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# IN THE COURT OF APPEALS OF INDIANA

Stephen M. Davis,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff.*

July 15, 2021

Court of Appeals Case No. 21A-CR-52

Appeal from the Madison Circuit Court

The Honorable Angela G. Warner Sims, Judge

Trial Court Cause No. 48C01-1911-F5-2878

**Najam, Judge.**

## Statement of the Case

[1] Stephen M. Davis appeals his sentence after he pleaded guilty to attempted overpass mischief, as a Level 5 felony. Davis raises two issues for our review:

1. Whether the trial court abused its discretion when it sentenced him.

2. Whether his sentence is inappropriate in light of the nature of the offense and his character.

[2] We affirm.

## Facts and Procedural History

[3] At approximately 5:45 p.m. on November 4, 2019, Davis threw a bicycle off an overpass onto Interstate-69 in Anderson. Davis then called 9-1-1, reported his actions, and waited for officers to come. Once an officer arrived, Davis admitted that he had thrown the bicycle off the overpass in "an attempt to make a vehicle crash and cause death." Appellant's App. Vol. 2 at 15. He further reported that he "regretted" that the bicycle had not caused "a ten car pile up and bodies on the ground." *Id*. And Davis informed the officer that he had thrown another bicycle off the overpass earlier that day, which struck a vehicle. Davis then told the officer that he wanted to get arrested so that he would be guaranteed "housing and food." *Id*. The State arrested Davis and charged him with one count of attempted overpass mischief, as a Level 5 felony.

[4] Following his arrest, Davis was initially placed in the custody of the Madison County Sheriff's Department. However, while there, Davis threw feces on staff and destroyed more than seven thousand dollars' worth of electronics. *See id*. at 27. As a result, Davis was moved to the Department of Correction.

[5] Davis ultimately pleaded guilty as charged without the benefit of a plea agreement. Specifically, Davis admitted that he had attempted to cause bodily injury by throwing a bicycle from the overpass. *See* Tr. at 11. He further admitted that he had thrown a second bicycle off the overpass earlier that same day. The trial court accepted Davis' guilty plea and entered judgment of conviction accordingly.

[6] At a sentencing hearing, the court identified as aggravating factors Davis' criminal history, the statements Davis had made to the officer following the offense, and that the facts of the offense were more than what was necessary to find him guilty. And the court identified as mitigating factors Davis' guilty plea and his history of mental health issues. However, the court noted that Davis had failed to seek treatment for those mental health issues. As such, the court sentenced Davis to five years executed in the Department of Correction. This appeal ensued.

## Discussion and Decision

### *Issue One: Abuse of Discretion in Sentencing*

[7] Davis first contends that the trial court abused its discretion when it sentenced him. Sentencing decisions lie within the sound discretion of the trial court. *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). An abuse of discretion occurs 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." *Gross v. State*, 22 N.E.3d 863, 869 (Ind. Ct. App. 2014) (citation omitted).

[8] A trial court abuses its discretion in sentencing if it does any of the following:

> (1) fails "to enter a sentencing statement at all;" (2) enters "a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons;" (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration;" or (4) considers reasons that "are improper as a matter of law."

*Id*. (quoting *Anglemyer v. State*, 868 N.E.2d 482, 490-91 (Ind.), *clarified on reh'g on other grounds*, 875 N.E.2d 218 (Ind. 2007)).

[9] The sentencing range for a Level 5 felony is one year to six years, with an advisory sentence of three years. Ind. Code § 35-50-2-6(b) (2020). Here, at sentencing, the court identified as an aggravating factor Davis' criminal history, which includes seven juvenile adjudications and nine convictions as an adult,[1] as well as two failed attempts at probation. The court also identified as aggravating factors the comments that Davis had made to the officer following the offense and that the facts of the offense exceeded those needed to prove the elements of the crime. The court identified as mitigating factors Davis' guilty

[1] The PSI does not indicate the level of some of the offenses. *See* Appellant's App. Vol. 2 at 65-57.

plea and his history of mental health issues. The court then sentenced Davis to an aggravated term of five years executed.

[10] On appeal, Davis contends that the trial court abused its discretion when it failed to identify a mitigating factor that he contends was "clearly . . . shown" by the record. Appellant's Br. at 7. It is well settled that the finding of mitigating circumstances is within the discretion of the trial court. *Rascoe v. State*, 736 N.E.2d 246, 248-49 (Ind. 2000). An allegation that the trial court failed to identify or find a mitigating circumstance requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Id*. at 249. The trial court is not obligated to accept the defendant's contentions as to what constitutes a mitigating circumstance. *Id*.

[11] Davis maintains that the court should have found as mitigating the fact that he "called in and reported what he did and then waited nearby to be arrested." Appellant's Br. at 7. However, Davis did not make any argument at the sentencing hearing regarding that alleged mitigator. Indeed, Davis argued in favor of a lenient sentence based only on his mental health issues, his remorse, that he pleaded guilty, and that he had only committed the offense to obtain shelter. Because Davis did not advance his act of self-reporting as a mitigator for consideration by the trial court, he has waived it for appeal. *See Webb v. State*, 941 N.E.2d 1082, 1089 (Ind. Ct. App. 2011).

[12] Waiver notwithstanding, Davis has not demonstrated that that mitigator is significant. Davis' only argument on this issue is that he "saved the [S]tate the

trouble of trying to identify who threw the bike and then finding him." Appellant's Br. at 7. But Davis does not acknowledge that he admitted that he wanted to be arrested to obtain "housing and food." Appellant's App. Vol. 2 at 15. Nor does he suggest how this purported mitigator would add weight not already accounted for by the trial court's assessment that Davis' acceptance of responsibility and mental health issues entitled him to mitigating weight. Further, at only thirty-three years old, Davis' criminal history includes seven adjudications as a juvenile and nine convictions as an adult, and Davis has had his probation revoked twice. And, as the trial court found, Davis threw a bicycle off an overpass onto a busy interstate during rush hour, which amounted to more than what was needed to convict him of attempted overpass mischief. We cannot say that the trial court abused its discretion when it did not identify as a mitigator the fact that Davis reported his crime to police.

### *Issue Two: Inappropriateness of Sentence*

[13] Davis also contends that his sentence is inappropriate in light of the nature of the offense and his character. However, Davis' argument on this issue is as follows:

> There was nothing in this case which made it more serious than any other case involving overpass mischief. The [S]tate argued that the crime was more serious because it happened just after rush hour as opposed to the wee hours of the morning. Given the speed at which traffic moves on interstates at night, it would seem to be unlikely that at night a driver would have time to spot a relatively low profiled item like a bike in his headlights, recognize the danger and take evasive action. At 70 miles per hour a driver is covering over 100 feet a second.

Appellant's Br. at 8 (citation omitted). In other words, Davis' argument is simply that his five-year executed sentence is inappropriate only in light of the nature of the offense. He makes no argument that his sentence is inappropriate in light of his character.

[14] However, that argument, by itself, is not sufficient to invoke this Court's authority to revise a sentence under Indiana Appellate Rule 7(B). As this Court has previously explained, revision of a sentence under Rule 7(B) "requires the appellant to demonstrate that his sentence is inappropriate in light of the nature of the offense *and* the character of the offender." *Sanders v. State*, 71 N.E.3d 839, 843 (Ind. Ct. App. 2017) (quotation marks omitted, emphasis in original), *trans. denied*. The language of that rule plainly requires "the appellant to demonstrate that his sentence is inappropriate in light of *both* the nature of the offenses and his character." *Id*. (quotation marks omitted, emphasis in original). Because Davis' argument on appeal does not address his sentence in relation to his character, he has waived our review of the appropriateness of his sentence. *See id*.

[15] There is a split of opinion on how to apply Appellate Rule 7(B). For example, this Court has previously held that we can review and revise a sentence based only on a *consideration* of both prongs without requiring the appellant to *prove* both. *See, e.g., Connor v. State*, 58 N.E.3d 215, 219 (Ind. Ct. App. 2016). But Rule 7(B) is not written in the disjunctive. Rather, that rule uses the word "and" not "or." "And" is a coordinating conjunction, which connects words that are of equal importance in the sentence. Indeed, as our Supreme Court has

pointed out, the current version of the rule was drafted to permit appellate review of sentences "when certain broad *conditions* are satisfied." *Childress v. State*, 848 N.E.2d 1073, 1079 (Ind. 2006) (emphasis added). The Court further stated that "a defendant must persuade the appellate court that his or her sentence has met this inappropriateness standard of review." *Id*. at 1080. In other words, the Supreme Court has expressly declared that Rule 7(B) establishes the necessary conditions—plural—that an appellant must prove have been satisfied. And those conditions, under the plain language of the rule, include *both* the nature of the offense *and* the character of the offender.

[16] For this Court to consider or address both prongs of Rule 7(B) in the absence of an appellant's own cogent argument, we would have to become an advocate for the appellant, which is not our role. *See, e.g., Thacker v. Wentzel*, 797 N.E.2d 342, 345 (Ind. Ct. App. 2003). As in all appeals, an appellant under Rule 7(B) has the burden to demonstrate entitlement to relief. If the appellant were only required to prove one of the conditions of Rule 7(B), his burden would be reduced by half, and our standard of review would be diluted. Accordingly, Rule 7(B) plainly requires "the appellant to demonstrate that his sentence is inappropriate in light of *both* the nature of the offenses and his character." *Sanders*, 71 N.E.3d at 843 (quotation marks omitted, emphasis in original), *trans. denied*.

[17] Waiver notwithstanding, Davis has failed to persuade us that his five-year executed sentence is inappropriate. Indiana's flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented, and

the trial court's judgment "should receive considerable deference." *Cardwell*, 895 N.E.2d at 1222. Whether we regard a sentence as inappropriate 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 facts that come to light in a given case." *Id*. at 1224. The question is not whether another sentence is more appropriate, but rather whether the sentence imposed is inappropriate. *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008). Deference to the trial court "prevail[s] 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).

[18] Here, Davis has not shown that his sentence is inappropriate. With respect to the nature of the offense, Davis threw a bicycle off an overpass onto an interstate during rush hour. Contrary to Davis' assertions, the potential for harm was greater at that time. Indeed, Davis declared to the police officer his intent to do harm, namely, that he had thrown the bicycle off the overpass in an attempt to "make a vehicle crash and cause death" and that he wished the bicycle had caused a "ten car pile up." Appellant's App. Vol. 2 at 15. And Davis admitted to having thrown another bicycle off the overpass hours earlier.

[19] As to his character, Davis has a lengthy criminal history that includes seven juvenile adjudications and nine adult convictions. In addition, Davis has had his probation revoked twice. Further, following his placement at the Madison

County Sheriff's Department for the instant offense, Davis threw feces on staff and destroyed expensive electronics, which reflects poorly on his character. And Davis has failed to seek treatment for his mental health issues. As such, we cannot say that Davis' sentence is inappropriate in light of the nature of the offense and his character.

[20] In sum, the trial court did not abuse its discretion when it sentenced Davis. And Davis' sentence is not inappropriate in light of the nature of the offense and his character. We therefore affirm his sentence.

[21] Affirmed.

Pyle, J., concurs in result.

Tavitas, J., concurs in result with opinion.

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**Tavitas, Judge, concurring in result.**

[22] I respectfully concur in the result. I write separately to express my disagreement with the majority's assertion that Appellate Rule 7(B) requires that a criminal defendant make a showing that his sentence is inappropriate in light of *both* his character *and* the nature of the offense. As Judge Bailey recently pointed out:

> Some judges construe the Court's use of the word "and" in the governing Rule and in caselaw to mean that a successful appellant must identify compelling positivity related to both the nature of the offense and to the appellant's character. *See Landske v. State*, 147 N.E.3d 387 (Ind. Ct. App. 2020). Other judges are persuaded that an appellant is not required to independently show revision is warranted with reference to each prong, because the role of this Court is to "ultimately balance" what is known of

> the nature of the offense and the character of the offender. *Connor v. State*, 58 N.E.3d 215, 218 (Ind. Ct. App. 2016).

*Turkette v. State*, 151 N.E.3d 782, 790 (Ind. Ct. App. 2020) (Bailey, J., concurring), *trans. denied.*

[23] I find myself in the latter camp. A formalistic reading of Rule 7(B), in my opinion, belies the rule's purpose. The rule is intended to express a constitutional power: "review and revision of sentences for defendants in all criminal cases." Ind. Const. art. 7, § 6. The power springs from a commitment to fundamental fairness. The contours of this power are determined by rules promulgated by our Supreme Court. Nevertheless, the authority to determine the propriety of a criminal sentence is an independent discretionary exercise, separate from the question of whether a trial court has abused its discretion. Such a determination, in my view, must necessarily be made holistically, particularly in instances where the statutory definition of a given crime forecloses entirely a conclusion that the nature of the offense renders the sentence inappropriate.[2]

[24] The language in our case law reflects this purpose. *Satterfield v. State*, 33 N.E.3d 344, 355 (Ind. 2015) ("We conclude that Satterfield has not carried his burden

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[2] Felony child molestation, for example, will surely not be accompanied by "compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) . . . ." *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015). Yet, our jurisprudence is, relatively speaking, replete with sentence reductions for those convicted of child molestation.

to show that the nature of his offense **or** his character warrants a reduced sentence.") (emphasis added). Inappropriateness of a sentence "'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.'" *Jackson v. State*, 145 N.E.3d 783, 785 (Ind. 2020) (quoting *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008)) (emphasis added). Though we must *consider* all these factors[3] when determining whether a sentence is inappropriate, it goes too far to require an appellant to demonstrate that each of the factors weighs in her favor. To do so discards the very nature of the balancing-style analysis we are called to employ.

[25] The majority asserts that Rule 7(B) is not written in the disjunctive. That is true, but not necessarily relevant. Consider the following two examples:

> Example 1: The Court will determine whether a sentence is inappropriate in light of:
>
> (1) The nature of the offense; and
>
> (2) the character of the offender.
>
> Example 2: The Court will determine whether a sentence is inappropriate:

[3] The term "factors" here is more apt than the term "prongs." Prongs are components of elements tests, whether conjunctive or disjunctive. But Rule 7(B) does not frame an elements test; rather it frames a multi-factor test, sometimes requiring a balancing analysis.

(1) in light of the nature of the offense; and

(2) in light of the character of the offender.

The first example implies a single act—determining the propriety of a sentence—and then provides a list of factors to consider when making that determination. The second example evinces two acts: first determining whether a sentence is inappropriate in light of the nature of the offense, and *then* separately determining whether the crime is inappropriate in light of the character of the offender. I find the first example to be a more compelling reading of Rule 7(B) and the single act it asks of a reviewing court: to determine whether a sentence is inappropriate.

[26] My interpretation of Rule 7(B) finds support in the fact that our Supreme Court has issued opinions regarding Appellate Rule 7(B) which have focused primarily—if not entirely—on one factor, while assigning little to no weight to the other. *See, e.g., Mullins v. State*, 148 N.E.3d 986, 987 (Ind. 2020); *Wampler v. State*, 67 N.E.3d 633, 635 (Ind. 2017); *Eckelbarger v. State*, 51 N.E.3d 169, 170 (Ind. 2016). Moreover, in at least one case, our Supreme Court has granted a sentence reduction while explicitly recognizing that the petitioner argued only one factor of Rule 7(B). *See Hamilton v. State*, 955 N.E.2d 723, 726-27 (Ind. 2011) (granting sentence reduction despite petitioner "not call[ing] [the Court's] attention to any aspects of his character that argue for a reduction in his sentence").

[27] In still other cases, our Supreme Court issues sentence reductions while explicitly recognizing that the petitioner has failed to establish that one of the factors weighs in favor of such a reduction. For example:

> Stidham's crimes were horrific. A night that started as friends playing guitars together escalated through a series of crimes until the victim was brutally murdered. Stidham and two others severely beat the victim in his own home and stole some of his possessions. They gagged the victim and forced him into his van, with Stidham chasing down the victim when he tried to escape. The group then drove the victim's van, with the victim and his possessions inside, to a hidden riverbank where they violently stabbed the victim forty-seven times before callously throwing his body in the river. **The brutal nature of the offenses does not weigh in favor of finding Stidham's sentence inappropriate.**

*State v. Stidham*, 157 N.E.3d 1185, 1195 (Ind. 2020), *reh'g denied* (emphasis added). The Court proceeded to reduce Stidham's 138-year sentence to eighty-eight years, based solely on an analysis of aspects of Stidham's "character."

[28] This issue is of no small moment. By my count, this Court issued 295 opinions pertaining to Rule 7(B) last year, out of a total of 1,507 criminal matters addressed. *See*, CT. OF APPEALS OF IND., 2020 ANNUAL REPORT at 7 (2020), https://www.in.gov/courts/appeals/files/2020-coa-annual-report.pdf. Thus, Rule 7(B) claims were raised in just shy of twenty percent of the criminal cases arriving for consideration in this Court. Moreover, this split in interpretation means that a given appellant's chances of a sentence reduction, which are already slim, may be whittled down even further based on the arbitrary factor of which judges happen to sit on the panel that reviews the case.

[29] Finally, it is worth noting that the majority's interpretation of Rule 7(B), if accurate, would render the rule functionally impotent. The only litigants eligible for a sentence reduction under such a rule would be those that could establish both good character and that the crime committed is a mild example of such an offense.

[30] In short, reading Rule 7(B) as establishing a two-pronged elements test strangles the rule's meaning. I find that our Supreme Court has made it abundantly clear that our role under Rule 7(B) is to consider both the nature of the offense and the character of the offender, without a requirement that a defendant must show that a sentence is inappropriate with respect to each factor that the court must consider. For these reasons, I respectfully concur in the result only.