MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Suzy St. John
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Myriam Serrano
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Edgar Pimentel, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 9, 2022

Court of Appeals Case No. 21A-CR-1480

Appeal from the Adams Circuit Court

The Honorable Chad E. Kukelhan, Judge

Trial Court Cause No. 01C01-1912-F3-9

Altice, Judge.

Case Summary

[1] Edgar Pimentel, Jr., appeals the sixteen-year sentence that was imposed following his conviction for dealing in methamphetamine, a Level 3 felony, and the eight-year enhancement of that sentence following his admission to being a habitual offender. On appeal, Pimentel claims that the sentencing order must be revised because the trial improperly calculated the amount of credit time to which he was entitled. Pimentel also asserts that the trial court abused its discretion in sentencing him and that the sentence is inappropriate.

[2] We affirm the sentence but remand for a correction of the sentencing order as needed.

Facts and Procedural History

[3] On October 6, 2019, a confidential informant (CI) notified Adams County Sheriff's Department personnel that Pimentel was selling methamphetamine. Thereafter, deputies arranged two controlled buys between the CI and Pimentel.

[4] On October 16, 2019, the CI purchased 3.5 grams of methamphetamine from Pimentel for $100. Four days later, the CI met with Pimentel and purchased

7.8 grams of methamphetamine from him for $140. Both transactions occurred under law enforcement supervision and surveillance.

[5] On December 18, 2019, the State charged Pimentel with Count I, dealing in methamphetamine, a Level 4 felony, and Count II, dealing in methamphetamine, a Level 3 felony. The State also alleged that Pimentel was a habitual offender, citing a 2009 burglary conviction and a 2015 conviction for dealing in a narcotic drug as the two prior unrelated felonies in support of the habitual offender count.

[6] The trial court issued a warrant for Pimentel's arrest and set a $1000 cash bond and a $30,000 surety bond. Thereafter, on December 24, 2019, Pimentel was arrested pursuant to the warrant and remained in jail until he posted bond.

[7] On April 21, 2021, the State and Pimentel entered into a plea agreement in which Pimentel agreed to plead guilty to Count II, Level 3 dealing in methamphetamine, and to being a habitual offender. In exchange, the State agreed to dismiss Count I, leave the sentencing to the trial court on Count II, and cap the sentence for the habitual offender enhancement at eight years.

[8] On June 1, 2021, a sentencing hearing was held at which time the trial court accepted the plea agreement and entered a judgment of conviction against Pimentel for dealing in methamphetamine, a Level 3 felony. Pimentel was also adjudicated a habitual offender.

[9] The trial court identified aggravating and mitigating circumstances at the sentencing hearing. The aggravating factors included Pimentel's juvenile and adult criminal history and his failure to abide by the terms of pretrial release, probation, and home detention in prior cases. Pimentel's juvenile history includes adjudications for battery and conversion. Pimentel has accumulated eight felony convictions, including possession and/or sale of narcotics and three counts of burglary. The trial court also noted that, while Pimentel has been given multiple opportunities to participate in substance abuse treatment and alternative sentencing programs, he has failed to take advantage of those opportunities.

[10] The trial court identified Pimentel's acceptance of responsibility as the sole mitigating factor and sentenced Pimentel to a term of sixteen years for dealing in methamphetamine. It enhanced that sentence by eight years on the habitual offender count, thus resulting in an aggregate sentence of twenty-four years.

[11] The trial court also determined that Pimental was entitled to 74 days of accrued credit time, and the abstract of judgment shows that he was incarcerated for 74 days between December 24, 2019 and "*March 6, 2020."* (Emphasis added). The presentence investigation report (PSI), however, shows that Pimental "was arrested on December 24, 2019; he was released on *March 7, 2020* after posting bond," thus reflecting 75 days of incarceration. *Appellant's Appendix Vol. II* at 108.

[12] Pimentel now appeals.

Discussion and Decision

I. Credit Time

[13] Pimentel first claims that the trial court erroneously calculated the amount of credit time to which he was entitled. Specifically, Pimentel maintains—and the State agrees—that there is a discrepancy regarding the date that Pimental posted bond and was released from incarceration. In light of this discrepancy, Pimenatel argues that he is entitled to 75 days of credit time in accordance with the PSI.

[14] We note that "pre-sentence jail time credit is a matter of statutory right" and trial courts typically "do not have discretion in awarding or denying such credit." *Molden v. State*, 750 N.E.2d 448, 449 (Ind. Ct. App. 2001). The calculation of a "defendant's pre-trial credit depends on (1) pretrial confinement, and (2) the pretrial confinement being a result of the criminal charge for which sentence is being imposed." *James v. State*, 872 N.E.2d 669, 672 (Ind. Ct. App. 2007). If there is an error in the manner in which credit time is calculated, "it is [this Court's] duty to correct that mistake." *Senn v. State*, 766 N.E.2d 1190, 1194 (Ind. Ct. App. 2002).

[15] In light of the credit time discrepancy discussed above, the parties contend—and we agree—that the record does not contain sufficient information from which we can determine Pimentel's correct release date. Thus, remand is appropriate for the trial court to review Pimentel's jail records, determine the

proper release date, and to award Pimentel one additional day of credit time if the release date of March 7, 2020 listed on the PSI is deemed correct.

II. Abuse of Discretion—Sentencing

[16] Pimentel argues that the trial court abused its discretion in sentencing him. Specifically, Pimentel contends that the trial court improperly identified his Indiana Risk Assessment System (IRAS) score as an aggravating circumstance. Pimentel further claims that the record does not support the trial court's determination that his sentence should be fully executed in light of his failed prior attempts in alternative sentencing programs, including therapeutic community.

[17] Trial courts generally have broad discretion in selecting a sentence. *Jackson v. State*, 105 N.E.3d 1081, 1084 (Ind. 2018). On appeal, we review a court's sentencing decision for an abuse of that discretion. *McCain v. State*, 148 N.E.3d 977, 981 (Ind. 2020). "An abuse of discretion occurs if the decision is 'clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.'" *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007) (quoting *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006)), *clar'd on reh'g*. However, "we will remand for resentencing if we cannot say with confidence that the trial court would have imposed the same sentence if it considered the proper aggravating and mitigating circumstances." *McCann v. State*, 749 N.E.2d 1116, 1121 (Ind. 2001).

[18] With respect to an offender's IRAS score, our Supreme Court observed in *Malenchik v. State*, 928 N.E.2d 564, 570 (Ind. 2010), that this score is "intended to predict an offender's likelihood of recidivism and to provide information useful in determining his rehabilitative needs." The *Malenchik* court further noted that although the IRAS scores "*do not in themselves* constitute an aggravating or mitigating circumstance … *the assessment tool scores may, and if possible, should be considered* to supplement and enhance a judge's evaluation, weighing, and application of the other sentencing evidence in the formulation of an individualized sentencing program appropriate for each defendant." *Id.* at 573 (emphasis added). Thus, the "offender's scores and/or narrative assessment results may be considered by a trial judge in reaching an informed sentencing decision" and the trial court "may employ such results in formulating the manner in which the sentence is served." *Id.* at 574-75.

[19] Pimentel correctly observes that the trial court reviewed and considered the IRAS score when determining what sentence to impose. But contrary to Pimentel's assertion, the trial court fell short of specifically identifying Pimentel's IRAS score as an aggravating factor in either its oral sentencing statement or in its written sentencing order. Rather, the trial court commented that Pimental's "IRAS … scores are high in the criminal history, education, employment, financial situations, substance abuse, peer associations." *Supplemental Transcript Vol. II* at 19. The judge also stated that "when I see high . . . scores, it alarms me because there's a reason why they're high." *Id.*

[20] It is apparent that the trial court commented on Pimentel's IRAS score when it was in the process of deciding whether to utilize various alternative sentencing options. And because Pimentel argued that a portion of his sentence should be suspended to probation, it was permissible under *Malenchik* for the trial court to consider the IRAS score as a basis for declining to suspend a portion of Pimentel's sentence. Inasmuch as the trial court did not specifically identify Pimentel's IRAS score as an aggravating factor and instead used that information as a means of "reaching an informed sentencing decision" for Pimentel, *see id.* at 574, there was no abuse of discretion.

[21] Pimentel also claims that the trial court abused its discretion in determining that he was not a good candidate to participate in a treatment program while incarcerated because of his repeated failures at rehabilitation, including his unsuccessful attempt at "therapeutic community" through the Indiana Department of Correction (DOC). *Appellant's Brief* at 19.

[22] We initially observe that Pimentel "do[es] not have a right to placement" in a DOC treatment program, and "trial courts themselves have no authority to require the DOC to place a particular defendant into a program." *Miller v. State*, 105 N.E.3d 194, 196 (Ind. Ct. App. 2018). However, the "trial court's role in relation to purposeful incarceration is to identify which defendants should be flagged as individuals most likely to benefit from placement in the program." *Id.*

[23] Here, the evidence established that Pimentel had participated in alternative placement programs during previous incarcerations. Pimentel also had been

placed on probation and in-home detention in other cases. Notwithstanding these alternatives, Pimental has not demonstrated a commitment to achieve and maintain sobriety or be rehabilitated, and the trial court correctly observed that Pimental has failed to take advantage of, and benefit from, the numerous opportunities and services that were offered to him. Pimentel has continued to maintain a life of crime and engage in drug use and dealing. As a result, the trial court did not abuse its discretion in denying Pimentel's request to participate in an alternative treatment program in light of his prior repeated failures at rehabilitation.

[24] As an aside, we also note that contrary to Pimentel's contention, the trial court did not decide that Pimentel could *never* be placed in a treatment program while incarcerated. The trial court pointed out that it would consider a modification of Pimentel's sentence at a later point in time, once Pimentel demonstrates that he is serious about rehabilitation and sobriety.

[25] In sum, Pimentel's claim that the trial court abused its discretion in sentencing fails.

III. Inappropriate Sentence

[26] Pimentel contends that the twenty-four-year sentence was inappropriate given the nature of the offense and his character. Pimentel argues that because neither weapons nor violence were involved in the commission of the offenses, his sentence must necessarily be "revised downward with a portion suspended to be served in community-based drug treatment." *Appellant's Brief* at 28.

[27] We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). The defendant has the burden of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). The principal role of App. R. 7(B) review "should be to attempt to leaven the outliers and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived 'correct' result in each case." *Cardwell v. State,* 895 N.E.2d 1219, 1225 (Ind. 2008). "Appellate Rule 7(B) analysis is not to determine whether another sentence is more appropriate but rather whether the sentence imposed is inappropriate." *Conley v. State,* 972 N.E.2d 864, 876 (Ind. 2012) (internal quotation marks and citation omitted). Whether a sentence is inappropriate turns on "the culpability of the defendant, the severity of the crime, the damage done to others, and a myriad of other factors that come to light in a given case." *Cardwell*, 895 N.E.2d at 1224.

[28] The sentencing range for a Level 3 felony is between three and sixteen years, with an advisory sentence of nine years. Ind. Code § 35-50-2-5. In accordance with the habitual offender statute, I.C. § 35-50-2-8, Pimentel's Level 3 felony sentence may be enhanced by an additional six to twenty years. The plea agreement here, however, capped the maximum enhancement at eight years.

[29] When reviewing the nature of the offense, we look to the details and circumstances of the offense and the defendant's participation therein. *Madden v. State*, 162 N.E.3d 549, 564 (Ind. Ct. App. 2021). Here, Pimentel sold a total

of 11.3 grams of methamphetamine to the CI on two separate occasions. This offense affects the community at large and has many victims. And Pimentel's criminal history demonstrates that he dealt drugs on a larger scale than just the two buys that led to the current charges.

[30] When Pimentel was released from incarceration on another offense in March 2019, he committed the instant offense only seven months later. And while he was out on bond awaiting trial in this case, Pimentel committed additional offenses and was convicted of possession of a narcotic drug and unlawful possession of a syringe in a different county.

[31] Additionally, Pimentel's conduct involved the sale of a greater quantity of methamphetamine than is necessary to constitute a Level 3 felony, thus, making his offense more serious than other Level 3 felony methamphetamine dealing offenses.[1] Given these circumstances, Pimentel has not presented "compelling evidence portraying in a positive light the nature of the offense." *See Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[32] When examining Pimentel's character, we note that character is found in what we learn of the offender's life and conduct. *Perry v. State*, 78 N.E.3d 1, 13 (Ind. Ct. App. 2017). We conduct our review of a defendant's character by engaging

[1] Dealing in methamphetamine is a Level 3 felony if the amount of the drug is at least five grams but less than ten grams. I.C. § 35-48-4-1.1(d)(1).

in a broad consideration of his or her qualities. *Madden*, 162 N.E.3d at 564. Criminal history is one relevant factor in analyzing character. *Id.*

[33] Pimentel has a lengthy juvenile and adult criminal history. As a juvenile, he was adjudicated a delinquent for conversion and battery. Pimentel's adult criminal history spans from 2009 through 2020 and includes eight prior felony convictions. Pimentel has been convicted of burglary on three occasions and possession of a narcotic drug on two occasions. Pimentel has also been convicted of dealing in a narcotic drug, failing to return to lawful detention, and possession of a syringe.

[34] Pimentel has served time in prison and has participated in home detention. He has also been placed on probation and parole in prior cases and has violated the terms and conditions of alternative placement each time it was ordered. Pimentel has been afforded numerous opportunities to reform his behavior, but he has failed to do so by continuing to commit drug-related offenses that reflect poorly on his character. *See Phelps v. State*, 969 N.E.2d 1009, 1021 (Ind. Ct. App. 2012) (acknowledging that the defendant's refusal to take advantage of rehabilitative efforts offered to him reflected poorly on his character), *trans. denied*.

[35] Additionally, Pimentel has been identified as an individual who is at a high risk to reoffend, and he has repeatedly demonstrated a disregard for the law. Pimentel has committed new offenses and has continued his drug use while out on bond awaiting trial. In short, the repeated nature of Pimentel's criminal

offenses demonstrates that he has not been rehabilitated and he continues to pose a threat to the community.

[36] We further note that while Pimentel has a lengthy history of drug addiction, the trial court pointed out—and the evidence established—that he did not seek help to treat his substance abuse issues that might deter him from committing crimes. Pimentel's drug addiction does not render the sentence inappropriate. *See, e.g., Hape v. State*, 903 N.E.2d 977, 1002 (Ind. Ct. App. 2009) (holding that a defendant's failure to address a known substance-abuse problem is not mitigating), *trans. denied.*

[37] Pimentel also suggests that his sentence is inappropriate because he admitted responsibility for his crimes in the plea agreement. We acknowledge that pleading guilty can be a relevant factor in the mitigation or revision of a sentence. *See Amalfitano v. State*, 956 N.E.2d 208, 212 (Ind. Ct. App. 2011), *trans. denied.* However, we agree with the State that Pimentel's decision to plead guilty does not render his sentence inappropriate, as it was likely a pragmatic plea, given the weight of the evidence against him and the significant benefit that Pimentel received by pleading guilty. More specifically, in exchange for Pimentel's guilty plea, the State agreed to dismiss one charge of dealing in methamphetamine as a Level 4 felony. And significantly, the plea agreement reduced Pimentel's potential habitual offender enhancement by twelve years. As a result, Pimentel received a notable benefit by pleading guilty, and we cannot say that his guilty plea warrants a revision of his sentence. *See, e.g., Sanchez v. State,* 891 N.E.2d 174, 176 (Ind. Ct. App. 2008)

(observing that a guilty plea is not significantly mitigating where the defendant's decision to plead guilty is pragmatic because he has received a significant benefit from the agreement and the evidence of his guilt is strong.)

[38] In sum, Pimentel has failed to provide examples of his virtuous traits or good character. Pimentel has shown little regard for the law, and he has not been rehabilitated, despite numerous opportunities to do so. Pimentel has a lengthy criminal history, including past drug-related convictions and he has continued to engage in criminal activity. In short, Pimentel has not presented any compelling evidence of his positive character or the nature of the offense that would render his sentence is inappropriate. Thus, we decline to revise Pimentel's sentence.

[39] Judgment affirmed.

Vaidik, J. and Crone, J., concur