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IN THE
COURT OF APPEALS OF INDIANA

Britni N. Wihebrink,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

January 24, 2022

Court of Appeals Case No.
21A-CR-1749

Appeal from the
Delaware Circuit Court

The Honorable
John M. Feick, Judge

Trial Court Cause No.
18C04-1809-F1-5

Vaidik, Judge.

Case Summary

- [1] Our Supreme Court held in *Creech v. State*, 887 N.E.2d 73 (Ind. 2008), that a defendant may waive the right to appeal their sentence as part of a written plea agreement that leaves sentencing to the discretion of the trial court. Several

years later, in *Crider v. State*, 984 N.E.2d 618 (Ind. 2013), the Court held an appeal waiver is unenforceable when the sentence the trial court imposes is “illegal” or “contrary to law.” Here, Britni Wihebrink entered into a plea agreement under which she pled guilty to a Level 1 felony, agreed to a sentencing cap of thirty years, and waived the right to appeal any sentence within that cap. She was sentenced to thirty years, but she now argues some of the aggravators found by the trial court are invalid and that therefore she was not sentenced “in accordance with the law.” But *Crider* was concerned with the legality of the sentence imposed, not the individual factors considered in reaching that sentence. As such, Wihebrink’s appeal waiver is enforceable.

Facts and Procedural History

[2] In September 2018, the State charged Wihebrink with Level 1 felony neglect of a dependent resulting in death and Level 6 felony obstruction of justice. In February 2020, Wihebrink and the State entered into a plea agreement under which Wihebrink pled guilty to Level 1 felony neglect, the State dismissed the remaining count, and Wihebrink’s sentence was capped at thirty years (the advisory sentence for a Level 1 felony, *see* Ind. Code § 35-50-2-4(b)). In addition, Wihebrink agreed to waive the right to appeal her sentence:

9. As further consideration for this Plea Agreement, the Defendant hereby waives any and all appellate review of a sentence imposed by the court that is consistent with the terms of this Plea Agreement. This waiver of appellate review includes but is not limited to: challenges for abuse of discretion, challenges to the trial court’s sentencing statement, and challenges to the

appropriateness of the sentence pursuant to Indiana Appellate Rule 7(B). This waiver also includes the waiver of the Defendant's right to have an attorney appointed, at public expense, to prosecute the appeal, as well as the right to have a transcript of the proceedings prepared for the Defendant at public expense.

Appellant's App. Vol. II p. 42. The trial court accepted the plea agreement and scheduled a sentencing hearing.

[3] The sentencing hearing was held in July 2020. The trial court found six aggravators and five mitigators and sentenced Wihebrink to thirty years in the Department of Correction. Wihebrink did not file a notice of appeal within thirty days of the sentencing order.

[4] Approximately ten months later, in May 2021, Wihebrink filed a pro se petition for permission to file a belated notice of appeal under Indiana Post-Conviction Rule 2. The State objected, arguing Wihebrink is not an "eligible defendant" under that rule because she waived the right to appeal her sentence under the plea agreement. The trial court denied Wihebrink's petition. The State Public Defender then entered an appearance for Wihebrink and filed a motion to correct error, arguing Wihebrink is an "eligible defendant" notwithstanding the appeal waiver because the trial court relied on invalid aggravators and therefore she was not sentenced "in accordance with the law." *Id.* at 102. The court denied Wihebrink's motion to correct error.

[5] Wihebrink now appeals.

Discussion and Decision

[6] Wihebrink contends the trial court erred in denying her petition for permission to file a belated notice of appeal. Where, as here, a trial court rules on such a motion on a paper record without holding a hearing, our review is de novo. *Fields v. State*, 162 N.E.3d 571, 575 (Ind. Ct. App. 2021), *trans. denied*.

[7] To file a belated appeal, a defendant must be an “eligible defendant” under Post-Conviction Rule 2, which provides, in relevant part:

An “eligible defendant” for purposes of this Rule is a defendant who, but for the defendant’s failure to do so timely, would have the right to challenge on direct appeal a conviction or sentence after a trial or plea of guilty by filing a notice of appeal, filing a motion to correct error, or pursuing an appeal.^[1]

The State argues Wihebrink is not an “eligible defendant” because she waived the right to appeal her sentence under the plea agreement and therefore did not have the right to challenge her sentence on direct appeal. It is well settled “a defendant may waive the right to appellate review of his sentence as part of a written plea agreement.” *Creech*, 887 N.E.2d at 75. However, an appeal waiver

¹ Post-Conviction Rule 2 also requires defendants to prove they failed to file a timely notice of appeal, they were not at fault for the failure, and they have been diligent in requesting permission to file a belated notice of appeal. Because we conclude Wihebrink is not an “eligible defendant,” we need not address these other requirements.

is unenforceable when the sentence is “illegal” or “contrary to law.” *Crider*, 984 N.E.2d at 619, 622.²

[8] Wihebrink does not dispute that her sentence falls within the statutory range for her crime. She was convicted of a Level 1 felony. The sentencing range for a Level 1 felony is twenty to forty years, with an advisory sentence of thirty years. I.C. § 35-50-2-4(b). Wihebrink received the advisory sentence. Nevertheless, Wihebrink argues her sentence is contrary to law because several aggravators found by the trial court are invalid. She cites the last paragraph of *Crider*, where our Supreme Court stated a defendant is entitled to presume the trial court will sentence them “in accordance with the law.” 984 N.E.2d at 625. Wihebrink claims a defendant who is sentenced based in part on invalid aggravators is not sentenced “in accordance with the law.”

[9] But the quoted passage from *Crider* must be read in context. The defendant in *Crider* entered into a plea agreement under which he pled guilty to theft and admitted being a habitual offender and waived the right to appeal his sentence. When he made the agreement, the defendant had been convicted in another county of theft and attempted fraud and found to be a habitual offender. The plea agreement did not address the other case. At sentencing, the trial court

² If a defendant explicitly agrees to an illegal sentence in the plea agreement, the appeal waiver is enforceable. *Crider*, 984 N.E.2d at 623-24. The State does not argue Wihebrink explicitly agreed to an illegal sentence in her plea agreement.

ordered the defendant's habitual-offender sentences to run consecutively. The defendant appealed, arguing his sentence was "illegal" because Indiana law did not authorize consecutive habitual-offender sentences. *Id.* at 620. On appeal, our Supreme Court found the defendant's consecutive habitual-offender sentences were illegal or contrary to law. *See id.* at 622 ("We reiterate [u]nder Indiana law, a trial court cannot order consecutive habitual offender sentences." (quotation omitted)). And because the defendant did not agree to consecutive habitual-offender sentences in his plea agreement, the Court found his appeal waiver was unenforceable and remanded for resentencing. The Court was concerned with whether the defendant's consecutive habitual-offender sentences were authorized by law; nowhere in *Crider* did the Court suggest that reliance on one or more invalid aggravators makes the sentence "illegal" or "contrary to law."

[10] Wihebrink notes this Court has held otherwise. In *Haddock v. State*, a panel of this Court held a defendant was an "eligible defendant" under Post-Conviction Rule 2 notwithstanding an appeal waiver because he alleged his sentence was "illegal" due to one of the two aggravators being invalid. 112 N.E.3d 763, 767 (Ind. Ct. App. 2018), *trans. denied*; *see also Fields*, 162 N.E.3d 571 (relying on *Haddock*). But again, *Crider* doesn't support such a holding. *See Crouse v. State*, 158 N.E.3d 388, 395 (Ind. Ct. App. 2020) (Vaidik, J., concurring in result (opining *Haddock* was "wrongly decided" because "[e]ven if the challenged aggravator was invalid, that would not have made the defendant's sentence 'illegal'"), *trans. not sought*). And for good reason. Indiana Code section 35-38-1-

7.1(d) provides that “[a] court may impose any sentence that is: (1) authorized by statute; and (2) permissible under the Constitution of the State of Indiana; regardless of the presence or absence of aggravating circumstances or mitigating circumstances.” As such, when imposing a sentence, a trial court has discretionary authority to sentence a defendant within the parameters authorized by statute for each offense. To the extent a court finds improper aggravators or fails to find proper mitigators, we review the sentence for an abuse of discretion, not for legality. *Crider* concerns sentence illegality. Examples of sentences that would be illegal or contrary to law include: (1) a sentence that exceeds statutory guidelines, such as a fifty-year sentence for a Level 2 felony, *see* I.C. § 35-50-2-4.5; (2) consecutive sentences without an aggravator, *see Sanquenetti v. State*, 727 N.E.2d 437, 442 (Ind. 2000) (“In order to impose consecutive sentences, a trial court must find at least one aggravating circumstance.”); (3) impermissible double enhancements, *see, e.g., Dye v. State*, 984 N.E.2d 625, 629 (Ind. 2013) (“[A] person convicted of unlawful possession of a firearm by a serious violent felon may not have his or her sentence for that crime enhanced under the general habitual offender statute by proof of the same felony used to establish that the person was a serious violent felon.”); and (4) consecutive habitual-offender sentences, as in *Crider*.

[11] Furthermore, if a defendant who waived the right to appeal their sentence was allowed to appeal on the ground that the trial court found improper aggravators or failed to find proper mitigators, the appeal waiver explicitly sanctioned in *Creech* would be largely gutted in those cases where a defendant does not agree

to a specific sentence, *see Creech*, 887 N.E.2d at 75, as any defendant could make such an argument.

[12] Because Wihebrink’s argument is not one of illegality under *Crider*, she did not have the right to challenge her sentence on direct appeal. As such, she is not an “eligible defendant” under Post-Conviction Rule 2. We therefore affirm the trial court’s denial of Wihebrink’s petition for permission to file a belated notice of appeal.

[13] Affirmed.

Weissmann, J., concurs.

Najam, J., dissents with separate opinion.

I N T H E
C O U R T O F A P P E A L S O F I N D I A N A

Britni N. Wihebrink,
Appellant-Defendant,

v.

State of Indiana,
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Najam, Judge, dissenting.

[14] I respectfully dissent. The question before us is whether, under Post-Conviction Rule 2, Wihebrink is an eligible defendant entitled to file a belated appeal. The majority holds that Wihebrink is not an eligible defendant because she waived her right to appeal her sentence and because she does not allege that her sentence is illegal. But this Court has recently held, on three occasions, that individuals were eligible defendants despite the waiver-of-appeal provisions in their plea agreements where they alleged that their sentences were contrary to law. Based on that precedent, I would hold that Wihebrink is an eligible defendant pursuant to Indiana Post-Conviction Rule 2.

[15] Indiana Post-Conviction Rule 2 expressly applies only to an “eligible defendant,” which is a “defendant who, but for the defendant’s failure to do so

timely, would have the right to challenge on direct appeal a conviction or sentence after a trial or plea of guilty[.]” P-C.R. 2. In *Haddock v. State*, this Court considered whether a defendant was an eligible defendant under that rule. 112 N.E.3d 763 (Ind. Ct. App. 2018), *trans. denied*. In that case, Haddock pleaded guilty to dealing in a narcotic drug, as a Level 3 felony. *Id.* at 765. Pursuant to the terms of his plea agreement, Haddock agreed to waive his right to appeal his sentence so long as the judge sentenced him within the terms of the agreement. *Id.* After identifying certain aggravating factors, the court sentenced Haddock to an enhanced term of fourteen years. *Id.*

[16] Haddock then sought permission to file a belated appeal in which he asserted that his sentence was illegal because the court had relied on an improper aggravator. The court denied Haddock’s petition. *Id.* at 766. On appeal, this Court held that, “[a]t this stage of the proceedings,” it was not Haddock’s burden to demonstrate that his sentence was, in fact, illegal as that was the substance of the issue he sought to raise in his belated appeal. *Id.* Rather, we held that Haddock “would have had the right to raise in a timely appeal the issue of whether his sentence is illegal.” *Id.* Accordingly, we held that Haddock was an eligible defendant under Post-Conviction Rule 2. *Id.*

[17] Thereafter, this Court decided *Crouse v. State*, 158 N.E.3d 388 (Ind. Ct. App. 2020), *trans. not sought*. In that case, Crouse pleaded guilty to several charges in exchange for a maximum sentence of forty years. In that plea agreement, Crouse waived his right to appeal his sentence as long as the court sentenced him pursuant to the terms of the plea. *Id.* at 390. The court sentenced Crouse

to an aggregate term of forty years. *Id.* Thereafter, Crouse filed a petition for permission to file a belated notice of appeal in which he alleged that his sentence was illegal. *Id.* at 393. The court ultimately granted Crouse’s petition and allowed him to file a belated appeal.

[18] On appeal, this Court relied heavily on *Haddock* and held that Crouse was an eligible defendant because he had “alleged that he was not sentenced in accordance with the applicable law.” *Id.* The Court also noted that, even though Crouse’s plea agreement provided for a maximum sentence of forty years, which is the sentence he received, the court still had the “discretion to determine the length of his aggregate sentence and how that sentence was to be structured and served.” *Id.* at 392.

[19] Then, in *Fields v. State*, Fields pleaded guilty to several offenses. 162 N.E.3d 571, 574 (Ind. Ct. App. 2021), *trans. denied*. The plea agreement left sentencing open to the court but provided for a maximum term of twenty-five years on any executed sentence. *Id.* Fields also agreed to waive the right to appeal his sentence. *Id.* After a sentencing hearing, the court sentenced Fields to thirty-seven years, with twenty-five years executed and twelve years suspended. *Id.* Thereafter, Fields filed a petition for permission to file a belated appeal in which he asserted that his sentence was contrary to law because the court had relied on an improper aggravator when it sentenced him. *Id.* The court denied that motion.

[20] On appeal, this Court noted that, while it appeared on its face that the court had sentenced him pursuant to the plea agreement, Fields “did not agree to be sentenced either to the full twenty-five-year executed term, or to an additional twelve years suspended, based on an improper aggravator.” *Id.* at 576. Then, again relying heavily on *Haddock*, this Court noted that Fields had asserted in his petition for permission to file a belated notice of appeal that his sentence was contrary to law because the court had used an improper aggravator when it sentenced him. And we stated that that was “an issue Fields would have the right to raise in a timely appeal.” *Id.* As such, this Court held that Fields was an eligible defendant pursuant to Post-Conviction Rule 2.

[21] In other words, this Court has repeatedly held that, had a defendant timely appealed his sentence and asserted that it was contrary to law because it was based on improper aggravators, that issue would have been available for review notwithstanding the waiver-of-appeal provision in a plea agreement. And because such a defendant would have had the right to challenge his sentence on direct appeal, he is an eligible defendant under Post-Conviction Rule 2.

[22] Here, like the defendants in *Crouse* and *Fields*, the court sentenced Wihebrink to the maximum sentence allowed under the plea agreement. But even though Wihebrink agreed to a maximum sentence of thirty years, she did not agree to be sentenced to the full thirty-years based on an improper aggravator. *See Fields*, 162 N.E.3d at 576. And Wihebrink asserted in her petition for permission to file a belated notice of appeal that her sentence is contrary to law because it relied on several improper aggravators. As we held in *Haddock*, *Crouse*, and

Fields, I would again hold that that is an issue she would have had the right to raise in a timely appeal and, as such, that Wihebrink is an eligible defendant under Post-Conviction Rule 2.³ Accordingly, I would reverse the trial court's order and remand with instructions for the court to grant Wihebrink's petition for permission to file a belated notice of appeal.

³ I express no opinion on the merits of her purported belated appeal.