MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jack B. Harrell,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff,

March 11, 2022

Court of Appeals Case No. 21A-CR-1862

Appeal from the Steuben Circuit Court

The Honorable Allen N. Wheat, Judge

Trial Court Cause No. 76C01-2010-F1-1001

Robb, Judge.

Case Summary and Issue

[1] Jack Harrell pleaded guilty to neglect of a dependent resulting in death, a Level 1 felony, pursuant to a plea agreement that called for a sentence between twenty and thirty years, with executed jail time capped at twenty-five years. The trial court accepted the plea, entered judgment of conviction, and sentenced Harrell to twenty-five years to be executed at the Indiana Department of Correction ("DOC"). Harrell appeals his sentence, claiming 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] In the summer of 2019, Harrell was watching his children while his long-time significant other slept in their lakeside home. Harrell knew his three-year-old son "had a habit of running out to the water and playing on the docks[.]" Transcript, Volume 2 at 7. As Harrell changed his daughter's diaper, his son "snuck out[,] . . . went down to the pier and fell in." Appellant's Appendix, Volume II at 37. Harrell found his son in the lake and tried to give him CPR, but he was already dead.

[3] A grand jury in Steuben County returned an indictment against Harrell for neglect of a dependent resulting in death, a Level 1 felony. Eventually, the State and Harrell reached a plea agreement pursuant to which Harrell would plead guilty as charged, the State would dismiss charges in another case and a

pending motion to revoke probation in a third case, and the sentence would be left to the trial court under the following terms: "Court to sentence to a term of between 20-30 years, including any term of probation; executed jail time capped at 25 years." *Id.* at 28.

[4] At the change of plea hearing, Harrell admitted he failed to properly supervise his son and changed his plea to guilty. The trial court took the plea under advisement, ordered a pre-sentence investigation report to be prepared, and vacated the pending jury trial. The pre-sentence investigation report revealed Harrell had no relationship with his father when he was growing up, and although he lived with his mother, he "raised himself" because she was often hospitalized. *Id.* at 38. She died when he was nineteen. When Harrell started high school, he also started working full time but did graduate. He has been with his children's mother for twenty-five years and was employed full-time with the same company for fourteen years prior to this incident. He had a lengthy hospitalization for cancer at some point and currently has two masses on his pancreas that have not been tested. Although Harrell had dabbled in alcohol and marijuana as a teen, he began using drugs, including marijuana, methamphetamine, cocaine, and heroin, daily after his son's death. His criminal history consists of three prior misdemeanor convictions and several arrests both before and after this offense. He was on probation at the time of his son's death.

[5] When the trial court reconvened approximately one month later, it accepted Harrell's plea. The State agreed with the probation department's

recommendation of a twenty-five-year sentence, noting Harrell's criminal history and that the victim of the crime was under twelve years of age. Harrell's counsel advocated for a twenty-year sentence, noting it was the lowest sentence he could receive both under the plea agreement and by statute because there was no lesser offense to which he could have pleaded. Citing Harrell's prior criminal history, that he occupied a position of trust with the victim, that he was on probation at the time of the crime, that the victim was less than twelve years of age, and that Harrell pleaded guilty but received a substantial benefit for doing so, the trial court sentenced him to an executed term of twenty-five years with no probation. *See* Appealed Order at 1-2. Harrell now appeals his sentence.

Discussion and Decision

I. Standard of Review

[6] Indiana Appellate Rule 7(B) permits us to revise a sentence "if, after due consideration of the trial court's decision, [we] find[] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Sentencing is "principally a discretionary function" of the trial court to which we afford great deference. *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). "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).

[7] The defendant carries the burden of persuading us that the sentence imposed by the trial court is inappropriate, *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006), and we may consider any factors appearing in the record in making such a determination, *Reis v. State*, 88 N.E.3d 1099, 1102 (Ind. Ct. App. 2017). The question under Rule 7(B) is "not whether another sentence is *more* appropriate; rather, the question is whether the sentence imposed is inappropriate." *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008). Whether a defendant's sentence is 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 light in a given case." *Cardwell*, 895 N.E.2d at 1224. "The principal role of appellate review should be to attempt to leaven the outliers, . . . not to achieve a perceived 'correct' result in each case." *Id.* at 1225.

II. Inappropriate Sentence

[8] Harrell argues his sentence is inappropriate in light of the nature of his offense and his character. He argues that "[e]ven though he is responsible for the neglect that led to the death of his son, [he] has suffered a grievous loss" and anything other than the minimum sentence available by statute and under the terms of his plea agreement is inappropriate. Appellant's Brief at 10. He asks that we revise his sentence to twenty years.

[9] Our analysis of the "nature of the offense" portion of the review begins with the advisory sentence. *Clara v. State*, 899 N.E.2d 733, 736 (Ind. Ct. App. 2009). The advisory sentence is the starting point selected by the legislature as an appropriate sentence for the crime committed. *Childress*, 848 N.E.2d at 1081. The sentence for a Level 1 felony is a fixed term of between twenty and forty years, with an advisory sentence of thirty years. Ind. Code § 35-50-2-4(b). The trial court sentenced Harrell to twenty-five years, a sentence below the advisory. When a defendant has received the advisory sentence, he or she faces a "particularly heavy burden" in persuading this court that the sentence is inappropriate. *Fernbach v. State*, 954 N.E.2d 1080, 1089 (Ind. Ct. App. 2011), *trans. denied*. It stands to reason that the burden is even more onerous where, as here, the defendant receives a sentence below the advisory.

[10] The nature of the offense is found in the details and circumstances of the offense and the defendant's participation therein. *Lindhorst v. State*, 90 N.E.3d 695, 703 (Ind. Ct. App. 2017). Harrell and the State agreed to a sentence between twenty and thirty years, implicitly acknowledging by agreeing to a below advisory sentence that the nature of the offense was tragic, not reprehensible. 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*. Because the entire sentencing range agreed to by the parties and available to the trial

court was below the advisory sentence, we believe any particular sentence within that range accounts for the less egregious nature of this particular offense. In other words, we cannot say that the below advisory sentence imposed here is inappropriate in light of the nature of Harrell's offense.

[11] 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*, and permits a broader consideration of the defendant's character, *Anderson v. State*, 989 N.E.2d 823, 827 (Ind. Ct. App. 2013), *trans. denied*. A defendant's life and conduct are illustrative of his or her character. *Morris v. State*, 114 N.E.3d 531, 539 (Ind. Ct. App. 2018), *trans. denied*.

[12] A typical factor to be considered in examining a defendant's character is his or her criminal history. *Johnson v. State*, 986 N.E.2d 852, 857 (Ind. Ct. App. 2013). The significance of a person's criminal history varies based on the "gravity, nature, and number of prior offenses in relation to the current offense." *Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007). However, "[e]ven a minor criminal record reflects poorly on a defendant's character," *Reis*, 88 N.E.3d at 1105, as does a history of arrests, *Rutherford*, 866 N.E.2d at 874.

[13] At the time of the sentencing in this case, Harrell had two prior misdemeanor convictions for operating a vehicle while intoxicated and a prior misdemeanor conviction for battery resulting in bodily injury. The plea agreement disposing of the battery charge resulted in the dismissal of charges for domestic battery

and invasion of privacy. Further, Harrell was on probation for the battery conviction when the instant offense occurred. And after this offense, Harrell was charged with two counts of battery and one count of criminal confinement, all felonies, that were dismissed pursuant to the plea agreement in this case, and with auto theft, which remained pending. Although Harrell's prior offenses and several arrests are not similar in gravity or nature to the instant offense, they are still a poor reflection on his character. *See Boling v. State*, 982 N.E.2d 1055, 1060 (Ind. Ct. App. 2013) (finding that although defendant's "criminal history is not significantly aggravating, it is still a poor reflection on his character").

[14] Harrell accepted responsibility for his crime by pleading guilty, but we must also consider, as the trial court did, that he received a significant benefit for doing so, where the State dismissed three pending felony charges and agreed to a below-advisory sentence. Further, although the probation officer who conducted the pre-sentence investigation reported that Harrell "appears to be remorseful[,]" Appellant's App., Vol. II at 42, the officer also recorded that Harrell stated, "It was an accident. Now I have to set [sic] in jail for the rest of my life for an accident. Accidents happen every day. I don't know why I am accountable. . . . The death of my son was enough of a penalty[,]" *id.* at 40. Undoubtedly, Harrell is remorseful over the loss of his son, but his statement that it was an accident does not demonstrate that he fully accepts or understands the part his own failure to supervise a toddler played in the tragedy.

[15] We acknowledge the facts Harrell highlights about his difficult past and his current medical condition. We also acknowledge that he has suffered a terrible loss. However, as stated above, the question is not whether another sentence would be more appropriate, but whether the sentence imposed is inappropriate. *See supra* ¶ 7. Considering the nature of Harrell's offense and his character, we cannot say the below advisory sentence imposed by the trial court – which falls squarely within the sentencing range agreed to by the parties – is inappropriate.

Conclusion

[16] Harrell's twenty-five-year sentence is not inappropriate, and the judgment of the trial court is affirmed.

[17] Affirmed.

Riley, J., and Molter, J., concur.