MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Damon Griffin,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 9, 2023

Court of Appeals Case No. 22A-CR-3053

Appeal from the Shelby Superior Court

The Honorable R. Kent Apsley, Judge

Trial Court Cause No. 73D01-2104-F5-22

Memorandum Decision by Judge Kenworthy
Judges Robb and Crone concur.

Kenworthy, Judge.

Case Summary

[1] Damon Griffin pleaded guilty to Level 4 felony unlawful possession of a firearm as a serious violent felon ("SVF"),[1] for which he received the advisory sentence of six years. Griffin appeals, challenging his sentence. We affirm.

Facts and Procedural History[2]

[2] In April 2021, an officer from the Shelbyville Police Department saw a person—later identified as Griffin—standing in a grassy area near a gas station. Wondering whether Griffin needed help, the officer walked over. By that point, Griffin was on the phone with a family member, seeking a ride and giving directions to the gas station. Griffin held up the phone so the officer could help give directions. When it started raining, the officer offered Griffin a ride. Griffin accepted. The officer asked for Griffin's identification, planning to tell dispatch who he would be driving. When Griffin said he lacked identification, the officer began to wonder whether Griffin was trying to conceal his identity.

[3] When the two approached the officer's vehicle, the officer asked whether Griffin had a weapon or an open warrant. Griffin denied having either. And when the officer asked for Griffin's full name, Griffin appeared nervous and gave the name "Demont Griffith." Noticing Griffin was wearing a backpack,

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[1] Ind. Code § 35-47-4-5(c) (2020).

[2] In reciting the facts and challenging his sentence, Griffin relies on information in the probable-cause affidavit. We follow Griffin's lead, drawing from the probable-cause affidavit in setting forth the facts.

the officer asked to have the backpack in the front seat—out of Griffin's reach—during the ride. At that point, Griffin declined the ride, saying he would walk.

[4] Griffin did not leave, instead engaging the officer in conversation. At some point, the officer asked Griffin what was in the backpack. Griffin said the backpack contained receipts and a mask. The officer asked whether there was anything illegal in the bag, and Griffin denied having contraband. Eventually, Griffin consented to a search of the backpack, which revealed a black M&P Bodyguard 380 handgun with the serial number filed off. The search also revealed a receipt with the name Damon Griffin on it, not "Demont Griffith." Working with dispatch, the officer learned Griffin had an open warrant out of Michigan for a parole violation; Griffin told the officer he had been in prison for carjacking.

[5] The State brought four charges against Griffin: (1) the Level 4 felony SVF count; (2) Level 5 felony possession of an altered firearm; (3) Level 6 felony obstruction of justice; and (4) Class A misdemeanor carrying a handgun without a license. Griffin and the State reached a plea agreement under which Griffin would plead guilty to the SVF count, the remaining counts would be dismissed, and Griffin would receive a sentence no longer than seven years.

[6] Griffin pleaded guilty under the agreement, admitting to possessing a handgun while having a conviction for carjacking in the State of Michigan. Griffin acknowledged his prior offense resulted in his SVF status, prohibiting him from

possessing a handgun. The court took the plea under advisement, scheduled a sentencing hearing, and ordered a presentence investigation report.

[7] At the November 2022 sentencing hearing, the court accepted Griffin's plea under the plea agreement. Griffin then made a statement in allocution, apologizing to the judge and the prosecutor. Griffin noted he had "done a lot of time"— starting when he was "really young"—and, although he had learned lessons along the way, he "didn't learn enough." *Tr. Vol. 2* at 92. Griffin said he recently "learned more" in part by taking a course called Thinking for a Change, which helped Griffin "learn[] to make better decisions in [his] life." *Id.* at 92–93.

[8] Griffin sought a four-year sentence in the Indiana Department of Correction ("DOC") consisting of two years executed and two years suspended to probation. Griffin acknowledged there were aggravating circumstances, noting the "aggravating factors are . . . what they are," in that Griffin had a criminal history and was on parole when he committed the offense. *Id.* at 94. The presentence investigation report showed Griffin committed misdemeanor larceny in Michigan in 2007. As for that offense, Griffin (1) admitted violating the conditions of his probation in 2010, resulting in the extension of his probation; and (2) later received a jail sentence for contempt. Griffin also had misdemeanor convictions in Michigan for possession of marijuana and carrying a weapon with unlawful intent. His most serious prior conviction was for carjacking, a felony he committed in 2013.

[9] Turning to potential mitigating circumstances, Griffin pointed out "he pleaded to the top charge . . . obviously with a [sentencing cap], but he pleaded to the top charge." *Id.* Griffin also asserted "there's no victim in this case." *Id.* Griffin asserted being incarcerated would work a hardship on his dependents, including one child with autism. Griffin also argued for mitigation because "he cooperated with the police, was not rude to them," and now had "some insight into his behavior and insight into what he needs to change to succeed." *Id.*

[10] The State acknowledged there was at least one mitigating circumstance, pointing out Griffin "accepted responsibility for his actions by entering th[e] plea agreement." *Id.* at 95. Still, the State questioned the significance of Griffin's acceptance of responsibility because he already benefited from the plea agreement, which "capp[ed] the total sentence at seven years." *Id.* at 98. The State also challenged Griffin's assertion being "cooperative and nice in talking with the [police]" should be a significant mitigator, noting Griffin was "lying about his identity" during his exchange with the police. *Id.* at 95.

[11] As for Griffin's assertion the impact on his dependents was a mitigating factor, the State argued that factor "should carry diminished weight" because Griffin had previously been imprisoned "for a lengthy period of time" and had not yet "reprioritize[d] things," "continuing to commit crimes that [could] potentially send him away to prison again for an extended period of time." *Id.* at 95–96. The State also pointed to Griffin's presentence investigation report, which showed Griffin had a child support arrearage—the State questioned: "[H]ow much is [Griffin] really supporting the children when he's been [in prison], and

he's not paying child support?" *Id.* at 96. And as to Griffin's assertion he benefitted from the Thinking for a Change program, the State asserted this evidence did not necessarily suggest Griffin would respond to "lesser incarceration or programming," pointing out Griffin had access to programming while incarcerated in Michigan "and yet here we are again. He's done those things and we haven't seen a positive change in his behavior." *Id.*

[12] As for aggravating circumstances, the State referred to Griffin's criminal history. The State argued the criminal history showed a concerning pattern of "carrying guns . . . or being associated with guns when he shouldn't be," noting Griffin committed an offense in 2012 "where he's carrying a handgun as a misdemeanor[.]" *Id.* at 96–97. The State argued probation would not be appropriate, noting Griffin had a "history of violating probation" and was on parole when he committed the offense. *Id.* at 97. It ultimately sought a seven-year sentence in the DOC, the maximum allowed under the plea agreement.

[13] In sentencing Griffin, the trial court identified two mitigating circumstances—Griffin's acceptance of responsibility and the impact incarceration would have on Griffin's dependents. As to the acceptance of responsibility, the court acknowledged Griffin had "somewhat mitigated his [penal] exposure" through the plea agreement, but concluded the acceptance of responsibility was "genuine," noting Griffin had "always been very respectful of the court" in resolving the criminal matter. *Id.* at 98–99. And as to the hardship on dependents, the court stated, although this was a mitigator, "it's simply a question of how much weight . . . [the court] will give it[.]" *Id.* at 99.

[14] The trial court identified two aggravating circumstances—Griffin's criminal history, and that Griffin violated a condition of court supervision because he was on parole when he committed this new criminal offense. The court also noted: "[W]hatever happened in Michigan, you didn't learn your lesson from that, and that is something I have to consider in determining my sentence." *Id.*

[15] The court concluded the aggravators outweighed the mitigators. The court noted that, when the aggravators outweigh the mitigators, the court would "generally . . . go above th[e] six-year advisory sentence" for a Level 4 felony. *Id.* at 100. Despite "believ[ing] th[e] aggravating circumstances and mitigating [circumstances] . . . would justify an aggravated sentence," the court chose leniency: "I'm simply not going to aggravate your sentence above the advisory sentence in this case, although the law would certainly support that." *Id.*

[16] The trial court imposed the advisory sentence of six-years, with all six years executed in the DOC. In declining to suspend time, the court stated: "I don't want to set you up for failure," so "[w]hen you get done doing your time in Michigan and Indiana, you will simply be done and with no time hanging over your head." *Id.*

[17] Griffin appeals.

Discussion and Decision

[18] Griffin challenges his sentence, arguing the trial court abused its discretion in imposing the advisory sentence and, regardless, this Court should revise the sentence under Appellate Rule 7(B) because the sentence is inappropriate.

Sentencing Discretion

[19] Generally, "sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clar'd on reh'g*. The trial court abuses its discretion when its 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." *Schuler v. State*, 132 N.E.3d 903, 904 (Ind. 2019). The Indiana Supreme Court has identified several ways a trial court abuses its sentencing discretion. *See generally, e.g.*, *Anglemyer*, 868 N.E.2d at 490–91. For example, a trial court abuses its sentencing discretion by failing to enter a sentencing statement when required. *See id*. at 490. A court also abuses its sentencing discretion if the sentencing statement is deficient, *e.g.*, if the sentencing statement "explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration[.]" *Id.* at 490–91.

[20] In arguing the trial court abused its sentencing discretion, Griffin alleges the sentencing statement "omits mitigating circumstances that are clearly supported by the record." *Appellant's Br.* at 7. Griffin specifically argues the trial court erred by omitting the following circumstances: (1) Griffin completed the "Thinking for a Change" program while incarcerated; (2) the SVF offense "was a victimless crime (no one was threatened or injured)"; (3) "Griffin was polite and cooperative with police"; and (4) "Griffin was remorseful." *Id.*

[21] When a defendant alleges the trial court abused its discretion by failing to include a proffered mitigator, the defendant must "establish that the mitigating evidence is both significant and clearly supported by the record." *Anglemyer*, 868 N.E.2d at 493. Yet Griffin does not provide this standard or otherwise cogently argue the proffered mitigators are significant mitigators. *See* Ind. Appellate Rule 46(A)(8)(a) (requiring "cogent reasoning" supporting "the contentions of the appellant on the issues presented"). We therefore conclude Griffin waived his claim the court abused its sentencing discretion. *See, e.g.*, *Combs v. State*, 168 N.E.3d 985, 990 n.3 (Ind. 2021) (identifying appellate waiver for noncompliance with Appellate Rule 46(A)(8)(a)). Of course, even if Griffin had established irregularity with respect to mitigators, one proper remedy would be to independently review the sentence under Appellate Rule 7(B). *See Windhorst v. State*, 868 N.E.2d 504, 507 (Ind. 2007) (noting that, rather than remand for resentencing, we may "exercise our authority to review and revise the sentence" under Rule 7(B)). We turn to Griffin's claim under this rule.

Appellate Rule 7(B)

[22] The Indiana Constitution authorizes this Court to review and revise sentences as specified by rule. Ind. Const. art. 7, § 6. The pertinent rule is Appellate Rule 7(B), which states as follows: "The 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." Under this rule, we "show the trial court 'considerable deference.'" *Oberhansley v. State*, No. 20S-LW-620, 2023 WL

3490928, at *3 (Ind. May 17, 2023) (quoting *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008)). Moreover, "[s]uch 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). Further, the "principal role of appellate review should be to attempt to leaven the outliers[.]" *Cardwell*, 895 N.E.2d at 1222. "And whether 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." *Id.* at 1224.

[23] The defendant ultimately bears the burden of persuading us that the sentence is inappropriate. *Hall v. State*, 177 N.E.3d 1183, 1197 (Ind. 2021). Moreover, where—as here—the defendant challenges the advisory sentence, the defendant "bears a particularly heavy burden in persuading us that [the] sentence is inappropriate[.]" *Fernbach v. State*, 954 N.E.2d 1080, 1089 (Ind. Ct. App. 2011), *trans. denied*. That is because our legislature chose the advisory sentence as the "starting point" for "an appropriate sentence for the crime committed[.]" *Id.*

[24] Ordinarily, a Level 4 felony conviction carries a sentencing range of two to twelve years, with an advisory sentence of six years. *See* I.C. § 35-50-2-5.5. Here, however, the plea agreement capped the sentence at seven years. In deciding to impose the advisory sentence—one year below the agreed cap—the trial court determined the aggravators outweighed the mitigators. The court

noted this determination "would justify an aggravated sentence." *Tr. Vol. 2* at 100. Still, the court chose to be lenient in sentencing Griffin, telling him: "I'm simply not going to aggravate your sentence above the advisory sentence in this case, although the law would certainly support that." *Id.*

[25] As to the nature of the offense, Griffin argues his offense was "mild" because—among other things—he "was not using the firearm in a threatening manner" and "[n]o one was harmed." *Appellant's Br.* at 8–9. In general, Griffin contends "there was nothing particularly egregious about the nature of the offense in this case." *Id.* at 9. But Griffin chose to arm himself and then lie to the police. Moreover, the SVF count is a status offense, criminalizing the mere possession of a firearm whether or not the firearm was used. *See generally* I.C. § 35-47-4-5. All in all, we discern nothing compelling about the nature of the offense to support revising the sentence.

[26] Turning to the character of the offender, Griffin points to instability in his childhood, including in relationships with parental figures. Griffin also notes he "had been diagnosed with schizophrenia in 2013" and "had struggled with manic depression since he was 16 years old," but was "not currently" prescribed medication for these diagnoses. *Id.* Moreover, in support of his character, Griffin asserts he was "polite to police and respectful to the court," and ultimately "accepted responsibility and ple[aded] guilty to the top charge." *Id.* At bottom, Griffin contends "[t]here is nothing about the nature of Griffin's offense or his character that warrants a six-year executed sentence[.]" *Id.*

[27] We acknowledge Griffin showed respect to authority, expressed remorse, and chose to accept responsibility by pleading guilty, all circumstances that reflect well on his character. The record also shows Griffin has had personal struggles that might explain at least some poor choices in his past. Still, Griffin has not seized on opportunities to rehabilitate himself and become a law-abiding adult, failing to show he would benefit from a shorter sentence outside of prison. For example, despite a prior opportunity to serve a sentence on probation and a recent chance at parole, Griffin has reoffended. Thus, although Griffin has directed us to evidence portraying his character in a positive light, he has not convinced us this evidence is compelling enough to support sentence revision.

[28] Having considered Griffin's arguments for revising his sentence, we conclude Griffin's advisory sentence is not an outlier to be leavened. Indeed, he has not met his "particularly heavy burden" of identifying evidence compelling enough to warrant disturbing the advisory sentence. *Fernbach*, 954 N.E.2d at 1089.

Conclusion

[29] Through noncompliance with Indiana Appellate Rule 46(A)(8)(a), Griffin waived his claim the court abused its sentencing discretion as to proffered mitigators. In any case, the advisory sentence is not inappropriate.

[30] Affirmed.

Robb, J., and Crone, J., concur.