

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jeffrey T. Smith,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

September 29, 2021

Court of Appeals Case No.
21A-CR-459

Appeal from the Switzerland
Circuit Court

The Honorable W. Gregory Coy,
Judge

Trial Court Cause No.
78C01-1907-F5-317

Robb, Judge.

Case Summary and Issue

- [1] Following a guilty plea, Jeffrey Smith was convicted of child solicitation, a Level 5 felony. Smith was sentenced to a term of three years to be served in the Indiana Department of Correction (“DOC”) with eighteen months suspended to probation. He now appeals, raising one issue, which we restate as whether his sentence is inappropriate in light of the nature of his offense and his character. Concluding his sentence is not inappropriate, we affirm.

Facts and Procedural History

- [2] In late 2018, Smith, then twenty-nine years of age, initiated a Facebook messenger conversation with the profile of a fictitious, fifteen-year-old female, operated by officers of the Switzerland County Sheriff’s Office and the Vevay Police Department. Despite being informed that the female was fifteen years old, Smith indicated that age was just a number and the conversation turned sexual. Smith advised the fifteen-year-old that he had a ten-inch penis and proceeded to send her several photos, including two pictures of what he claimed to be his penis. During the conversation Smith indicated that he wanted to chill, smoke, and let her have “some of this dick.” Appendix of Appellant, Volume Two at 10. When asked what he would tell people if the two were caught together, Smith informed the fifteen-year-old that they would not get caught. Additionally, Smith repeatedly asked the fifteen-year-old for pictures and indicated that he would use them while masturbating. Smith continued the conversation for approximately three and one-half weeks.

[3] On July 1, 2019, the State charged Smith with child solicitation, a Level 5 felony, and dissemination of matter harmful to minors, a Level 6 felony. On January 19, 2021, Smith pleaded guilty to child solicitation. The trial court ordered a pre-sentence investigation and scheduled a sentencing hearing for February 24, 2021. The pre-sentence investigation report indicated that Smith has an extensive history of substance abuse that began when he was sixteen. Smith has abused alcohol, marijuana, opiates, benzodiazepines, heroin, and methamphetamine. Further, the report indicated that when he was served a warrant for this case, Smith was arrested for and ultimately convicted of possession of methamphetamine, a felony, and possession of drug paraphernalia, a misdemeanor, in Owen County, Kentucky, and received a twelve-month sentence.

[4] At the sentencing hearing, Smith testified that drug addiction played a role in his actions and that he began attending intensive outpatient counseling for his drug addiction in December of 2020. Smith expressed remorse for his conduct and indicated that he had to “accept whatever I have coming[.]” Transcript, Volume II at 13. Smith also testified that he was currently helping support his four-year-old daughter and working to pay \$10,000 owed on a felony non-support charge in Kentucky. The trial court, utilizing Smith’s testimony and the pre-sentence investigation report, made a finding of thirteen mitigating factors and three aggravating factors.

[5] The trial court accepted Smith’s plea of guilty to child solicitation, a Level 5 felony and dismissed the charge of dissemination of matter harmful to minors

with prejudice. Concluding that the mitigating and aggravating factors balanced, the trial court sentenced Smith to the advisory sentence of three years in the DOC with eighteen months suspended to probation. Smith now appeals his sentence.

Discussion and Decision

Inappropriate Sentence

I. Standard of Review

[6] Article 7, sections 4 and 6 of the Indiana Constitution authorize independent review and revision of sentences through Indiana Appellate Rule 7(B). *Madden v. State*, 162 N.E.3d 549, 563 (Ind. Ct. App. 2021). Rule 7(B) allows revision 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.” An evaluation of the nature of the offense and character of the offender are separate inquiries that are ultimately balanced to determine whether a sentence is inappropriate. *Reis v. State*, 88 N.E.3d 1099, 1102 (Ind. Ct. App. 2017). We may look to any factors in the record to make such a determination. *Id.*

[7] However, we note that sentencing decisions rest within the discretion of the trial court and 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). Therefore, the principal role of this court in reviewing a defendant's sentence is "not to achieve a perceived 'correct' result in each case[.]" but "to attempt to leaven the outliers[.]" *Cardwell*, 895 N.E.2d at 1225. The question is not whether the defendant's sentence is appropriate or another sentence is more appropriate. *Perry v. State*, 78 N.E.3d 1, 13 (Ind. Ct. App. 2017). Rather, the test is whether the sentence is inappropriate. *Id.* The burden of demonstrating a sentence is inappropriate falls on the defendant. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). Ultimately, 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." *Cardwell*, 895 N.E.2d at 1224.

II. Nature of the Offense

[8] Our analysis of the nature of the offense begins with the advisory sentence. *Reis*, 88 N.E.3d at 1104. The advisory sentence is the starting point selected by the legislature as an appropriate sentence for the crime committed. *Childress*, 848 N.E.2d at 1081. The sentencing range for a Level 5 felony is a fixed term of between one and six years, with an advisory sentence of three years. Ind. Code § 35-50-2-6(b). Here, Smith faced a maximum prison sentence of six years, but the trial court determined that the advisory sentence of three years with eighteen months suspended to probation was appropriate. We note that

when the trial court imposes an advisory sentence, the task of demonstrating that a sentence is inappropriate is a particularly heavy burden. *Fernbach v. State*, 954 N.E.2d 1080, 1089 (Ind. Ct. App. 2011), *trans. denied*.

[9] Smith contends that the nature of his offense is ordinary in that his actions minimally satisfy the requirements for guilt and therefore, his sentence is inappropriate in light of the nature of the offense. Smith highlights that he never traveled to meet the fifteen-year-old, there was no real victim in the case, and the crime was not one of violence. However, when reviewing the nature of the offense we look to the details and circumstances of the offense and the defendant's participation therein. *Madden*, 162 N.E.3d at 564.

[10] Here, Smith initiated a Facebook conversation with a female who revealed that she was only fifteen years old. We note that our supreme court has indicated that crimes against children are "particularly contemptible." *Harris v. State*, 897 N.E.2d 927, 929 (Ind. 2008). Although Smith is correct to point out that the fifteen-year-old victim in this case was fictitious, there is no indication that Smith knew that the victim was fictitious; rather, Smith indicated that age was just a number to him and proceeded to conduct a highly sexualized conversation with the fifteen-year-old. Further, by indicating the two would not get caught, he showed he was aware of the inappropriate nature of his solicitations. Over the course of three and one-half weeks, Smith sent pictures of his penis to the fifteen-year-old, offered to let her have some of "this dick," and repeatedly requested photos of her for his own sexual gratification. Appellant's App., Vol. Two at 10; see *Vega v. State*, 119 N.E.3d 193, 204 (Ind.

Ct. App. 2019) (reasoning, in part, that a sentence was not inappropriate because the defendant solicited a minor on multiple occasions). Accordingly, we cannot say that the trial court's imposition of the advisory sentence was inappropriate based upon the nature of Smith's offense.

III. Character of the Offender

[11] We conduct our review of a defendant's character by engaging in a broad consideration of his or her qualities. *Madden*, 162 N.E.3d at 564. Character is found in what we learn of the offender's life and conduct. *Perry*, 78 N.E.3d at 13. Criminal history is one relevant factor in analyzing character. *Madden*, 162 N.E.3d at 564.

[12] Smith argues that he has a relatively short criminal history which reflects favorably on his character. However, "[e]ven a minor criminal record reflects poorly on a defendant's character[.]" *Reis*, 88 N.E.3d at 1105. Here, the State charged Smith with child solicitation and dissemination of matter harmful to minors and Smith was subsequently arrested and convicted in Owen County, Kentucky, for possession of methamphetamine and possession of drug paraphernalia. This court has previously determined that committing a crime while awaiting trial or out on bail for a separate offense reflects poorly on character, *Valle v. State*, 989 N.E.2d 1268, 1274 (Ind. Ct. App. 2013), and the same can be said in the present case where Smith was found in possession of drugs when he was served with the warrant in this case. Additionally, although not a conviction, Smith had a felony non-support case pending at the time of

sentencing for approximately \$10,000 owed for the support of his then four-year-old daughter.

[13] Smith also has an extensive history of substance abuse. Here, Smith, who was twenty-nine years old at the time of the offense, has been abusing a number of substances since the age of sixteen. *See Vega*, 119 N.E.3d at 204 (holding that five years of substance abuse reflected poorly on a defendant's character). Although we applaud Smith's voluntary participation in intensive outpatient counseling for his drug addiction, he did not enter counseling until one month prior to his guilty plea and over one year after he was charged by the State in this matter. We cannot say that entering outpatient counseling over a year after the present offense completely negates more than a decade of extensive substance abuse or makes his sentence inappropriate based on his character. *See Hape v. State*, 903 N.E.2d 977, 1002 (Ind. Ct. App. 2009) (holding that the trial court did not fail to recognize substance abuse as a mitigating factor when the defendant knew he had a substance abuse problem but did little or nothing to treat it until after his arrest and six months prior to his sentencing hearing), *trans. denied*.

We acknowledge that, as Smith points out, he has taken steps that reflect favorably on his character. Pleading guilty, seeking counseling for substance abuse, and paying down on \$10,000 owed in child support were all identified by the trial court as mitigating factors. However, we do not believe that these improvements render the trial court's sentence inappropriate due to his character. Smith was arrested and convicted of two crimes after he was charged

for the present offense, has a felony non-support charge pending in Kentucky, and has been abusing substances since he was sixteen, all of which are persistent examples of poor character.

In summary, Smith received the advisory sentence of three years with eighteen months suspended to probation. After reviewing the nature of Smith's offense and his character, we cannot say that Smith has carried the heavy burden to convince us his advisory sentence is inappropriate.

Conclusion

[14] Smith's sentence is not inappropriate in light of the nature of his offense or his character. Therefore, we affirm.

[15] Affirmed.

Bradford, C.J., Altice, J., concur.