

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT

James C. Spencer
Madison, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Robert M. Yoke
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Vivian Moore,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 24, 2022

Court of Appeals Case No.
21A-CR-2256

Appeal from the
Switzerland Circuit Court

The Honorable
W. Gregory Coy, Judge

Trial Court Case No.
78C01-1809-MR-290

Darden, Senior Judge.

Statement of the Case

- [1] Vivian Moore conspired and actively participated with others in the murder of her boyfriend, Dennis Dziwulski, which involved the use of a cast-iron frying pan, hammer, and possibly a baseball bat to bludgeon him to death. Moore subsequently pleaded guilty to one count of Level 1 felony conspiracy to commit murder,¹ with an agreed sentencing range of twenty to thirty years. After accepting Moore's plea, the trial court sentenced her to thirty years with twenty-eight years executed. Moore appeals, arguing that her sentence is inappropriate in light of the nature of the offense and the character of the offender. We affirm.

Facts and Procedural History²

- [2] Forty-six-year-old Moore and Dennis Dziwulski began their dating relationship around 2016 or 2017. Commencing in around March of 2018, Dziwulski

¹ Ind. Code § 35-41-5-2 (2014) (conspiracy); Ind. Code § 35-42-1-1 (2018) (murder).

² Moore challenges the State's recitation of facts because it "borrows heavily from facts contained in the Probable Cause Affidavit." Reply Br. p. 4. Moore says that the "best source of determining the facts in this case" should come from the "considerable law enforcement live testimony" at her sentencing hearing as "some of [it] conflicts with the Probable Cause Affidavit." *Id.* We observe that Moore is challenging the appropriateness of her sentence, which includes an evaluation of the nature of the offense and the character of the offender. *See* Ind. Appellate Rule 7(B). During sentencing, in addition to the State's "prima facie case" set out during the guilty plea hearing, Tr. Vol. II, pp. 4-5, the court considered the pre-sentence investigation report, to which no objections, additions, or corrections were made. *Id.* at 6-7. The pre-sentence investigation report directs the reader to the "Affidavit for Probable Cause and Warrant for Arrest" for the official version of the present offense. Appellant's App. Vol. 5 Conf., p. 6. The court's consideration of the contents of the probable cause affidavit was not erroneous, nor was the State's recitation from it, as Moore waived any challenge to the court's consideration of the pre-sentence investigation report's contents. *See Dillard v. State*, 827 N.E.2d 570, 576 (Ind. Ct. App. 2005) ("having been afforded the opportunity to review the report, if the defendant fails to register an objection to the information contained therein, any such

became abusive when he drank large quantities of alcohol. The abusive behavior persisted from March 2018 until Dziwulski's death on June 2, 2018.

[3] On June 2, 2018, Moore's twenty-five-year-old son, Justin Girdler, called 911 to report a domestic abuse incident between Moore and Dziwulski at the mobile home they shared. While he was on the telephone with the 911 operator, he reported that he was armed with a sledgehammer for protection from Dziwulski. When police officers arrived, they found Girdler holding the sledgehammer, which he was instructed to drop while they investigated. They observed that Dziwulski was intoxicated. The officers noticed that Girdler was agitated and aggressive and they asked him to leave. After asking Girdler to leave, officers heard him say "something to the effect of 'okay, I'll take care of it myself.'" Tr. Vol. II, p. 37. Rather than remain at the mobile home, Moore left with Girdler at that time.

[4] Later, that same evening, Moore returned to her home, along with Girdler and his friend Michael Hall. At some point, she, Girdler, and Michael Hall bludgeoned Dziwulski to death with a cast-iron skillet, a hammer, and possibly a baseball bat while he slept on the couch. After Dziwulski was killed, Girdler, Hall, and Victoria Hall, drove Dziwulski's car from the home and abandoned it in Kentucky in the early morning hours of June 3, 2018.

objection is waived for appellate review."), *trans. denied*. Consequently, we cite to the probable cause affidavit as well to resolve the sentencing issue raised on appeal.

- [5] On June 3rd, the Kentucky State Police (KSP) located Dziwulski's car, which had been abandoned on a dead-end road. KSP officers contacted officers with the Switzerland County Sheriff's Office (SCSO) about their discovery. The KSP officers were informed that Dziwulski was involved in a domestic incident the previous day, and they towed the vehicle after they were unable to contact him.
- [6] On June 22nd, Doug Dziwulski, Dziwulski's brother, called the sheriff's office because he was concerned that he had not heard from his brother since June 2nd. Dziwulski had called Doug on that date and said that his relationship with Moore might be ending after the incident with the police. Doug tried to call his brother's phone, but after a few days Doug began receiving an automated message that the phone was no longer in service.
- [7] Next, Doug contacted Moore to see if she had any information on his brother's whereabouts. Moore told Doug that Dziwulski had returned to Maryland after they had broken off their relationship on June 2nd. Through additional inquiries, Doug learned that his brother had not shown up for work as well.
- [8] In following up, officers contacted Dziwulski's employer, his landlord, and an auto dealership to which Dziwulski owed money, and no one had heard from him in several weeks. Moore had told each of them the story that Dziwulski had moved back to Maryland. The landlord later told officers that Moore had moved out of the mobile home shortly after June 2nd.

- [9] Moore was first interviewed by officers on June 22nd, at which time she told them that Dziwulski had moved back to Maryland after ending their relationship on June 2nd. She further told police that on June 2nd, Girdler dropped her off at the mobile home later in the evening and she discovered that Dziwulski had packed his belongings. She said that she argued with Dziwulski, which led to a physical confrontation. After getting away from Dziwulski, she said that he threw and broke his cellphone, and told her he was moving to Maryland, and walked out.
- [10] On June 25th, police went to the mobile home and after looking around concluded that “a very significant blood-related event” had occurred in the living room. Tr. Vol. II, p. 30. There was “blood spatter inside the home” on the walls and the ceiling. *Id.* There also was “a large pool of blood that was found on the carpet that had soaked through to the sub floor.” *Id.* Police officers obtained a search warrant for Moore’s storage unit in which they located a couch with spots “that field tested positive” for evidence of blood. *Id.* at 34. A large cast-iron skillet was also found in Moore’s storage unit.
- [11] Because Moore’s mobile home was located near a wooded area, police cadaver dogs were brought to the scene to search for Dziwulski’s body. After his body/remains were discovered, Dr. Krista Latham, Director of the University of Indianapolis Human Identification Center, was called to the scene to recover them. Dr. Latham’s team discovered that the remains were scattered over an area approximately thirty-two meters long near Moore’s mobile home. Dr. Latham reported that the location where Dziwulski’s remains were found is

where decomposition began and the body began to separate into eight separate parts due to “gravity, rainwater, and carnivore activity” during decomposition. Ex. Vol. III, p. 50; Ex. 24. Dr. Latham’s examination of Dziwulski’s head and face revealed “perimortem blunt force trauma.” *Id.* at 56.

[12] After the completion of Dr. Latham’s examination, Dr. Michael Smith, a pathologist, performed an autopsy. Dr. Smith concluded that Dziwulski died of “blunt force trauma of the head and face.” *Id.* at 65; Ex. 25. He further concluded that the “degree of trauma would have been caused by multiple blows from multiple angles, likely with a heavy blunt force object or objects.” *Id.* Dr. Smith also reported that “[t]here would have been extensive bleeding at the scene due to this trauma.” *Id.* He stated, “It is also likely that the facial trauma would have made visual identification difficult.” *Id.*

[13] Next, on June 26th, officers interviewed Moore again, along with her new boyfriend, Kevin Boston separately. Boston provided officers with “a large amount of information” regarding the case. Tr. Vol. II, p. 44. That information led officers to conduct a third interview with Moore. Officers described Moore’s statements as “although always a confession,” they were “ever evolving” and “always changed.” *Id.*

[14] Initially, Moore told officers that she had grown tired of Dziwulski’s abuse and killed him while he slept on the couch. She said that she killed Dziwulski by hitting him on the head multiple times with a cast-iron skillet while Girdler witnessed it. She later changed her story and said that Girdler had killed

Dziwulski by striking him in the head twice with a hammer while she argued with Dziwulski. She also stated that Girdler's actions were unprovoked and that Girdler had threatened her. She further claimed that she initially took responsibility for the murder to protect Girdler.

[15] Officers then spoke with Girdler, who also gave conflicting statements. At first, Girdler said that Moore had already killed Dziwulski before he arrived at the mobile home. Later, he said he witnessed Moore hitting Dziwulski on the head with a cast-iron skillet while he was asleep on the couch, killing him. Next, Girdler admitted that he also struck Dziwulski on the head three times with a hammer after Moore had hit him on the head with a cast-iron skillet. He further stated that he had brought Michael Hall with him to the mobile home and that Hall had hit Dziwulski three times with a baseball bat. Girdler said that he was intimidated by Moore into hitting Dziwulski, and that he had told Moore to stop hitting Dziwulski. Girdler then said that Moore threatened him into helping her and threatened that if he went to the police, that he would end up like Dziwulski. He told officers that Moore wrapped Dziwulski's body in trash bags and that Hall dragged the body out of the trailer.

[16] Moore and Girdler each told the police that Dziwulski's body had been placed in trash bags and initially was placed under the mobile home after the murder. Dziwulski's body was moved the next day to the location in the nearby woods where he was found by the cadaver dogs. They also told officers that they tried to cover up the blood evidence in the mobile home.

- [17] Hall was interviewed and told police that he saw Moore hit Dziwulski on the head with a cast-iron skillet while he was asleep on the couch. He said that he felt threatened by Moore into hitting Dziwulski with the hammer and that she threatened him into moving Dziwulski's body under the mobile home after the murder.
- [18] The State initially charged Moore with murder, a felony; aiding in murder, a felony; and Level 6 felony obstruction of justice. After entering into a plea bargain,³ the State amended the charges and Moore was permitted to plead guilty to lesser charges. Moore pleaded guilty on August 20, 2021 to Level 1 felony conspiracy to commit murder. She admitted in open court that she had struck Dziwulski with a cast-iron frying pan multiple times and that Girdler and Hall had also engaged in beating him to death. The State dismissed the remaining charges. Moore was sentenced to a term of thirty years with twenty-eight years executed. Moore now appeals.

Discussion and Decision

- [19] Moore asserts that her sentence is inappropriate. She argues that “her sentence [should] be revised and that the executed portion of her sentence [should] not exceed twenty (20) years.” Appellant’s Br. pp. 11-12.

³ The offense of murder, the most serious charge, carries a sentencing range of between forty-five and sixty-five years, with an advisory sentence of fifty-five years. See Ind. Code § 35-50-2-3(a) (2015). On the other hand, conspiracy to commit murder, a Level 1 felony, carries a sentencing range of twenty to forty years with an advisory sentence of thirty years. Ind. Code § 35-59-2-4 (2014).

- [20] We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). It is the defendant's burden to "'persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.'" *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007) (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).
- [21] In determining whether a sentence is inappropriate, the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Childress*, 848 N.E.2d at 1081. Indiana Code section 35-50-2-4 (2014) provides for a sentencing range of twenty to forty years with an advisory sentence of thirty years for the commission of a Level 1 felony. We observe that Moore's negotiated plea provided for a sentencing cap of thirty years, the advisory sentence for the offense.
- [22] Pursuant to Indiana Appellate Rule 7(B), this court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the [c]ourt finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Our Supreme Court has explained that the principal role of appellate review should be to attempt to leaven the outliers, "not to achieve a perceived 'correct' result in each case." *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). We independently examine the nature of Moore's offense and her character under Appellate Rule 7(B) with substantial deference to the sentence imposed by the trial court. *See Satterfield v. State*, 33 N.E.3d 344, 355 (Ind. 2015). "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).

[23] "In conducting our review, we do not look to see whether the defendant's sentence is appropriate or if another sentence might be more appropriate; rather, the test is whether the sentence is 'inappropriate.'" *Barker v. State*, 994 N.E.2d 306, 315 (Ind. Ct. App. 2013), *trans. denied*. Whether a sentence is inappropriate ultimately depends upon "the culpability of the defendant, the severity of the crime, the damage done to others, and a myriad other factors that come to light in a given case." *Cardwell*, 895 N.E.2d at 1224. Moore bears the burden of persuading us that her sentence is inappropriate. *See id.*

[24] The sentencing range for Level 1 felony conspiracy to commit murder is a term of between twenty and forty years with an advisory sentence of thirty years. Ind. Code § 35-50-2-4 (2014). Moore's plea agreement capped the executed portion of her sentence at the advisory sentence of thirty years. "A defendant's conscious choice to enter a plea agreement that limits the trial court's discretion to a sentence less than the statutory maximum should usually be understood as strong and persuasive evidence of sentence reasonableness and appropriateness" and appellate relief should be granted "only in the most rare, exceptional cases." *Merriweather v. State*, 151 N.E.3d 1281, 1286 n. 2 (Ind. Ct. App. 2020) (quoting *Childress*, 848 N.E.2d at 1081 (Dickson, J. concurring)).

[25] We first turn to Moore's character. Moore argues that her poor health and her age support a downward revision of her sentence. She claims that she "was the typical battered female who had suffered several months of physical abuse, some of which had been witnessed by her sisters." Appellant's Br. p. 11.

[26] The facts of this case, however, reveal that Moore is far from the typical battered female. After the initial incident where the police were called to Moore's mobile home, Moore left with her son, Girdler. Instead of remaining apart from her alleged abuser, Moore returned to the mobile home with two others, all armed with items they used to bludgeon Dziwulski to death as he slept on the couch. According to statements given by her co-defendants, Moore had threatened and intimidated her twenty-five-year-old son and his friend. She embarked upon a scheme of not only deceiving the police with the lie that Dziwulski had returned to Maryland after they broke off their relationship, but she told the same story to Dziwulski's brother, landlord, and employer. Moore put Dziwulski's body in trash bags and enlisted others to hide his body under the mobile home and later had them move the body to the wooded area near the mobile home. Dziwulski's car was driven to Kentucky and abandoned. This type of cruelty, planning, deception, and manipulation reflects poorly on Moore's character.

[27] The nature of the offense analysis compares the defendant's actions with the required showing to sustain a conviction under the charged offense. *Cardwell*, 895 N.E.2d at 1224. We now turn to the nature of Moore's offense.

[28] Conspiracy is defined as follows:

A person conspires to commit a felony when, with intent to commit the felony, the person agrees with another person to commit the felony. A conspiracy to commit a felony is a felony of the same level as the underlying felony. However, a conspiracy to commit murder is:

* * *

(2) a Level 1 felony if the conspiracy results in the death of another person.

(b) The state must allege and prove that either the person or the person with whom he or she agreed performed an overt act in furtherance of the agreement.

Ind. Code § 35-41-5-2 (2014).

[29] Here, the evidence illustrating the nature of Moore's offense shows that she did much more than necessary to commit the offense of conspiracy to commit murder. After police had been involved in an earlier incident and Moore had separated herself from her abusive and intoxicated boyfriend, Moore returned to the mobile home later with her son and his friend. Once there, they discovered that Dziwulski was asleep or passed out on the couch. Nonetheless, Moore used a cast-iron skillet to hit Dziwulski multiple times in the head and face, bludgeoning him until he was unrecognizable. She intimidated her son and his friend into participating in the brutal murder, and they used a hammer and possibly a baseball bat to help her in the commission of her crime.

[30] After the murder was completed, Moore placed trash bags around Dziwulski's body and threatened or intimidated Girdler and Hall to remove the body from

the mobile home, initially placing it underneath the mobile home. The next day, she and the others moved the body to the nearby woods where it was left to decompose and be exposed to both carnivores and the elements of weather where his body was later found. Dziwulski's body had been ravished by animals and scattered into eight different parts covering a thirty-two-meter area of the woods through "gravity, rainwater, and carnivore activity" during decomposition. Ex. Vol. III, p. 50; Ex. 24.

[31] Further, Moore attempted to cover up her crime. Dziwulski's car was taken to another state and was abandoned there. She made efforts to clean up the blood spatter in the mobile home. She also removed the cast-iron skillet and couch, hiding them in a storage unit. Moore lied to police officers, Dziwulski's brother, his employer, and his landlord about his whereabouts, delaying the discovery of Dziwulski's remains.

[32] We recently have held that an aggravated sentence is not inappropriate where the evidence shows the defendant took advantage of an intoxicated person, bludgeoning her to death and dumping her body by the side of the road "as if it were a piece of trash" and then "attempting to dispose of evidence." *See Messel v. State*, 80 N.E.3d 230, 233 (Ind. Ct. App. 2017), *trans. denied*. In the instant case, it appears that the State's evidence against Moore was exceptionally strong regarding her involvement in the murder of Dziwulski. If convicted of the most serious charge of murder, Moore faced the sentencing range of forty-five to sixty-five years, the minimum of which was nonsuspendable. Here, Moore bargained for and benefitted by receiving as part of a plea a conviction

of conspiracy to commit murder with a sentencing range capped at the advisory sentence for her offense, thirty years. We find no error in the trial court's imposition of sentence in Moore's conspiracy to commit this grisly murder. Moore has not met her burden of persuading us that her sentence should be revised.

Conclusion

[33] In light of the foregoing, we conclude that Moore's sentence is not inappropriate in light of her character or the nature of her offense.

[34] Affirmed.

Robb, J., and Molter, J., concur.