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

Brandon A. Kincheloe,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 25, 2021

Court of Appeals Case No. 21A-CR-1008

Appeal from the Bartholomew Circuit Court

The Honorable Kelly S. Benjamin, Judge

Trial Court Cause Nos. 03C01-2101-F6-6 03C01-2102-F6-921

Najam, Judge.

Statement of the Case

[1] Brandon A. Kincheloe appeals his aggregate five-year sentence after he pleaded guilty to invasion of privacy, as a Level 6 felony; auto theft, as a Level 6 felony; and resisting law enforcement, as a Level 6 felony, under two cause numbers. Kincheloe raises a single issue for our review, namely, whether his aggregate sentence is inappropriate in light of the nature of the offenses and his character. We affirm.

Facts and Procedural History

[2] In December of 2020 and January of 2021, M.Sn. had an order of protection in place against Kincheloe. Nonetheless, in December of 2020, a trial court convicted Kincheloe of invasion of privacy for violating the order of protection. And, in January of 2021, Kincheloe again knowingly violated the order of protection.

[3] In February, Kincheloe stole a motor vehicle that belonged to his grandmother, M.Sh. After Kincheloe "t[ook] off" in her vehicle, local police "tried to stop" him. Tr. Vol. 2 at 16. But Kincheloe "did not stop" and led the officers on a chase from Columbus to Nashville. *Id.* at 16-17. There, however, officers were able to detain him.

[4] The State charged Kincheloe in relevant part with invasion of privacy, as a Level 6 felony; auto theft, as a Level 6 felony; and resisting law enforcement, as a Level 6 felony, under two cause numbers. Kincheloe agreed to plead guilty to those offenses pursuant to an open plea agreement, and the State agreed to

dismiss other pending charges. After an ensuing sentencing hearing, the trial court entered its sentencing order in which the court found as follows:

> The Court finds no mitigating circumstances.
>
> The Court finds the following aggravating circumstances:
>
> 1. The defendant's prior criminal history. He has had 10 convictions since 2011.
>
> 2. The defendant has been placed on probation previously and has violated.
>
> 3. The defendant has been offered treatment previously.
>
> 4. The defendant's attitude.
>
> The defendant made the statement that he would always be a danger to the community.

Appellant's App. Vol. 2 at 50-51. The court then sentenced Kincheloe to an aggregate term of five years in the Department of Correction. This appeal ensued.

Discussion and Decision

[5] Kincheloe argues that his aggregate five-year sentence is inappropriate in light of the nature of the offenses and his character. As our Supreme Court has made clear:

> The Indiana Constitution authorizes appellate review and revision of a trial court's sentencing decision. Ind. Const. art. 7, §§ 4, 6; *Serino v. State*, 798 N.E.2d 852, 856 (Ind. 2003). This authority is implemented through Indiana Appellate Rule 7(B), which permits an appellate court to revise a sentence if, after due consideration of the trial court's decision, the sentence is found to be inappropriate in light of the nature of the offense and the character of the offender. *Serino*, 798 N.E.2d at 856. The principal role of such review is to attempt to leaven the outliers. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). The burden is on the defendant to persuade the reviewing court that the sentence is inappropriate. *Bowman v. State*, 51 N.E.3d 1174, 1181 (Ind. 2016).

Robinson v. State, 91 N.E.3d 574, 577 (Ind. 2018) (per curiam).

[6] Further:

> Indiana Appellate Rule 7(B) is a "rare" avenue for appellate relief that is reserved "for exceptional cases." *Livingston v. State*, 113 N.E.3d 611, 612-13 (Ind. 2018) (per curiam). Even with Rule 7(B), "[s]entencing is principally a discretionary function in which the trial court's judgment should receive considerable deference." *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015) (quoting *Cardwell*, 895 N.E.2d at 1222). "Such deference 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)." *Id.* Absent such a "sufficiently compelling" evidentiary basis, we will not "override the decision of the . . . trial court." *Id.*

Sorenson v. State, 133 N.E.3d 717, 728 (Ind. Ct. App. 2019) (alteration and omission original to *Sorenson*), *trans. denied*.

[7] Kincheloe pleaded guilty to three Level 6 felonies. A Level 6 felony carries a sentencing range of six months to two-and-one-half years, with an advisory term of one year. Ind. Code § 35-50-2-7(b) (2021). The trial court sentenced Kincheloe to two-and-one-half years on each of his three convictions; however, the court ordered two of the convictions to run consecutive to each other and ordered the third to run concurrent with those two for an aggregate term of five years, or two-and-one-half years below the maximum possible sentence for three Level 6 felony convictions.

[8] On appeal, Kincheloe asserts that the nature of the offenses was "not especially egregious" and "was rather unremarkable." Appellant's Br. at 13, 15. He also asserts that, while he has several prior convictions, "he had no felony convictions higher than Class D or Level 6," he pleaded guilty, and he has "admitted his struggles with substance abuse." *Id.* at 17.

[9] But Kincheloe's arguments merely asks this Court reweigh the evidence that was before the trial court, which we will not do. Again, the defendant in an appeal under Rule 7(B) must present "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*, 29 N.E.3d at 122 (emphasis added). Absent such a showing, we must defer to the trial court's judgment. *Id.*

[10] Kincheloe has made no such showing on appeal. Indeed, Kincheloe twice violated an order for protection; he stole a car from his grandmother; and then he resisted law enforcement by leading officers on a chase in that car from Columbus to Nashville. Further, we agree with the trial court that Kincheloe's ten convictions since 2011, which includes five felony convictions, and his established inability to successfully participate in probation reflect poorly on his character. Therefore, we cannot say that his aggregate five-year sentence is inappropriate, and we affirm his sentence.

[11] Affirmed.

Riley, J., and Brown, J., concur.