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.

FILED
Aug 09 2022, 8:44 am
CLERK
Indiana Supreme Court
Court of Appeals
and Tax Court

ATTORNEY FOR APPELLANT

Glen E. Koch II
Boren, Oliver & Coffey, LLP
Martinsville, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

George P. Sherman
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Russell D. Fox,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 9, 2022

Court of Appeals Case No. 22A-CR-315

Appeal from the Morgan Superior Court

The Honorable Sara A. Dungan, Judge

Trial Court Cause No. 55D03-2011-F5-1649

Tavitas, Judge.

Case Summary

[1] After a long series of criminal convictions, Russell Fox's driving privileges were suspended for life. Nevertheless, on November 5, 2020, Fox was arrested for operating a motor vehicle while intoxicated. His blood-alcohol content was .266. Fox pleaded guilty and received an aggregate sentence of nine years. Fox contends that this sentence is inappropriate in light of the nature of the offense and his character. We cannot agree. Accordingly, we affirm.

Issue

[2] Fox raises a single issue: whether his sentence was inappropriate in light of the nature of the offense and his character.

Facts

[3] On November 5, 2020, Lieutenant Richard Clayton of the Morgan County Sheriff's Department received a dispatch call advising him to be on the lookout for a red pickup truck.[1] Lieutenant Clayton located the truck, followed it, and observed erratic driving behavior. Lieutenant Clayton initiated a traffic stop and approached the truck. The driver—Fox—admitted at the scene that he had been drinking alcohol, and Lieutenant Clayton could smell alcohol. Fox gave

---

[1] These facts are drawn from the probable cause affidavit, which was attached to the pre-sentence investigation report and submitted during Fox's sentencing hearing. Fox had an opportunity to review the PSI and raised no objection to its contents.

Lieutenant Clayton an expired license, and a records check revealed that Fox is a habitual driving offender with a lifetime suspension of his driver's license.

[4] Fox then failed a field sobriety test and refused a chemical blood test after being advised of the implied consent law.[2] Lieutenant Clayton obtained a search warrant for a blood draw, ultimately revealing an ACE of .266.

[5] On November 6, 2020, the State charged Fox with Count I, operating a motor vehicle after forfeiture of license for life, a Level 5 felony; Count II, operating a motor vehicle while intoxicated, endangering a person, a Class A misdemeanor; and Count III, operating a vehicle while intoxicated, a Class C misdemeanor. The State also filed two enhancement counts (Counts IV and V) alleging that Fox committed the preceding counts within seven years of another operating while intoxicated offense. Finally, the State alleged that Fox was a habitual vehicular substance offender with three prior convictions.

[6] On January 13, 2022, Fox pleaded guilty to Counts I, II, and IV without the benefit of a plea agreement. The State dismissed the other two counts but did not dismiss the habitual vehicular substance offender enhancement. The trial court imposed a sentence of five years on Count I. Counts II and IV were merged, and the trial court sentenced Fox to two years on Count IV with the sentences to run concurrently. After considering Fox's lengthy criminal history,

---

[2] "A person who operates a vehicle impliedly consents to submit to the chemical test provisions of this chapter as a condition of operating a vehicle in Indiana." Ind. Code § 9-30-6-1.

the trial court imposed an additional sentence of four years for the habitual vehicular substance offender violation for an aggregate sentence of nine years. Fox now appeals.

Analysis

[7] Fox contends that his sentence is inappropriate in light of the nature of the offense and his character. The Indiana Constitution authorizes independent 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). Our Supreme Court has implemented this authority through Indiana Appellate Rule 7(B), which allows this Court to revise a sentence when it is "inappropriate in light of the nature of the offense and the character of the offender."[3] Our review of a sentence under Appellate Rule 7(B) is not an act of second guessing the trial court's sentence; rather, "[o]ur posture on appeal is [ ] deferential" to the trial court. *Bowman v. State*, 51 N.E.3d 1174, 1181 (Ind. 2016) (citing *Rice v. State*, 6 N.E.3d 940, 946 (Ind. 2014)). We exercise our authority under Appellate Rule 7(B) only in "exceptional cases, and its exercise 'boils down to our collective sense of what is appropriate.'" *Mullins v. State*, 148 N.E.3d 986,

---

[3] Though we must consider both the nature of the offense and the character of the offender, an appellant need not prove that each prong independently renders a sentence inappropriate. *See, e.g., State v. Stidham*, 157 N.E.3d 1185, 1195 (Ind. 2020) (granting a sentence reduction based solely on an analysis of aspects of the defendant's character); *Connor v. State*, 58 N.E.3d 215, 219 (Ind. Ct. App. 2016); *see also Davis v. State*, 173 N.E.3d 700, 707-09 (Tavitas, J., concurring in result).

987 (Ind. 2020) (per curiam) (quoting *Faith v. State*, 131 N.E.3d 158, 160 (Ind. 2019)).

[8] "'The principal role of appellate review is to attempt to leaven the outliers.'" *McCain v. State*, 148 N.E.3d 977, 985 (Ind. 2020) (quoting *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008)). The point is "not to achieve a perceived correct sentence." *Id*. "Whether a sentence should be deemed 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.'" *Id*. (quoting *Cardwell*, 895 N.E.2d at 1224). Deference to the trial court's sentence "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). 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. *Fuller v. State*, 9 N.E.3d 653, 657 (Ind. 2014).

[9] In the case at bar, Fox pleaded guilty to a Level 5 felony. Indiana Code Section 35-50-2-6 provides that: "A person who commits a Level 5 felony (for a crime committed after June 30, 2014) shall be imprisoned for a fixed term of between one (1) and six (6) years, with the advisory sentence being three (3) years." Fox also pleaded guilty to a Level 6 felony and a Class A misdemeanor. Those two counts (Counts II and IV) were merged, and Fox was only sentenced on the

Level 6 felony. "A person who commits a Level 6 felony (for a crime committed after June 30, 2014) shall be imprisoned for a fixed term of between six (6) months and two and one-half (2 ½) years, with the advisory sentence being one (1) year." I.C. § 35-50-2-7(b). If a person is found to be a habitual vehicular substance offender, the trial court shall sentence him to an additional term "of at least one (1) year but not more than eight (8) years of imprisonment, to be added to the term of imprisonment imposed under IC 35-50-2 or IC 35-50-3." I.C. § 9-30-15.5-2. The trial court imposed a sentence of five years for the Level 5 felony and two years for the Level 6 felony; those sentences were ordered to be served concurrently. The trial court further imposed an additional four years for the habitual vehicular substance offender enhancement, for an aggregate sentence of nine years.

[10] Our analysis of the "nature of the offense" requires us to look at the nature, extent, and depravity of the offense. *Sorenson v. State*, 133 N.E.3d 717, 729 (Ind. Ct. App. 2019), *trans. denied*. Here, Fox became intoxicated and drove a motor vehicle despite having his driving privileges suspended for life due to a series of prior offenses. Fox's ACE was over three times the legal limit. Such recklessness poses a danger to the public and any citizens on the roadways. Moreover, Fox refused to comply with police when they requested a chemical test, forcing them to get a search warrant in the middle of the night.

[11] Fox argues that his sentence is near the maximum and that the maximum sentence must be reserved for the worst of the worst offenders. *See, e.g.,* Appellant's Br. p. 14. Fox further argues: "Fox did not use force or a threat of

force. [ ] Second, no person suffered a physical injury from the offense. [ ] Third, the loss suffered was not greater than the elements necessary to prove the commission of the offense." *Id*. at 16 (internal citations omitted). We are unmoved by these arguments. Our focus is not on the fact that the crime could have been worse but, rather, on whether the sentence administered for the crime is inappropriate. We find that Fox's crimes, the latest in a long history of similar crimes, do not warrant a downward revision of his sentence. Nothing about his crimes exhibits restraint. To the contrary, Fox appears incapable of resisting the urge to drive while intoxicated.

[12] Our analysis of the character of the offender involves a "broad consideration of a defendant's qualities," *Adams v. State*, 120 N.E.3d 1058, 1065 (Ind. Ct. App. 2019), including the defendant's age, criminal history, background, and remorse. *James v. State*, 868 N.E.2d 543, 548-59 (Ind. Ct. App. 2007). Fox admits that he has a long criminal history of alcohol-related offenses and that he has a substance abuse issue for which he has never sought treatment. Fox further concedes that many rehabilitative options have been offered to him in the past. He has failed to avail himself of those options.

[13] Fox also concedes that his criminal history is related to his present offenses. "The significance of a criminal history in assessing a defendant's character and an appropriate sentence varies based on the gravity, nature, proximity, and number of prior offenses in relation to the current offense." *Sandleben v. State*, 29 N.E.3d 126, 137 (Ind. Ct. App. 2015) (citing *Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006)), *trans. denied*. "Even a minor criminal history is a poor

reflection of a defendant's character." *Prince v. State*, 148 N.E.3d 1171, 1174 (Ind. Ct. App. 2020) (citing *Moss v. State*, 13 N.E.3d 440, 448 (Ind. Ct. App. 2014), *trans. denied*). As the trial court noted, Fox's criminal history is long and many of his offenses are alcohol-related: "eight prior misdemeanors, two felonies that were reduced to AMS, [and] eight felony convictions . . . ." Tr. Vol. II p. 47.

[14] With respect to his character, Fox argues:

> Here, Fox was 61 at time of sentencing. He had been at the same residence for the last 20 years. He is paying his mortgage monthly. He has pets: a dog, a cat and cows. He works at Milestone as a heavy equipment operator. He suffers from prostate cancer. He had surgeries scheduled for two weeks from the date of sentencing. He also had just had heart surgery approximately a year and a half prior to sentencing. He was willing to do Intensive Outpatient Treatment or inpatient treatment.

Appellant's Br. p. 19. Fox does not explain, and neither do we see, how these personal details render his sentence inappropriate. Given his criminal history and lengthy inability or unwillingness to embrace opportunities for rehabilitation, we cannot say that the sentence was inappropriate in light of Fox's character.

Conclusion

[15] Fox's sentence was not inappropriate in light of the nature of his offense and his character. We affirm.

[16] Affirmed.

Riley, J., and May, J., concur.