

MEMORANDUM DECISION

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IN THE
Court of Appeals of Indiana

Bie Ma Dau,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff



March 14, 2024

Court of Appeals Case No.
23A-CR-2435

Appeal from the Johnson Circuit Court
The Honorable Andrew S. Roesener, Judge

Trial Court Cause No.
41C01-2212-F4-109

Memorandum Decision by Judge Bradford
Chief Judge Altice and Judge Felix concur.

Bradford, Judge.

Case Summary

- [1] Bie Ma Dau was sentenced to an aggregate nine-year sentence after pleading guilty to Level 4 felony operating a vehicle while intoxicated (“OWI”) causing serious bodily injury and Level 5 felony operating a vehicle while a habitual traffic violator (“HTV”) causing serious bodily injury. Dau contends that his convictions violate the prohibitions against double jeopardy and that his sentence is inappropriate. We affirm.

Facts and Procedural History

- [2] On December 6, 2022, Dau, while intoxicated, was involved in an accident which resulted in serious bodily injury to Amy Wilson. Dau claimed that he had “drank beer with [a] friend” after being “kicked out from work” due to inoperable machinery. Tr. Vol. II p. 35. Testing revealed that at the time of the accident, Dau’s blood alcohol concentration (“BAC”) had been “.197.” Tr. Vol. II p. 36. On December 19, 2022, Dau was charged with the following: Count I–Level 4 felony OWI causing serious bodily injury, Count II–Level 5 felony operating a vehicle while HTV causing serious bodily injury, and Count III–Level 6 felony OWI.
- [3] On August 10, 2023, Dau entered into an open guilty plea. The trial court accepted Dau’s guilty plea and entered a judgment of conviction. In sentencing Dau, the trial court stated the following:

[A]s has been noted this is your fourth drunk driving conviction for the same or similar conduct and it goes without saying that, um, the seriousness of the offenses has increased with this one resulting in this poor woman's legs being snapped as a result of Mr. Dau's drunk driving. A serious injury. The injury is not an aggravator. It's an element of the offense. I say it to only highlight that the criminal history is one that started as misdemeanor offenses and now resulted in this horrific situation. The court finds that the nature and circumstances, notably the very, very high BAC. Um, and really the feeble explanation, as far as the court's concerned, for why he was drinking. He was upset apparently that some machinery wasn't working at work and, uh, this was the cause of his drinking to this level of impairment.... [B]ased upon the totality of the evidence that he has not really in any meaningful way addressed his substance[-]abuse problem..., the court finds that his unaddressed substance abuse is an aggravator. He hasn't even obtained treatment. And while I appreciate his reliance on his faith and I don't totally discount it, it seems difficult to imagine that somebody on their fourth drunk driving case, given all that is at stake here, might not have offered something more. I guess ... it does give me some concern about whether he's fully grasped the seriousness of what's going on.... I do believe there's some remorse here. He has complied with the pretrial order with regard to the RAM device ... he deserves the benefit of that. The court finds that the aggravating circumstances outweigh the mitigating circumstances here. Um, I'm entering judgment of conviction under Counts [I and II]. I'm vacating on double jeopardy grounds Count [III]. I'm ordering a 9[-]year sentence on Count [I], a 4½[-]year sentence on Count [II]. I will allow those to be served concurrently.

Discussion and Decision

I. Double Jeopardy

[4] Dau contends that his convictions for Level 4 felony OWI causing serious bodily injury and Level 5 felony operating a vehicle while being a HTV causing serious bodily injury violate the prohibitions against double jeopardy. Dau cites to this court’s prior decision in *Thompson v. State*, 82 N.E.3d 376, 379 (Ind. Ct. App. 2017), *trans. denied*, in which a panel of this court determined that a defendant had not waived his right to bring a double-jeopardy claim by entering into an open plea agreement. However, as we more recently noted, the *Thompson* decision “is contrary to Indiana Supreme Court precedent.” *Yost v. State*, 150 N.E.3d 610, 613 (Ind. Ct. App. 2020).

[5] “[A] conviction based upon a guilty plea may not be challenged” on appeal. *Tumulty v. State*, 666 N.E.2d 394, 395 (Ind. 1996) (internal quotation omitted). More recently, the Indiana Supreme Court reaffirmed that “it is well-established that a defendant who has pleaded guilty may not challenge the validity of his conviction on direct appeal.” *McDonald v. State*, 179 N.E.3d 463, 464 (Ind. 2022) (summarily affirming and quoting *McDonald v. State*, 173 N.E.3d 1043, 1047 (Ind. Ct. App. 2021)). The Indiana Supreme Court has not

¹ The trial court recommended that Dau participate in “Recovery While Intoxicated” and indicated that it would “consider a modification upon successful completion of that program and upon successful completion of at least 6½ years of [Dau’s executed] sentence.” Tr. Vol. II p. 44.

exempted cases involving open pleas from this well-established rule. *See generally, McDonald*, 179 N.E.3d at 464 (summarily affirming the Indiana Court of Appeals’ statement that the conclusion in *Thompson* regarding open pleas was contrary to Indiana Supreme Court precedent); *Hayes v. State*, 906 N.E.2d 819, 821 (Ind. 2009) (concluding that the Indiana Court of Appeals had erred by reversing a conviction following an open guilty plea on double-jeopardy grounds). Dau has waived the right to challenge his convictions on double-jeopardy grounds by pleading guilty.

II. Appropriateness of Dau’s Sentence

[6] Indiana Appellate Rule 7(B) provides that “[t]he Court may revise a sentence authorized by statute 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.” In analyzing such claims, we “concentrate less on comparing the facts of [the case at issue] to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant’s character.” *Paul v. State*, 888 N.E.2d 818, 825 (Ind. Ct. App. 2008) (internal quotation omitted), *trans. denied*. The defendant bears the burden of persuading us that his sentence is inappropriate. *Sanchez v. State*, 891 N.E.2d 174, 176 (Ind. Ct. App. 2008).

[7] “A person who commits a Level 4 felony shall be imprisoned for a fixed term of between two (2) and twelve (12) years, with the advisory sentence being six (6)

years.” Ind. Code § 35-50-2-5.5. “A person who commits a Level 5 felony ... shall be imprisoned for a fixed term of between one (1) and six (6) years, with the advisory sentence being three (3) years.” Ind. Code § 35-50-2-6(b). The trial court imposed a nine-year sentence for Dau’s Level 4 felony conviction and a four-and-one-half-year sentence for his Level 5 felony conviction. The trial court ordered that the Level 5 felony conviction would run concurrent to the Level 4 felony conviction, for an aggravated, aggregate nine-year sentence.

[8] The nature of Dau’s offenses is quite serious. After having received three prior convictions for OWI-type offenses, Dau again drove a vehicle while he was intoxicated. While driving with a BAC of .197, which is more than twice the legal limit, Dau crashed into another vehicle, causing serious injury to Wilson as described by the trial court as her “legs being snapped.” Tr. Vol. II p. 43. As of the date of sentencing, which was approximately nine months after the accident, Wilson had yet to fully recover. Furthermore, at the time of the accident, Dau was driving despite his driving privileges having been suspended due to his HTV status.

[9] As for his character, while Dau expressed remorse for his actions, Dau had previously shown a disregard for the laws of this State and for others by continuing to drive his vehicle while intoxicated, even after having received three prior OWI convictions. Prior attempts at rehabilitation have also been unsuccessful, with his prior placement on probation having been revoked after he had violated the terms of his probation. Specifically, following his 2019 OWI conviction, while on probation, Dau “missed 228 tests and submitted 74

invalid videos” and tested positive for alcohol on one occasion. Tr. Vol. II p. 35. Further, despite admitting that he had been aware of his alcohol-related issues and having been offered prior opportunities to participate in treatment programs, Dau had not done so. Given the serious nature of his offenses coupled with his criminal history and failure to reform his behavior, Dau has failed to bear his burden of persuading us that his aggregate nine-year sentence is inappropriate. *See Sanchez*, 891 N.E.2d at 176.

[10] The judgment of the trial court is affirmed.

Altice, C.J., and Felix, J., concur.

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