MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Paul Dean Newcomb, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 5, 2021

Court of Appeals Case No. 21A-CR-303

Appeal from the Elkhart Superior Court

The Honorable Gretchen S. Lund, Judge

The Honorable Olga H. Stickel, Senior Judge

Trial Court Cause No. 20D04-1106-FD-170

Tavitas, Judge.

Case Summary

[1] Paul Dean Newcomb, Jr. appeals his sentence for possession of methamphetamine, a Class D felony, and possession of a syringe, a Class D felony. Newcomb argues that the trial court abused its discretion when sentencing him and that his sentence is inappropriate in light of the nature of the offenses and the character of the offender. The State counters that Newcomb's appeal is moot because he has already completed his sentence. We conclude that Newcomb's appeal is not moot because Newcomb received consecutive sentencing in a separate matter following his sentence in this case. Moreover, the trial court abused its discretion when sentencing Newcomb by failing to enter a sentencing statement. Accordingly, we reverse Newcomb's sentence and remand for a new sentencing hearing.

Issue

[2] Initially, we address the State's argument that Newcomb's appeal is moot. Additionally, Newcomb raises two issues, one of which we find dispositive and restate as whether the trial court abused its discretion when sentencing Newcomb.

Facts

[3] On June 4, 2011, officers with the Elkhart Police Department conducted a traffic stop on a vehicle driven by forty-five-year-old Newcomb. After Newcomb consented to a search of the vehicle and Newcomb's person, officers found methamphetamine and two syringes. The State charged Newcomb with

possession of methamphetamine, a Class D felony, and possession of a syringe, a Class D felony. On June 13, 2011, appearing pro se, Newcomb pleaded guilty as charged without a plea agreement.

[4] On July 14, 2011, a sentencing hearing was held. The State noted that Newcomb had twenty-two prior convictions consisting of eight prior felonies and a minimum of twelve misdemeanors.[1] The State recommended a sentence of thirty-six months in the Department of Correction ("DOC"). Newcomb's presentence investigation report reflects that Newcomb admitted he had addictions to methamphetamine and sex. The trial court sentenced Newcomb to concurrent sentences of 900 days in Elkhart County Community Corrections with 600 days suspended and one year of probation.

[5] In December 2011, Newcomb's probation was transferred to Tennessee. Tennessee, however, denied the probation transfer due to Newcomb's failure to report to probation and failure to respond to telephone messages. Further, in April 2012, Newcomb was charged in Tennessee with tampering with evidence, possession of a schedule I and II controlled substance, possession of paraphernalia, resisting arrest, driving on a suspended license, and disorderly conduct.[2]

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[1] The State noted that some of the dispositions were "unknown." Tr. Vol. II p. 11.

[2] The appellate record does not indicate a disposition of these charges.

[6] The State filed notices of probation violations in this case. Newcomb did not appear for a hearing on the matter, and an arrest warrant was issued in June 2012. Newcomb was not located until March 2014, when the State arrested Newcomb and charged him with dealing in methamphetamine, a Class B felony, and alleged that Newcomb was an habitual offender.[3] The State then filed another notice of probation violation due to the new charges. On May 1, 2014, the trial court revoked Newcomb's probation and imposed the previously-suspended sentence of 600 days. Newcomb completed his sentence on December 17, 2014. *See* Ind. Dep't of Corr., Offender Database, https://www.in.gov/apps/indcorrection/ofs/ofs.

[7] In February 2021, Newcomb filed a motion for permission to file a belated appeal of his initial sentence because the trial court did not advise him of his right to appeal at sentencing, which the trial court granted. Newcomb then filed the instant appeal. The State filed a motion to dismiss this appeal on grounds that the appeal was moot. Our motions panel denied the State's motion to dismiss.

[3] In February 2015, Newcomb was convicted and sentenced to sixteen years in the DOC with four years suspended enhanced by eight years for his status as an habitual offender, for an aggregate sentence of twenty-four years with four years suspended.

Analysis

I. Mootness

[8] The State contends that Newcomb's challenge to his sentence is moot because he has already served the sentence. Our motions panel considered the State's argument and denied the motion to dismiss. It is well established that we may reconsider a ruling by the motions panel. *Kelley v. Kelley*, 158 N.E.3d 396, 399 (Ind. Ct. App. 2020). "While we are reluctant to overrule orders decided by the motions panel, this court has inherent authority to reconsider any decision while an appeal remains in fieri." *Id.*

[9] Newcomb acknowledges that, once a "sentence has been served, the issue of the validity of the sentence is rendered moot." *Lee v. State*, 816 N.E.2d 35, 40 (Ind. 2004); *see also Smith v. State*, 971 N.E.2d 86, 89 (Ind. 2012) (holding that a defendant's argument that he was entitled to home-detention good time credit toward his sentence was moot).

> [W]here the principal questions at issue cease to be of real controversy between the parties, the errors assigned become moot questions and this court will not retain jurisdiction to decide them. Stated differently, when we are unable to provide effective relief upon an issue, the issue is deemed moot, and we will not reverse the trial court's determination where *absolutely no change in the status quo will result*.

Bell v. State, 1 N.E.3d 190, 192 (Ind. Ct. App. 2013) (quoting *Jones v. State*, 847 N.E.2d 190, 200 (Ind. Ct. App. 2006), *trans. denied*) (emphasis added).

[10] In most cases, this issue would involve a moot question. According to Newcomb, however, upon completing his sentence for the instant convictions, he was not released from incarceration due to other pending charges. After completing the instant sentence in December 2014, he was convicted in February 2015 in a separate case and sentenced to an aggregate sentence of twenty-four years with four years suspended. Newcomb argues that relief in this case could result in an adjustment to his credit time for his sentence for his later conviction. Given the possibility of a credit time adjustment, we cannot say that "absolutely no change in the status quo will result" from Newcomb's appeal. *Id.* Accordingly, we decline to reconsider our motions panel's ruling, and we will address Newcomb's arguments.

II. Abuse of Sentencing Discretion

[11] Newcomb argues that the trial court abused its discretion by failing to enter a sentencing statement and by failing to consider his guilty plea as a mitigator. "[S]ubject to the review and revise power [under Indiana Appellate Rule 7(B)], sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007); *Phipps v. State*, 90 N.E.3d 1190, 1197 (Ind. 2018). An abuse occurs only 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. *Schuler v. State*, 132 N.E.3d 903, 904 (Ind. 2019). A trial court may abuse its discretion in a number of ways, including: (1) failing to enter a

sentencing statement at all; (2) entering a sentencing statement that includes aggravating and mitigating factors that are unsupported by the record; (3) entering a sentencing statement that omits reasons that are clearly supported by the record; or (4) entering a sentencing statement that includes reasons that are improper as a matter of law. *Ackerman v. State*, 51 N.E.3d 171, 193 (Ind. 2016), *cert. denied*, 137 S. Ct. 475 (2016).

[12] At the time of Newcomb's offenses, Indiana Code Section 35-38-1-1.3 provided: "After a court has pronounced a sentence for a felony conviction, the court shall issue a statement of the court's reasons for selecting the sentence that it imposes."[4] Our Supreme Court has held that: "the statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." *Anglemyer*, 868 N.E.2d at 490.

[13] In pronouncing Newcomb's sentence, the trial court here did not recite a reasonably detailed explanation of its reasons for imposing a particular sentence. In fact, the trial court merely pronounced the sentence without any

[4] The statute now provides: "After a court has pronounced a sentence for a felony conviction, the court shall issue a statement of the court's reasons for selecting the sentence that it imposes unless the court imposes the advisory sentence for the felony."

explanation whatsoever. Accordingly, the trial court abused its discretion in sentencing Newcomb.

[14] Our Supreme Court encountered a similar situation in *Bowen v. State*, 988 N.E.2d 1134 (Ind. 2013) (per curiam). There, the trial court "did not state its reasons for imposing" the sentence and "did not identify any reason for consecutive sentences." *Bowen*, 988 N.E.2d at 1134. The Court held:

> Precedent requires that a trial court "include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence," *Anglemyer v. State*, 868 N.E.2d 482, 490-91 (Ind. 2007), including the reasons for imposing consecutive sentences, *see, e.g., Ortiz v. State*, 766 N.E.2d 370, 377 (Ind. 2002); *Smith v. State*, 474 N.E.2d 71, 73 (Ind. 1985); *see also* Ind. Code § 35-50-1-2. We choose to remand to the trial court for clarification of its sentencing decision and preparation of a new sentencing order. *See Windhorst v. State*, 868 N.E.2d 504, 507 (Ind. 2007), *reh'g denied*.[5]

Id. at 1134-35. On rehearing, the Court revised its instructions because the trial court judge who originally sentenced the defendant was no longer on the bench and the new judge could not "clarify the original sentencing decision." *Bowen v. State*, 1 N.E.3d 131, 131 (Ind. 2013). Accordingly, the Supreme Court ordered:

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[5] The Supreme Court also held in *Windhorst* that "we may exercise our authority to review and revise the sentence." *Windhorst*, 868 N.E.2d at 507. More recently, however, our Supreme Court held that "Rule 7(B) is not for correcting actual error in trial court sentencing." *McCain v. State*, 148 N.E.3d 977, 981 (Ind. 2020). The Court in *McCain* also noted that "abuse-of-discretion review in sentencing generally requires a remand to the same trial court for correction after an error is found." *Id.* Under these circumstances, we elect to remand for resentencing.

> On remand for a new sentencing order that responds to concerns raised by the Supreme Court, the trial court may discharge this responsibility by (1) issuing a new sentencing order without taking any further action, (2) ordering additional briefing on the sentencing issue and then issuing a new order without holding a new sentencing hearing, or (3) ordering a new sentencing hearing at which additional factual submissions are either allowed or disallowed and then issuing a new order based on the presentations of the parties.

Id. Given the multiple errors here during the sentencing hearing, the lack of proper advisements, and the fact that a different judge will determine Newcomb's sentence, the third option given by our Supreme Court in *Bowen* seems advisable and appropriate here. Accordingly, we choose to remand for a new sentencing hearing.

Conclusion

[15] We decline the State's request to find this appeal moot. The trial court, however, abused its discretion by failing to enter a sentencing statement. Accordingly, we reverse and remand for the trial court to conduct a new sentencing hearing.

[16] Reversed and remanded.

Mathias, J., and Weissmann, J., concur.