

## 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

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Ronald M. Marshall,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff,*

April 30, 2021

Court of Appeals Case No.  
20A-CR-1961

Appeal from the Boone Circuit  
Court

The Honorable Lori N. Schein,  
Judge

Trial Court Cause No.  
06C01-1702-F5-160

**Robb, Judge.**

## Case Summary and Issue

- [1] Ronald Marshall pleaded guilty to child solicitation, a Level 5 felony. Subsequently, the trial court sentenced him to the advisory term of three years to be executed in the Indiana Department of Correction (“DOC”).
- [2] Marshall now appeals, raising multiple issues for our review, one of which we find dispositive: whether Marshall waived his right to appeal his sentence.<sup>1</sup> Concluding that pursuant to his plea agreement Marshall waived his right to appeal his sentence, we affirm.

## Facts and Procedural History

- [3] Marshall is the grandfather of F.M. On February 19, 2017, eleven-year-old F.M. and a friend were at Marshall’s home when Marshall requested that F.M. “engage in fondling or touching of [Marshall] with the intent to arouse or satisfy the sexual desires of [Marshall].” Appellant’s Appendix, Volume 2 at 33.
- [4] The State charged Marshall with child solicitation, a Level 5 felony; two counts of performing sexual conduct in the presence of a minor, both Level 6 felonies; attempted child molesting, a Level 4 felony; and child molesting, a Level 4 felony. Marshall pleaded guilty to child solicitation and, in exchange, the

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<sup>1</sup>Marshall raised two additional issues: (1) “[w]hether the trial court abused its discretion for the sentence imposed[,]” and (2) “[w]hether [his] sentence should be revised pursuant to Indiana Rule of Appellate Procedure 7(B).” Appellant’s Brief at 4. Because we conclude that Marshall waived his right to appeal his sentence, we do not address these issues.

remaining charges were dismissed. Marshall's plea agreement stipulated that Marshall's sentence would be determined by and at the discretion of the trial court. Marshall's plea agreement also provided, in part:

The defendant hereby waives the right to appeal any sentence imposed by the Court, under any standard of review, including but not limited to, an abuse of discretion standard and the appropriateness of the sentence under Indiana Appellate Rule 7(B), so long as the Court sentences the defendant within the terms of the plea agreement[.]

Appellant's App., Vol. 2 at 36.

[5] At the guilty plea hearing, the trial court confirmed that Marshall understood that by pleading guilty he was giving up a multitude of rights, including his right to appeal his conviction. *See* Transcript of Evidence, Volume 2 at 7. Further, Marshall testified that he had read his plea agreement and had gone over it with his attorney prior to signing. *Id.* at 11-12. The trial court discussed the potential range of Marshall's sentence and informed him that the sentence was an "open sentence meaning . . . the parties are free to argue everything[.]" *see* Tr., Vol. 2 at 9-12; however, nothing about Marshall's forfeiture of his right to appeal his *sentence* was mentioned at the guilty plea hearing. The trial court found that there was a factual basis for the plea and accepted Marshall's guilty plea, finding him guilty of child solicitation.

[6] Subsequently, the trial court held a sentencing hearing. The trial court noted that Marshall has a "somewhat limited criminal history and [] did take

responsibility for [his] crime” but also found that Marshall “was in a position of trust and care” with the victim. Tr., Vol. 2 at 67. The trial court then sentenced Marshall to the advisory sentence of three years in the DOC.

- [7] After sentencing, Marshall filed an application for pauper counsel for the purpose of pursuing an appeal. Appellant’s App., Vol. 2 at 68. The trial court appointed counsel for Marshall but noted that Marshall “waived his right to appeal his conviction pursuant to terms set out in the Plea Agreement.” *Id.* at 69. Marshall now appeals.

## Discussion and Decision

- [8] Marshall contends that he “did not waive his right to appeal the sentence imposed for his conviction pursuant to a plea agreement.” Appellant’s Br. at 21. Our supreme court has held that a criminal defendant may waive the right to appellate review of their sentence as part of a written plea agreement. *Creech v. State*, 887 N.E.2d 73, 75 (Ind. 2008). A defendant must knowingly and voluntarily waive this right. *See id.* at 77 (concluding, “Acceptance of the plea agreement containing the waiver provision is sufficient to indicate that, in the trial court’s view, the defendant knowingly and voluntarily agreed to the waiver.”).
- [9] Marshall argues that “nothing in the colloquy indicated Marshall waived his right to appeal the sentence imposed by trial court[,]” and “[t]he trial court did not specifically reference or review the waiver of Marshall’s right to appeal the

sentence imposed at either the guilty plea or sentencing hearing[.]”<sup>2</sup> Appellant’s Br. at 22-23. However, trial courts are not required to orally advise defendants that they are waiving this right during the guilty plea colloquy. *Brattain v. State*, 891 N.E.2d 1055, 1057 (Ind. Ct. App. 2008). In *Brattain*, the defendant claimed that waivers “should only be enforceable when accompanied by an advisement on the record by the trial court[.]” *Id.* But we concluded our supreme court specifically rejected this argument in *Creech* on the basis that neither the Indiana Rules of Criminal Procedure nor the Indiana Code requires trial courts accepting plea agreements to make express findings regarding a defendant’s intention to waive his appellate rights. *Id.* (citing *Creech*, 887 N.E.2d at 77).

[10] Marshall also notes “the trial court’s order appointing pauper counsel for Marshall’s appeal stated that Marshall had waived the right to appeal his conviction, not that he has waived the right to appeal his sentence[.]” Appellant’s Br. at 23. Marshall seemingly argues the trial court’s failure to include that Marshall also waived his right to appeal his sentence in their order granting pauper counsel, to pursue an appeal, indicated that Marshall maintained that right. However, even if we considered this to be a declaration

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<sup>2</sup> Marshall states he did not “place his initials next to paragraph waiving the right to appeal his sentence” and the “deputy prosecutor [failed to] ask the trial court to review the clause regarding waiver[.]” Appellant’s Br. at 23. This, he asserts, makes it unclear from the record that Marshall understood he was waiving the right to appeal his sentence. *See id.* However, Marshall did not place his initials next to any individual paragraphs in his plea agreement. Further, Marshall offers no authority to support the premise that a paragraph in a plea agreement a defendant signs has no effect if it is not initialed, or that the State is obliged to assure each paragraph is initialed. We therefore decline to address the effect of Marshall’s failure to initial that paragraph. *See, e.g., Donaldson v. State*, 904 N.E.2d 294, 301 (Ind. Ct. App. 2009) (contention waived pursuant to Indiana Appellate Rule 46(A)(8)(a) when a defendant cites to no legal authority).

by the trial court that Marshall maintained his right to appeal his sentence, such a statement would fall directly under our supreme court's decision in *Creech*.

[11] In *Creech*, the trial court made statements at the close of the sentencing hearing that led the defendant to believe he had retained his right to appeal despite a contrary provision in his plea agreement. *See* 887 N.E.2d at 76. However, these statements were “not grounds for allowing [defendant] to circumvent the terms of his plea agreement” because “[b]y the time the trial court erroneously advised [defendant] of the possibility of appeal, [defendant] had already pleaded guilty and received the benefit of his bargain.” *Id.* at 76-77. Here, the trial court's order appointing pauper counsel took place well after Marshall's plea hearing.<sup>3</sup> Therefore, we conclude it did not affect Marshall's knowing and voluntary waiver of the right to appeal his sentence.

## Conclusion

[12] We conclude that pursuant to his plea agreement, Marshall waived his right to appellate review of his sentence. Accordingly, we affirm the sentence ordered by the trial court.

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<sup>3</sup> In *Ricci v. State*, we concluded that when the trial court “unambiguously stated at the plea hearing” that a defendant maintained his right to appeal his sentence, he did not waive his right via written plea agreement. 894 N.E.2d 1089, 1093-94 (Ind. Ct. App. 2008) (emphasis omitted), *trans. denied*. We have even expanded this interpretation to include vague statements made by the trial court at the guilty plea hearing but retained the requirement that such a statement occur before the defendant “received the benefit of his bargain.” *Bonilla v. State*, 907 N.E.2d 586, 590 (Ind. Ct. App. 2009) (trial court advised defendant that he “may” have waived the right to appeal his sentence), *trans. denied*.

[13] Affirmed.

Bailey, J., and May, J., concur.