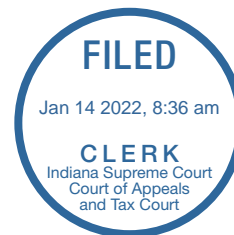


MEMORANDUM DECISION

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

Dinetra J. Simmons,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 14, 2022

Court of Appeals Case No.
21A-CR-1798

Appeal from the Allen Superior
Court

The Honorable Frances C. Gull,
Judge

Trial Court Cause No.
02D05-2001-F6-141

Kirsch, Senior Judge.

Statement of the Case

[1] Dinetra J. Simmons appeals from the sentence imposed after her conviction of one count of possession of cocaine¹ as a Level 6 felony and one count of possession of marijuana² as a Class B misdemeanor. Contending that the trial court erred in committing her to the Indiana Department of Correction (DOC) and that her sentence is inappropriate based on the nature of the offenses and her character, she now appeals. More specifically, Simmons contends that her commitment to the DOC was an abuse of discretion and that her character, coupled with the aggravating and mitigating circumstances found by the trial court do not support the trial court's judgment. Finally, Simmons requests that this court revise her sentence to the advisory sentence and commit her to Allen County Community Corrections or the Allen County Jail. The State agrees that the trial court erred in committing Simmons to the DOC. Finding that the length of Simmons' sentence is not inappropriate, we affirm in part and reverse in part and remand with instructions.

Issues

[2] Simmons presents the following issues for our review:

I. Did the court err by committing Simmons to the DOC?

¹ Ind. Code § 35-48-4-6 (2014).

² Ind. Code § 35-48-4-11(a) (2018).

- II. Is Simmons' sentence inappropriate in light of her character and the nature of her offenses?

Facts and Procedural History

- [3] On January 26, 2020, at approximately 3:09 p.m., Fort Wayne Police Officer Heyerly was on patrol in the area of Radisill Boulevard and Oliver Street. Noticing that Simmons was driving a gold Oldsmobile with an expired Indiana dealer tag, Officer Heyerly activated his emergency lights and initiated a traffic stop.
- [4] During the stop, Officer Heyerly smelled a strong odor of burnt marijuana coming from the car. Officer Lichtsinn, who was also on the scene, removed Simmons' purse and discovered a small plastic bag containing 0.5 grams of cocaine. Officer Ulrich was the third officer on the scene. He searched Simmons and found a plastic bag in her coat pocket containing three grams of marijuana.
- [5] The State charged Simmons with possession of cocaine, a Level 6 felony, and possession of marijuana as a Class B misdemeanor. Simmons pled guilty to both charges. The trial court took Simmons' guilty plea under advisement and placed Simmons into the Drug Court Program. If Simmons successfully completed the program, the charges against her would be dismissed.
- [6] On August 24, 2020, Simmons began participation in the Drug Court program. Thereafter, she tested positive for methamphetamine on three occasions, cocaine on two occasions, THC on thirteen occasions, and alcohol and MDMA

on one occasion each. In addition, Simmons failed to appear for her drug test on three occasions.

[7] On September 28, 2020, November 2, 2020, and March 8, 2021, Simmons was sanctioned with jail time for violating program rules. On June 28, 2021, the State filed a petition to terminate Simmons' participation in the program, alleging that Simmons violated the terms and conditions, and the trial court thereafter terminated her participation in the program.

[8] On July 23, 2021, the trial court held a sentencing hearing and found a number of aggravating factors:

- A criminal history including three misdemeanor convictions and one felony conviction;
- A history of failed rehabilitation efforts spanning in time from 2008 to 2021;
- Simmons had been given short, intermediate, and long jail sentences;
- Simmons had participated in unsupervised probation, active adult probation, home detention, and had been ordered to perform community service;
- Simmons had suspended sentences revoked on three occasions;
- Simmons had multiple attempts at treatment culminating in the failure of her Drug Court participation.

[9] The trial court found that Simmons' guilty plea, acceptance of responsibility and expression of remorse were mitigating factors that were outweighed by the aggravating factors. The trial court sentenced Simmons to a term of

incarceration of one and one-half years on Count One and eighty days on Count Two, with the sentences to run concurrently.

Discussion and Decision

I. Commitment Error

[10] Simmons argues that the court erred by issuing its order committing her to the DOC. With exceptions for reasons not applicable here, the general rule is that a person convicted of a misdemeanor or a Level 6 felony may not be committed to the DOC. *See* Ind. Code § 35-38-3-3(a) (2019). The State agrees that the trial court erred by committing Simmons to the DOC. This Court remands this case to the trial court to issue a sentencing statement ordering Simmons' commitment to the county jail, rather than the DOC. We so order.³

II. Inappropriate Sentence

[11] Finally, Simmons' sentence is not inappropriate based on her character and the nature of her offenses. Although a trial court may have acted within its lawful discretion in imposing a particular sentence, article 7, sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Appellate Rule 7(B), which provides that on appeal a court "may revise a sentence authorized by statute if, after due consideration of the

³ The State observes that Simmons is serving her sentence in the county jail, contrary to the court's commitment, but agrees that the court's sentencing order should be corrected even though it will have no effect on her actual placement.

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." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007)). The defendant has the burden of persuading us that his sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

[12] When determining whether a sentence is inappropriate, the advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed. *Kunberger v. State*, 46 N.E.3d 966 (Ind. Ct. App. 2015); *Thompson v. State*, 5 N.E.3d 383 (Ind. Ct. App. 2014), *trans denied*. Simmons was convicted of possession of cocaine, a Level 6 felony, and possession of marijuana, a Class B misdemeanor. The sentencing range for a Level 6 felony is six months to two and one-half years of incarceration. *See* Ind. Code § 35-50-2-7(b) (2019). The sentencing range for a Class B misdemeanor is a fixed term of no more than one hundred and eighty days. *See* Ind. Code § 35-50-3-3 (1977). The trial court ordered Simmons to serve an executed sentence of one and one-half years for possession of cocaine and one hundred and eighty days for possession of marijuana with the sentences to be served concurrently.

[13] Simmons must show that her sentence is inappropriate with "compelling evidence portraying in a positive light the nature of the offense[s] (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). The "nature of

offense” compares the defendant’s actions with the required showing to sustain a conviction under the charged offense, *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008), while the “character of the offender” permits for a broader consideration of the defendant’s character. *Douglas v. State*, 878 N.E.2d 873, 881 (Ind. Ct. App. 2007).

[14] Simmons’ sentence is not inappropriate in light of the nature of her offenses. First, she was convicted of illegally possessing two different controlled substances. In the six-month period between July 15, 2020, and January 14, 2021, Simmons tested positive for methamphetamine (three times), cocaine (two times), THC (thirteen), alcohol (one), MDMA (one), and, in addition, failed to appear for her drug tests on three occasions. She continued to use drugs after her guilty plea to possession of methamphetamine and marijuana. She also violated the terms and conditions of the Drug Court program.

[15] Simmons has failed to present evidence portraying the nature of her offenses in a positive light. Rather, she attempts to minimize the seriousness of her offenses by stating that she was not engaged in the more serious act of selling or dealing in cocaine and marijuana. Such fact does not lessen her culpability of the offenses which she did commit. In addition, Simmons’ criminal history reflects poorly on her character, and that alone justifies the sentence. Even a minor criminal history reflects poorly on a defendant’s character for the purposes of sentencing. *Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007). Simmons’ criminal history is not minor.

- [16] As stated by this court in 2017, “The significance of criminal history varies on the gravity, nature, and number of prior offenses.” *Johnson v. State*, 986 N.E.2d 852, 857 (Ind. Ct. App. 2017). As noted by the State, between 2008 and 2020, Simmons was convicted of three misdemeanor offenses and one felony. *See Appellee’s Br.* p. 12. The convictions “include criminal conversion, prostitution, possession of cocaine and methamphetamine, and reckless driving.” *Id.* (citing Appellant’s App. Vol. II, pp. 67-68; Tr. Vol II, p. 6). She has been incarcerated and put on probation. She has had numerous opportunities to reform her behavior, but she has failed repeatedly to do so.
- [17] In addition, Simmons has a history of substance abuse, including marijuana, ecstasy, cocaine, and methamphetamine. Her participation in rehabilitative efforts has not been successful, which reflects poorly on her character. Simmons has not met her burden of persuading us that her sentence is inappropriate.

Conclusion

- [18] In light of the foregoing, we affirm the court’s sentencing decision, finding the length of Simmons’ sentence is not inappropriate in light of the nature of the offense and the character of the offender but remand with instructions that the court enter a corrected sentencing order committing Simmons to the county jail.
- [19] Affirmed in part and reversed in part and remanded.

Brown, J., and Molter, J., concur.