MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Gordon McIntosh,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 22, 2023

Court of Appeals Case No. 23A-CR-305

Appeal from the Ripley Superior Court

The Hon. Jeffrey Sharp, Judge

Trial Court Cause No. 69D01-2206-F6-75

Memorandum Decision by Judge Bradford
Judges Riley and Weissmann concur.

Bradford, Judge.

Case Summary

[1] In June of 2022, Gordon McIntosh strangled his partner during an argument in Ripley County, and, when police arrived, they discovered him to be in possession of methamphetamine. McIntosh eventually pled guilty to Level 6 felony strangulation and Level 6 felony methamphetamine possession in exchange for the State dropping five other charges and a habitual-offender allegation, after which the trial court imposed an aggregate sentence of four years of incarceration with one year suspended to probation. McIntosh contends that his sentence is inappropriately harsh. We affirm.

Facts and Procedural History

[2] On June 27, 2022, McIntosh became angry with his partner, Patricia Hauser, regarding a motorcycle title and strangled her. According to the probable-cause affidavit, Hauser had been driving with McIntosh and, after they began arguing, McIntosh "used his left arm and reached across her, putting his forearm into her throat." Appellant's App. Vol. II p. 21. Hauser called the police, and when officers arrived, they found McIntosh in possession of methamphetamine. On June 29, 2022, the State charged McIntosh with Level 6 felony strangulation, Level 6 felony methamphetamine possession, and five other charges and alleged that he was a habitual offender. On December 15, 2022, McIntosh pled guilty to Level 6 felony strangulation and Level 6 felony methamphetamine possession in exchange for the State dropping the other five charges and the habitual-offender allegation.

[3] The sentencing hearing was held on January 11, 2023. The then-thirty-six-year-old McIntosh's presentence investigation report indicated that he had sixteen prior convictions dating back to 2005, including trafficking in counterfeit controlled substances, two domestic batteries, and at least four alcohol- or substance-related offenses; his criminal record included four felonies and at least two probation violations. McIntosh also had another criminal case pending at the time of sentencing. The trial court imposed an aggregate sentence of four years of incarceration with one year suspended to probation.[1]

Discussion and Decision

[4] McIntosh argues that his four-year sentence, with one year suspended to probation, is inappropriately harsh. We "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." Ind. Appellate Rule 7(B). "Although appellate review of sentences must give due consideration to the trial court's sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." *Shouse v. State*, 849 N.E.2d 650, 660 (Ind. Ct. App. 2006) (citations and quotation marks omitted), *trans. denied*.

[1] Although the trial court's judgment of conviction and sentencing order indicates that the two sentences are to be served concurrently, its statements at the sentencing hearing and the abstract of judgment clearly indicate that they are to be served consecutively. In any event, the parties do not dispute that the trial court imposed a four-year sentence with one year suspended to probation.

"[W]hether we regard a sentence as appropriate at the end of the day 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 v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). In addition to the "due consideration" we are required to give to the trial court's sentencing decision, "we understand and recognize the unique perspective a trial court brings to its sentencing decisions." *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). Indiana Code section 35-50-2-7(b) provides that "[a] person who commits a Level 6 felony […] shall be imprisoned for a fixed term of between six (6) months and two and one-half (2½) years, with the advisory sentence being one (1) year." McIntosh's sentence is therefore moderately enhanced, with the trial court having imposed sentences of two years of incarceration for each of his convictions and suspending one year of the aggregate sentence to probation.

[5] McIntosh's strangulation seems to us to be more egregious than an "average" strangulation, in that Hauser was his romantic partner at the time. As the Indiana Supreme Court has recognized, "[a] harsher sentence is […] more appropriate when the defendant has violated a position of trust that arises from a particularly close relationship between the defendant and the victim[.]" *Hamilton v. State*, 955 N.E.2d 723, 727 (Ind. 2011). While the record does not reveal much detail regarding McIntosh's methamphetamine-possession charge, the probable-cause affidavit gives rise to an inference that he possessed a relatively small amount, namely, "a slight white substance on the threads where

the metal cap would be attached" to a glass tube that had been found in his pocket. Appellant's App. Vol. II p. 21. In summary, the nature of McIntosh's offenses is, on the whole, moderately more egregious than average instances of those offenses and does not support a sentence reduction.

[6] As for McIntosh's character, it also justifies his enhanced sentences. "The character of the offender is found in what we learn of the offender's life and conduct." *Croy v. State*, 953 N.E.2d 660, 664 (Ind. Ct. App. 2011). We consider several circumstances to evaluate whether a defendant's character warrants a change to his sentence, including whether the defendant has expressed remorse for his crimes, *Gibson v. State*, 51 N.E.3d 204, 216 (Ind. 2016); whether he has successfully obtained treatment or rehabilitation for past illegal behaviors, *id*.; whether he is likely to be deterred from committing new crimes, *Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005); whether he was on probation, parole, or pretrial release in another case at the time he committed the underlying offense, *Childress v. State*, 848 N.E.2d 1073, 1081 (Ind. 2006); and whether he has a criminal history, *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (2007). Criminal history is generally relevant with respect to the character inquiry and can be significant evidence of poor character depending on the "gravity, nature, and number of prior offenses in relation to the current offense." *Johnson v. State*, 986 N.E.2d 852, 857 (Ind. Ct. App. 2013).

[7] McIntosh's criminal history dates back almost twenty years and includes numerous offenses that are similar to those in this case. McIntosh's record

includes convictions for trafficking in counterfeit controlled substances, two prior domestic batteries, at least four alcohol- or substance-related offenses, four prior felonies, twelve prior misdemeanors, and at least two probation violations. McIntosh had another criminal case pending at the time of sentencing, one also related to an encounter with Hauser. McIntosh does not seem to have learned from his past mistakes and is continuing to commit the very same kinds of offenses. McIntosh's character, as revealed by his somewhat-extensive criminal history, fully justifies his moderately-enhanced sentences.

[8] McIntosh testified as his sentencing hearing that he had suffered a traumatic brain injury three years previously which had affected his balance and ability to speak and argued that jail was not the place to "better [him]self." Tr. Vol. II p. 18. McIntosh also testified that "I was at the hospital it's more like a depression thing or something and so and then it turned into addiction." Tr. Vol. II p. 16. The trial court was in a much better position than us to evaluate McIntosh's credibility in this regard, gauge the effect of his claimed ailments on his offenses, and assign weight to all of this in determining McIntosh's sentence. We will not second-guess the trial court in this regard. McIntosh has failed to establish that the nature of his offenses and his character warrant a reduction in his sentence.

[9] We affirm the judgment of the trial court.

Riley, J., and Weissmann, J., concur.