MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Xavier L. Kinnie,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 7, 2021

Court of Appeals Case No. 20A-CR-2078

Appeal from the Allen Superior Court

The Honorable Wendy W. Davis, Judge

Trial Court Cause No. 02D04-2003-F6-426

Najam, Judge.

Statement of the Case

[1] Xavier L. Kinnie appeals his sentence after he pleaded guilty to domestic battery, as a Level 6 felony. Kinnie 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] On March 24, 2020, Kinnie punched S.W., who is the mother of one of his children, "right in the jaw" while intoxicated. Tr. at 35. The State charged Kinnie with domestic battery, as a Level 6 felony. The trial court issued a no-contact order prohibiting Kinnie from contacting S.W. Despite that no-contact order, Kinnie contacted S.W. 1,193 times while incarcerated. During one of those conversations, Kinnie told S.W. "to lie about [her] story so . . . he could get out." *Id*. Accordingly, on September 16, the State moved to have the court hold Kinnie in contempt for violating the court's no-contact order.

[4] Thereafter, Kinnie pleaded guilty to domestic battery, as a Level 6 felony. Specifically, Kinnie admitted that he had "hit" S.W. while drunk. *Id*. at 24. Kinnie also admitted that he had contacted S.W. despite the no-contact order. The trial court accepted Kinnie's guilty plea and entered judgment of conviction accordingly. At a sentencing hearing, the court identified as aggravating factors

Kinnie's criminal history, the fact that Kinnie was on parole at the time he committed the instant offense, and the fact that prior attempts at rehabilitation have failed. And the court identified as a mitigating factor Kinnie's acceptance of responsibility by pleading guilty. The court then found that "all of the facts and circumstances in this case push [him] well above the advisory sentence." *Id*. at 46. Accordingly, the court sentenced Kinnie to two and one-half years, with two years executed and 182 days suspended.[1] This appeal ensued.

Discussion and Decision

Issue One: Abuse of Discretion in Sentencing

[5] Kinnie 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).

[6] 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

[1] The court also sentenced Kinnie to a concurrent sentence of ninety days for the contempt citation. However, on appeal, Kinnie does not challenge that sentence. Rather, he only challenges his sentence for the Level 6 felony conviction. *See* Appellant's Br. at 13, 18.

> 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).

[7] The sentencing range for a Level 6 felony is six months to two and one-half years, with an advisory sentence of one year. *See* Ind. Code § 35-50-2-7(b) (2020). Here, at sentencing, the trial court identified as aggravating factors Kinnie's criminal history, which includes eight prior felony convictions and five prior misdemeanor convictions; the fact that he was on parole at the time he committed the instant offense; and the fact that multiple prior attempts at alternative sentences have failed. And the court identified as a mitigating factor the fact that Kinnie accepted responsibility by pleading guilty. The court then found that the aggravators outweighed the mitigators and sentenced Kinnie to an aggravated term of two and one-half years, with two years executed and 182 days suspended.

[8] On appeal, Kinnie contends that the trial court abused its discretion when it failed to identify several mitigating circumstances that he claims are "significant, relevant[,] and supported by the record." Appellant's Br. at 14. 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*.

[9] Kinnie maintains that the court should have found as mitigating: his "remorse for the commission of the present offense," the fact that he was employed at the time of the sentencing hearing, the financial impact his incarceration would have on his children, and his "long history of substance abuse and mental health related issues." Appellant's Br. at 15. However, while Kinnie lists those factors and asserts that they are supported by the record, he does not explain why any of those factors are significant.

[10] And we cannot say that any of the proffered mitigators are significant in light of Kinnie's extensive criminal history, his inability to take advantage of multiple prior attempts at alternative sentencing, and his failed prior attempts at rehabilitation. Again, at only thirty-three years old, Kinnie's criminal history includes eight prior felony convictions and five prior misdemeanor convictions, and he has had his parole revoked twice and his suspended sentence modified once. Further, Kinnie was on parole at the time he punched the mother of his child in the face while drunk. And despite prior attempts to resolve his drinking problem, Kinnie continues to drink and commit new crimes. The trial court did not abuse its discretion when it declined to identify Kinney's proffered mitigators.

Issue Two: Inappropriateness of Sentence

[11] Kinnie also contends that his sentence is inappropriate in light of the nature of the offense and his character. 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." This court has recently held that "[t]he advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed." *Sanders v. State*, 71 N.E.3d 839, 844 (Ind. Ct. App. 2017). And the Indiana Supreme Court has recently explained that:

> The principal role of appellate review should be to attempt to leaven the outliers . . . but not achieve a perceived "correct" result in each case. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). Defendant has the burden to persuade us that the sentence imposed by the trial court is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind.), as amended (July 10, 2007), *decision clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007).

Shoun v. State, 67 N.E.3d 635, 642 (Ind. 2017) (omission in original).

[12] 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).

[13] Kinnie contends that his sentence is inappropriate in light of the nature of the offense because the offense was no more "egregious than any other offense of its type" and because he "was not acting with a clear mind when the battery occurred." Appellant's Br. at 17. And Kinnie contends that his sentence is inappropriate in light of his character because he accepted responsibility, he has a "desire to change his life in a positive way," and he was employed at the time of sentencing. *Id*. at 18.

[14] However, Kinnie has not met his burden on appeal to demonstrate that his sentence is inappropriate. With respect to the nature of the offense, again, Kinnie punched the mother of his child in the face while drunk. As a result of the offense, S.W. felt "traumatized." Tr. at 35. Further, following his arrest for that offense, Kinnie violated a no-contact order and contacted S.W. over 1,000 times. And, during one of those conversations, Kinnie told S.W. "to lie about [her] story so . . . he could get out." *Id*. Kinnie has not presented compelling evidence portraying the nature of the offense in a positive light. *See Stephenson*, 29 N.E.2d at 122.

[15] As to his character, Kinnie has a lengthy criminal history that includes eight prior felony convictions and five prior misdemeanor convictions. Further, Kinnie has been given several opportunities to avoid incarceration in the past through alternative sentences, but he continues to commit crimes. Indeed, Kinnie committed the instant offense while on parole. And despite prior attempts to resolve his alcohol problem, he continues to drink. We cannot say that Kinnie's sentence is inappropriate in light of his character.

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

[17] Affirmed.

Pyle, J., and Tavitas, J., concur.