MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Keith Lee Jabaay,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 29, 2022

Court of Appeals Case No. 22A-CR-1590

Appeal from the Marshall Superior Court

The Honorable Matthew E. Sarber, Judge

Trial Court Cause No. 50D03-2005-F5-26

Tavitas, Judge.

Case Summary

[1] Keith Jabaay appeals his sentence of five years in the Department of Correction ("DOC"). Jabaay argues that his sentence is inappropriate in light of the nature of the offense and his character. We find that Jabaay's sentence is not inappropriate and, accordingly, affirm.

Issue

[2] Jabaay raises one issue on appeal, which we restate as whether his sentence is inappropriate in light of the nature of the offense and his character.

Facts

[3] On May 25, 2020, Jabaay drove to a Walmart in Plymouth, Indiana, where he concealed three packages of meat in his shorts and left the store without paying. On May 29, 2020, the State charged Jabaay with two counts: Count I, operating a motor vehicle after forfeiture of license for life, a Level 5 felony; and Count II, theft, a Level 6 felony.

[4] On May 12, 2022, Jabaay and the State executed a plea agreement wherein Jabaay agreed to plead guilty to Count II and serve a sentence of two and one-half years in the DOC, and the State agreed to dismiss Count I. The trial court rejected the plea agreement the following day.

[5] On May 16, 2022, Jabaay and the State executed a new plea agreement wherein Jabaay agreed to plead guilty to Counts I and II and agreed that the trial court would determine his sentence. The following day, the trial court held a hearing

on the new plea agreement. Jabaay's counsel explained to the trial court that Jabaay agreed to plead guilty to Count I in the new plea agreement after viewing video evidence that "eliminated any doubt in his mind" that a jury would find him guilty of Count I. Tr. Vol. II p. 43. The trial court accepted the plea agreement and entered judgments of conviction on Counts I and II.

[6] The trial court held a sentencing hearing on June 8, 2022, and sentenced Jabaay to a concurrent sentence of five years on Count I and two and one-half years on Count II in the DOC. The trial court found the following aggravators: 1) Jabaay's criminal history, which includes fifteen felonies and twenty-two misdemeanors; 2) Jabaay's criminal history includes "repeated driving offenses" and conduct "extremely similar" to the present offenses, *id*. at 75; and 3) Jabaay's twelve probation violations, problem-solving court violation, pre-trial diversion violation, and violation during his current incarceration in the Marshall County Jail. The trial court found two mitigators: Jabaay's guilty plea and remorse. The trial court "offset[]" some of the mitigating weight of Jabaay's guilty plea based on the amount of time it took Jabaay to enter the plea and because Jabaay only did so after viewing compelling video evidence against him. Tr. Vol. II p. 76. Jabaay now appeals.

Discussion and Decision

[7] Jabaay argues that his sentence of five years in the DOC is inappropriate. We disagree.

[8] 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."[1] 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)).

[9] "'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

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[1] 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).

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).

[10] 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, Jabaay was sentenced for (1) operating a vehicle after forfeiture of license for life, a Level 5 felony; and (2) theft, a Level 6 felony. A Level 5 felony carries a sentencing range of one and six years, with the advisory sentence set at three years. Ind. Code § 35-50-2-6(b). A Level 6 felony carries a sentencing range of six months and two and one-half years, with the advisory sentence set at one year. Ind. Code § 35-50-2-7(b).

[11] 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*. Jabaay argues that his sentence is inappropriate based on the nature of the offense because his theft conviction was for stealing meat, his operating a motor vehicle after forfeiture of license for life offense "was a victimless crime," and his offenses were not "serious" felonies. Appellant's Br. p. 8. We are not persuaded. Jabaay points to nothing that portrays these offenses in a positive light.

[12] 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). "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*).

[13] Here, Jabaay's criminal history is both extensive and replete with offenses similar to the instant convictions. His record includes nearly two dozen similar driving related convictions, five theft convictions, and four retail theft convictions. In addition, Jabaay has twelve probation violations, a problem-solving court violation, a pre-trial diversion violation, and a jail conduct violation for insubordination. Jabaay argues that his criminal history "does not have many higher-level felony convictions" and "involved no violent offenses." Appellant's Br. p. 8. Jabaay's character, however, is clearly evident by his

disregard for the law and failure to reform his conduct and character.[2] In light of the nature of the offense and Jabaay's character, we do not find that his sentence is inappropriate.

Conclusion

[14] Jabaay's sentence is not inappropriate in light of the nature of the offense and his character. Accordingly, we affirm.

[15] Affirmed.

Brown, J., and Altice, J., concur.

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[2] Jabaay also argues that the trial court erred by "us[ing] the fact that it took a considerable length of time for Mr. Jabaay to plead as a reason to temper the weight of mitigation that was assigned to" Jabaay's guilty plea. *Id.* Jabaay did not plead guilty until mere days before his trial was scheduled to occur—nearly two years after he was charged—and only after viewing compelling video evidence against him. "As this court has observed, 'the significance of a guilty plea is lessened if it is made on the eve of trial after the State has expended resources in preparing its case.'" *See Snyder v. State*, 176 N.E.3d 995, 999 (Ind. Ct. App. 2021) (quoting *Padgett v. State*, 875 N.E.2d 310, 317 (Ind. Ct. App. 2007), *trans. denied*). Accordingly, we find no error.