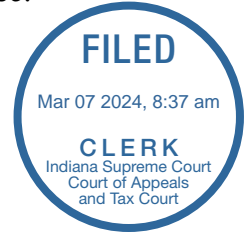


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



IN THE
Court of Appeals of Indiana

Mark D. Schmidt,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

March 7, 2024

Court of Appeals Case No.
23A-CR-1898

Appeal from the Dearborn Superior Court
The Honorable Sally A. McLaughlin, Judge

Trial Court Cause No.
15D02-2209-F1-000004

Memorandum Decision by Judge Felix
Chief Judge Altice and Judge Bradford concur

Felix, Judge.

Statement of the Case

[1] In August 2022, Mark Schmidt and his fiancée Dione Hargis used illegal drugs together in a casino hotel room. The next morning, Schmidt woke. Hargis did not. It was later determined that Hargis died from a cocaine and fentanyl overdose. The State charged Schmidt with a number of drug dealing offenses. Pursuant to a plea agreement, Schmidt pled guilty to one count of dealing in a narcotic drug. The trial court sentenced Schmidt to six years of incarceration. Schmidt now appeals and raises one issue for our review: Whether Schmidt's sentence is inappropriate under Indiana Appellate Rule 7(B).

[2] We affirm.

Facts and Procedural History

[3] At approximately 5:00 p.m. on August 3, 2022, Schmidt and Hargis rented a room at the Hollywood Casino in Lawrenceburg, Indiana. In the room, Schmidt and Hargis drank alcohol and listened to music. Schmidt had cocaine, his prescription Oxycodone, and Hargis's prescription Klonopin with him, and he and Hargis consumed both the cocaine and the Oxycodone. Sometime thereafter, Schmidt fell asleep. Shortly before 5:00 a.m. on August 4, 2022, Schmidt woke up and discovered that Hargis had died. Hargis's cause of death was an overdose from consumption of cocaine and fentanyl.

- [4] At the time of Hargis's death, Schmidt and Hargis had been in an on-again off-again relationship for approximately 19 years. Hargis had a decades-long substance abuse problem, which, according to Hargis's daughter Millissia Thompson, led to many of Schmidt and Hargis's breakups.
- [5] Schmidt cooperated with law enforcement and admitted to providing cocaine and Oxycodone to Hargis. The State charged Schmidt with dealing in a controlled substance resulting in death as a Level 1 felony;¹ dealing in cocaine or narcotic drug as a Level 4 felony;² dealing in cocaine or narcotic drug as a Level 5 felony;³ and possession of a controlled substance, a Class A misdemeanor⁴. Pursuant to a plea agreement, Schmidt pled guilty to dealing in cocaine or a narcotic drug as a Level 4 felony in exchange for the State dropping the other three charges.
- [6] At sentencing, the presentence investigation report revealed Schmidt had several criminal convictions in Ohio throughout the 1990s, including convictions for trafficking as Level 3 and 4 felonies, a conviction for having a weapon while under disability, a conviction for aggravated theft as a Level 2

¹ Ind. Code § 35-42-1-1.5(a).

² *Id.* § 35-48-4-1(a)(1)(C), (c)(1).

³ *Id.* § 35-48-4-1(a)(1).

⁴ *Id.* § 35-48-4-7(a).

felony, and a conviction for aggravated menacing as a Level 1 misdemeanor. Schmidt also had at least one prior probation revoked.

[7] Schmidt had been on Social Security disability for several years, and he had resided in Ohio with the younger of his two adult sons, who is mentally disabled, as well as Thompson and her three minor children. Schmidt was the sole provider and caretaker for his mentally disabled son. Several people wrote letters in support of Schmidt for his sentencing, including his older son; his daughter-in-law; and Thompson, who also testified on Schmidt's behalf at the sentencing hearing.

[8] In requesting the trial court sentence him to probation, Schmidt argued that he was likely to respond to probation, he was unlikely to commit crimes in the future, and the circumstances of the instant offense were unlikely to recur. Schmidt acknowledged that he had a criminal history but stated that he did not have any criminal convictions since 1998. Additionally, Schmidt asserted that Hargis "had problems with drugs her whole life" and that he "wanted her to go to drug rehab and she refused to go." Tr. Vol. II at 13. Schmidt also pointed to his medical conditions as well as his responsibilities caring for his mentally disabled son and providing a home for Thompson and her children. Ultimately, Schmidt argued that "[h]e lost the love of his life, who he had been with for 19 years, and we worked out this plea so that he could move on with his life." *Id.* In response, the State acknowledged that Schmidt was remorseful and had the support of his family but asked the trial court to consider the fact that despite Schmidt's long-term relationship with Hargis and his knowledge of

her drug issues, he chose to supply Hargis with cocaine and his own prescription Oxycodone.

[9] The trial court found the following mitigating circumstances: “[t]he remorse of the defendant, his cooperation with police, [and] the undue hardship his incarceration may pose to his fiancée’s daughter and his son.” Appellant’s App. Vol. II at 83. The trial court also considered the benefit Schmidt received by pleading guilty to a Level 4 felony in exchange for the dismissal of the Level 1 felony charge. As aggravating circumstances, the trial court found that Schmidt “made the decision to obtain illegal drugs and supply them to his fiancée who he knew struggled with addiction.” *Id.* The trial court further found that “[a]lthough at the time, the defendant had no recent criminal convictions, the defendant’s history in the 1990s includes several convictions for felony drug trafficking,” which showed that Schmidt “was not new or naïve to the activity and consequences of supplying drugs to others.” *Id.*

[10] The trial court sentenced Schmidt to six years at the Indiana Department of Correction (the “DOC”) with the possibility of modifying his sentence if he completed substance abuse programming while incarcerated. This appeal ensued.

Discussion and Decision

[11] Schmidt argues that his sentence is inappropriate under Appellate Rule 7(B) and should be revised. The Indiana Constitution authorizes us to independently review and revise a trial court’s sentencing decision. *Faith v.*

State, 131 N.E.3d 158, 159 (Ind. 2019) (citing Ind. Const. art. 7, §§ 4, 6; *McCain v. State*, 88 N.E.3d 1066, 1067 (Ind. 2018)). That authority is implemented through Appellate Rule 7(B), which permits us to revise a sentence if, after due consideration of the trial court’s decision, we find that the sentence is “inappropriate in light of the nature of the offense and the character of the offender.” *Faith*, 131 N.E.3d at 159 (quoting App. R. 7(B)).

[12] Our role under Appellate Rule 7(B) is to “leaven the outliers,” *Faith*, 131 N.E.3d at 159–60 (quoting *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008)), and we reserve that authority for “exceptional cases,” *Mullins v. State*, 148 N.E.3d 986, 987 (Ind. 2020) (quoting *Faith*, 131 N.E.3d at 160). When gauging inappropriateness under Appellate Rule 7(B), we “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.” *Brown v. State*, 10 N.E.3d 1, 8 (Ind. 2014) (citing *Cardwell*, 895 N.E.2d at 1225). Generally, a trial court’s sentencing decision prevails unless it is “overcome by compelling evidence portraying in a positive light the nature of the offense . . . and the defendant’s character.” *Stephenson v. State*, 29 N.E.3d 111, 111–12 (Ind. 2015). In conducting this analysis, “we are not limited to the mitigators and aggravators found by the trial court.” *Brown*, 10 N.E.3d at 4.

[13] When considering the nature of the offense, we start with the advisory sentence. *Brown*, 10 N.E.3d at 4 (citing *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *as amended* (July 10, 2007), *decision clarified on reh’g*, 875 N.E.2d 218 (Ind. 2007)). Here, Schmidt was convicted of and sentenced for dealing in a narcotic

drug as a Level 4 felony. “A person who commits a Level 4 felony shall be imprisoned for a fixed term of between two (2) and twelve (12) years, *with the advisory sentence being six (6) years.*” I.C. § 35-50-2-5.5 (emphasis added). The trial court sentenced Schmidt to six years all executed at the DOC. However, the trial court advised Schmidt that it may consider modifying his sentence if he completed “the appropriate substance abuse programming” through the DOC. Appellant’s App. Vol. II at 83; Tr. Vol. II at 27.

[14] The trial court imposed the advisory sentence for Schmidt’s Level 4 felony conviction. “We are unlikely to consider an advisory sentence inappropriate.” *Shelby v. State*, 986 N.E.2d 345, 371 (Ind. Ct. App. 2013) (citing *Fernbach v. State*, 954 N.E.2d 1080 (Ind. Ct. App. 2011), *trans. denied*), *trans. denied*.

Schmidt argues that the nature of his offense and his character are compelling reasons to modify his sentence from the advisory term of six years. We cannot agree.

[15] As for the nature of Schmidt’s offense, Schmidt provided cocaine and his own prescription Oxycodone to someone he knew had a long-term substance abuse problem. In fact, Hargis’s substance abuse had been the impetus for several breakups between Schmidt and Hargis, and Schmidt claims he had attempted to get Hargis into rehab. None of this stopped Schmidt from supplying Hargis with illegal drugs, which ultimately led to her death.

[16] As for Schmidt’s character, Schmidt cooperated with law enforcement regarding Hargis’s death; provided for his mentally disabled son, Thompson,

and Thompson’s children; was remorseful; and had not had a drug-related conviction in approximately 24 years before this offense. However, Schmidt’s criminal history primarily consists of drug-related offenses, including several convictions for drug trafficking.

[17] We also note that Schmidt pled guilty. The Indiana Supreme Court has held that “a defendant who pleads guilty deserves ‘some’ mitigating weight be given to the plea in return,” *Anglemyer*, 875 N.E.2d at 220–21 (citing *McElroy v. State*, 865 N.E.2d 584, 591 (Ind. 2007)), but “the significance of a guilty plea as a mitigating factor varies from case to case,” *id.* (citing *Francis v. State*, 817 N.E.2d 235, 238 n.3 (Ind. 2004)). For instance, a trial court may not consider a guilty plea to be “significantly mitigating” if “it does not demonstrate the defendant’s acceptance of responsibility,” *id.* (citing *Francis*, 817 N.E.2d at 238 n.3), or if “the defendant receives a substantial benefit in return for the plea,” *id.* (citing *Sensback v. State*, 720 N.E.2d 1160, 1165 (Ind. 1999)). Here, Schmidt received a substantial benefit in return for pleading guilty—three of the four charges against him, including a Level 1 felony charge, were dropped.

[18] Based on the foregoing, we cannot say that Schmidt has produced compelling evidence demonstrating that the nature of his offense or his character renders his advisory sentence inappropriate.

[19] Affirmed.

Altice, C.J., and Bradford, J., concur.

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