

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Brendan Johnathan Weaver,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 17, 2021

Court of Appeals Case No.
21A-CR-116

Appeal from the
Tippecanoe Circuit Court

The Honorable
Sean M. Persin, Judge

Trial Court Cause No.
79C01-2002-F2-8

Kirsch, Judge.

[1] Brendan Johnathan Weaver (“Weaver”) pleaded guilty to dealing in methamphetamine¹ as a Level 2 felony and resisting law enforcement² as a Class A misdemeanor and was sentenced to twenty years executed in the Indiana Department of Correction (“DOC”). He appeals his sentence, contending that his sentence is inappropriate in light of the nature of the offense and the character of the offender.

[2] We affirm.

Facts and Procedural History

[3] On February 27, 2020, a police officer observed Weaver standing in the parking lot of a convenience store in Lafayette, Indiana. *Appellant’s App. Vol. 2* at 13. The officer recognized Weaver and knew he had multiple outstanding warrants. *Id.* When the officer pulled into the parking lot, Weaver, who was holding a black backpack, began jogging away. *Id.* The officer activated his siren and emergency lights, and Weaver ran across the street toward an apartment complex. *Id.* The officer then began a foot pursuit of Weaver, and Weaver ran between two buildings. *Id.* When Weaver emerged from between the buildings, he no longer had the backpack he had been carrying and continued to run despite the officer identifying himself as a police officer and ordering

¹ See Ind. Code § 35-48-4-1.1.

² See Ind. Code § 35-44.1-3-1(a)(3).

Weaver to stop. *Id.* The foot chase ended when Weaver tripped on a sidewalk and fell to the ground. *Id.*

[4] The officer approached Weaver and grabbed his wrist to place him under arrest, but Weaver ignored the officer's order to roll over and repeatedly tried to pull away from the officer. *Id.* Weaver also tried to stand up while attempting to pull free from the officer and balled his hand to make a fist. *Id.* The officer used his taser to subdue Weaver and was able to take him into custody. *Id.* The officer performed a search incident to arrest and found a black bag in Weaver's pocket containing two baggies of a white crystalline substance, one of which weighed 33.83 grams and the second weighed 4.59 grams. *Id.* An additional 1.25 grams of a similar crystalline substance was found in a plastic vial in Weaver's pocket, and 4.21 grams of a crystalline substance was found wrapped in two \$100 bills inside of a black case found on Weaver. *Id.* The substances field tested as containing methamphetamine. *Id.* Officers recovered Weaver's backpack from the patio of an apartment, and inside, they found a digital scale with white crystalline powder on it. *Id.* Attached to the backpack, officers found a white bag that contained several syringes. *Id.*

[5] On February 28, 2020, the State charged Weaver with Level 2 felony dealing in methamphetamine, Level 3 felony possession of methamphetamine, Level 6 felony unlawful possession of a syringe, and two counts of Class A misdemeanor resisting law enforcement. *Id.* at 8-12. On April 3, 2020, the trial court conducted a guilty plea hearing. *Id.* at 28-29. Pursuant to the plea agreement, Weaver agreed to plead guilty to Level 2 felony dealing in

methamphetamine and Class A misdemeanor resisting law enforcement, and the State agreed to dismiss the remaining charges under the instant cause number, the charges under another misdemeanor cause number, and a pending petition to revoke probation under yet another misdemeanor cause number. *Id.* at 28. The plea agreement also resolved another petition to revoke probation filed in a felony cause number by requiring Weaver to admit the violation and to be unsuccessfully discharged from probation. *Id.* The plea agreement imposed the following conditions and limitations on Weaver's sentence: (1) the initial portion of the sentence executed in DOC must be no less than fifteen years; (2) any sentence above fifteen years and up to and including twenty years could be served in DOC, community corrections, or probation; (3) any sentence above twenty years must be served in community corrections, if accepted, or probation; and (4) the sentence must be consecutive to sentences in three other felony cause number and a misdemeanor cause number. *Id.* at 28-29.

[6] At the sentencing hearing conducted on May 1, 2020, the trial court accepted the plea agreement, and Weaver acknowledged the accuracy of the presentence investigation ("PSI") other than to note that a DCS case described as ongoing had been closed. *Tr. Vol. 2* at 34. In the PSI, Weaver described himself at the time of the present offenses as "an addict who was refusing to seek help with his addiction." *Appellant's Conf. App. Vol. 2* at 62. At the sentencing hearing, Weaver testified that he is "definitely a drug addict and not the drug dealer that [he's] being portrayed as." *Tr. Vol. 2* at 40. He testified that he had a substantial substance abuse problem and began using synthetic marijuana

around the age of fourteen and then progressed to using more serious drugs including methamphetamine and heroin around the age of twenty-one or twenty-two. *Id.* at 37-38. Weaver stated that he had not yet sought adequate treatment for his substance abuse issues. *Id.* at 38. He requested that the trial court order programs as part of his sentence because he believed “long term rehabilitation during and after my incarceration is going to allow [him] the best possible chance to maintain sobriety and drastically reduce [his] chances of becoming a repeat offender.” *Id.* at 40-41. Weaver testified that he had three children and had joint custody of one child and that the other two children “were given an adoptive family.” *Id.* at 38-39. Weaver requested the trial court to impose a twenty-year sentence with five of those years suspended to probation. *Id.* at 45.

- [7] The trial court found as aggravating factors Weaver’s criminal history and his recent violations of probation and conditions of bond. *Id.* at 47; *Appellant’s App. Vol. 2* at 65-66. Weaver’s criminal history included a felony conviction for criminal recklessness, eight prior misdemeanor convictions including two for resisting law enforcement, and an adjudication for delinquency as a juvenile. *Appellant’s Conf. App. Vol. 2* at 51. He also had numerous probation violations filed against him with several still pending at the time of sentencing. *Id.* at 52. As mitigating factors, the trial court found Weaver’s family support, that long term incarceration would impose a hardship on his minor children, his guilty plea and acceptance of responsibility, and his history of mental health issues. *Tr. Vol. 2* at 47; *Appellant’s App. Vol. 2* at 66. Finding that the aggravating factors

outweighed the mitigating factors, the trial court sentenced Weaver to twenty years for his conviction for Level 2 felony dealing in methamphetamine and one year for his conviction for Class A misdemeanor resisting law enforcement and ordered the sentences to run concurrently for an aggregate twenty-year sentence executed in the DOC. *Tr. Vol. 2* at 48; *Appellant's App. Vol. 2* at 66. The trial court further stated that it would like for Weaver to be released to community corrections or probation after serving fifteen years, but “[was] not inclined to do it up front.” *Tr. Vol. 2* at 48. Rather, the trial court told Weaver “you need to earn that” by making good use of his time in the DOC including by avoiding discipline problems and by getting involved in programs. *Id.* The trial court said it would consider a sentence modification after Weaver had served twelve or thirteen years of his sentence. *Id.* at 48-49. The trial court included this in the written sentencing order by noting it would consider purposeful incarceration “and modification of the last five years of this sentence, if the defendant makes good use of his time in the [DOC].” *Appellant's App. Vol. 2* at 66. Weaver now appeals.

Discussion and Decision

- [8] Pursuant to Indiana Appellate Rule 7(B), this court “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the [c]ourt finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Our Supreme Court has explained that the principal role of appellate review should be to 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). We independently examine the nature of Weaver’s offense and his character under Appellate Rule 7(B) with substantial deference to the trial court’s sentence. *Satterfield v. State*, 33 N.E.3d 344, 355 (Ind. 2015). “In conducting our review, we do not look to see whether the defendant’s sentence is appropriate or if another sentence might be more appropriate; rather, the test is whether the sentence is ‘inappropriate.’” *Barker v. State*, 994 N.E.2d 306, 315 (Ind. Ct. App. 2013), *trans. denied*. Whether a sentence is inappropriate ultimately depends upon “the culpability of the defendant, the severity of the crime, the damage done to others, and a myriad of other factors that come to light in a given case.” *Cardwell*, 895 N.E.2d at 1224. The defendant bears the burden of persuading us that his sentence is inappropriate. *Id.*

- [9] Weaver argues that his fully executed twenty-year sentence is inappropriate and should be reduced. He claims that the nature of his offense does not warrant the sentence because he was a relatively low-level drug dealer who was doing so primarily to support his own addiction. He further argues that, although he possessed items related to drug dealing activities and more than ten grams of methamphetamine, such facts were not well in excess of the minimum required to sustain his conviction. Weaver also contends that his good character shows that his sentence is inappropriate. Specifically, he asserts that he had a history of trying to establish a better life through education and vocational training as he struggled with his addiction and that he made an effort to support and be a part of his children’s lives. Based on the facts of the case and Weaver’s good

character, he maintains that his sentence should be reduced to a total of twenty years with fifteen years served in DOC and five years either served in community corrections or suspended to probation.

[10] Weaver pleaded guilty to one count of Level 2 felony dealing in methamphetamine and one count of Class A misdemeanor resisting law enforcement. A person who commits a Level 2 felony shall be imprisoned for a fixed term of between ten and thirty years, with the advisory sentence being seventeen and one-half years. Ind. Code § 35-50-2-4.5. A person who commits a Class A misdemeanor shall be imprisoned for a fixed term of not more than one year. Ind. Code § 35-50-3-2. The trial court sentenced Weaver to twenty years for his Level 2 felony conviction, which is more than the advisory but less than the maximum sentence allowed, and one year for his Class A misdemeanor conviction to run concurrently for an aggregate sentence of twenty years executed in DOC.

[11] As this court has recognized, the nature of the offense is found in the details and circumstances of the commission of the offense and the defendant's participation. *Perry v. State*, 78 N.E.3d 1, 13 (Ind. Ct. App. 2017). "When determining the appropriateness of a sentence that deviates from an advisory sentence, we consider whether there is anything more or less egregious about the offense as committed by the defendant that 'makes it different from the typical offense accounted for by the legislature when it set the advisory sentence.'" *Moyer v. State*, 83 N.E.3d 136, 142 (Ind. Ct. App. 2017) (quoting *Holloway v. State*, 950 N.E.2d 803, 807 (Ind. Ct. App. 2011)), *trans. denied*.

[12] The evidence showed that, when he was arrested, Weaver was found in possession of more than forty grams of methamphetamine as well as cash, digital scales, and syringes. *Appellant's App. Vol. 2* at 13; *Tr. Vol. 2* at 43. The Level 2 felony dealing in methamphetamine charge to which he pleaded guilty only required evidence of at least ten grams of methamphetamine. *See Ind. Code § 35-48-4-1.1*. The initial reason why Weaver came to the attention of the police was because the officer recognized Weaver and knew he was wanted on “multiple warrants,” which were issued because he had been released on bond in three other causes and failed to appear in those causes. *Appellant's Conf. App. Vol. 2* at 13, 45-47; *Tr. Vol. 2* at 43. When the officer attempted to stop Weaver, he fled on foot and refused to stop when ordered to do so, and after the officer caught up to him, Weaver continued to resist arrest by struggling with the officer and refusing to obey the officer's commands. *Appellant's Conf. App. Vol. 2* at 13. The evidence showed that this is his third conviction for resisting law enforcement. *Id.* at 46-47. Although Weaver attempts to portray himself as primarily a drug user dealing to support his addiction instead of a large-scale dealer, the evidence that he possessed a significant amount of drugs and that he was unemployed with a lack of other income at the time of his arrest indicate otherwise. *Id.* at 49. Weaver has failed to portray the nature of his offense in a positive light, “such as accompanied by restraint, regard, and lack of brutality” that is required to prove that his sentence should be revised. *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015). Thus, he has failed to show that his sentence is inappropriate considering the nature of his offense.

[13] The character of the offender is found in what we learn of the offender's life and conduct. *Perry*, 78 N.E.3d at 13. When considering the character of the offender, one relevant fact is the defendant's criminal history. *Johnson v. State*, 986 N.E.2d 852, 857 (Ind. Ct. App. 2013). The evidence showed that Weaver has a lengthy criminal history and a history of substance abuse dating back to the age of fourteen. Weaver's criminal history includes a prior felony conviction for criminal recklessness, eight prior misdemeanor convictions including two prior misdemeanor convictions for resisting law enforcement, and a prior delinquency adjudication. *Appellant's Conf. App. Vol. 2* at 51. His criminal history also showed that he had three petitions for modification filed against him as a juvenile and ten petitions to revoke probation filed against him, three of which were found to be true and seven of which were still pending at the time of the PSI. *Id.* at 51-52. This evidence demonstrates that he has a significant history of failing to take advantage of alternative placements that have been given to him for past criminal convictions and that such grants of alternative placement have not deterred him from committing further crimes.

[14] Weaver argues that he should be given a more lenient sentence due to his "severe" drug addiction and because much of his criminal history relates to that addiction. *Appellant's Br.* at 10-12. However, the evidence shows that Weaver has not taken appropriate steps to seek treatment despite acknowledging that he has a substance abuse problem. *See Hape v. State*, 903 N.E.2d 977, 1002 (Ind. Ct. App. 2009) (holding that, where a defendant is aware of a substance abuse problem but has not taken appropriate steps to treat it, the sentence did not

warrant a reduction), *trans. denied*. In the PSI, Weaver made the statement that he was “an addict who was refusing to seek help with his addiction.”

Appellant’s Conf. App. Vol. 2 at 62. The evidence also does not support Weaver’s assertions that his good character is shown through his history of employment. He was unemployed at the time of the arrest in the present case and reported no employment for almost two years prior to his arrest. *Id.* at 49. He also reported in the PSI that he had no income and was financially unstable. *Id.* at 50.

Weaver also claims he supports his three children and has regular contact with them. However, he testified at sentencing that two of his children “were given an adoptive family,” that he visits the remaining child “[a]bout twice a month,” and that he has no formal child support obligations. *Tr. Vol. 2* at 38-39.

Weaver has not shown that his sentence is inappropriate in light of his character.

- [15] The only issue raised in this appeal is whether the final five years of Weaver’s sentence should be served in the DOC or in community corrections or on probation. However, in both its oral and written sentencing statements, the trial court has already indicated that it would consider modifying Weaver’s sentence in the manner that he requests on appeal if he shows progress through his behavior and participation in programs while in the DOC. *Id.* at 48-49; *Appellant’s App. Vol. 2* at 66. Therefore, Weaver has an opportunity for sentence modification in the future that will allow him to seek a shorter executed sentence if he maintains good behavior and “makes good use of his time” while in the DOC. *Tr. Vol. 2* at 48; *Appellant’s App. Vol. 2* at 66.

[16] Weaver’s arguments do not portray the nature of his crimes and his character in “a positive light,” which is his burden under Appellate Rule 7(B). *See Stephenson*, 29 N.E.3d at 122. He has not shown that his sentence is inappropriate in light of the nature of the offense and the character of the offender. We, therefore, affirm the sentence imposed by the trial court.

[17] Affirmed.

Altice, J., and Weissmann, J., concur.