MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Zachary A. Woodward,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 11, 2023

Court of Appeals Case No. 22A-CR-2962

Appeal from the Decatur Superior Court

The Honorable Matthew D. Bailey, Judge

Trial Court Cause No. 16D01-2103-F4-196

Memorandum Decision by Judge Brown
Judges Crone and Felix concur.

Brown, Judge.

[1] Zachary A. Woodward appeals his sentence for possession of methamphetamine as a level 5 felony. He raises four issues which we consolidate and restate as whether his convictions for possession of methamphetamine as a level 5 felony and possession of marijuana as a class A misdemeanor were improperly elevated and whether his sentence is inappropriate in light of the nature of the offense and the character of the offender. We affirm.

Facts and Procedural History

[2] The relevant facts as discussed in Woodward's prior direct appeal follow:

> Woodward failed to appear for a hearing on March 2, 2021. At that time, he was serving a sentence via community corrections in Decatur County. As a result, a warrant was issued for Woodward's arrest. GPS data established that Woodward spent time at his mother's house on March 2 and then moved toward St. Paul, Indiana. Woodward was arrested soon thereafter at a storage unit in St. Paul. At the storage unit, officers noted that Woodward and his associate smelled like marijuana and learned that one or both of them may be in possession of methamphetamine. A dog sniff search revealed the presence of drugs in both the storage unit and a vehicle present at the scene. A search of the vehicle yielded vaping cartridges in packages that suggested the cartridges contained THC. Despite positive alerts from a K-9 officer, no drugs were discovered in the storage unit.
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> Officers then obtained a search warrant for Woodward's home. The search yielded a substance appearing to be methamphetamine, marijuana, shotgun shells and casings, a scale, vaping devices, and other paraphernalia. Officers then obtained a search warrant for Woodward's tattoo parlor. That search revealed a disassembled shotgun, shotgun ammunition,

> rifle ammunition, nine-millimeter ammunition, a digital scale, marijuana "roach" syringes (some of which contained a crystalline substance), rolling papers, a small tube containing what appeared to be marijuana, and a pill bottle that contained what appeared to be methamphetamine. In a magnetic box in the ceiling, officers also found 1.7 grams of a substance that a forensic scientist later determined to be methamphetamine.
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> On March 3, 2021, Officers subsequently obtained consent from Woodward's mother to search her barn and the surrounding area based on GPS data that showed Woodward had been at the barn for approximately forty-five minutes while the bench warrant was pending. Officers located a modified shotgun with a loaded magazine in the barn. The shotgun was wrapped in a blanket on the backseat of an inoperable vehicle. The record does not reflect the titled owner of the vehicle.
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> Later that day police interviewed Woodward. He informed the officers that he went to his mother's house the previous day and that he had been in a "storage shed." Tr. Vol. III pp. 52-53. Woodward admitted that he kept firearms at both his mother's barn and his tattoo shop, as well as the fact that he knew that he was not legally allowed to possess firearms. Woodward expressed that he believed he was allowed to be in possession of pieces of a firearm, so long as the pieces were not assembled, and explained that a friend asked Woodward to artistically embellish the stock of one of the weapons. Woodward relayed details pertaining to the shotgun that police recovered from the barn and directed officers to a pill bottle at his tattoo shop that contained methamphetamine, which Woodward had "messed with." St. Ex. 12 at 16:53.

Woodward v. State, 187 N.E.3d 311, 315-316 (Ind. Ct. App. 2022) (footnotes omitted), *reh'g denied*.

[3] On March 4, 2021, the State charged Woodward with: Count I, unlawful possession of a firearm by a serious violent felon as a level 4 felony; Count II, possession of methamphetamine as a level 5 felony; and Count III, possession of marijuana as a class A misdemeanor. That same day, the State alleged Woodward was an habitual offender and listed five offenses including dealing in a Schedule IV controlled substance as a class C felony under cause number 73C01-0704-FC-012 ("Cause No. 12").[1]

[4] On May 14, 2021, the State filed a Notice and Motion to File Amended Charging Information to "amend the habitual charging information by removing the predicate offense [Cause No. 12] on page two of the charging information alleging the Habitual Offender Sentencing Enhancement" because the predicate offense of Cause No. 12 "will be introduced during the State's case in chief" to establish the necessary element of Count I, possession of a firearm as a serious violent felon as a level 4 felony, to establish the necessary element of Count II, possession of methamphetamine as a level 5 felony, and to establish the necessary element of Count III, possession of marijuana as a class A misdemeanor. Prior Case Appellant's Appendix Volume II at 31.

[5] On May 20, 2021, the State filed a Second Notice and Motion to File Amended Charging Information listing Count I, "Possession of a Firearm in Violation of I.C. 35-47-4-5, Level 4 Felony, contrary to Indiana Code 35-47-4-5(c)"; Count

[1] The State alleged that the date of the offense under Cause No. 12 occurred between April 18, 2007, and April 19, 2007, and the date of sentencing was January 15, 2009.

II, "Possession of Methamphetamine, Level 6 Felony, contrary to Indiana Code 35-48-4-6.1(a)"; Count III, "Possession of Marijuana, Class B Misdemeanor, contrary to Indiana Code 35-48-4-11(a)(1)"; Count IV, "Possession of Methamphetamine, Level 5 Felony, contrary to Indiana Code 35-48-4-6.1(b)(2)" for possessing methamphetamine with an enhancing circumstance of "a prior conviction for Dealing in a Schedule IV Controlled Substance as a Class C Felony"; Count V, "Possession of Marijuana, Class A Misdemeanor, contrary to Indiana Code 35-48-4-11(b)(1)" for possessing marijuana "while having a prior conviction for a drug offense."[2] *Id.* at 39-40. The State also alleged that Woodward was an habitual offender in that he had accumulated three or more prior unrelated felony convictions including theft as a class D felony under cause number 16C01-0803-FD-108 ("Cause No. 108"), two counts of burglary as class C felonies under cause number 16C01-0809-FB-258 ("Cause No. 258"), possession of methamphetamine as a level 6 felony under cause number 73D01-1607-F4-21 ("Cause No. 21"), and possession of methamphetamine as a level 5 felony under cause number 16D01-1711-F5-1210 ("Cause No. 1210").

[6] Later on May 20, 2021, the State filed a Third Notice and Motion to File Amended Charging Information asserting that "[t]he Habitual Offender

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[2] The State's Notice and Motion to File Amended Charging Information asserted that the State's intent was that Count IV would not be presented to the jury unless and until a guilty verdict was rendered on Count II and that Count V would not be presented to the jury unless and until a guilty verdict was rendered on Count III.

Sentencing Enhancement will cease to allege the predicate offense of [Cause No. 108] for the reason that judgment of conviction was entered in that cause as a misdemeanor, and it was included in error." *Id.* at 44. The habitual offender information alleged that Woodward had prior convictions for two counts of burglary as class C felonies under Cause No. 258, possession of methamphetamine as a level 6 felony under Cause No. 21, and possession of methamphetamine as a level 5 felony under Cause No. 1210.

[7] On May 21, 2021, Woodward filed a motion in limine to exclude a "Certificate of Analysis from the Indiana State Police Laboratory Division regarding the testing of alleged illegal substances." *Woodward*, 187 N.E.3d at 316. Woodward argued that he received the laboratory report only five days before his trial and that this constituted impermissible undue delay under Indiana Evidence Rule 403. *Id.* The trial court denied the motion. *Id.*

[8] At the jury trial in May 2021, the State moved to admit the laboratory report. *Id.* Woodward's counsel stated that he had "No objection to (indiscernible)." *Id.* The jury found Woodward guilty as charged. *Id.* The jury similarly found that Woodward was an habitual offender. *Id.* The trial court declined to enter a sentence on the later-added charges, presumably for reasons of double jeopardy. *Id.* at 316 n.5. The court sentenced Woodward to ten years for possession of a firearm by a serious violent felon, enhanced by twenty years on the basis of Woodward's status as an habitual offender; six years for possession of methamphetamine; and one year for possession of marijuana. *Id.* at 316. The latter two sentences were ordered to be served concurrently with the

sentence for possession of a firearm for an aggregate sentence of thirty years. *Id.*

[9] On direct appeal, Woodward argued that the trial court abused its discretion in admitting the laboratory report concerning methamphetamine, the State produced insufficient evidence to sustain his conviction for possession of methamphetamine, and the State produced insufficient evidence to establish the requisite prior felony for his conviction for unlawful possession of a firearm by a serious violent felon. *Id.* at 315. This Court concluded that the trial court did not abuse its discretion in admitting the laboratory report. *Id.* at 318. With respect to Woodward's challenge to the sufficiency of the evidence, we concluded that "the State presented sufficient evidence for the jury to conclude that Woodward constructively possessed the methamphetamine located in the ceiling." *Id.* at 320. The Court reversed Woodward's conviction for unlawful possession of a firearm by a serious violent felon and held that "[b]ecause the habitual offender finding, which Woodward does not challenge, attached to this reversed conviction, we must remand for resentencing." *Id.* at 323 (citing *Hobbs v. State*, 161 N.E.3d 380, 387 (Ind. Ct. App. 2020) ("In *Greer v. State*, 680 N.E.2d 526 (Ind. 1997), our supreme court reversed Greer's attempted murder conviction to which a habitual offender enhancement was attached. On resentencing, the trial court attached the habitual offender enhancement to Greer's robbery conviction and resentenced Greer for his robbery conviction. Greer appealed his resentencing. Our supreme court held that the trial court on remand was not prohibited from revising the sentence for the surviving felony

conviction to reflect the habitual offender enhancement.") (internal citations omitted), *trans. denied*). Accordingly, we affirmed in part, reversed in part, and remanded for further proceedings.[3] *Id.*

[10] On May 12, 2022, Woodward filed a petition for rehearing arguing that this Court did not address whether the conviction for possession of methamphetamine is now a level 6 felony due to insufficient evidence of identity for the conviction under Cause No. 12 which the jury used to enhance it from a level 6 to a level 5 felony. This Court denied Woodward's petition.

[11] On November 9, 2022, the trial court held a resentencing hearing. Woodward's counsel argued:

> By way of argument, kind of preliminarily, and in the interest of making a record, we would ask the Court, and I guess perhaps preliminarily or preemptively object to any sentencing as to the Level 5 felony enhancement for possession of methamphetamine. We would make the same objection to sentencing on the Class A misdemeanor dealing in a controlled substance.
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> Both of those, and in looking at the verdict forms, Judge, both of those cases, both of those counts were enhanced by virtue of the prior conviction of dealing in a controlled substance as a Class C felony from Shelby Circuit Court, [Cause No. 12]. We would urge the Court that that is, in fact, the very case that the Court of

[3] This Court noted: "Given our remand for new sentencing proceedings, we need not address the parties' arguments with respect to the propriety of the previous sentence under Appellate Rule 7(B). Neither is it necessary to visit the parties' arguments about whether Woodward possessed the firearm recovered from his tattoo shop." *Woodward*, 187 N.E.3d at 314 n.2.

> Appeals find insufficient evidence of in the Appellate Number 21ACR1229.
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> In other words, to get the formality of the language out of the way to say well, if it was – if it was insufficient for the serious violent felon charge, then it would be insufficient, that that case was insufficiently proved to enhance a Level 6 possession to a Level 5, it would be insufficient to raise a Class B misdemeanor to a Class A misdemeanor. Why the Court of Appeals did not address that on the petition for rehearing is a bit of a mystery to me.
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> However, that notwithstanding, I think in the interest of judicial economy and in order to follow the law of the case which is now this appellate opinion that came down on May the 2nd of this year, we think it would be proper and only proper to sentence Zachary to – as to the Level 6 felony, possession. I think the Court of Appeals made clear that the habitual enhancement, I don't think that's impacted, whether it's a 5 or a 6, and then to the Class B misdemeanor, possession is, for all of those reasons.
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> So at the outside we would kind of like to preemptively object to that, in fact, and if not, then to ask for the Court to follow that reasoning in terms of the sentencing today based on the opinion of the Court of Appeals.

Transcript Volume II at 4-5.

[12] The court asked: "So for clarification, so we're talking about the Count IV possession of methamphetamine as a Level 5 felony, you're saying that because they vacated Count I based on identity, that Count IV then could be [sic] enhanced to the Level 5 felony because of that?" *Id.* at 5. Defense counsel answered:

> Correct, and I think that's a predicate to the enhancement, and you've got to prove that that happened, the same line of reasoning on misdemeanor. I think that if the proof offered at trial is insufficient to support a conviction for possession of a firearm by a serious violent felon, then it's insufficient to prove, because you're proving the same thing, you're proving this prior conviction, right? Whether his status is a serious violent felon because of that conviction.
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> And the court goes – and the Court of Appeals goes at some length describing what they expect moving forward, what was done, what could have been done, and so on and so forth, and I'm not throwing stones, I'm just saying that's just what it says.
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> So in other words . . . if it was insufficient for that purpose, it's insufficient for any of the purposes because the jury has to find beyond a reasonable doubt for the enhancement that the conviction exists, and those were the convictions . . . that were alleged on both of those counts as well as the serious violent felon. It's the same count, and presumably it was too old to be used on the habitual phase . . . but there's no timing issue on the enhancement, so . . . that's our argument, Judge.

Id. at 5-6.

[13] After further discussion, the trial court stated: "The Court of Appeals opinion vacated the conviction for Count I, it left Count IV and Count V which remain and the resentencing will occur with regard to those, and habitual offender enhancement." *Id.* at 8.

[14] Woodward presented the testimony of his mother and Trent Shuppard, a minister. Woodward's counsel then urged the court "to confine its sentencing and its consideration to those crimes for which [Woodward's] actually being

sentenced for today, which is possession of methamphetamine as a Level 5 and possession of marijuana." *Id.* at 22. He then stated: "[F]or the record, we would renew our request to have him sentenced under the Level 6 and the Class B misdemeanor, but we understand the Court's ruling, but I just want to make the record very clear on that." *Id.* The court stated: "I don't consider him to be a good risk for community supervision based on his past behavior." *Id.* at 25.

[15] On November 17, 2022, the trial court entered an Order on Resentencing which vacated the conviction for Count I, attached the habitual offender sentencing enhancement to Count IV, and enhanced the sentence for Count IV by four years to be executed in the Department of Correction.

Discussion

[16] Woodward argues that the law of the case doctrine bars the trial court from resentencing him for possession of methamphetamine as a level 5 felony. He asserts that the State relied upon the conviction under Cause No. 12 to support enhancing his possession of methamphetamine conviction from a level 6 felony to a level 5 felony and his possession of marijuana conviction from a class B misdemeanor to a class A misdemeanor, that this Court found that the evidence was insufficient to identify him as the offender in Cause No. 12, and that the law of the case doctrine requires that he be resentenced on possession of methamphetamine as a level 6 felony and possession of marijuana as a class B misdemeanor. He argues that, even if this Court does not apply the law of the case doctrine, the State still failed to prove his identity with respect to the conviction under Cause No. 12, and that the evidence is insufficient to sustain

his convictions for possession of methamphetamine as a level 5 felony and possession of marijuana as a class A misdemeanor.

[17] The State argues that Woodward has waived his arguments regarding whether his convictions for possession of methamphetamine and possession of marijuana should be reduced. It asserts that, if the law of the case doctrine applies, it required the trial court to resentence Woodward for possession of methamphetamine as a level 5 felony. It further argues that "[t]he methamphetamine conviction from [Cause No. 1210] still makes the conviction in this underlying cause a Level 5 and not a Level 6, regardless of what elevated the conviction in [Cause No. 1210] itself." Appellee's Brief at 16.

[18] Woodward does not cite to his initial brief in his prior direct appeal and our review of that brief does not reveal that he argued that his conviction for possession of methamphetamine was improperly elevated from a level 6 felony to a level 5 felony or that he challenged his conviction for possession of marijuana as a class A misdemeanor on the basis that the convictions were improperly enhanced by the conviction under Cause No. 12. Accordingly, Woodward has waived these issues. *See Becker v. State*, 719 N.E.2d 858, 860 (Ind. Ct. App. 1999) ("On an appeal from resentencing, the appellate court is confined to reviewing only the errors alleged to have occurred as a result of the resentencing. If an issue was available for litigation in direct appeal but was not in fact raised, then the issue has been waived."). To the extent Woodward asserts in the present appeal that his counsel argued at oral argument in the prior direct appeal that, if this Court found insufficient evidence that he was the

offender in the conviction under Cause No. 12, then not only must the Court vacate his conviction for possession of a firearm as a serious violent felon but that the Court must remand for resentencing on the possession of methamphetamine as a level 6 felony, we note that he raised this issue for the first time at oral argument and the issue is waived.[4] *See Harris v. State*, 76 N.E.3d 137, 140 (Ind. 2017) ("[I]ssues are waived when raised for the first time at oral argument."); *see also Young v. State*, 30 N.E.3d 719, 728 (Ind. 2015) ("Generally, 'new claims or issues, including constitutional arguments . . ., cannot be presented for the first time in a petition for rehearing.'") (quoting *N. Ind. Commuter Transp. Dist. v. Chicago SouthShore & South Bend R.R.*, 685 N.E.2d 680, 686 (Ind. 1997) (citing *City of Indianapolis v. Wynn*, 239 Ind. 567, 159 N.E.2d 572 (1959))).

[19] Accordingly, we turn to Woodward's argument that his sentence is inappropriate. Woodward argues the 1.7 grams of methamphetamine was a small amount generally possessed for one's personal use and he was a drug addict, obtained his GED in 2011, obtained his associate's degree, completed the R-O-B-Y program while incarcerated, and opened his own tattoo shop. He also points to the testimony of Shuppard and his mother.

[20] Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that

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[4] The oral argument in the prior direct appeal was held on April 1, 2022, at John Adams High School in South Bend. *See Woodward*, 187 N.E.3d at 314 n.1. A recording of the oral argument is not available online.

the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). "[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, 1225 (Ind. 2008). "[A]ppellate review should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count." *Id.*

[21] Ind. Code § 35-50-2-6 provides that a person who commits a level 5 felony shall be imprisoned for a fixed term of between one and six years, with the advisory sentence being three years. At the time of the offense and the resentencing hearing, Ind. Code § 35-50-2-8 provided that the court shall sentence a person found to be an habitual offender to an additional fixed term that is between two years and six years for a person convicted of a level 5 felony and that the additional term imposed is nonsuspendible.[5]

[22] Our review of the nature of the offenses reveals that officers discovered a substance appearing to be methamphetamine, marijuana, shotgun shells and casings, a scale, vaping devices, and other paraphernalia in Woodward's home.

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[5] Subsequently amended by Pub. L. No. 37-2023, § 2 (eff. July 1, 2023).

A search of his tattoo parlor revealed shotgun ammunition, rifle ammunition, nine-millimeter ammunition, a digital scale, marijuana "roach" syringes (some of which contained a crystalline substance), rolling papers, a small tube containing what appeared to be marijuana, and a pill bottle that contained what appeared to be methamphetamine. *Woodward*, 187 N.E.3d at 315. In a magnetic box in the ceiling, officers also found 1.7 grams of a substance that a forensic scientist later determined to be methamphetamine.

[23] Our review of the character of the offender reveals that, at the resentencing hearing, Shuppard testified that he was a minister who knew Woodward since Woodward was seventeen or eighteen years old, he observed growth in him over the previous year, and Woodward was honest with him "even when he didn't agree with what [he] was trying to share with him from the bible." Transcript Volume II at 13. He also stated that Woodward had been "very open about his addiction to drugs." *Id.* at 14. When asked if she noticed any growth in Woodward, his mother testified that he was more mature, takes responsibility for what he did, and shows gratitude to her and her husband for raising his son. The trial court stated: "I don't think the fact that he's had good phone calls with his mother and minister means that he is in fact a different person than he was. I hope he is, but I don't think that there's evidence of that . . . ." *Id.* at 25.

[24] The presentence investigation report ("PSI") indicates that Woodward, who was born in 1988, first used alcohol at age nine and marijuana at age fourteen and has also used methamphetamine, heroin, cocaine, acid, and pain pills. It

indicates that Woodward received substance abuse and mental health counseling. The PSI indicates that Woodward reported having one child but not paying child support. It reveals that, as an adult, Woodward was charged in 2007 with dealing in a schedule IV controlled substance as a class C felony, possession of marijuana as a class D felony, maintaining a common nuisance as a level 6 felony, and illegal possession of an alcoholic beverage or minor in possession of alcohol as a class C misdemeanor, and was sentenced to six years in the Department of Correction with four years executed; he was found guilty of visiting a common nuisance as a class B misdemeanor and theft as a class A misdemeanor in 2008; he was charged with two counts of burglary as class B felonies and sentenced to six years in 2009; and he was convicted of theft and conversion as class A misdemeanors under separate cause numbers in 2016. It indicates he was charged in 2016 with dealing in methamphetamine as a level 4 felony, possession of methamphetamine as a level 6 felony, resisting law enforcement as a class A misdemeanor, and visiting a common nuisance as a class B misdemeanor. It also indicates that he was charged with battery resulting in bodily injury as a class A misdemeanor and disorderly conduct as a class B misdemeanor in 2017 and was sentenced to 180 days and that he was charged with unlawful possession of a firearm by a serious violent felon as a level 4 felony and maintaining a common nuisance as a level 6 felony in 2019. The PSI notes that Woodward had a community corrections "violation pending under [Cause No. 1210] because of the current new charges that he is to be sentenced on." Prior Case Appellant's Appendix Volume II at 69. The PSI

states that Woodward's overall risk assessment score using the Indiana Risk Assessment System places him in the high risk to reoffend category.

[25] After due consideration, we conclude that Woodward has not sustained his burden of establishing that his sentence is inappropriate in light of the nature of his offenses and his character.

[26] For the foregoing reasons, we affirm Woodward's sentence.

[27] Affirmed.

Crone, J., and Felix, J., concur.