MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Curtis D. Shank,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 4, 2023

Court of Appeals Case No. 22A-CR-1500

Appeal from the Elkhart Circuit Court

The Honorable Michael A. Christofeno, Judge

Trial Court Cause No. 20C01-2001-F1-4

Memorandum Decision by Judge Foley
Judges Robb and Mathias concur.

Foley, Judge.

[1] Curtis D. Shank ("Shank") was convicted, after a jury trial, of attempted murder,[1] a Level 1 felony, and he admitted to being a habitual offender. The trial court sentenced Shank to thirty-eight years for attempted murder enhanced by ten years for the habitual offender determination, resulting in an aggregate sentence of forty-eight years executed. On appeal, he raises two issues for our review:

I. Whether the trial court properly handled Shank's requests for a speedy trial; and

II. Whether Shank's 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] Angela Burns ("Burns") began a romantic relationship with Shank shortly after meeting him, and the two moved in together. The relationship deteriorated, and Shank became controlling, demeaning, unpredictable, and jealous to the extent that Burns was afraid of him. Shank and Burns broke up, and Shank moved out of the state. Burns had met John Wood ("Wood") through Shank, and she began a relationship with Wood and moved in with him. Shank returned to Indiana and called Burns repeatedly on her cell phone. When

[1] Ind. Code §§ 35-42-1-1(1), 35-41-5-1(a).

Shank would contact Burns, he made threats against Wood and told Burns that he would "take care of" or "hurt" Wood. Tr. Vol. II p. 188.

[4] On the morning of August 3, 2018, Burns had left the house she shared with Wood to go get ice and coffee. Wood woke up and heard a loud muffler outside. Wood knew that Shank drove a truck with a loud muffler, so he looked outside and saw Shank's truck in the driveway. Wood walked outside and approached Shank. As he walked towards Shank, Wood saw Shank lift his arm up. Shank shot Wood twice in the stomach, once in the arm, and once in the head. Wood lost consciousness and fell to the ground.

[5] Shank drove away and went to the gas station where Burns was. Shank told Burns that "it was done," that she "didn't have to worry about [Wood] anymore," and that he had "shot [Wood]." *Id*. at 197. He also told Burns not to go home and that she "wouldn't like what [she] would see" if she went home. *Id*. at 199. When Burns returned home, Wood was sitting on the front steps of the house with a towel wrapped around his neck and a wound on his head. Wood looked a bit disheveled and was confused about what had occurred. He told Burns that he had fallen and wanted help getting inside the house. Burns noticed some blood on the back steps and in the doorway area. While she helped Wood into the house, she called 911. Wood was taken by medical helicopter to Parkview Medical Center in Fort Wayne.

[6] In total, Wood suffered four gunshot wounds, two to his abdomen, one to his arm, and one to the scalp area of his head. Wood's injuries were life

threatening, and bullet fragments were found throughout Wood's body. Wood had a traumatic brain injury, and part of his colon was damaged and needed to be removed. Wood also had a right rib fracture and needed a chest tube because he had blood in his left lung. He also suffered respiratory failure. Wood spent three weeks in the trauma center, and when he was discharged, he went to a rehabilitation center.

[7] On January 29, 2020, the State charged Shank with Level 1 felony attempted murder and subsequently, filed an amended information alleging that Shank was a habitual offender. On April 2, 2020, an initial hearing was held, and after conducting an indigency hearing, the trial court informed Shank that a public defender would be appointed to represent him. The trial court informed Shank that his trial date was set for October 5, 2020, and Shank acknowledged this trial date. Shank then asked the trial court if there was "any way [that he] could do a fast and speedy." Tr. Vol. II pp. 8–9. The trial court told Shank that he needed to speak to his attorney and that the attorney would need to file a motion for a speedy trial in writing.

[8] At a pretrial hearing held on April 30, 2020, Shank was represented by an attorney who appeared on his behalf. Shank again orally asked the trial court for a fast and speedy trial. The trial court advised Shank that the courts were under a Supreme Court emergency order due to the Covid-19 pandemic, and that under that order, speedy trial motions were suspended. The trial court also again informed Shank that his motions needed to be in writing and filed by his counsel. On September 8, 2020, Shank's counsel filed a motion to determine

competency, and as a result of that filing, the October 5, 2020 trial date was vacated. At a hearing held on September 10, 2020, Shank stated that he understood that this trial date would be vacated in order to determine competency. The trial court set a new trial date for March 1, 2021.

[9] On February 25, 2021, Shank attempted to file a pro se motion for a speedy trial, but the trial court declined to accept the motion because it was not filed by Shank's counsel and because Shank's competency to stand trial had not yet been determined. The trial court also noted that, at the time Shank tried to file his pro se motion, speedy trial motions had been suspended by order until March 1, 2021, due to the Covid-19 pandemic. A competency hearing was held on March 25, 2021, and Shank was found competent to stand trial. The jury trial was then set for August 2, 2021, and Shank acknowledged the trial date. On July 15, 2021, Shank moved to continue the jury trial, and it was continued to January 10, 2022. On December 16, 2021, again on Shank's motion, the trial date was continued to May 2, 2022.

[10] On December 27, 2021, Shank filed a pro se request entitled, "Judicial Notice," in which he asked the trial court to dismiss his case for failing to grant him a fast and speedy trial. Appellant's App. Vol. II pp. 75–85. The trial court declined to accept this filing because Shank was represented by counsel. Shank wrote additional letters to the trial court on January 18, 2022, and February 14, 2022, which the trial court also declined to accept or act upon because Shank was represented by counsel.

[11] On February 21, 2022, Shank's counsel filed a written motion for a fast and speedy trial, and on February 24, 2022, a hearing was held to address the motion. Because Shank's case was set for jury trial on May 2, 2022, which was the seventieth day after the motion was filed, Shank's counsel admitted that the trial date complied with his request for a speedy trial.

[12] Commencing on May 2, 2022, and concluding on May 5, 2022, the trial court conducted a jury trial. While the jury was deliberating on May 5, Shank pleaded guilty to the habitual offender enhancement subject to his conviction on the underlying charge. After deliberating, the jury found Shank guilty of Level 1 felony attempted murder. At the sentencing hearing, the trial court identified as aggravating factors (1) Shank's prior criminal history, (2) his history of substance abuse, (3) his prior failures on probation and community corrections, (4) that other forms of sanctions have been unsuccessful, (5) Shank was at high risk to reoffend, (6) his use of a firearm to commit the attempted murder and firing multiple times, (7) that Shank left Wood to die without rendering help or assistance, and (8) the harm and injury caused to Wood was permanent and greater than the elements of the crime. As mitigating factors, the trial court found (1) Shank's addiction issues, (2) the comments of Shank showing remorse for Wood's injuries and his counsel's statements on Shank's behalf, (3) his admission to the habitual offender enhancement, (4) Shank's mental health issues, and (5) Shank's childhood abuse. After finding that the aggravating factors outweighed the mitigating factors, the trial court sentenced Shank to thirty-eight years executed for his attempted murder conviction

enhanced by ten years for the habitual offender determination, resulting in an aggregate sentence of forty-eight years in the Department of Correction. Shank now appeals.

Discussion and Decision

I. Speedy Trial Requests

[13] Shank argues that the trial court erred in its handling of his requests for a fast and speedy trial because it failed to take any action when he made an oral request at his initial hearing and when he made several personal filings because he was represented by counsel. He asserts that the actions by the trial court effectively deprived him of his personal right to a fast and speedy trial and due process rights under Indiana Criminal Rule 4. "Indiana Criminal Rule 4 generally implements the constitutional right of an accused to a speedy trial." *Cundiff v. State,* 967 N.E.2d 1026, 1027 (Ind. 2012). Criminal Rule 4(B) provides in part: "If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion . . ." except when any delay is caused by the defendant's own actions or where there was not sufficient time to try the defendant in the seventy-day period because of congestion of the court calendar. Ind. Crim. Rule 4(B)(1). When reviewing Criminal Rule 4(B) claims, we review questions of law de novo. *Austin v. State,* 997 N.E.2d 1027, 1039 (Ind. 2013). We review factual findings under the clearly erroneous standard. *Id.* at 1040. Here, we are faced with questions of law and, therefore, review the trial court's actions de novo.

[14] Here, at the initial hearing on April 2, 2020, the trial court stated it would appoint a public defender to represent Shank and set a trial date for October 5, 2020. Shank then orally requested a speedy trial, and the trial court informed him he needed to talk to his attorney about that and that any motion needed to be in writing and filed by his counsel. Our Supreme Court has concluded that Criminal Rule 4 does not specify that the motion for early trial must be in writing, but a trial court can require a defendant to make such a motion in writing pursuant to Indiana Trial Rule 7(B). *McGowan v. State*, 599 N.E.2d 589, 591 (Ind. 1992); *see also* Ind. Trial Rule 7(B) (providing in pertinent part, "Unless made during a hearing or trial, or otherwise ordered by the court, an application to the court for an order shall be made by written motion."). Therefore, under Trial Rule 7(B), Shank could have orally made the motion except for the fact that the trial court instructed him that he must make his motion in writing. *See McGowan*, 599 N.E.2d at 591 (concluding that the defendant's motion could have been made orally because made at a hearing but that the trial court ordered that it be in writing, which fell under the portion of Trial Rule 7(B) stating "or otherwise ordered by the court").

[15] Shank again requested a speedy trial orally and personally on April 30, 2020, even though he was represented by counsel who was present at the hearing. The trial court again informed Shank that the motion needed to be made in writing and through his counsel. Once counsel was appointed, Shank was required to speak to the trial court through his counsel, and the trial court was not required to respond to Shank's request. *See Black v. State*, 7 N.E.3d 333, 338

(Ind. Ct. App. 2014) (citing *Underwood v. State*, 722 N.E.2d 828, 832 (Ind. 2000)). "'To require the trial court to respond to both [Shank] and counsel would effectively create a hybrid representation to which [Shank] is not entitled.'" *Id*. (quoting *Underwood,* 722 N.E.2d at 832). Shank's pro se request was made after counsel was appointed, and the trial court was not required to respond to such request. In any event, the trial court could not have honored Shank's request, even if properly made, because at the time the request was made, the Indiana courts were under a Supreme Court Emergency Order due to the Covid-19 pandemic, which suspended all speedy trial motions.

[16] The original trial date of October 5, 2020, was continued when Shank's counsel filed a motion to determine competency on September 8, 2020, and Shank indicated to the trial court that he understood that a competency determination would vacate the original trial date. It has consistently been found that delays attributable to a defendant's claim of incompetency are charged against the defendant for Criminal Rule 4 purposes. *Curtis v. State*, 948 N.E.2d 1143, 1150 (Ind. 2011); *State v. Davis*, 898 N.E.2d 281, 286 n.3 (Ind. 2008); *Baldwin v. State,* 274 Ind. 269, 271, 411 N.E.2d 605, 606 (1980).

[17] However, on February 25, 2021, Shank filed a written pro se motion for a fast and speedy trial, which was not accepted by the trial court because he was represented by counsel. The competency hearing was held on March 25, 2021, and a new jury trial date of August 2, 2021 was set, which was acknowledged by Shank in open court. This date was then continued twice, both times at Shank's request, and Shank acknowledged the new trial dates on each occasion.

Eventually, the jury trial was scheduled for May 2, 2022. "A movant for an early trial must maintain a position which is reasonably consistent with the request that he has made," and "[a] defendant who permits the court, without objection, to set a trial date outside the [seventy]-day limit is considered to have waived any speedy trial request." *Hahn v. State*, 67 N.E.3d 1071, 1080 (Ind. Ct. App. 2016) (quoting *Wilburn v. State,* 442 N.E.2d 1098, 1103 (Ind. 1982) (internal quotations omitted), *trans. denied*. Therefore, Shank waived his request for a speedy trial when he did not object to the August 2, 2021 trial date and twice requested a continuance of his trial date. If he wished to request to have a speedy trial, he was required to file a new request for one, which would have started a new seventy-day time frame.

[18] Despite Shank's multiple requests to continue the trial date and acknowledgements of trial dates outside of the seventy-day window, he filed a "judicial notice" on December 27, 2021, asking the trial court to dismiss his case for failing to grant him a fast and speedy trial. Shank also wrote two additional letters to the trial court over the course of the next two months regarding a "fast and speedy" trial. Appellant's App. Vol. II pp. 128–30. The trial court again properly declined to accept these requests because Shank was represented by counsel. On February 21, 2022, Shank's counsel filed a written motion for a fast and speedy trial, which was the first motion for a fast and speedy trial properly filed in writing by Shank's counsel. At that time, the jury trial was set within seventy days from the date of the filing of the motion.

Because Shank's jury trial was held within seventy days from the time of the only properly filed motion, his Criminal Rule 4(B) rights were not violated.

[19] In his argument that the trial court did not properly handle his requests for a speedy trial, Shank relies on *Smith v. State*, 943 N.E.2d 421 (Ind. Ct. App. 2011). However, that case is readily distinguishable from this case. There, the defendant orally moved for a speedy trial at this initial hearing, and the magistrate suggested that he talk it over with his attorney and file a formal written motion. *Id*. at 423. However, unlike in the present case, the magistrate in *Smith* accepted the verbal motion, noted the request on the record, and told the defendant that he would receive a new trial date. *Id*. As a result, on appeal, it was determined that the magistrate had accepted his motion, agreed that the defendant should receive a new trial date, and did not require the defendant to file a written motion through counsel. *Id*. at 426. Therefore, this court found that there had been a valid motion for a speedy trial, no actions were taken inconsistent with the motion, and the trial court erred by not dismissing the charges against the defendant. *Id*. However, here, the trial court clearly stated that it required Shank's counsel to file a written motion before the trial court would consider a motion for a speedy trial, which was allowable under Trial Rule 7(B).

[20] Shank first raised his inquiry as to a speedy trial at his initial hearing after being appointed counsel and after acknowledging the trial date that had been set, and the trial court informed him that such a motion needed to be filed in writing and by his counsel. On February 25, 2021, Shank filed his first written motion

for a speedy trial, but he filed it as a pro se litigant when he was represented by counsel. During the course of the proceedings, Shank took several actions that waived any of his purported requests for a speedy trial when he sought a competency hearing, twice requested to continue the trial date, and acknowledged trial dates outside of the seventy-day window. On February 21, 2022, Shank's counsel filed the first motion for a fast and speedy trial properly filed in writing by counsel, and the jury trial was set within seventy days from the date of the filing of the motion. We, therefore, conclude that the trial court properly handled all of Shank's requests for speedy trial, and his Criminal Rule 4(B) rights were not violated.

II. Inappropriate Sentence Analysis

[21] Shank next argues that his aggregate forty-eight-year sentence is inappropriate. The Indiana Constitution authorizes 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). "That authority is implemented through 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." *Faith v. State*, 131 N.E.3d 158, 159 (Ind. 2019).

[22] Our review under Appellate Rule 7(B) focuses on "the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count." *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). Our role is only to "leaven the outliers," which

means we exercise our authority only in "exceptional cases." *Faith*, 131 N.E.3d at 160. Thus, we generally defer to the trial court's decision, and our goal is to determine whether the defendant's sentence is inappropriate, not whether some other sentence would be more appropriate. *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). "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)." *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[23] When determining whether a sentence is inappropriate, the advisory sentence is the starting point the legislature has selected as the appropriate sentence for the crime committed. *Fuller v. State*, 9 N.E.3d 653, 657 (Ind. 2014). Here, Shank was convicted of Level 1 felony attempted murder, which has a sentencing range of between twenty and fifty years, with the advisory sentence being thirty years. Ind. Code § 35-50-2-4(a). Shank was also found to be a habitual offender, which carries a possible enhancement of between six and twenty years for a person convicted of a Level 1 felony. I.C. § 35-50-2-8(i)(1). Shank received thirty-eight years for his Level 1 felony conviction, which was enhanced by ten years for the habitual offender finding. This resulted in an aggregate sentence of forty-eight years executed.

[24] As to the nature of his offense, Shank contends that the evidence at trial only established the basic elements of his conviction for attempted murder and did not portray his actions in an egregious manner. To show his sentence is

inappropriate, Shank must portray the nature of his offense in a positive light, "such as accompanied by restraint, regard, and lack of brutality." *Stephenson*, 29 N.E.3d at 122. Contrary to Shank's assertion, the evidence showed that his offense was more egregious than typical offenses of its kind. After Burns broke up with him because of his abusive and aggressive behaviors, Shank threatened to kill Wood, her new boyfriend. On the morning of the crime, when Shank knew that Burns was not at home, he went to Wood's home and shot Wood, who was unarmed, multiple times. After shooting Wood four times, in the head, abdomen, and arm, Shank left Wood to die, lying in his driveway. Shank then drove to find Burns, and bragged about shooting Wood, telling her that "it was done," she "didn't have to worry about [Wood] anymore," and that Shank had "shot him." Tr. Vol. II p. 197. The injuries that Wood suffered were life threatening, resulting in him being in the hospital for three weeks with a traumatic brain injury, a hemorrhage in his brain, a rib fracture, damage to his colon, blood in his lung, and respiratory failure. Based on the number of times Shank shot Wood and the serious nature of the injuries that Wood suffered, the trial court correctly concluded that, "[t]he harm, injury, loss, or damage to . . . Wood is permanent and, therefore, greater than the elements of Attempted Murder." Tr. Vol. IV p. 88. Shank's sentence is not inappropriate in light of the nature of his offense.

[25] As to his character, Shank argues that, although the trial court properly considered his criminal history, it neglected information that spoke well of his character and the challenges he had overcome. "A defendant's criminal history

is one relevant factor in analyzing character, the significance of which varies based on the 'gravity, nature, and number of prior offenses in relation to the current offense.'" *Smoots v. State*, 172 N.E.3d 1279, 1290 (Ind. Ct App. 2021) (quoting *Rutherford v. State,* 866 N.E.2d 867, 874 (Ind. Ct. App. 2007)). Even a minor criminal history reflects poorly on a defendant's character for the purposes of sentencing. *Id.* Shank's criminal history began with juvenile adjudications for auto theft and resisting law enforcement. His adult convictions span from 1990 until the present and include six felony convictions and sixteen misdemeanor convictions. At the time of sentencing, Shank had other pending charges in another county. Shank had violated probation and community corrections a total of ten times. This criminal history shows that Shank has a long history of flouting the laws of Indiana, and prior attempts to reform his behavior have not proven successful.

[26] Although it is commendable that Shank obtained his GED and completed classes at Ivy Tech Community College, we do not find that this demonstrates his positive character such that his sentence is inappropriate. Additionally, although the evidence showed that Shank has a history of addiction and substance abuse issues, substance abuse counseling was recommended and ordered in the past by the trial court, and such attempts at treatment did not deter him from committing further criminal offenses. Consequently, we do not believe that Shank has met his burden to show "substantial virtuous traits or persistent examples of good character" such that his requested reduction of his sentence is warranted based on his character. *Stephenson*, 29 N.E.3d at 122.

We, therefore, do not find that Shank's sentence is inappropriate in light of his character.

[27] In conclusion, we hold that the trial court properly handled Shank's requests for a speedy trial such that his Criminal Rule 4(B) rights were not violated, and we find that Shank has failed to show that his sentence is inappropriate.

[28] Affirmed.

Robb, J., and Mathias, J., concur.