

MEMORANDUM DECISION

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ATTORNEY FOR APPELLANT

James D. Crum
Coots Henke & Wheeler, P.C.
Carmel, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Jodi Kathryn Stein
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Daniel Devon Foy,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 29, 2023

Court of Appeals Case No.
23A-CR-1409

Appeal from the
Hamilton Superior Court

The Honorable
Michael A. Casati, Judge

Trial Court Cause No.
29D01-2106-F5-3693

Memorandum Decision by Senior Judge Shepard
Judges Tavitas and Weissmann concur.

Shepard, Senior Judge.

- [1] Daniel Devon Foy pleaded guilty to Level 5 felony carrying a handgun without a license and Class B misdemeanor possession of marijuana. On appeal, he asks the Court to revise his sentence. Concluding that Foy has not established his sentence is inappropriate, we affirm.

Facts and Procedural History¹

- [2] On June 23, 2021, a police officer stopped a vehicle Foy was driving. Foy was alone. The officer smelled the odor of marijuana and searched the vehicle. During the search, the officer discovered a small bag of marijuana and a partially burnt marijuana cigarette. He also saw a handgun tucked between the driver's seat and the center console. Foy claimed the gun belonged to his then-girlfriend, but subsequent testing revealed the presence of Foy's DNA on "the grip, trigger, and rear slide of the handgun." Tr. Vol. 2, p. 11.
- [3] The State charged Foy with possession of a handgun with a prior similar conviction, a Level 5 felony; possession of a handgun with a prior felony conviction within fifteen years, a Level 5 felony; Class A misdemeanor possession of a handgun; and Class B misdemeanor possession of marijuana.

¹ The circumstances of this case are largely set forth in the probable cause affidavit, which is attached to the presentence investigation report. During the sentencing hearing, Foy did not object to the trial court's reference to the report and its attachments.

[4] Foy pleaded guilty as charged, without a plea agreement. The trial court accepted Foy’s plea and entered a judgment of conviction on the charge of Level 5 felony possession of a handgun with a prior felony conviction within fifteen years, determining the other two handgun charges merged into it. The court further entered a judgment of conviction on the marijuana charge. The court sentenced Foy to five years, with three years executed and two years suspended to probation. For the executed portion, it ordered Foy to serve one year in the Indiana Department of Correction, one year in a Hamilton County Community Corrections facility on work release, and one year on home detention with electronic monitoring. This appeal followed.

Discussion and Decision

[5] Foy asks the Court to “eliminate” the executed portion of his sentence, Appellant’s Br. at 9, claiming it is inappropriate. Article 7, section 6 of the Indiana Constitution authorizes the Court to review and revise sentences. We implement this authority through Indiana Appellate Rule 7(B), which states we may revise a sentence “if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.”

[6] “[S]entencing is principally a discretionary function in which the trial court’s judgment should receive considerable 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). The purpose of sentencing review under Indiana Appellate Rule 7(B) "is not to determine whether another sentence is more appropriate but whether the sentence imposed is inappropriate." *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012) (internal quotation omitted). "The burden is on the defendant" to prove the sentence is inappropriate. *Id.*

[7] When Foy committed his offenses, the maximum sentence for a Level 5 felony was six years, with a minimum sentence of one year and an advisory sentence of three years. Ind. Code § 35-50-2-6 (2014). And the maximum sentence for a Class B misdemeanor was 180 days. Ind. Code § 35-50-3-3 (1977). The court sentenced Foy to five years for the felony handgun charge, with three years executed as described above and two years suspended to probation. It further sentenced Foy to 180 days for the marijuana charge, the maximum possible. But the court ordered Foy to serve his sentences concurrently, and his overall sentence falls short of the maximum possible term of six and a half years. Further, the executed portion of Foy's sentence is the advisory amount for a Level 5 felony.

[8] As to the nature of the offenses, Foy argues his conduct "was accompanied by restraint, regard, and lack of brutality." Appellant's Br. p. 7. It is true that he did not commit any acts of violence, but the charges reflect the lack of violent misconduct. And Foy attempted to deceive the officer during the traffic stop by

claiming the handgun belonged to his then-girlfriend even though his DNA was later found on the gun.

[9] Turning to the character of the offender, Foy has a troubling criminal history. Foy, who was thirty-four years old at sentencing, has accrued four prior felony convictions consisting of resisting law enforcement, theft, and twice possessing a handgun without a license. He has also been convicted of three misdemeanors, including carrying a handgun without a license, aiming a laser at a law enforcement officer, and driving while suspended. Previous convictions for unlicensed possession of a handgun have failed to dissuade Foy from his criminal conduct.

[10] In addition, Foy was twice placed on probation, and in both cases he violated the terms of his probation. In a third case, Foy was placed on home detention through community corrections, but he violated the conditions of his placement and was incarcerated at a work release facility. Alternatives to incarceration have not affected Foy's behavior.

[11] Foy notes he was employed at the time of the traffic stop. He also notes he gained custody of his thirteen-year-old child after the child's mother was incarcerated. While his efforts to maintain a job and care for his thirteen-year-old are commendable, we cannot conclude those factors outweigh his lengthy criminal record and his history of failing to benefit from alternatives to incarceration. Further, Foy has four other minor children, and he is not under court orders to pay support for any of them. He has failed to prove his sentence

is inappropriate in light of the nature of the offenses and his character. *See Zavala v. State*, 138 N.E.3d 291, 302 (Ind. Ct. App. 2019) (sentence not inappropriate in light of character of offender; Zavala claimed his five children would experience undue hardship from his incarceration, but only one of them lived with him, and he was behind on child support payments), *trans. denied*.

Conclusion

[12] For the reasons stated above, we affirm the judgment of the trial court.

[13] Affirmed.

Tavitas, J., and Weissmann, J., concur.