MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Michael Lee Anthony Moffatt,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 31, 2022

Court of Appeals Case No. 21A-CR-2252

Appeal from the Tippecanoe Superior Court

The Honorable Steven P. Meyer, Judge

Trial Court Cause No. 79D02-2106-F6-498

Brown, Judge.

[1] Michael Lee Anthony Moffatt appeals his sentence for failure to return to lawful detention as a level 6 felony and asserts that his sentence is inappropriate in light of the nature of the offense and his character. We affirm.

Facts and Procedural History

[2] On May 21, 2018, the trial court sentenced Moffatt under cause number 79D02-1802-F4-3 ("Cause No. 3") and ordered that he serve four years in the Department of Correction, two years on community corrections, and two years on probation. On August 24, 2019, Moffatt was placed on community corrections and, at that point, had two hundred thirty-four days of his sentence remaining.

[3] On August 29, 2020, Moffatt left his place of employment while on work release, his employer informed work release that Moffatt had been terminated, and his ankle monitor was placed into "device tamper" mode. He discussed the situation on the phone with an officer, he was told to immediately return to the work release facility, and he did not return to custody until June 2021 when he was arrested. Appellant's Appendix Volume II at 8.

[4] On June 17, 2021, the State charged Moffatt with failure to return to lawful detention as a level 6 felony under cause number 79D02-2106-F6-498 ("Cause No. 498"), the cause from which the appeal arises. On August 13, 2021, the court held a hearing at which, pursuant to a plea agreement, Moffatt pled guilty to failure to return to lawful detention as a level 6 felony as charged, he admitted to a Petition to Execute filed in Cause No. 3, and the State agreed to

dismiss charges of possession of methamphetamine as a level 6 felony filed in cause number 79D04-2106-F6-458 ("Cause No. 458").

[5] On September 13, 2021, the court held a sentencing hearing under Cause No. 498, at which it determined "on the Petition to Execute . . . that the balance remaining all be executed at the Department of Corrections." Transcript Volume II at 33. With regard to his guilty plea for failure to return to lawful detention under Cause No. 498, Moffatt gave a statement and apologized for "taking the Court's trust." *Id.* at 27. The court found the aggravating circumstances included Moffatt's criminal history, three petitions to revoke probation filed against him and found true, "a pending Petition to Execute; he was on probation at the time of the commission of the offense; [and] prior attempts at rehabilitation and Community Corrections have failed (previous violations not reported by Community Corrections[])]." Appellant's Appendix Volume II at 57-58. It found the mitigating circumstances included that Moffatt "pled guilty; he has a substance abuse issue (diminished by prior opportunities to address); he has mental health issues; he is medically recovering from a stabbing; and his employment history (diminished as he left his employment and never returned[])]." *Id.* at 58. The court found the aggravating factors outweighed the mitigating factors. It sentenced Moffatt to one year and one hundred eighty days "all executed to be served consecutively to any sentence imposed in [Cause No. 3]." *Id.*

Discussion

[6] The issue is whether Moffatt's sentence is inappropriate in light of the nature of the offense and his character. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute 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." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

[7] Moffatt argues the nature of his offense and character do not warrant a 545-day sentence. He argues "the facts of this offense were no worse than those involved in any other case of this kind" and he did not "fight law enforcement officers, he did not flee in a vehicle, and he did not threaten the public by his actions of removing his ankle monitor." Appellant's Brief at 10. [1] He asserts

[1] Moffatt also claims that the trial court failed to consider his acceptance of responsibility, remorse, and the hardship that incarceration would cause to his dependents as mitigating factors. He further claims that the court merely recited statutory factors and did not sufficiently explain the aggravators to improperly enhance his sentence. While Moffatt raised the single issue of whether his sentence is inappropriate, he appears to conflate two separate sentencing standards: whether the trial court abused its discretion in identifying mitigating and aggravating factors and whether his sentence is inappropriate pursuant to Ind. Appellate Rule 7. "As our Supreme Court has made clear, inappropriate sentence and abuse of discretion claims are to be analyzed separately." *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008) (citing *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007)). Accordingly, "an inappropriate sentence analysis does not involve an argument that the trial court abused its discretion in sentencing the defendant." *Id.* To the extent Moffatt argues that the trial court abused its discretion, we need not address this issue because we find that his sentence is not inappropriate. *See Chappell v. State*, 966 N.E.2d 124, 134 n.10 (Ind. Ct. App. 2012) (noting that any error in failing to consider the defendant's guilty plea as a mitigating factor is harmless if the sentence is not inappropriate) (citing *Windhorst v. State*, 868 N.E.2d 504, 507 (Ind. 2007) (holding that, in the absence of a proper sentencing order, Indiana appellate courts may either remand for resentencing or exercise their authority to review the sentence pursuant to Ind. Appellate Rule 7(B)), *reh'g denied*.) Even if we were to address Moffatt's abuse of discretion argument, we would not find it persuasive in light of the record.

that he accepted responsibility, showed remorse, and had dependents that would be harmed by his incarceration.

[8] Ind. Code § 35-50-2-7(b) provides that a person who commits a level 6 felony shall be imprisoned for a fixed term of between six months and two and one-half years with the advisory sentence being one year.

[9] Our review of the nature of the offense reveals that Moffatt did not return to work release on August 29, 2020, as required and that he remained absent until his arrest in June 2021. He removed his ankle monitoring unit and talked with a corrections officer who informed him that he needed to return to work release, an order with which he did not comply.

[10] Our review of the character of the offender reveals that Moffatt pled guilty to failure to return to lawful detention as a level 6 felony under Cause No. 498 pursuant to a plea agreement which provided that, in exchange for his guilty plea under Cause No. 498 and his admission to the petition to execute under Cause No. 3, the State would dismiss the charge under Cause No. 458.

[11] According to the presentence investigation report ("PSI"), Moffatt's juvenile history includes an alcohol violation in September 1999, two counts of dangerous possession of a firearm in August 2000, and theft in 1999. His adult history includes "misdemeanor convictions for Minor Consumption (2005), Resisting Law Enforcement (2005), Public Intoxication (2006, 2010, and 2012), and Disorderly Conduct (2016)" as well as "prior felony convictions for Robbery (2004) and Unlawful Poss. of a Firearm by Serious Violent Felon

(2018)." Appellant's Appendix Volume II at 44. With respect to his criminal history, the court stated at sentencing that "at some point, enough is enough" and "[it] seems like you've sort of earned your spot here right now based upon your own actions." Transcript Volume II at 32. The court also noted Moffatt had "three Petitions to Revoke filed against him, all found true" and "he was on Community Corrections at the time of this offense and that prior attempts at rehabilitation or Community Corrections have failed in the sense that . . . there were many other violations by [Moffatt] during his placement on Community Corrections." *Id.* at 37. The PSI indicates that Moffatt has six children, two of whom have been adopted, three with whom he has not had contact for six months, and one with whom he had contact a week before incarceration, and he does not believe he has been ordered to pay child support. Moffatt's overall risk assessment score using the Indiana Risk Assessment System placed him in the very high risk to reoffend category.

[12] After due consideration, we conclude that Moffatt has not sustained his burden of establishing that his sentence is inappropriate in light of the nature of the offense and his character.

[13] For the foregoing reasons, we affirm Moffatt's sentence.

[14] Affirmed.

May, J., and Pyle, J., concur.