

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Travis Kelley,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 23, 2023

Court of Appeals Case No.
22A-CR-2088

Appeal from the Tippecanoe
Superior Court

The Honorable Steven P. Meyer,
Judge

Trial Court Cause No.
79D02-2203-F5-40

Memorandum Decision by Judge Kenworthy
Judges Robb and Crone concur.

Kenworthy, Judge.

Case Summary and Issue

[1] Travis Kelley pleaded guilty to possession of less than five grams of methamphetamine, a Level 5 felony because he had a prior dealing in methamphetamine conviction.¹ The trial court sentenced him to five years at the Indiana Department of Correction (“DOC”) to include one year with community corrections. Kelley appeals his sentence, arguing it is inappropriate in light of the nature of his offense and his character. Concluding the sentence is not inappropriate, we affirm.

Facts and Procedural History

[2] During a guilty plea hearing, Kelley admitted that on March 5, 2022, he knowingly or intentionally possessed methamphetamine. The probable cause affidavit provides additional details of the offense: while looking for an unrelated person at a residence in Lafayette, a Lafayette Police Department officer encountered Kelley. The officer discovered there was an active warrant for Kelley’s arrest in Floyd County and detained him. Kelley then voluntarily turned over two containers to the officer. The first container held two plastic bags, one with less than one gram of a white crystal substance that field tested

¹ Ind. Code § 35-48-4-6.1(a), (b)(2)(2014).

positive for methamphetamine and the other with a green plantlike material that field tested positive for marijuana. The second container held syringes and a straw with white crystal residue. Kelley was arrested.

[3] The State charged Kelley with five counts: Count I, possession of methamphetamine, a Level 5 felony; Count II, possession of methamphetamine, a Level 6 felony; Count III, unlawful possession of a syringe, a Level 6 felony; Count IV, possession of marijuana, a Class B misdemeanor; and Count V, possession of paraphernalia, a Class C misdemeanor. Count I was charged as a Level 5 felony because the amount of methamphetamine was less than five grams and an enhancing circumstance applied. The enhancing circumstance was that Kelley had a prior conviction for dealing in methamphetamine. Ind. Code § 35-48-1-16.5(1).

[4] Pursuant to a plea agreement, Kelley pleaded guilty to Count I and the State dismissed the remaining counts. The sentence was to be left to the trial court's discretion after hearing evidence and argument from counsel. Following the guilty plea hearing, the trial court accepted the plea, entered judgment of conviction for possession of methamphetamine as a Level 5 felony, and scheduled a sentencing hearing.

[5] Although not specifically discussed at the sentencing hearing, Kelley revealed during the presentence investigation that he had problems during his childhood due to abuse by his mother, "he was raised by his parents and 'the juvenile system in Oklahoma,'" and he left home at age thirteen. *Appellant's App. Vol. 2*

at 29. He also reported he first tried marijuana at twelve, was a daily user until he was forty-five and occasionally thereafter; first consumed alcohol at thirteen; and used methamphetamine weekly in his forties and fifties, including intravenously. He completed a substance abuse treatment program in 2019.² Kelley also reported he was diagnosed with depression in 2016 or 2017 and participated in one week of inpatient treatment at that time. *Id.* at 31.

[6] Kelley testified at the sentencing hearing that he was fifty-five years old, was living with friends, and had applied for disability benefits. Kelley admitted he had a drug problem, stating at the time of his offense he was using methamphetamine to self-medicate because he was unable to go to the right doctors or afford the appropriate prescription medication. To pay for the methamphetamine, he obtained funds by “about any means possible,” including shoplifting. *Tr. Vol. 2* at 22. Kelley was on probation for theft at the time of his arrest in this case. Kelley stated disability benefits would help him pay for counseling and mental health treatment, and asked the trial court to include a drug treatment and mental health program as part of his sentence. Kelley told the trial court, “I’m remorseful for what I did. I know I’ve made some bad decisions in my life, but I’m trying to go in a different direction.” *Id.* at 26. He advised the trial court he would have a place to live if he were

² The presentence investigation report also states that Kelley was ordered to complete a substance abuse assessment and all available drug treatment while incarcerated in 2003 but does not reflect whether he actually did so.

released to community corrections and job possibilities if his disability claim were denied.

[7] Kelley's counsel asked the trial court to give Kelley credit for his admission and to consider "where he is now compared to where he was quite a while ago when he was imprisoned previously[.]" *Id.* at 27-28. Counsel asked the trial court to sentence Kelley to community corrections and/or give him probation in lieu of a DOC commitment. Kelley's counsel acknowledged, however, that the Floyd County warrant remained outstanding and would have to be resolved before community corrections was a viable option.

[8] The State focused on Kelley's criminal history, including numerous previous drug offenses; that he was on probation at the time of this offense; his continuous use of illegal substances; and his past participation in substance abuse programs that had not succeeded in stemming his addiction. The State asked for a sentence of four years in the DOC followed by one year of community corrections "as a sort of step-down with more supervision before he is allowed to be back in the public without any supervision." *Id.* at 30.

[9] The trial court found several aggravating factors: Kelley has a significant criminal history, including several crimes similar to the current offense; he has had four petitions to revoke probation and one petition to execute a community corrections sentence filed against him; he has a history of failing to appear; and he was on probation when he committed this offense and has a corresponding warrant still outstanding. The trial court also found several mitigating factors:

Kelley pleaded guilty and accepted responsibility for his offense; he has mental health and substance abuse issues, although the trial court considered the significance of this factor to be diminished by his failure to seek or benefit from treatment; he was cooperative at the time of his arrest; and he had a difficult childhood. Ultimately, the trial court determined the aggravating factors outweighed the mitigating factors and sentenced Kelley to five years executed, with the last year served in a direct placement to community corrections.

[10] Kelley now appeals his sentence as inappropriate in light of the nature of his offense and his character. He asks that we exercise our authority to review and revise his sentence.

Discussion and Decision

I. Standard of Review

[11] Article 7, Section 6 of the Indiana Constitution gives this Court the authority to independently review and revise sentences. This authority is implemented through Appellate Rule 7(B), which provides that a sentence authorized by statute may be revised “if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” In considering the “nature of offense,” we compare the defendant’s actions with the required showing to sustain a conviction of the charged offense, whereas the “character of the offender prong permits a broader consideration of the defendant’s life and

conduct.” *Anderson v. State*, 989 N.E.2d 823, 827 (Ind. Ct. App. 2013), *trans. denied*.

[12] Whether we find a sentence inappropriate turns on “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.” *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). In conducting this review, we “defer to the trial court’s sentence and impose on the defendant the burden of persuading us that a revised sentence is warranted.” *McCallister v. State*, 91 N.E.3d 554, 566 (Ind. 2018). The principal role of Rule 7(B) review is to leaven the outliers, not to achieve a perceived correct sentence. *Conley v. State*, 183 N.E.3d 276, 288 (Ind. 2022). Thus, we exercise our authority sparingly. *Taylor v. State*, 86 N.E.3d 157, 165 (Ind. 2017).

II. Kelley’s Sentence

[13] The advisory sentence is the starting point selected by the legislature as an appropriate sentence for the crime committed. *Wellings v. State*, 184 N.E.3d 1236, 1239 (Ind. Ct. App. 2022). Kelley was charged with knowingly or intentionally possessing less than five grams of methamphetamine without a valid prescription while having a prior conviction for dealing in a controlled substance. *See Appellant’s App. Vol. 2* at 9. Kelley pleaded guilty to the charge and was convicted of possession of methamphetamine as a Level 5 felony. A Level 5 felony is punishable by imprisonment for a fixed term of between one and six years, with an advisory sentence of three years. I.C. § 35-50-2-6(b).

The trial court found several aggravating factors that it determined outweighed several mitigating factors and sentenced Kelley to serve five years for his conviction, which is above the advisory but below the maximum sentence.

A. Nature of the Offense

[14] The nature of the offense is found in the details and circumstances of the offenses and the defendant's participation therein. *Lindhorst v. State*, 90 N.E.3d 695, 703 (Ind. Ct. App. 2017). When considering a sentence that deviates from the advisory sentence, we consider whether there is anything more or less egregious about the offense as committed by the defendant that distinguishes it from the typical offense accounted for by our legislature when it set the advisory sentence. *Moyer v. State*, 83 N.E.3d 136, 142 (Ind. Ct. App. 2017), *trans. denied*.

[15] Kelley contends the nature of his offense warrants revision because he cooperated with the officer and voluntarily turned over the containers holding drugs and paraphernalia. In *Mitchell v. State*, we were not persuaded by a similar argument that the nature of the defendant's offense warranted a sentence reduction because he did not resist officers and did not possess enough methamphetamine to be charged with dealing. 184 N.E.3d 705, 709 (Ind. Ct. App. 2022). We noted the argument "essentially equate[d] to a request that this Court reduce his sentence because he did not commit additional crimes." *Id.* Likewise, we are not persuaded here. Once Kelley identified himself to the officer, the discovery of the active warrant for his arrest and eventual discovery of the contraband was inevitable. Further, although the offense was fairly

benign in that Kelley possessed less than one gram of methamphetamine and harmed only himself, Kelley possessed the methamphetamine while he was on probation in Floyd County, had failed to appear in that matter, and had an active warrant for his arrest.

B. Character of the Offender

[16] The “character of the offender” portion of the Rule 7(B) standard refers to general sentencing considerations and relevant aggravating and mitigating factors. *Williams v. State*, 782 N.E.2d 1039, 1051 (Ind. Ct. App. 2003), *trans. denied*. We assess the trial court’s recognition or non-recognition of aggravating and mitigating factors as an initial guide to determine whether the sentence imposed was inappropriate. *Stephenson v. State*, 53 N.E.3d 557, 561 (Ind. Ct. App. 2016). However, a trial court’s finding of aggravating and mitigating factors does not limit our review. *State v. Stidham*, 157 N.E.3d 1185, 1195 (Ind. 2020). Instead, we may consider any factors in the record. *Reis v. State*, 88 N.E.3d 1099, 1102 (Ind. Ct. App. 2017).

[17] Here, the trial court found Kelley’s criminal history, his many previous drug convictions, prior petitions to revoke probation, history of failing to appear, outstanding arrest warrant, and commission of this offense while on probation to be aggravating factors, and his guilty plea, mental health and substance abuse issues, cooperation with law enforcement, and difficult childhood to be mitigating factors. While recognizing Kelley’s mental health and substance abuse issues as a mitigating factor, the trial court considered the significance of

that factor “diminished by defendant not seeking treatment.” *Appellant’s App. Vol. 2* at 45.

[18] Kelley contends the diminished value the trial court placed on his mental health and substance abuse issues “serves as an indicator that the sentence imposed was inappropriate.” *Appellant’s Br.* at 12. Kelley reported during the presentence investigation that he has used alcohol, marijuana, and methamphetamine at various times since his teenage years, including using methamphetamine weekly for the last seven years. Despite his history of substance abuse, Kelley participated in only one treatment program and continued using drugs afterward. The trial court considered Kelley’s proffered mitigation evidence but appropriately tempered it by recognizing his unwillingness or inability to seek and benefit from meaningful treatment.

[19] Even had the trial court not placed diminished significance on Kelley’s mental health and substance abuse issues, those issues would not be sufficient justification to impose a lesser sentence given Kelley’s significant criminal history. A typical factor to be considered in examining a defendant’s character is his or her criminal history. *McFarland v. State*, 153 N.E.3d 369, 374 (Ind. Ct. App. 2020), *trans. denied*. The significance of a defendant’s criminal history varies based on comparing the gravity, nature, and number of prior offenses against the current offense. *Murray v. State*, 182 N.E.3d 270, 278-79 (Ind. Ct. App. 2022). Kelley has numerous prior felony convictions, at least three of which are related to illegal substances. In addition, his convictions include serious offenses such as rape, burglary, and resisting law enforcement. Further,

Kelley indicated he was willing to commit additional crimes in order to procure illegal substances.

[20] We acknowledge Kelley's offense is not egregious. However, his criminal history and failure to address his substance abuse issues which have led to additional criminal behavior reflect poorly on his character. In sum, Kelley has not met his burden of persuading us that his sentence is an outlier warranting revision pursuant to Appellate Rule 7(B).

Conclusion

[21] After giving due consideration to the nature of Kelley's offense and his character, we conclude his sentence is not inappropriate and affirm the sentence imposed by the trial court.

[22] Affirmed.

Robb, J., and Crone, J., concur.