, 2020, until he posted bond on May 22, 2020. Meanwhile, in a different court, 183 days of Ditmore's previously-suspended sentence under the prior case, F5-3631, were ordered to be executed and served on work release.[1]

[4] On August 27, 2020, Ditmore requested to leave the work release center for medical attention. The request was granted, Ditmore went to the hospital, and was discharged at 4:00 A.M. As of 6:00 A.M., and without explanation,

[1] Ditmore fails to include documentation from F5-3631 in his appendix. We provide this information here—retrieved from the public Mycase system—purely for context.

Ditmore had not returned and was considered to have escaped. Ditmore was once more arrested and charged this time with escape under cause number 34D04-2008-F6-2625 ("F6-2625"), and a petition to revoke was filed under F5-3631. The trial court ordered executed 667 days of Ditmore's previously-suspended sentence in F5-3631 to be served in the DOC. The trial court also noted the balance of Ditmore's credit days.[2]

[5] On January 14, 2021, Ditmore pleaded guilty to the new charges in F6-885 and F6-2625. The trial court held a sentencing hearing on February 11, 2021.[3] The partial transcript of the hearing reflects that the trial court stated:

> The charge, or the case in Superior Court 1 included non-compliance arrests for 34D01-1911-F5-3631 and so all the credit time is going, has gone already toward that case or is going toward that case and that was charged as a Burglary and you plead guilty to Residential Entry as a Level 6 Felony.

Tr. Vol. II p. 10.

[6] The trial court then recited Ditmore's criminal history and the fact that both of the new convictions resulted from noncompliance with the conditions of the work release program. The trial court noted one mitigating factor: the fact that

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[2] According to Mycase, the trial court's order in F5-3631 stated: "The Defendant has jail time credit as of 11/17/2020 in the sum of 181 actual days or 362 credit days, served while awaiting disposition in this matter."

[3] The sentencing hearing pertained only to the new charges in F6-885 and F6-2625, as the petitions for revocation were handled separately under F6-3631.

Ditmore pleaded guilty and saved the State the cost of trial. On each charge, the trial court sentenced Ditmore to two years, with one year executed in the DOC, and one year suspended, for an aggregate sentence of four years with two years executed. The sentences were ordered to be served consecutive to one another and consecutive to his F5-3631 sentence. Ditmore now appeals.

Analysis

I. Abuse of Discretion

[7] Ditmore claims that the trial court abused its discretion by failing to award Ditmore credit time for the aggregate sentence imposed in F6-885 and F6-2625. Credit time is a matter of statutory right; therefore, trial courts "'. . . generally do not have discretion in awarding or denying such credit.'" *Perry v. State,* 13 N.E.3d 909, 911 (Ind. Ct. App. 2014) (quoting *Molden v. State*, 750 N.E.2d 448, 449 (Ind. Ct. App. 2001)); *see also Meadows v. State,* 2 N.E.3d 788, 791 (Ind. Ct. App. 2014) (stating that pre-sentence credit time is a matter of statutory right, not a matter of judicial discretion). Two types of credit time are calculated by the trial court: "'(1) the credit toward the sentence a prisoner receives for time actually served, and (2) the additional credit a prisoner receives for good behavior and educational attainment.'" *Maciaszek v. State,* 75 N.E.3d 1089, 1092 (Ind. Ct. App. 2017) (quoting *Purcell v. State,* 721 N.E.2d 220, 222 (Ind. 1999)), *trans. denied*.

[8] The legislature defines "credit time" in Indiana Code Section 35-50-6-0.5(2) as "the sum of a person's accrued time, good time credit, and educational credit."

Credit for time actually served is denoted as "accrued time" in Indiana Code Section 35-50-6-0.5(1) and is defined as "the amount of time that a person is imprisoned or confined." Credit time received for either good behavior or educational attainment is denoted as "good time credit" and "educational credit" respectively.[4] Ind. Code § 35-50-6-0.5(3-4).

[9] The determination of a defendant's pre-trial or pre-sentence credit time depends upon: (1) the defendant being confined before trial or sentencing; and (2) the confinement resulting from the "'criminal charge for which [the] sentence is being imposed.'" *Maciaszek,* 75 N.E.3d at 1092 (quoting *Stephens v. State,* 735 N.E.2d 278, 284 (Ind. Ct. App. 2000), *trans. denied*). If a person is confined before trial or sentencing on more than one charge and is sentenced to concurrent terms for the separate crimes, credit time is applied against each separate term. *Swihart v. State,* 71 N.E.3d 60, 63 (Ind. Ct. App. 2017). Where, however, the defendant receives consecutive terms for the separate crimes, credit time is applied only "against the aggregate of the sentence." *Id.* (quoting *Shane v. State*, 716 N.E.2d 391, 400 (Ind. 1999)).

[10] Ditmore fails to explain how or why the trial court abused its discretion. In fact, we are unable to even discern how many credit time days to which

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[4] "Good time credit" is defined in Indiana Code Section 35-50-6-0.5(4) as "a reduction in a person's term of imprisonment or confinement awarded for the person's good behavior while imprisoned or confined." "Educational credit" is defined in Indiana Code Section 35-50-6-0.5(3) as "a reduction in a person's term of imprisonment or confinement for participation in an educational, vocational, rehabilitative, or other program."

Ditmore believes he is entitled. We conclude that Ditmore's claims are not supported by cogent, reasoned arguments, and they wholly lack citation to authority. The claims are, therefore, waived for purposes of appellate review. *See* Ind. Appellate Rule 46(A)(8)(a); *Clark Cnty. Drainage Bd. v. Isgrigg*, 963 N.E.2d 9, 18 (Ind. Ct. App. 2012), *adhered to on reh'g*, 966 N.E.2d 678 (Ind. Ct. App. 2012) (citing *Watson v. Auto Advisors, Inc.*, 822 N.E.2d 1017, 1027-28 (Ind. Ct. App. 2005), *trans. denied*) ("'When parties fail to provide argument and citations, we find their arguments are waived for appellate review.'").[5]

[11] Waiver notwithstanding, from what we can discern from Ditmore's argument, he is claiming that he is entitled to some jail credit time which he did not receive. The trial court indicated at Ditmore's sentencing hearing that Ditmore did earn and receive credit time for his F5-3631 sentence; no party contested the credit time determination. Nothing in the record, including Ditmore's appendix, contradicts the trial court's finding. Furthermore, the sentences were all ordered to be served consecutively. Ditmore has failed to show that the trial court abused its discretion.

[5] Incidentally, we note that the record does not reflect that Ditmore's trial counsel raised any objection to the sentence or raised the issue pertaining to credit time. As such, this argument is waived for the independent reason that the argument was not raised below. *See, e.g.*, *Steelman v. State*, 486 N.E.2d 523, 525 (Ind. 1985) (holding that an ". . . issue at the heart of appellant's argument was not raised in the trial court and preserved for review. It cannot therefore be properly considered to be before this court. . . .").

II. Appellate Rule 7(B)

[12] Ditmore further contends that his sentence is inappropriate in light of the nature of the offenses and his character. 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 is appropriate.'" *Mullins v. State*, 148 N.E.3d 986, 987 (Ind. 2020) (quoting *Faith v. State*, 131 N.E.3d 158, 160 (Ind. 2019)).

[13] "'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).

[14] 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, Ditmore was convicted of two Level 6 felonies. Indiana Code Section 35-50-2-7(b) provides a sentencing range of six months to two and one-half years for a Level 6 felony, with an advisory sentence of one year.[6] Thus, Ditmore was susceptible to a sentencing range of between one and five years for both convictions and Ditmore received a sentence of four years (two years to be executed and two to be suspended)—two years more than the advisory sentence.

[15] 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*. Ditmore argues that there is nothing in the probable cause affidavits to "evidence anything other than what the Legislature

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[6] Ditmore's brief inaccurately asserts that Indiana Code Section 35-50-2-7(a) controls. That provision references the now- outmoded classification "Class D felony," and applies only to crimes committed prior to July 1, 2014.

would have contemplated as an advisory sentence offense, and probably less." Appellant's Br. p. 9. Ditmore offers no argument in support of this proposition and cites no authority. Nonetheless, we note that this claim must fail.

[16] We do not wield Rule 7(B) to seek perceived correct results or to attempt to divine what the legislature might view as a set of facts that warrants an advisory sentence. Advisory sentences are merely a starting point for the analysis, not a stricture on the length of sentence that might be imposed. *See, e.g., Fuller*, 9 N.E.3d at 657. Ditmore's burden is to demonstrate that the sentence he received was inappropriate, not that he was deserving of an advisory sentence. *See, e.g., McCain*, 148 N.E.3d at 985 (quoting *Cardwell*, 895 N.E.2d at 1225). He has not met that burden.

[17] We turn to our analysis of the character of the offender, which 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). "The 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*).

[18] According to the "Memo to the Court," Appellant's App. Vol. II pp. 33-34, filed by the probation department prior to the sentencing hearing, Ditmore was previously convicted of three felonies and eleven misdemeanors. Ditmore was on probation eleven times and participated in the "Alcohol and Drug Program" on four different occasions. *Id*. at 33. Moreover, Ditmore has served executed sentences twice before, and courts have revoked his probation on two prior occasions, resulting in prison time. Ditmore's lengthy criminal history reflects poorly on Ditmore's character.

[19] The sum of Ditmore's argument with respect to his character is as follows:

> Ditmore asks this Court to take judicial notice, not only of the COVID that was raging last year, but also of the many published articles of the COVID that was running through Howard County, including its jail and alternative incarceration problems. The undersigned does not know if those concerns were before the Trial Court [ ] because the Trial Court did not record the bulk of the sentencing hearing[,] but Ditmore has told the undersigned he left work release because he was worried about COVID.

Appellant's Br. pp. 9-10. Ditmore fails to provide a cognizable Rule 7(B) argument supported by reasoning. Ditmore does not cite a single authority to support his argument and, accordingly, his argument is waived for failure to cite authority under Appellate Rule 46(A)(8).[7]

[7] Vaguely asking this Court to "take judicial notice" of apparently every published article pertaining to Covid-19 in Howard County is insufficient under Appellate Rule 46(A).

[20] Waiver notwithstanding, Ditmore's sentence is not one of the outliers that Rule 7(B) is intended to eliminate. His lengthy criminal history evinces Ditmore's resistance to rehabilitation. Further, Ditmore articulates no mitigating factors and, thereby, fails to counterbalance his criminal history and his repeated abscondment from a program in which he was enrolled as a matter of benevolence. Ditmore's sentence is not inappropriate.

Conclusion

[21] Ditmore's claims are unsupported by argument and citation to authority; they are, thus, waived. Waiver notwithstanding, the trial court did not abuse its discretion, and Ditmore's sentence is not inappropriate in light of the nature of the offenses and his character. We affirm the trial court.

[22] Affirmed.

Mathias, J., and Weissmann, J., concur.